



PRACTICE ADVISORY¹
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**IMMIGRATION LAWSUITS AND THE APA:
 THE BASICS OF A DISTRICT COURT ACTION**

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1. Introduction

The Administrative Procedure Act (APA) is a federal statute that regulates federal agency action in a number of ways. Relevant here, the judicial review provisions of the APA, 5 U.S.C. § 701, *et seq.*, provide a means for an individual—including noncitizens—or an employer to challenge unlawful decisions or action by immigration agencies in cases outside of the removal context.

This practice advisory addresses the basic requirements for an APA suit, with a focus on challenging the unlawful denial of immigration benefits, particularly by U.S. Citizenship and Immigration Services (USCIS). The advisory does not address in any detail the use of the APA to challenge delayed agency action,² or the APA provisions relating to the promulgation of agency regulations and the standards for challenging regulations. *See* 5 U.S.C. § 553.

a. What is the APA?

The APA provides for judicial review of final agency action. 5 U.S.C. 702. It states that a person “suffering [a] 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.” *Id.* Only non-monetary relief—such as injunctive or declaratory relief—is available. *Id.* The reviewing court must either “compel agency action unlawfully withheld or unreasonably delayed,” or “hold unlawful and set aside agency action, findings, and conclusions” that violate any one of six factors. 5 U.S.C. § 706.

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, thus allowing a person to sue the federal government over unlawful agency action for non-monetary damages. The

² For more on APA and mandamus delay cases, *see Mandamus and APA Actions for Special Immigrant Juvenile Petitions* (Jan. 2021), <https://immigrationlitigation.org/wp-content/uploads/2021/01/2021.1.7-SIJS-Mandamus-APA-PA-FINAL-FINAL.pdf>, and *Mandamus and Delay Cases: Avoiding Dismissal and Proving the Case* (Feb. 19, 2021), <https://immigrationlitigation.org/wp-content/uploads/2021/02/2021.2.19-Mandamus-APA.Advisory-FINAL.pdf>.

APA is *not* a jurisdictional statute—it does not give a court the authority to hear the case. Instead, jurisdiction is based on 28 U.S.C. § 1331, the Federal Question statute.

An APA suit is a civil action governed by the Federal Rules of Civil Procedure and the district court’s local rules. The local rules are available on each district court’s website.

b. 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.³ The following are just a few examples of successful APA challenges:

- *Special Immigrant Juvenile Status (SIJS)*: court held that USCIS misapplied the SIJS statute when it required a permanent state custody order and a showing that plaintiff’s reunification with his parents would never occur. *Perez v. Cuccinelli*, 949 F.3d 865 (4th Cir. 2020) (*en banc*);
- *Adjustment of status*: court determined that USCIS’ determination that the noncitizen was inadmissible and thus ineligible for adjustment was arbitrary, capricious, or otherwise not in accordance with law. *Duron v. Nielsen*, 491 F. Supp. 3d 256, 267 (S.D. Tex. 2020);
- *U nonimmigrant petition*: court held that USCIS violated the plain meaning of the U nonimmigrant regulations when it denied the petition on the basis that the petitioner was not physically present at the crime. *Morris v. Nielsen*, 374 F. Supp. 3d 239, 254-56 (E.D.N.Y. 2019);
- *H-1B nonimmigrant petition*: court held that USCIS’ determination that a computer programmer position was not a specialty occupation was arbitrary and capricious. *Innova Solutions, Inc. v. Baran*, 983 F. 3d 428, 431 (9th Cir. 2020).

³ The INA provides an independent route for judicial review of naturalization denials. *See* 8 U.S.C. § 1421(c) (providing for de novo district court review of denied naturalization applications); *see also* § 1447(b) (providing de novo district court review where no decision made on naturalization application within 120 days after an interview). Similarly, the INA provides that a national of the United States who is denied a right or privilege on the ground that he or she is not a national may bring a declaratory judgment action to resolve the issue of their nationality. 8 U.S.C. 1503(a). Courts have held that Congress intended both § 1421(c) and § 1503(a) to be the exclusive means for seeking judicial review. *See Miriyeva v. USCIS*, No. 20-5032, -- F.3d --, 2021 WL 3625813 (D.C. Cir. Aug. 17, 2021) (finding that Congress intended to preclude judicial review of naturalization claims outside of § 1421(c)); *Cambranis v. Blinken*, 994 F.3d 457, 466 (5th Cir. 2021) (holding that § 1503(a) is the exclusive remedy for a person within the United States to seek a declaration of nationality). Thus, with respect to nationality and naturalization issues, practitioners should determine if the issue falls under either statute. Under both §§ 1421(c) and 1503(a), courts review nationality claims de novo, which is a more favorable standard than the APA standard. *See* 5 U.S.C. 706(2)(A); *see also* section 8, below.

