



# LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

---

---

## **PRACTICE ADVISORY<sup>1</sup>**

Updated June 20, 2013

### **IMMIGRATION LAWSUITS AND THE APA: THE BASICS OF A DISTRICT COURT ACTION**

By Mary Kenney

#### **Table of Contents**

1. Introduction
  - What is the Administrative Procedure Act (APA)?
  - What types of immigration-related claims can be brought under the APA?
2. Forum/Venue
  - Where is an APA suit filed?
3. Statute of limitations
  - When can an APA suit be filed?
4. Jurisdiction
  - What is the jurisdictional basis for an APA suit?
  - Because an APA action is against the federal government, does the APA include a waiver of sovereign immunity?
  - Are there other jurisdictional grounds that can or must be included in an APA complaint?
5. Cause of Action
  - What does it mean for the APA to provide a cause of action?
  - What “agency action” is reviewable under the APA?
6. Limitations on Judicial Review under the APA
  - No judicial review where another statute specifically precludes review
  - No review of agency action committed to agency discretion by law
  - Exhaustion of administrative remedies
  - Final agency action
7. Parties to an APA suit

---

<sup>1</sup> Copyright (c) 2013 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

- Who has standing to bring an APA suit?
  - Who can be named as a defendant?
8. Standard of Review
    - What is the scope and standard of review in an APA suit?
  9. Discovery
    - Can discovery be carried out against the government agency in an APA suit?
  10. Attorney's Fees
    - Is it possible to get attorney's fees in an APA case?

## **1. Introduction**

Suits under the Administrative Procedure Act (APA) can be an effective means of challenging unlawful agency decisions or action in immigration cases outside of the removal context. This practice advisory will discuss the primary issues involved in an APA suit, with examples of how these issues have been decided in immigration cases and arguments that can be made to meet the various procedural requirements for an APA action.

- **What is the APA?**

The APA is a federal statute that regulates federal agency action in a number of ways. This practice advisory will focus on the provisions of the APA that allow an individual to sue a federal agency or official in federal district court for unlawful action (including the unlawful failure to act). The suit must be for non-monetary relief such as an injunction. The relevant portions of the APA are found at 5 USC §701 et seq.

The APA states that a person who is suffering a legal wrong because of agency action, or who is adversely affected by agency action within the meaning of a relevant statute, is entitled to judicial review. 5 USC §702. The APA creates a “cause of action.” It provides an individual a basis to sue a federal agency where Congress has not specifically provided such a basis anywhere else in the law. The APA also provides a waiver of sovereign immunity that allows a person to sue the federal government over unlawful agency action for non-monetary damages.

The APA is *not* a jurisdictional statute – it does not give a court the initial authority to hear the case. In APA cases, jurisdiction will be based on 28 USC §1331, the Federal Question Statute.

- **What types of immigration-related claims can be brought under the APA?**

The APA has been used to remedy unlawful action by immigration agencies in various types of immigration cases that fall outside of the removal context.<sup>2</sup> The following are just a few examples of successful APA challenges:

- Court reversed denial of a religious worker visa petition where it was based upon the improper application of a regulation, *Camphill Soltane v. USDOJ*, 381 F.3d 143 (3d Cir. 2004);
- Court granted preliminary injunction where there was a reasonable question whether directives from the Executive Office for Immigration Review (EOIR) to immigration judges violated the APA, *Baharona-Gomez v. EOIR*, 167 F.3d 1228 (9th Cir. 1999);
- Court reversed denial by United States Citizenship and Immigration Services (USCIS) of specific consent to pursue special immigrant juvenile status in state court, *Young Zheng v. Pogash*, 416 F. Supp. 2d 550 (S.D. Tex. 2006);
- Court reversed USCIS denial of an H-1B visa where the Administrative Appeals Office (AAO) made findings that were not based on evidence in the record and ignored contrary evidence that was in the record, *Fred 26 Importers v. U.S. DHS*, 445 F. Supp. 2d 1174 (C.D. Cal. 2006).

## 2. Forum/Venue

- **Where is an APA suit filed?**

An APA suit is filed in a federal district court. Venue is determined according to 28 USC §1391(e), which states that a suit against the federal government or a federal official acting in his or her official capacity can be brought in any judicial district where 1) a defendant resides; 2) a substantial part of the events or omissions giving rise to the claim occurred; or 3) the plaintiff resides if no real property is involved in the action.

An APA suit is a civil action and, therefore, the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on each district court's website.

