The Government Answered a Complaint Alleging Administrative Procedure Act Violations – Now What?

This practice tip addresses what happens after federal defendants answer a federal district court complaint based on an Administrative Procedure Act (APA) cause of action. In lawsuits against a federal agency, officer, or employee (in their official capacity), such as a challenge to the denial of an employment-based immigration petition, the defendant(s) must either answer the complaint or file a motion to dismiss the case within 60 days after the U.S. Attorney's Office is served. Fed. R. Civ. P. 12. Plaintiff may name one or more defendants, depending on circumstances and litigation strategy. If defendants move to dismiss, the plaintiff must file a memorandum of law (sometimes called a statement of points and authorities) in opposition. If the court denies the motion to dismiss, then defendants must answer the complaint 14 days later unless the court orders a different time period. *See* Fed. R. Civ. P. 12(a)(4)(A).

What happens after the government has filed an answer?

The precise steps the plaintiff must take after the government defendants file their answer will depend on the district court's procedures. These procedures are governed by up to three sets of rules, all of which must be followed: the Federal Rules of Civil Procedure, and particularly Rule 56, which governs summary judgment specifically; the district court's local rules; and any judge's rules or standing orders issued by the judge assigned to the case. These latter two often provide more specific guidance than the federal rules.

A. The certified administrative record is filed

Generally, the next step after a party answers in civil litigation is to plan discovery via a Federal Rule of Civil Procedure 26(f) report and a conference with the court under Rule 16(b). But a lawsuit challenging USCIS' denial of an employment-based immigration petition (EB petition) under the APA will be decided on the administrative record. Because there is usually no discovery in APA actions for review on the administrative record, these cases are exempted from initial discovery disclosure and discovery conference requirements. Fed. R. Civ. P. 26(a)(1)(B)(i); 26(f)(1). Some courts also exempt these actions from the pretrial conference requirements of Rule 16(b), while others leave the decision to each judge. *See* District of Columbia Local Civil Rule (LCvR) 16.3(b)(1) (exempt); Central District of California Local Civil Rule 16-1 (not specifically exempted but permitting each judge to waive Fed. R. Civ. P. 16 requirements).

The government is responsible for filing the certified administrative record, to which the parties will cite as evidentiary support for their respective positions. In the District Court for the District of Columbia, the government must file "a certified list" of the administrative record's contents "within 30 days following services

of the answer … or simultaneously with the filing of a dispositive motion, whichever occurs first," unless the court orders a different timeframe. LCvR 7(n)(1). In other jurisdictions, the local rules may set a different deadline or not address the topic. A complete administrative record includes no more or less than "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)).

Courts very rarely allow discovery or supplementation of the administrative record. The threshold for supplementation is high, given that a certified administrative record "is entitled to a strong presumption of regularity." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010). For material the plaintiff asserts was omitted, plaintiff must provide "reasonable, non-speculative grounds demonstrating" the decisionmaker directly or indirectly considered the material. *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 6 (D.D.C. 2009). For extra-judicial evidence, plaintiff must demonstrate one of the following circumstances: 1) the agency deliberately or negligently excluded adverse materials; 2) the court needs the material to determine what factors the agency considered; or 3) the agency's failure to explain its decision precludes judicial review. *See City of Dania Beach v. Fed. Aviation Admin.*, 628 F.3d 581, 590 (D.C. Cir. 2010). To show the need for discovery, the plaintiff must make a "strong showing [in support of a claim] of bad faith or improper behavior." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

B. The parties move for summary judgment

Once the government defendants file the administrative record, the plaintiff must move for summary judgment asking the court to set aside the EB petition denial as a matter of law. Defendants likely will file a cross-motion for summary judgment in addition to opposing plaintiff's motion.

In an APA action, the court will use a different standard than ordinarily applies in deciding a summary judgment motion. The standard in other civil actions is: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In an APA-based challenge to an EB petition denial, plaintiff's summary judgment motion will be granted when the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F. 3d 1127, 1135 (D.C. Cir. 2014) (quoting *Jicarilla Apache Nation v. Dep't of Interior*, 613 F.3d 1112, 1118 (D.C. Cir. 2010), quoting 5 U.S.C. § 706(2)(A)). This difference extends to the district court's consideration of the agency's findings of fact. Rather than making its own findings of fact, the district court "sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (footnote and citation omitted).

If the local rules do not contain deadlines, and if the court does not issue a scheduling order, then plaintiff's counsel will need to confer with government counsel to reach agreement on the filing date for the administrative record and the briefing schedule for summary judgment. Typically, the plaintiff files the opening motion for summary judgment. The government defendants then file an opposition to plaintiff's summary judgment motion and its cross-motion for summary judgment, with one legal memorandum containing the authority for its opposition and affirmative motion. Similarly, one date would be set for the plaintiff to file its opposition

to defendants' cross-motion and its reply in support of its own motion in one legal memorandum. A date also would be set for defendants' reply in support of their summary judgment motion. A hearing on the motion for summary judgment should be requested in accordance with the local rules, or the court may set a hearing on its own accord. The local rules also may require the moving party to designate a hearing date. Frequently, courts decide summary judgment on the papers alone.

The plaintiff's legal memorandum in support of its summary judgment motion and in opposition to any cross-motion filed by the defendants will include factual and legal support for its position. The factual support will be drawn from facts in the administrative record, which should be cited specifically, while the legal support could include citation to the INA, the regulations, case law, prior agency decisions, and/or agency policy. Some courts require the parties to file their statement of facts separately from the memorandum of law, even though the facts are not in dispute in an APA record-review case.

While reviewing all applicable rules is a must, don't hesitate to reach out to other attorneys. AILA members should consider joining AILA's Federal Court Litigation Section where litigators share their knowledge of various federal district and appellate courts. Hearing first-hand what to expect – particularly if the attorney has experience with the same judge—helps put the rules into perspective. AILA members also may submit questions to clearinghouse@immcouncil.org