2. Venue: Where is an APA suit filed?

An APA suit is filed in a federal district court. Pursuant to 28 U.S.C. § 1391(e), venue for suits against the United States, a federal agency, or a federal official acting in his or her official capacity, can be brought in any one of three judicial districts: 1) where a defendant resides; 2) where a substantial part of the events or omissions giving rise to the claim occurred; or 3) where the plaintiff resides if no real property is involved.

3. Statute of limitations: When can an APA suit be filed?

The APA does not contain a statute of limitations. However, courts uniformly agree that the general six-year statute of limitations for civil actions brought against the United States, 28 U.S.C. § 2401(a), governs APA actions.⁴ A number of courts have held that § 2401(a) is not jurisdictional. *See, e.g., DeSuze v. Ammon*, 990 F.3d 264, 270 (2d Cir. 2021) (reading § 2401(a) as a claims processing rule rather than a jurisdictional bar and citing other cases for the same result). At least one court has found that equitable tolling of the deadline may be available. *Id.*, 990 F.3d at 271.

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 U.S.C. § 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.

Generally, the six-year limitations period begins to run from the date of the final agency action—e.g., the denial of an application or, in a procedural challenge to an agency rule, the date of the agency’s final rulemaking. *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1077–79 (9th Cir. 2016); *Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010). As one court explains, an APA cause of action accrues when the agency takes an “action . . . mark[ing] the ‘consummation’ of the agency’s decisionmaking process;” that was not of a “tentative or interlocutory nature” and that had “legal consequences.” *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *see also* Section 6.a., *infra* (discussing final agency action).

⁴ *See, e.g., Trafalgar Cap. Ass’ns, Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998); *Polanco v. U.S. Drug Enf’t Admin.*, 158 F.3d 647, 652 (2d Cir. 1998); *Com. of Pa. Dep’t of Pub. Welfare v. U.S. Dep’t of Health and Human Servs.*, 101 F.3d 939, 944-45 (3d Cir. 1996); *Jersey Heights Neighborhood Ass’n. v. Glendenning*, 174 F.3d 180, 186 (4th Cir. 1999); *Dunn-McCampbell Royalty Int., Inc. v. Nat’l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Roberts v. Fed. Housing Fin. Agency*, 889 F.3d 397, 406 (7th Cir. 2018); *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 815 (8th Cir. 2006); *Turtle Island Restoration Network v. U.S. Dep’t of Com.*, 438 F.3d 937, 942-43 (9th Cir. 2006); *Ala. v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015); *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014).

Some courts have held that where the limitations period has run on a final agency action, simply reapplying for the same relief does not restart the clock with respect to that previously denied application. *Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 306 (D.D.C. 2018). However, the applicant could bring an APA action challenging the denial of the new application without regard to the earlier application. *Id.*

4. Jurisdiction

a. What is the jurisdictional basis for an APA suit?

The APA does not provide federal district courts with subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977). Instead, the jurisdictional basis for APA suits lies in 28 U.S.C. § 1331, the Federal Question statute. *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 U.S.C. § 1331.”). Section 1331 grants subject matter jurisdiction to federal courts in civil actions “arising under the Constitution, laws, or treaties of the United States.”

In immigration cases, courts uniformly find that 28 U.S.C. § 1331 is the jurisdictional basis for an APA suit. *See, e.g., Perez Perez v. Wolf*, 943 F.3d 853, 860 (9th Cir. 2019) (U nonimmigrant petition); *Dhakal v. Sessions*, 895 F.3d 532, 538 (7th Cir. 2018) (asylum); *Yeboah v. U.S. DOJ*, 345 F.3d 216, 220 (3d Cir. 2003) (SIJS); *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999) (immigrant visa petition).⁵

Defendant immigration agencies may move to dismiss a case for alleged lack of jurisdiction on the basis that an essential element of an APA claim—such as final agency action—is missing. Several courts have denied such motions, however, holding that that a missing element of an APA claim does not impact jurisdiction since the APA itself does not confer jurisdiction; rather, these courts hold that such issues go to whether the plaintiff has stated a valid cause of action. *See, e.g., Dhakal v. Sessions*, 895 F.3d 532, 538 n.9 (7th Cir. 2018); *Jama v. DHS*, 760 F.3d 490, 494 n.4 (6th Cir. 2014); *Trudeau v. FTC*, 456 F.3d 178, 183-85 (D.C. Cir. 2006).