## 3. Statute of limitations

- **When can an APA suit be filed?**

*All courts that have ruled on the issue have applied the general six-year statute of limitations for suits against the United States to APA actions.*

The APA does not contain a statute of limitations. However, there is a general six-year statute of limitations for civil actions brought against the United States. 28 USC

---

<sup>2</sup> See Section 6, *supra*, discussing limits on district court jurisdiction over issues arising from removal proceedings imposed by section 242(a)(5) of the Immigration and Nationality Act.

§2401(a).<sup>3</sup> All courts that have considered the question of what statute of limitations applies to APA actions agree that the six-year limitations period found in §2401(a) is applicable (note, however, that there are no cases specifically addressing this issue in the immigration context). *See, e.g., Trafalgar Capital Associations, Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998); *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647, 656 (2d Cir. 1998); *Pennsylvania Dept. of Public Welfare v. United States Department of Health and Human Services*, 101 F.3d 939, 944-45 (3d Cir. 1996); *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999); *Dunn McCampbell Royalty Interest Inc. v. National Park Service*, 112 F.3d 1283, 1286 (5th Cir. 1997); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 815 (8th Cir. 2006); *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 438 F.3d 937, 942-43 (9th Cir. 2006); *Daingerfield Island Protective Society v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994).

#### 4. Jurisdiction

- **What is the jurisdictional basis for an APA suit?**

*The “federal question” statute, 28 USC §1331, is the basis for jurisdiction in an APA suit for review of agency action. The APA, 5 USC §§702 et seq., can also be listed in the jurisdictional section of a complaint. While the APA does not provide an independent grant of jurisdiction to the court, it does waive sovereign immunity in suits against the government for injunctive relief. Such a waiver is necessary for the court to exercise its jurisdiction. See FDIC v. Meyer, 510 U.S. 471 (1994) (sovereign immunity is jurisdictional in nature).*

The APA is not an independent grant of subject matter jurisdiction to the federal courts. *See Califano v. Sanders*, 430 U.S. 99 (1977). In contrast, 28 USC § 1331 provides a general grant of subject matter jurisdiction to federal district courts in civil actions over “federal questions” arising under the Constitution, laws or treaties of the United States.

The Supreme Court has found that 28 USC §1331 serves as the jurisdictional basis for federal courts “to review agency action.” *Califano*, 430 U.S. at 105; *see also Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988) (“[I]t is common ground that if review is proper under the APA, the District Court has jurisdiction under 28 USC §1331”). Courts of Appeals uniformly agree that 28 USC §1331 is the jurisdictional basis for a suit to review agency action under the APA. *See, e.g., Ana International Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) (finding that this rule applies in the immigration context); *Yeboah v. U.S. DOJ*, 345 F.3d 216, 220 (3d Cir. 2003) (SIJS visa case); *Sabhari v. Reno*,

---

<sup>3</sup> The one exception to the six-year statute of limitations is for suits that accrue under a statute that was adopted after December 1, 1990, in which case a four-year statute of limitations is applicable. 28 USC §1658. The APA itself was enacted prior to 1990, so §1658 would not apply to it. However, it is unclear whether §1658 would apply if the APA suit challenged conduct as violating a statute that was enacted after December 1, 1990. In such cases, the safer practice would be to file within four years where possible.

197 F.3d 938, 943 (8th Cir. 1999) (immigrant visa case); *Sigman Coal Co. v. Apfel*, 226 F.3d 291, 301 (4th Cir. 2000); *Dixie Fuel Co. v. Comm'r of Social Security*, 171 F.3d 1052, 1057 (6th Cir. 1998); *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006).

A plaintiff's erroneous reliance on the APA as the sole ground of jurisdiction, without alleging jurisdiction under 28 USC §1331, can result in dismissal of the case. *See, e.g., Figgins v. CIS*, No. 1:05-CV-107 TS, 2006 U.S. Dist. LEXIS 28734 (N.D. Ut. May 8, 2006) (case dismissed where viable ground of jurisdiction was not pled along with the APA).<sup>4</sup>

- **Because an APA action is against the federal government, does the APA include a waiver of sovereign immunity?**

*Yes. The United States is immune from suit and can only be sued if there is a specific waiver of this immunity. The APA includes a statutory waiver of sovereign immunity for suits that seek non-monetary relief.*

The waiver of sovereign immunity, found in 5 USC §702, states:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency . . . acted or failed to act . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

The waiver of sovereign immunity found in the APA applies to suits that seek relief other than money damages. Generally, this would include suits for injunctive and declaratory relief. *See, e.g., Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006); *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999) (challenge to the denial of an immigrant visa petition); *Shah v. Chertoff*, No. 3:05-CV-1608-BH (K) ECF, 2006 U.S. Dist. LEXIS 73754, at \*5-6 (N.D. Tex. 2006) (challenge to denial of an L-1A visa extension).

