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ADMINISTRATIVE REVIEW VERSUS JUDICIAL REVIEW WHEN AN EMPLOYMENT-BASED PETITION IS DENIED

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Under the Trump administration, there have been an increasing number of denials of employment-based petitions, especially of H-1B visas. To reverse what Trump sees as American carnage, his administration has unleashed carnage on the H-1B visa program, and indeed, all legal immigration. It does not matter that employment-based visas help facilitate American competitiveness globally by attracting worldwide talent, or that foreign workers complement the US workforce rather than replace them, resulting in greater overall efficiency, productivity and jobs. Rather, the administration continues to attack all pathways to legal immigration under its misguided *America First* philosophy.

The stakes for an approval have become even higher, as USCIS recently announced that it will "issue an NTA where, upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States." In yet another recent policy, USCIS instructs adjudicating officials to deny applications based on the lack of "sufficient initial evidence" without the issuance of an RFE or notice of intent to deny. This could be subjectively viewed as resulting in more denials followed by NTAs.

Upon the USCIS Service Center denying an employment-based petition, the petitioner may file Form I-290B, Notice of Appeal or Motion in order to appeal to the Administrative Appeals Office (AAO) within 30 days (plus 3 days if received in the mail) of the decision. Alternatively, the petitioner may request a motion to reopen or a motion to reconsider or both with 33 days of the decision. The petitioner may also opt to seek judicial review in federal court without going to the AAO. In addition, a petitioner may also wish to re-file the petition, which may at times be the best strategy. However, the re-filing option

may not always be available, such as when the H-1B cap for the fiscal year has already been reached or the beneficiary's nonimmigrant status has ended and consular processing would be problematic for whatever reason.

This blog will discuss the advantages and disadvantages of administrative review over judicial review.

Advantages of Seeking Administrative Review

Filing Form I-290B is more administratively convenient, efficient and less costly for the client. If the USCIS has made an obvious error, requesting that the USCIS either reopen or reconsider or do both may be an effective and simple strategy. For example, if an H-1B is erroneously denied without an RFE or NOID, and it was clearly an error, the filing a motion to reopen may make more sense over judicial review.

In the event that the petition has been denied on substantive grounds, filing an appeal to the AAO allows one to supplement the record by providing additional evidence such as a more detailed expert evaluation. The process is less formal than going to federal court. Writing the brief in support of the appeal or motion is an extension of what was already said in the response to the Request for Evidence prior to denial, although the new brief must make new and creative arguments to overcome the denial.

Even when the intention is to file an appeal on Form I-1290B, the official who made the initial decision, according to agency regulation, will first review the appeal and determine whether to take favorable action and grant the benefit request. This process is called "initial field review." Thus, every appeal is first treated as a motion to reopen or reconsider. There are many occasions where a case based on an egregious denial can be reopened and reversed without going through the AAO.

There is nothing to lose and a chance of a favorable result - the AAO could either outright reverse a denial or remand back to the USCIS Service Center, which in turn, could issue another RFE. If the AAO dismisses the appeal, one can still seek review in federal court.

Disadvantages of Seeking Administrative Review

The success rate at the AAO is very low. In FY2017, with respect to H-1B petitions, the AAO dismissed 598 appeals, sustained only 22 and remanded 44.

With respect to L-1 petitions, the AAO dismissed 181 appeals, sustained only 15 and remanded 6.

The process is also not expeditious. If the beneficiary is already in the US and does not have another underlying nonimmigrant status, he/she will start accruing unlawful presence for purposes of triggering the 3/10 year bar upon the denial of the request for change or extension of status. If the individual's appeal is not successful after 180 days of unlawful presence have accrued, the beneficiary will be subject to the bars upon departing the US. (If the individual's appeal is successful, any related application for change of status or extension of stay is likely to be reopened on Service motion following the granting of the petition, but one cannot know for sure in advance whether this will happen.)

The AAO may not just affirm the USCIS denial, but may also improve upon it by providing better reasoning or even affirming for different or additional reasons. This would render it more difficult to seek judicial review.

Advantages of Seeking Judicial Review

The case is reviewed by a judge who is not part of the USCIS and is not influenced by its prevailing policy as an adjudicator within the AAO is.

There may also be an opportunity to have the case resolved with an Assistant US Attorney who may advise his/her client, the USCIS, to reverse the decision rather than fight it out in court.

If the plaintiff prevails, the attorney may seek fees under the Equal Access to Justice Act.

One can ask for extraordinary remedies through a preliminary injunction (or temporary restraining order followed by a preliminary injunction) to maintain the nonimmigrant status of the beneficiary during the pendency of the matter, or at least prevent the beneficiary from accruing unlawful presence during the pendency of the matter.

Moreover, if an NTA is issued upon the denial of petition, then one potential advantage in federal court litigation is to ask the court in the preliminary injunction to restore the status of the beneficiary, which could then be grounds for termination of the removal proceedings. It should be noted that business immigration attorneys will also need to either hone in or develop their litigation skills for beneficiaries who are placed in removal proceedings, which was

discussed in our previous blog, "Heightened Ethical and Strategic Considerations for Business Immigration Attorneys Under USCIS's New Removal Policy." Attorneys will need to simultaneously navigate the removal process while challenging the denial of the underlying petition.

In a few cases, the beneficiary has been able to establish standing as a plaintiff in litigation involving nonimmigrant visas. *See e.g.*, *Tenrec, Inc. v. USCIS*, No. 3:16□cv□995□SI, 2016 U.S. Dist. LEXIS 129638 **21□22 (D. Or. Sept. 22, 2016). In the administrative review context, the USICS has recognized that the beneficiary of an I-140 may administratively challenge the revocation of an I-140 petition who has exercised job portability pursuant to INA 204(j). *See Matter of V-S-G-Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

Disadvantages of Seeking Judicial Review

Seeking judicial review can be far more expensive and time consuming. In addition, a federal court may exercise a more deferential standard, where under the Administrative Appeal Act (APA) a denial may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002). Factual findings may be set aside by a federal court only if "unsupported by substantial evidence"—which is not quite the same thing as review for "clear error" as in appellate review of a lower court's fact-finding, but is still far from *de novo* review. *See* 5 U.S.C. § 706(2)(E); *Dickinson v. Zurko*, 527 U.S. 150 (1999). The AAO, on the other hand, can undertake a *de novo* review of all issues of fact, law, policy, and discretion, and can also address new issues that were not addressed in the prior decision. *See* AAO Practice Manual, Chapter 3 Appeals.

New evidence cannot be introduced into the record.

Some employers also fear government retaliation, although this may be anecdotal and not necessarily official policy. Employers also are shy about unwanted publicity when they become plaintiffs.

The stakes have never been higher for employment-based immigration. With the very real threat of deportation looming, practitioners and employers alike must weigh the benefits and risks with any of these options when seeking review of a denial. For some, a motion to reopen and reconsider may be sufficient for a more obvious error. Others may wish to resolve a recurring, systemic issue by seeking judicial review in a district court. Regardless, it is clear

that the role of the immigration practitioner, especially those practicing business immigration, must be prepared to increasingly litigate these petitions in order to prevent further carnage of the existing immigration system.