While the APA does not provide an independent grant of jurisdiction to the court, it nevertheless is often listed in the jurisdiction section of a complaint because it waives sovereign immunity—a jurisdictional requirement—in these suits. 5 U.S.C. § 702; *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (holding that sovereign immunity is jurisdictional in nature).

⁵ An erroneous reliance on the APA as the sole ground of jurisdiction, without alleging jurisdiction under 28 U.S.C. § 1331, can result in dismissal of the case. *See, e.g., Figgens v. USCIS*, No. 1:05-CV-107 TS, 2006 WL 8457233 (N.D. Utah May 8, 2006).

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

The United States and its agencies are generally immune from suit unless Congress unequivocally waives sovereign immunity. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), The APA, at 5 U.S.C. § 702, contains such an unequivocal waiver, stating in relevant part that a federal court action:

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.

5 U.S.C. § 702. The APA’s waiver of sovereign immunity applies to suits that seek relief other than money damages. Generally, this includes suits for injunctive and declaratory relief. *See, e.g., Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006). Moreover, several courts have held that the waiver applies in suits challenging unlawful agency action even if the suit is not brought under the APA. *See, e.g., Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 673 (6th Cir. 2013) (holding that the waiver applies to non-monetary claims against federal agencies regardless of whether review is sought over “agency action” or “final agency action” as defined in the APA); *Treasurer of N.J. v. U.S. Dep’t of the Treasury*, 684 F.3d 382, 399-400 (3d Cir. 2012); *Mich. v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 774-75 (7th Cir. 2011); *Trudeau*, 456 F.3d at 186; *Presbyterian Church v. United States*, 870 F.2d 518, 524-25 (9th Cir. 1989) (finding waiver in a challenge to INS investigation brought directly under the Constitution).

Note, however, that the APA’s waiver of sovereign immunity does not apply if “any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702; *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (explaining that § 702 prevents parties from “exploiting the APA’s waiver to evade limitations on suit contained in other statutes”). The “any other statute” limitation applies when the statute addresses the same type of grievance the plaintiff asserts, deals “in particularity” with the claim, and was intended by Congress to afford the “exclusive remedy” for that type of claim. *Cambranis v. Blinken*, 994 F.3d 457, 463 (5th Cir. 2021) (quoting *Patchak*, 567 U.S. at 216) (finding that § 702’s sovereign immunity waiver did not apply because Congress intended 8 U.S.C. § 1503 to be the exclusive remedy for a person to seek a declaration of U.S. nationality). Under the *Patchak* standard, one court has held that the Immigration and Nationality Act’s (INA) judicial review provision, 8 U.S.C. § 1252, did not bar reliance on § 702’s waiver in a challenge to USCIS’ use of its Controlled Application Review and Resolution Program. *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 45 (D.D.C. 2018).

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

In some instances, there will be other jurisdictional grounds to consider including in the complaint. For example, the Mandamus Act, 28 U.S.C. § 1361, provides jurisdiction over claims seeking to compel a federal agency or official to act. *See* note 2, *supra*. In contrast, the Declaratory Judgment Act, 28 U.S.C. § 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 Lovitky v. Trump*, 949 F.3d 753, 758 (D.C. Cir. 2020) (internal quotation omitted) (“[R]esort to the Declaratory Judgement Act will not fill a gap in subject matter jurisdiction.”). As such, the Declaratory Judgment Act provides for relief rather than for jurisdiction. *Allen v. DeBello*, 861 F.3d 433, 444 (3d Cir. 2017). The jurisdictional basis for a claim under the Declaratory Judgment Act, as under the APA, is 28 U.S.C. § 1331. *Porzecanski v. Azar*, 943 F.3d 472, 485 n.11 (D.C. Cir. 2019).

d. Are there limits on a court’s ability to exercise jurisdiction over APA claims?

The APA contains two limits on judicial review: (1) where another statute specifically precludes review; and (2) where agency action is committed to agency discretion by law.

i. 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 U.S.C. §§ 1182(h) and (i)(2) (precluding judicial review of certain discretionary waivers), § 1252(a)(2)(B) (precluding review of certain discretionary decisions in both the removal and non-removal context), and §§ 1252(a)(5) and (b)(9) (regulating judicial review over orders of removal and issues rising from removal proceedings). In all cases, it is important to determine if there is a statutory bar to judicial review that could impact the APA claim.

The INA, at 8 U.S.C. § 1252(a)(5), states 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 this section bars both direct and *indirect* challenges to removal orders by means other than a petition for review in a court of appeals. *See, e.g., 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, 55-56 (2d Cir. 2011) (involving district court mandamus action to compel USCIS to decide an I-212 waiver and adjustment application for a noncitizen subject to a reinstated removal order); *Estrada v. Holder*, 604 F.3d 402, 408 (7th Cir. 2010) (involving a district court challenge to legacy Immigration and Naturalization Service’s rescission of the plaintiff’s LPR status). As one court has explained, 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 (internal quotation omitted).