The APA's waiver of sovereign immunity applies to agency action or inaction, including action or inaction by an agency officer or employee. Several courts have held that this waiver applies in suits against unlawful agency action even if the suit is not brought under the APA. *Treasurer of N.J. v. United States Dep't of the Treasury*, 684 F.3d 382, 399-400 (3d Cir. 2012); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 774-

---

<sup>4</sup> In *Figgins*, the plaintiffs erroneously relied on INA §279 for jurisdiction. That statute was amended in 1996 such that it now provides a district court with jurisdiction only over actions *brought by the United States*. It does *not* provide jurisdiction for cases *against the United States*. At the same time, however, it also does not bar jurisdiction that is based on some other ground in suits *against* the United States. *See Sabhari v. Reno*, 197 F.3d 938, 942 (8th Cir. 1999).

75 (7th Cir. 2011) (“The waiver applies when any federal statute authorizes review of agency action, as well as in cases involving constitutional challenges and other claims arising under federal law.”); *Trudeau*, 456 F.3d at 186; *Presbyterian Church v. U.S.*, 870 F.2d 518, 524-25 (9th Cir. 1989) (waiver found in a challenge to INS investigation brought directly under the Constitution).

- **Are there other jurisdictional grounds that can or must be included in an APA complaint?**

*Whether there are other jurisdictional grounds to include in the complaint will depend on the nature of the lawsuit and the claims that are raised. It is best to include all potential grounds of jurisdiction.*

For example, if you have a claim for mandamus, you will want to include the federal mandamus statute, 28 USC §1361.<sup>5</sup>

In contrast, the Declaratory Judgment Act, 28 USC §2201, is a procedural statute that does not confer jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also Fleet Bank Nat’l Assoc. v. Burke*, 160 F.3d 883, 886 (2d Cir. 1998); *State ex rel. Missouri Highway and Transportation Com’n v. Cuffley*, 12 F.3d 1332, 1334 (8th Cir. 1997). As such, the Declaratory Judgment Act provides for relief rather than for jurisdiction. The jurisdictional basis for a claim under the Declaratory Judgment Act, as under the APA, is 28 USC §1331.

## 5. Cause of Action

- **What does it mean for the APA to provide a cause of action?**

The courts have made clear that, while the APA is not a basis for federal jurisdiction, it does provide a “cause of action” for parties who have been adversely affected by agency action. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) (stating that 5 USC §704<sup>6</sup> provides a cause of action for all “final agency action for which there is no other adequate remedy in a court”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (holding that §704 expressly creates a “right of action” absent clear and convincing evidence of legislative intention to preclude review); *Chehazeh v. A.G. of the United States*, 666 F.3d 118, 125 n.11 (3d Cir. 2012) (citing *Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009)).<sup>7</sup>

---

<sup>5</sup> For more on mandamus actions, *see* the Legal Action Center’s (LAC) Practice Advisory “Mandamus Actions: Avoiding Dismissal and Proving the Case” (August 6, 2009), [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_081505.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_081505.pdf).

<sup>6</sup> Section 704 states in relevant part: “Actions Reviewable. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”

<sup>7</sup> The Third Circuit has noted that it and other courts may have used the term “jurisdiction” too “loose[ly]” when dismissing cases for a “lack of jurisdiction” that fail

As a “cause of action,” the APA provides an individual with a basis to sue a federal agency for unlawful agency action where Congress has not specifically provided such a basis anywhere else in the law. It also “permits the courts to provide redress for a particular kind of ‘claim.’” *Trudeau v. Federal Trade Commission*, 456 F.3d 178, 189 (D.C. Cir. 2006). Because the APA creates this specific cause of action, the Supreme Court has held that a separate indication of Congressional intent of the right to sue is not necessary. *Japan Whaling Assoc.*, 478 U.S. at 230 n.4; *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (finding that a private right of action is not necessary because review is available under the APA); *Central S.D. Cooperative Grazing District v. Secretary*, 266 F.3d 889, 894 (8th Cir. 2001) (“Although [the statute at issue] does not authorize a private right of action, the [APA] provides for judicial review of agency action”); *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995) (a plaintiff who has alleged a cause of action under the APA need not rely on an implied right of action under any other statute).

- **What “agency action” is reviewable under the APA?**

The APA states that a person who is suffering a legal wrong because of agency action, or who is adversely affected by agency action within the meaning of a relevant statute, is entitled to judicial review. 5 USC §702. “Agency action” is defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 USC §551(13). Thus, for example, an agency action may include the denial of a visa petition or an application for adjustment. It can also include the agency’s failure to adjudicate a visa petition or adjustment application.