Similarly, 8 U.S.C. § 1252(b)(9) bars review of claims “arising from . . . action[s] taken or proceeding[s] brought to remove” a noncitizen. This provision does not apply where the suit does not seek “‘review of an order of removal,’ ‘the decision . . . to seek removal,’ or ‘the process by which . . . removability will be determined.’” *Dep’t of Homeland Sec. v. Regents of the University of California*, 140 S. Ct. 1891, 1907 (2020) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841(2018)). Thus, for example, courts have held that § 1252(b)(9) does not bar a challenge to Immigration and Customs Enforcement’s practice of courthouse arrests, *Velasquez-Hernandez v. Immigration and Customs Enforcement*, 500 F.Supp.3d 1132, 1140 (S.D. Cal. 2020); or its policy of selective enforcement of immigration laws against activists, *NWDC Resistance v. Immigration Customs Enforcement*, 493 F. Supp. 3d 1003, 1011-1013 (W.D. Wash. 2020). In contrast, this provision has been found to bar APA review of video teleconferencing in removal proceedings, *P.L. v. Immigration and Customs Enforcement*, No. 1:19-cv-01336-ALC, 2021 WL 275690, at *3 (S.D.N.Y. Jan. 27, 2021), and of the Attorney General’s decision limiting the use of administrative closure in removal proceedings, *Lopez v. Barr*, No. 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021).

Another provision, 8 U.S.C. § 1252(a)(2)(B), bars review of certain discretionary decisions. It contains two parts: § 1252(a)(2)(B)(i), barring review over “any judgment regarding the granting of relief under [8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, or 1225];” and § 1252(a)(2)(B)(ii), barring 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 the Attorney General or the Secretary of Homeland Security.” Both subsections apply to district court jurisdiction. However, courts have strictly construed these sections in accordance with the statutory language. Thus, for example, the Supreme Court held that subsection (ii) applies only when the statute grants discretionary authority to DHS, not when such discretion is granted solely by regulation. *Kucana v. Holder*, 558 U.S. 233 (2010). In any case involving an element of discretion, practitioners are advised to review Supreme Court and relevant court of appeals caselaw interpreting § 1252(a)(2)(B).

ii. No review of agency action committed to agency discretion by law

The APA also limits review of agency action that is “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). The Supreme Court has held that circumstances meeting this standard 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, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In general, 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.

Courts thus consider whether the statute provides meaningful standards by which to review the agency’s action. For example, in *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003), the Ninth Circuit determined that the statutory

eligibility requirements for employment-based investor visas provided a standard to measure USCIS' denial of a preference petition for such a visa, and thus § 701(a)(2) did not bar its review. *See also Perez Perez v. Wolf*, 943 F.3d 853, 863-64 (9th Cir. 2019) (holding that the statutory framework for U visas provides standards for measuring USCIS' compliance with that framework); *Samma v. U.S. Dep't of Defense*, 486 F. Supp. 3d 240, 263 (D.D.C. 2020) (finding that the naturalization statute provided standards for reviewing agency's requirements for certifications necessary for expedited naturalization for military service members); *Budhathoki v. Dep't of Homeland Sec.*, 220 F. Supp. 3d 778, 784 (W.D. Tex. 2016) (finding that, inter alia, the statutory framework supplied standards for reviewing the denial of an SIJS petition).

Additionally, agency regulations or practices adopted to guide an agency's exercise of discretion can provide the necessary standard for judicial review of the agency's action. For example, in *M.B. v. Quarantillo*, 301 F.3d 109 (3d Cir. 2002), the Third Circuit found that the regulations that governed SIJS petitions set forth "the material matters to be included in a petition." *Id.* at 113. The court found that these regulations, coupled with agency field guidance, provided sufficient standards by which to review the agency action. *Id.* at 113-14; *see also ASSE v. Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1070-72 (9th Cir. 2015) (holding that agency regulations provided a meaningful standard by which to review a sanction imposed by the State Department in the Exchange Visitor Program).

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. *See, e.g., Hamad v. Secretary, Dep't of Homeland Sec.*, No. 3:20-cv-476, 2021 WL 2982765, at *3 (S.D. Ohio July 14, 2021) (no standards by which to measure USCIS' denial of work authorization); *Kondapally v. U.S. Citizenship and Immigration Serv.*, No. 20-00920 (BAH), 2020 WL 5061735, at *4-5 (D.D.C. Aug. 27, 2020) (same); *Saad v. Dep't of Homeland Sec.*, No. CV 09-8428 PSG (JEMx), 2011 WL 2555290, at *4 (C.D. Cal. June 11, 2011) (finding no standards by which to measure a denial of the waiver of the two-year filing deadline for asylee relative petitions). A number of courts also have held that the APA does not apply to the discretionary waiver of the foreign residency requirement under 8 U.S.C. § 1182(e) for the same reason. *See, e.g., Singh v. Moyer*, 867 F.2d 1035, 1038-39 (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); *but see Chong v. Director, U.S. Info. Agency*, 821 F.2d 171, 176 (3d Cir. 1987) (finding jurisdiction to review agency's failure to follow procedures set out in the regulations governing § 1182(e) waivers); *Teleanu v. Koumans*, 480 F.Supp.3d 567, 573-75 (S.D.N.Y. 2020) (finding standards to review whether hardship exists and distinguishing this issue from the discretionary decision to grant a § 1182(e) waiver)).

5. Cause of Action

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

The APA, at 5 U.S.C. § 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.” 5 U.S.C. § 704. The Supreme Court has interpreted this provision as creating a “cause of action” for parties who have been adversely affected by agency action. *See Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (noting that § 704 expressly creates a “‘right of action’ . . . absent some clear and convincing evidence of legislative intention to preclude review”).

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. *See Lexmark, Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (stating that the APA “permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review”).⁶ 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 Ass’n*, 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). In the immigration context, courts have recognized the APA as providing a cause of action for violations of the INA. *See, e.g., Duron v. Nielsen*, 491 F. Supp. 3d 256 (S.D. Tex. 2020) (reversing USCIS’s denial of an application for adjustment under the APA).

b. What is the “zone of interests” test and how is it related to the APA as a cause of action?

In order to invoke the APA’s cause of action, a plaintiff must demonstrate that he or she falls within the “zone of interests” protected by the law invoked—that is, that he or she “is within the class of plaintiffs whom Congress has authorized to sue” under the substantive statute. *Lexmark*, 572 U.S. at 128. This test was first characterized as one of prudential standing, but *Lexmark* clarified that it answers the question of whether the plaintiff has a cause of action under the statute. *Lexmark*, 572 F.3d at 127.

The zone of interests test in the APA context is “not meant to be especially demanding” and the “benefit of any doubt goes to the plaintiff.” *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209, 225 (2012) (internal quotations omitted). The 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

⁶ An APA cause of action may be dismissed when another statute provides a separate cause of action. *See, e.g., Starr Int’l Co. v. United States*, 910 F.3d 527, 536 (D.C. Cir. 2018) (finding that the plaintiff did not have a cause of action under the APA where the Internal Revenue Code provided a cause of action).

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) (emphasis in original) (quoting *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998)). The test “‘forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that’ Congress authorized that plaintiff to sue.” *Lexmark*, 572 U.S. at 130 (internal quotation marks omitted) (quoting *Patchak*, 567 U.S. at 225).

Applying this test in the immigration context, several courts have held that a noncitizen beneficiary of a family or employment-based visa petition is within the “zone of interests” 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; *Ghaley v. Immigration and Naturalization Service*, 48 F.3d 1426, 1434 n.6 (7th Cir. 1995); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986); *Khedkar v. U.S. Citizenship and Immigration Serv.*, No. 20-1510 (RC), 2021 WL 3418818, at * (D.D.C. Aug. 5, 2021) (reaching this result in the context of an employment-based beneficiary who ported). Similarly, other plaintiffs seeking immigration benefits or protections have been found to fall within the zone of interests of other INA and related provisions. *See, e.g., Hsiao v. Scalia*, 821 Fed. Appx. 680, 683 (9th Cir. 2020) (finding beneficiary of a Department of Labor permanent employment certification within the zone of interests of the INA’s labor certification provisions); *Jane Doe 1 v. Nielsen*, 357 F. Supp.3d 972, 1003 (N.D. Cal. 2018) (finding Iranian refugees seeking admission to the U.S. within the zone of interests of the Lautenberg Amendment); *Yu v. Brown*, 36 F. Supp. 2d 922, 930-31 (D. N.M. 1999) (concluding applicants for SIJ status within the zone of interests of those provisions).