## **6. Limitations on Judicial Review under the APA**

There are a number of limitations on when a suit can be brought under the APA. The following section will briefly discuss some of the most frequently encountered of these various limitations:

- **No judicial review where another statute specifically precludes review**

5 USC §701(a)(1) states that the APA does not apply to the extent that another statute precludes judicial review. There are a number of bars to judicial review found in the INA. *See, e.g.*, 8 USC §§212(h) and (i)(2) (precluding judicial review of certain discretionary waivers); §242(a)(2)(B) (precluding review of certain discretionary decisions in both the removal and non-removal context); §242(a)(5) (designating a petition for review in court of appeals as the “sole and exclusive means” of review of a

---

to satisfy the APA prerequisites. *Chehazeh*, 666 F.3d at 125 n.11. In accord with this, the court points out that, in accord with this, “the Seventh and Eighth circuits have recently held that whether a court has the authority to review a decision of the BIA under the APA is not a jurisdictional question.” *Id.* (citing *Vahora v. Holder*, 626 F.3d 907, 917 (7th Cir. 2010); *Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010)).

final order of removal). In all cases, it is important to determine if there is a statutory bar to judicial review that could impact the APA claim, and if so, exactly what the scope and impact of that bar is.

One of the more significant INA restrictions on judicial review relevant here is the limit on review of an order of removal to a petition for review in a court of appeals. INA §242(a)(5) (stating that a petition for review filed in a federal court of appeals is the “sole and exclusive means for judicial review” of an order of removal). Several courts have held that, in addition to barring direct challenges to removal orders by means other than a petition for review, this section bars district court actions that *indirectly* challenge removal orders. *Martinez v. Napolitano*, 704 F.3d 620, 622-23 (9th Cir. 2012) (involving a district court challenge to BIA’s determination that a noncitizen ordered removed was not eligible for asylum); *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011) (finding that district court mandamus action for order compelling USCIS to decide an I-212 waiver and adjustment application was barred as an indirect challenge to a reinstated removal order); *Estrada v. Holder*, 604 F.3d 402, 408 (7th Cir. 2010) (involving a district court challenge to legacy INS’s rescission of the plaintiff’s LPR status). The distinction between an independent claim and an indirect challenge turns on the substance of the relief that the plaintiff is seeking; when a claim challenges “an agency determination that is ‘inextricably linked’ to the order of removal, it is prohibited by section 1252(a)(5).” *Martinez*, 704 F.3d at 622-23 (citations omitted).

A second provision of the INA that impacts APA review is the bar to review of certain discretionary decisions. INA §242(a)(2)(B). This provision, adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, §304 (Sept. 30, 1996), contains two parts.

- §242(a)(2)(B)(i) bars review over “any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.” Prior to 2005, and with respect to adjustment of status applications under INA §245, the majority of courts interpreted this section as limiting review over discretionary denials of adjustment, but not over denials that were based upon nondiscretionary statutory eligibility issues. *Mamigonian v. Biggs*, 710 F.3d 936, 944 n. 5 (9th Cir. 2013) (citing cases).

In 2005, Congress amended §242(a)(2)(B) in the Real ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005), by adding language indicating that the jurisdictional limits in the section apply to agency decisions made outside of the removal context. *Id.* at 943. Following this, at least one court of appeals has held that district courts no longer have jurisdiction to review adjustment of status denials that are based upon nondiscretionary eligibility issues even when the individual is not in removal proceedings.<sup>8</sup> *Lee v. USCIS*, 592 F.3d 612, 619-20 (4th Cir.

---

<sup>8</sup> Where an individual is in removal proceedings and able to renew the adjustment application before the immigration judge, INA §242(a)(5) would limit judicial review to a petition for review in the court of appeals following a BIA appeal.



2010). Two other courts of appeals have held to the contrary, however, finding that – although the Real ID Act extended the limits on discretionary review to district courts – it did not extend the scope of such limitations where the individual was not in removal proceedings. *Mamigonian*, 710 F.3d at 945; *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) (“Determination of eligibility for adjustment – unlike the granting of adjustment itself – is a purely legal question and does not implicate agency discretion”).<sup>9</sup>

○ §242(a)(2)(B)(ii) limits review over any other action or decision (other than asylum), “the authority for which is specified under this title to be in the discretion” of DHS. As with subsection (i), the Real ID Act extended this provision to non-removal actions in district court. However, over the years, courts have identified important limits on its applicability. First, in *Kucana v. Holder*, 558 U.S. 233 (2010), the Supreme Court made clear that subsection (ii) limits judicial review only when the statute grants discretionary authority to DHS, not when such discretion is granted solely by regulation.