Numerous cases address the circumstances under which an organization falls within the zone of interests of an immigration statute. *Compare, e.g., East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 666-68 (9th Cir. 2021) (finding that legal services organizations assisting asylum-seekers within the zone of interests of the INA); *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 513 F. Supp. 3d 154, 171, 2021 (D.D.C. 2021) (finding legal services organizations fell within zone of interests of the INA) *with, e.g., De Dandre v. U.S. Dep’t of Homeland Sec.*, 367 F. Supp. 3d 174, 188-91 (S.D.N.Y. 2019) (finding immigration advocacy organizations representing clients in naturalization proceedings did not fall within zone of interests of the INA).

6. 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 or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. “[A]gency 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 U.S.C. § 551(13). Thus, for example, an agency action may include the denial of a visa petition or an application for adjustment. *See, e.g., Duron v. Nielsen*, 491 F. Supp. 3d at 262. It can also include the agency’s failure to adjudicate a visa petition or adjustment application. *See* 5

U.S.C. § 706(1) (“The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed”).

a. Final agency action

The challenged agency action must be final to be subject to review. The APA states that:

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. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. § 704. 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).

Applying this test, courts have found certain immigration agency actions final. For example, at least one court has held that USCIS’s denial of “specific consent” for a state court dependency hearing for a special immigrant juvenile status petition was final agency action. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 556 n.9 (S.D. Tex. 2006). Similarly, USCIS’ denial of a company’s intracompany executive transferee visa satisfied both prongs of *Bennett* and thus was final, *Canal A Media Holding, LLC v. USCIS*, 964 F.3d 1250, 1255-56 (11th Cir. 2020); as was USCIS’ denial of an affirmative asylee adjustment application where the person was not in removal proceedings. *Hosseini v. Johnson*, 826 F.3d 354, 362 (6th Cir. 2016); *but see Dhakal v. Sessions*, 895 F.3d 532, 540 (7th Cir. 2018) (reasoning that USCIS’ denial of an asylee adjustment application was not final because the plaintiff could renew the application if and when DHS initiated removal proceedings).

Courts have found that other immigration agency actions are not final under the APA. For example, one court held that USCIS’s finding of marriage fraud was not a final agency action and would only become final when the agency denied the immigrant visa petition. *Bangura v. Hansen*, 434 F.3d 487, 501 (6th Cir. 2006); *see also Hernandez v. DHS*, No. 06-CV-12457-DT, 2006 WL 2844539, at *2 (E.D. Mich. Sept. 29, 2006) (finding USCIS’ denial of Temporary Protected Status was not final because plaintiff was in removal proceedings and could renew the claim there); *E.J.’s Luncheonette v. De Haan*, No. 01 CIV 5603 (LMM), 2002 WL 15642, at *3-4 (S.D. N.Y. 2002) (finding denial of a request for Reduction in Recruitment as part of a labor certification was not final agency action; instead, only a denial of the labor certification would be final action); *Transport Robert LTEE v. U.S. Immigration and Naturalization Serv.*, 940 F. Supp. 338 (D. D.C. 1996) (finding letter from INS Associate Commissioner refusing to certify truck drivers as B-1 business visitors was not final agency action).

b. Exhaustion of administrative remedies

Section 704 also addresses the impact of further, available administrative remedies on the finality of the agency action, stating:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Interpreting this provision, the Supreme Court has held that, for claims brought under the APA, a plaintiff is required to exhaust administrative remedies “only” when they are required:

- by statute; or
- by an agency regulation that requires an administrative appeal prior to judicial review and that renders the administrative decision or action inoperative pending administrative review.

Darby v. Cisneros, 509 U.S. 137, 154 (1993) (emphasis in original); *see also Jie Fang v. Dir. U.S. Immigration and Customs Enforcement*, 935 F.3d 172, 181 (3d Cir. 2019).⁷ Absent either of these, the agency action is final for purposes of APA review. Further, courts are “not free to impose an exhaustion requirement” if the agency action has become final under § 704. *Darby*, 509 U.S. at 154.

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) (applying *Darby* and finding no exhaustion necessary in APA challenge to denial of a spousal immigrant visa petition); *Pinho v. Gonzales*, 432 F.3d 193, 202 (3d Cir. 2005) (holding that AAO decision denying adjustment application was final notwithstanding possibility of future removal proceedings in which plaintiff could renew the adjustment application); *Hillcrest Baptist Church v. USA*, No. C06-1042Z, 2007 WL 63826, at *4-6 (W.D. Wash. Feb. 23, 2007) (finding no exhaustion required for challenge to denial of adjustment of status in a religious worker case); *but see Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000) (holding that plaintiff failed to exhaust administrative remedies because the adjustment application could be renewed in removal proceedings, even though INS had not initiated proceedings).

⁷ For more on this topic, *see* AIC’s practice advisory, *Failure to Appeal to the AAO: Does it Bar All Federal Court Review of the Case?* (Sept. 26, 2016), https://www.americanimmigrationcouncil.org/practice_advisory/failure-appeal-ao-does-it-bar-all-federal-court-review-case.

Note, however, that even where exhaustion is not mandatory, courts have found that, if an administrative appeal is undertaken voluntarily, the agency decision is not final—and thus not reviewable—until the administrative process is complete. *See, e.g., Schreiber v. Cuccinelli*, 981 F.3d 766, 786-87 (10th Cir. 2020); *Air Espana v. Brien*, 165 F.3d 148 (2d Cir. 1999) (finding that INS’s 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) (holding that agency determination that plaintiff employer violated the Immigration Nursing Relief Act not final where plaintiff’s administrative appeal was still pending).

7. Parties to an APA suit

a. Who has standing to bring an APA suit?

Article III of the Constitution imposes a requirement that a plaintiff have “standing” to sue. To satisfy this test, a plaintiff must have suffered: (1) an “injury in fact,” *i.e.*, harm to a legally protected interest that is “concrete and particularized” and “actual or imminent”; (2) that is “fairly traceable to” the challenged conduct; and (3) that is “likely to be redressed” by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

Most applicants and petitioners for immigration benefits who have received a final denial from USCIS will satisfy this test. Additionally, several courts have held that beneficiaries of employment-based visa petitions satisfy this test. *See, e.g., Shalom Pentecostal Church v. Acting Sec’y DHS*, 783 F.3d 156, 162-63 (3d Cir. 2015); *Mantena v. Johnson*, 809 F.3d 721, 731 (2d Cir. 2015); *Kurapati v. USCIS*, 775 F.3d 1255, 1261 (11th Cir. 2014); *Patel v. USCIS*, 732 F.3d 633, 637-38 (6th Cir. 2013); *Ghaley v. Immigration and Naturalization Service*, 48 F.3d 1426, 1434 n.6 (7th Cir. 1995); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986); *Khedkar v. U.S. Citizenship and Immigration Serv.*, No. 20-1510 (RC), 2021 WL 3418818, at * (D.D.C. Aug. 5, 2021) (reaching this result in the context of an employment-based beneficiary who ported); *but see Pai v. USCIS*, 810 F. Supp. 2d 102, 111-12 (D.D.C. 2011) (finding that beneficiary lacked standing and citing cases).

b. Who can be named as a defendant?

Although the APA provides that the United States can be named as a defendant in an APA action, it also provides “that any action seeking mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.” 5 U.S.C. § 702. Accordingly, it is advisable to include as a defendant one or more federal officers within the agency who can carry out any injunction or other mandatory order of the court. It also is advisable that the complaint state—in the caption and in the party section—that these officers are being sued in their official capacity.⁸

⁸ For more on this topic, see the practice advisory *Whom To Sue And Whom To Serve In Immigration-Related District Court Litigation* (Updated May 28, 2020),

8. Available Relief and Standards of Review

a. What relief can the court order in an APA suit and what are the governing standards of review?

There are two types of relief a court may order if it grants an APA claim.

First, the court can “compel agency action unlawfully withheld or unreasonably delayed.” 5 USC §706(1). Often, this provision serves as a means to compel delayed agency decision-making or action, similar to a mandamus claim. A “point central to the analysis” 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 (2004). Moreover, a court may only compel an agency “to take action upon a matter, without directing *how* it shall act.” *Id.* (emphasis in original) (citation omitted).

Some courts distinguish between action that is “unlawfully withheld” and action that is “unlawfully delayed.” These cases generally hold that the distinction between the two “turns on whether Congress imposed a date-certain deadline on agency action.” *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). Actions unlawfully withheld are those in which Congress imposed a date-certain deadline. Where the agency has failed to comply with a statutorily imposed deadline, courts “must compel the agency to act.” *Id.*, 174 F.3d at 1190. In contrast, where the claim involves “unreasonable delay,” courts generally weigh the six factors articulated in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984), to determine if the agency’s delay is unreasonable. *See, e.g., Yu v. Brown*, 36 F. Supp. 2d 922, 934-35 (D.N.M. 1999) (applying *TRAC* factors to conclude that INS was obligated to adjudicate SIJ status and adjustment applications).⁹

Finally, some courts have found that § 706(1) is violated when an agency fails altogether to take action required by statute. *See, e.g., Ramirez v. Immigration & Customs Enforcement*, 471 F. Supp. 3d 88, 191 (D.D.C. 2020) (“In so doing, ICE has also ‘unlawfully withheld or unreasonably delayed’ required consideration of placement in the least restrictive setting available to many members of the certified class. 5 U.S.C. § 706(1).”); *Al Otro Lado, et al., v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *9 (S.D. Cal. Sept. 2, 2021) (finding that CBP violated § 706(1) when it failed to take discrete action required by statute—to process asylum seekers at the border).