Additionally, a number of courts have held that the grant of discretion to DHS must be clear in the statute; thus, because the INA does not grant DHS discretion to deny an I-130 visa petition, these courts concluded that §242(a)(2)(B)(ii) does not bar review of such denials. *See, e.g., Ginters v. Frazier*, 614 F.3d 822 (8th Cir. 2010); *Ruiz v. Mukasey*, 552 F.3d 269 (2d Cir. 2009); *Ayanbadejo v. DHS*, 517 F.3d 273 (5th Cir. 2008). Similarly, the Eleventh Circuit found that a district court retained review under §242(a)(2)(B)(ii) over statutory eligibility issues related to Temporary Protected Status (TPS) even though the ultimate grant of TPS was in the unreviewable discretion of DHS. *Mejia Rodriguez v. DHS*, 562 F.3d 1137 (11th Cir. 2009).

- **No review of agency action committed to agency discretion by law**

5 USC §701(a)(2) states that agency action is reviewable under the APA except “where it is committed to agency discretion by law.” The government takes an expansive view of what constitutes agency action committed to agency discretion by law, and will move to dismiss a case on this basis. Fortunately, courts have taken a more limited view. The Supreme Court has set forth several important guiding principles.

First, the Court has held that the APA embodies “a basic presumption of judicial review.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). “[O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Id.* at 141.

---

<sup>9</sup> For more on the INA bar to review of discretionary decisions, *see* the LAC’s Practice Advisory “Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits and Petitions for Review” (April 5, 2006), [http://www.legalactioncenter.org/sites/default/files/realid\\_update\\_040506.pdf](http://www.legalactioncenter.org/sites/default/files/realid_update_040506.pdf).

Under §701(a)(2) of the APA, this presumption of judicial review over agency action can be overcome where such action is committed to agency discretion by law. However, the Supreme Court has held that such circumstances are “rare,” and only occur “where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In such rare circumstances, the courts may find that there is no law for the court to apply to judge the agency’s exercise of discretion. Furthermore, in these cases, the court will find that the grant of discretion to the agency is unfettered and not subject to review under the APA.

Therefore, the first step in any analysis under §701(a)(2) is to look at the statute to see if it sets forth a standard against which to measure the agency action. For example, in *Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d 683, 688 (9th Cir. 2003), the court determined that the statute setting forth eligibility requirements for employment based investor visas provided a standard to measure USCIS’s decision of whether to approve a preference petition for such a visa. As such, the court found that there was law to apply and that there could be judicial review under the APA.

Similarly, the court in *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005), found that under the APA, the court could review the denial of an adjustment of status application by USCIS where the denial was based on a statutory eligibility issue. The court found that the statute set forth standards for eligibility under which the court could review the agency action. It distinguished such statutory eligibility issues from denials of adjustment applications in the exercise of discretion. *See also Shah v. Chertoff*, No. 3:05-CV-1608-BH (K) ECF, 2006 U.S. Dist. LEXIS 73754, \*28 (N.D. Tex. 2006) (finding that the issue subject to APA review was the question of eligibility for an extension of L-1A visa – for which there were statutory guidelines to apply – and not the discretionary denial of such an extension).

In contrast, courts have found that agency action is wholly committed to agency discretion in limited circumstances where neither the statute nor the regulations provide any guidelines for the exercise of discretion. For example, courts have held that the BIA’s refusal to reopen a case sua sponte is unreviewable on this basis. *See, e.g., Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011); *but see Chehazeh v. A.G. of the United States*, 666 F.3d 118 (3d Cir. 2012) (upholding district court review over BIA sua sponte reopening of a final removal decision).<sup>10</sup>

Similarly, the Fifth Circuit held that, under prior law, the APA did not apply to review of a grant of prehearing voluntary departure because there were no guidelines for the exercise of this discretionary authority set forth in the law. *Perales v. Casillas*, 903 F.2d 1043, 1050 (5th Cir. 1990). A number of courts also have held that the APA does not apply to the discretionary waiver of a foreign residency requirement under INA §212(e)

---

<sup>10</sup> While these and several cases cited below are removal cases, and thus were not brought under the APA, the same reasoning would apply in an APA case.

for the same reason. *See, e.g., Singh v. Moyer*, 887 F.2d 1035, 1039 (7th Cir. 1989); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *Dina v. Attorney General*, 793 F.2d 473, 476-77 (2d Cir. 1986) (per curiam).

However, even where a statute provides unfettered discretion to an agency, if the agency adopts regulations or practices to guide its exercise of discretion, these can provide the necessary standard for judicial review of the agency action under the APA. Thus, it is also important to look at regulations and agency guidelines to see if they contain factors that an agency must consider in reaching its decision. If so, judicial review arguably can be exercised under the APA

For example, in *M.B. v. Quarantillo*, 301 F.3d 109, 113 (3d Cir. 2002), the court found that the regulations that governed special immigrant juvenile visa petitions set forth “the material matters to be included in a petition.” The court found that these regulations, coupled with agency field guidance, provided sufficient standards by which to review the agency action. As such, judicial review could be exercised under the APA. Similarly, a number of courts have found that the regulations limit when the BIA can affirm the decision of an IJ without issuing an opinion, and that these regulations therefore supply the “law to apply” for judicial review. *See, e.g., Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003); *Smirko v. Ashcroft*, 387 F.3d 279, 291-292 (3d Cir. 2004); *but see Ngure v. Ashcroft*, 367 F.3d 975, 987 (8th Cir. 2004) (finding no review because decision committed to agency discretion by law).

- **Exhaustion of administrative remedies**

Generally, before seeking federal court review of a decision of an administrative agency, an individual must exhaust all administrative remedies. If the individual fails to do this, the court may refuse to review the case. The Supreme Court has held, however, that there are limits on when exhaustion of administrative remedies can be required in a suit under the APA. *Darby v. Cisneros*, 509 U.S. 137 (1993). Specifically, *Darby* held that in federal court cases brought under the APA, a plaintiff can only be required to exhaust administrative remedies that are mandated by either a statute or regulation.

For a case to be exempt from the exhaustion requirement under *Darby*, the following criteria must be met:

- the federal suit is brought pursuant to the APA;
- there is no statute that mandates an administrative appeal;
- Either: a) there is no regulation that mandates an administrative appeal; or b) if there is a regulation that mandates an administrative appeal, it does not also stay the administrative decision pending the administrative appeal; and
- The adverse agency decision being challenged is final for purposes of the APA.

For additional discussion of each of these requirements, see the LAC’s Practice Advisory “Failure to Appeal to the AAO: Does it Bar All Federal Court Review of the Case?” (July 22, 2004), [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_072704.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_072704.pdf).

The *Darby* rule has been applied in immigration cases brought under the APA, with the courts concluding that no exhaustion of administrative remedies was required. *See, e.g., Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (APA challenge to denial of a spousal immigration petition); *Pinho v. Gonzales*, 432 F.3d 193, 202 (3d Cir. 2005) (applying *Darby* and finding that possibility that removal proceedings could be instituted in future in which adjustment application could be renewed did not establish a mandatory exhaustion requirement); *Hillcrest Baptist Church v. USA*, No. C06-1042Z, 2007 U.S. Dist. LEXIS 12782, \*6 (W.D. WA. Feb. 23, 2007) (adjustment of status in a religious worker case).

- **Final agency action**

Section 704 of the APA states that “final agency action” for which there is no other adequate remedy in a court is subject to review under the APA. This “finality” requirement is somewhat intertwined with exhaustion; where there are administrative remedies that must be exhausted in accord with *Darby v. Cisneros*, 509 U.S. 137 (1993), an agency action generally will not be “final” until such exhaustion has taken place. *See Pinho v. Gonzales*, 432 F.3d 193, 200 (3d Cir. 2005) (“Finality requires exhaustion of administrative remedies”); *see also Air Espana v. Brien*, 165 F.3d 148 (2d Cir. 1999) (INS fine against airline carriers was not final where airlines’ voluntary appeal to the BIA was still pending); *Beverly Enterprise, Inc. v. Herman*, 50 F. Supp. 2d 7, 12 (D. D.C. 1999) (DOL determination that plaintiff employer violated the Immigration Nursing Relief Act not final where plaintiff’s administrative appeal was still pending).

The “finality” requirement is also distinct from the exhaustion requirement, however. Even where exhaustion of administrative remedies is not required under the *Darby* analysis, the APA still requires that the agency decision be “final” in order for it to be challenged in federal district court. The Supreme Court indicated that generally two conditions must be satisfied for agency action to be “final”: 1) the action must mark the “consummation” of the agency’s decision-making process” and cannot be “of a mere tentative or interlocutory nature;” and 2) the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Under this standard, USCIS’s denial of “specific consent” for a state court dependency hearing for a special immigrant juvenile visa was held to be final agency action. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 556 n.9 (S.D. Tex. 2006). Similarly, an AAO denial of an adjustment application has been found to be a final agency decision when there are no removal proceedings pending in which the issue could be raised. *Pinho v. Gonzales*, 432 F.3d 193, 202 (3d Cir. 2005); *but see Barut v. USCIS*, No. 06-3246-CV-S-RED, 2006 U.S. Dist. LEXIS 61424 (W.D. Mo. 2006) (adjustment denial is not a final agency action because application can be renewed in removal proceedings).