Second, a court can “hold unlawful and set aside agency actions, findings and conclusions” that meet one or more of six standards:

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- Contrary to constitutional right, power, privilege or immunity;

<https://immigrationlitigation.org/wp-content/uploads/2020/05/Sue-and-Serve-PA.5.29.2020-Update-FINAL-NILA.pdf>.

⁹ For more on suits to remedy agency delay, see the advisories cited in footnote 2.

- In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
- Without observance of procedures required by law;
- Unsupported by substantial evidence in a case subject to [5 U.S.C. §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute or rule; or
- Unwarranted by the facts to the extent that facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2)(A)-(F); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (citing 5 U.S.C. § 706(2)(A)-(D)) (“In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”).

9. Discovery: Is discovery available in an APA suit?

As a general rule, federal court review under the APA is limited to the administrative record that was before the agency when it made its decision. 5 U.S.C. § 706 (stating that “the court shall review the whole record or those parts of it cited by a party”); *Fla. Power and Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *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”). Consequently, discovery is rarely available in APA lawsuits.

There are limited exceptions to this general rule. The primary exception applies when there is no administrative record for the court to review. For example, there usually is no administrative record in lawsuits claiming that, under 5 U.S.C. § 706(1), the agency’s decision or action is unreasonably delayed. For this reason, numerous courts recognize that discovery may be necessary before applying the TRAC factors to determine if the delay at issue is unreasonable. *See, e.g., Al Otro Lado, et al., v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *5 (S.D. Cal. Sept. 2, 2021) (“[B]ecause this Court’s evaluation of the APA claims is limited to Plaintiffs’ contention that Defendants failed to act under § 706(1), an administrative record is not necessary here.”); *Barrios Garcia v. U.S. Dep’t of Homeland Sec.*, -- F.4th --, Nos. 21-1037/1056/1063, 2021 WL 4144034, at *17 (6th Cir. Sept. 13, 2021) (declining to dismiss challenge to USCIS delay in placing plaintiff on U visa waitlist and stating that “discovery is critical to understanding whether the U-visa process is a systematic line or not”); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 376 (4th Cir. 2021) (remanding challenge to delayed U visa waitlist determination and noting that “limited discovery” may be necessary); *Carranza v. Cuccinelli*, No. 2:19-cv-03078-BHH-MGB, 2020 WL 6292639, at *6-7 (D.S.C. Mar. 23, 2020) (finding that “courts generally have declined ‘to address [the TRAC] factors at the motion to dismiss stage and before discovery has been completed.’”); Decision on Motion to Dismiss, *Alvarez Espino v. USCIS*, No. 5:521-cv-21 (D. Vt. Aug. 18, 2021), ECF No. 21 at *9-11 (same).

In other *rare* cases, the administrative record may be insufficient with respect to the claims in the suit.¹⁰ Such an incomplete record “may frustrate effective judicial review.” *Voyageurs National Park Assoc. v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004). Thus, discovery may be necessary to supplement the agency record. *See, e.g., Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (stating that the “district court may inquire outside the record when necessary to explain the agency’s action” or “when the agency has relied on documents or materials not in the record”) (internal quotation omitted); *Newton v. County Wildlife Ass’n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998); *Sabhari v. Cangemi*, No. 04-1104 ADM/JSM, 2005 WL 552081, at *2-3 (D. Minn. Mar. 9, 2005) (allowing limited discovery in an APA challenge to the denial of an immigrant visa petition for alleged marriage fraud). In the vast majority of APA cases, however, no discovery is allowed.

10. Attorneys’ Fees: Is it possible to get attorneys’ fees for prevailing on APA claims?

Yes. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 *et seq.*, authorizes payment of attorneys’ fees and costs in litigation against the government where, *inter alia*, the plaintiff substantially prevailed, and the government’s position was not substantially justified. It is advisable to include a request for attorneys’ fees as part of the prayer for relief in the complaint.¹¹

¹⁰ A complete administrative record includes “all documents and materials that the agency ‘directly or indirectly considered.’” *Oceana Inc. v. Ross*, 290 F. Supp. 3d 73, 77 (D.D.C. 2018) (quoting *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006)).

¹¹ For more on EAJA fees, see the practice advisory *Requesting Attorneys’ Fees Under the Equal Access to Justice Act*, <https://immigrationlitigation.org/wp-content/uploads/2021/03/2021.03.23-EAJA-PA-FINAL.pdf>.