Other immigration agency actions, however, are not final under the APA. For example, USCIS’s finding of marriage fraud was not final agency action; rather, it would only

become final action when the visa petition was denied. *Bangura v. Hansen*, 434 F.3d 487, 501 (6th Cir. 2006); *see also Hernandez v. DHS*, No. 06-CV-12457-DT, 2006 U.S. Dist. LEXIS 71786 (E.D. Mich. 2006) (USCIS denial of TPS not final agency action where plaintiff placed in removal proceedings and can renew the TPS claim in these proceedings); *E.J.'s Luncheonette v. De Haan*, 01 CIV 5603 (LMM), 2002 U.S. Dist. LEXIS 105 (S.D. NY 2002) (denial of a request for Reduction in Recruitment as part of a labor certification was not final agency action; instead, only a Notice of Findings which denied the labor certification would be final action); *Transport Robert Ltee v. U.S. INS*, 940 F. Supp. 338 (D. D.C. 1996) (letter from INS Associate Commissioner refusing to certify truck drivers as B-1 business visitors was not final agency action).

## 7. Parties to an APA suit

- **Who has standing to bring an APA suit?**

In all federal litigation, Article III of the Constitution imposes a requirement that a plaintiff have “standing” to sue, which generally requires that the plaintiff have suffered a sufficient injury-in-fact. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). However, the APA imposes an *additional* standing requirement. The APA states that:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 USC §702. The Supreme Court has interpreted this provision as requiring that a plaintiff not only have an injury but also demonstrate standing under the APA by showing that “the interests sought to be protected by the [plaintiff are] arguably within the zone of interests to be protected or regulated by the statute ... in question.” *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The “zone of interest” test does not require a plaintiff to establish that Congress specifically intended to benefit the plaintiff. Rather, there is a two-step inquiry. “First, the court must determine what interests the statute *arguably* was intended to protect, and second, the court must determine whether the ‘plaintiff’s interests affected by the agency action in question are among them.’” *Bangura v. Hansen*, 434 F.3d 487, 499 (6th Cir. 2006) (*quoting NCUA v. First National Bank & Trust Co.*, 522 U.S. 479, 492 (1998)). One court has described this test as “a fairly weak prudential restraint, requiring some non-trivial relation between the interests protected by the statute and the interest the plaintiff seeks to vindicate.” *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995). Even so, the “zone of interest” test “denies a right of review if the plaintiff’s interests are ... marginally related or inconsistent with the purposes implicit in the statute.” *NCUA*, 522 U.S. at 491 (quotations omitted).

Applying this test in the immigration context, numerous courts have held that a non-citizen beneficiary of a family or employment-based visa petition is within the “zone of interest” of the statute and thus has standing to sue over the denial or revocation of a visa petition. *See, e.g., Bangura*, 434 F.3d at 499-500; *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998); *Ghaley v. INS*, 48 F.3d 1426, 1434 n.6 (7th Cir. 1995); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986). An applicant for a special immigrant juvenile visa also has been found to fall within the zone of interest of that provision of the INA. *Yu v. Brown*, 36 F.Supp. 2d 922 (D. N.M. 1999).

In contrast, several courts held that noncitizens who were serving criminal sentences for deportable offenses were not within the “zone of interest” of former INA § 242(i) and thus had no standing to challenge the immigration service’s failure to initiate deportation proceedings prior to completion of their criminal sentences. *See Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847-48 (10th Cir. 1995); *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992).

- **Who can be named as a defendant?**

The APA provides that the United States can be named as a defendant in an APA action. 5 USC §702. It also specifies, however, that an action seeking mandatory or injunctive relief “shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.” *Id.* In light of this, it is best to name as defendants the specific individual within the agency who can carry out any injunction or other mandatory order of the court. Note, however, that this does not mean this individual is being sued in his or her individual capacity. Instead, the individual is named as a defendant in his or her official capacity within the agency. For more on this topic, see the LAC’s practice advisory “Whom To Sue And Whom To Serve In Immigration-Related District Court Litigation” (Updated May 13, 2010), [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_040706.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf).

## **8. Standard of Review**

- **What is the scope and standard of review in an APA suit?**

5 USC §706 provides for two general types of relief and generally sets forth the scope of review for each. First, the court can “compel agency action unlawfully withheld or unreasonably delayed.” 5 USC §706(1). This provision is similar to a mandamus action to compel delayed agency decision-making or action. A “central point” is that the “only agency action that can be compelled under the APA is action legally required.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). Moreover, a court may only compel an agency “to take action upon a matter, without directing how it shall act.” *Id.* Congress need not have set a definitive deadline for an agency to act, however, in order for a court to find a delay unreasonable; §706(1) mandates that all action be done within a reasonable amount of time. *Kaplan v. Chertoff*, No. 06-5304, 2007 U.S. Dist. LEXIS 22935, \*71-72 (E.D. Pa. Mar. 29, 2007) (finding

that an APA claim was adequately stated against both USCIS and the FBI with respect to delays in adjustment of status and naturalization applications).

Second, the APA states that a court can “hold unlawful and set aside agency actions, findings and conclusions” that meet one or more of six standards. 5 USC §706(2). Four of these standards apply to all cases without limitation, and thus most often would apply to the type of suit discussed in this practice advisory. These four standards are:

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- Contrary to constitutional right, power, privilege or immunity;
- In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
- Without observance of procedures required by law.

5 USC §§706(2)(A)-(D); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (“In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion or otherwise no in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”).

## 9. Discovery

- **Can discovery be carried out against the government agency in an APA suit?**

*Yes, in certain cases. The general rule in an APA action is that judicial review is limited to the administrative record and thus no discovery is allowed. There are exceptions to this rule. Moreover, in any case in which there are additional claims besides the APA claim, the court may permit discovery outside of the administrative record with respect to the non-APA claims.*

As a general rule, judicial review under the APA is limited to the administrative record that was before the agency when it made its decision. *Overton Park*, 401 U.S. at 420; *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review [in an APA suit] should be the administrative record already in existence, not some new record made initially in the reviewing court”). Based upon this general rule, the government will frequently oppose discovery in an APA action.

There are exceptions to the general rule. The primary exception applies when there is no administrative record for the court to review, or the record may be insufficient with respect to the claims in the suit. Such an incomplete record “may frustrate judicial review,” *Voyageurs National Park Assoc. v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004), and discovery may be necessary to supplement the agency record. *See also Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (court may inquire outside the record when necessary to explain the agency’s action or when the agency has relied on documents not in the record).

This often will be the case where the suit challenges a pattern or practice of agency decisions or action, rather than the decision in one individual case. In such pattern and practice cases, there may not be a single agency record to be reviewed and the court may permit discovery.

Even in individual cases, however, discovery may be necessary to supplement the agency record. To remedy an incomplete or inadequate record, the district court may allow discovery, although the court may narrowly tailor the scope of discovery to respond to whatever is missing in the agency record. *Voyageurs National Park Assoc.*, 381 F.3d at 766. In particular, the Supreme Court has said that inquiry into the mental processes of the agency decision-maker is to be avoided unless it is “the only way there can be effective judicial review.” *Overton Park*, 401 U.S. at 420.

For example, in an APA challenge to the denial of a marriage-based visa petition for alleged fraud, the plaintiffs sought to depose two agency employees engaged in the investigation of the visa petition. *Sabhari v. Cangemi*, No. 04-1104 ADM/JSM, 2005 U.S. Dist. LEXIS 3550 (D. Minn. 2005). The plaintiffs argued that these depositions were necessary because the record was incomplete in that there was no contemporaneous administrative record to explain why USCIS deviated from its normal practices and procedures when investigating the marriage petition. *Id.*, 2005 U.S. Dist. LEXIS 3550, \*6. The district court agreed with this, but more narrowly tailored the discovery, ordering that the defendant USCIS was to submit the information that plaintiffs sought in affidavits rather than by deposition. *Id.*

## **10. Attorney’s Fees**

- **Is it possible to get attorney’s fees in these cases?**

Yes. The Equal Access to Justice Act (EAJA), 28 USC § 2412(d) & 5 USC § 504 et seq., authorizes payment of attorney’s fees and costs for successful litigation against the government in the federal courts. Thus, it is always a good idea to request attorney’s fees as part of the relief sought in an APA case. For more on EAJA fees, see the LAC’s practice advisory, “Requesting Attorney’s Fees Under the Equal Access to Justice Act” (Updated Dec. 15, 2008),

[http://www.legalactioncenter.org/sites/default/files/EAJA\\_Fees\\_04\\_07\\_06.pdf](http://www.legalactioncenter.org/sites/default/files/EAJA_Fees_04_07_06.pdf).