



Business Immigration Practice Tip: When to Appeal to the Administrative Appeals Office (AAO)

When a USCIS Service Center denies an employment-based visa petition, should you recommend that the petitioning employer appeal to the AAO? Not if you have the option of filing a new petition. But there are many situations where refiling is not an option. For example, where an immigrant visa petition must be approved to preserve the beneficiary's priority date or where a nonimmigrant visa petition must be approved in order for the beneficiary to be counted against the H-1B cap, refiling would not achieve your client's goals. The following pros and cons are intended to help you to analyze whether your client would benefit from an AAO appeal.

Pros

Provides an opportunity to supplement the administrative record. If, based on the Service Center's denial, you conclude that the record in your client's case is weak, you can use the administrative review process to provide additional evidence that your client has met the requirements for the relevant visa classification. If you go straight to court, you will have to present your case based on the record as it existed when the Service Center denied the petition.

May prompt USCIS to approve the petition. If you file an appeal to the AAO, agency regulations require the official who made the initial decision to review that decision and decide whether to take "favorable action." If, upon review, the official decides to approve the petition, your client's appeal would be treated as a motion to reopen or reconsider (whichever is applicable). If you decide to file an AAO appeal, remember that the deadline is within 30 days (or 33 days if you received the denial by mail) of the decision date.

Cons

Bad odds. In Fiscal Year 2014, the AAO dismissed (i.e. upheld denials of) 95% of its appeals on the merits from H-1B petition denials and 86% of its appeals on the merits from L-1 petition denials. See AAO Appeal Adjudications Chart, AILA Doc. No. 15091102. Since the filing fee is currently \$630, with a proposed increase to \$675, an employer would understandably be concerned about the high cost of filing as compared with the low success rate.

Prospect of an even worse decision. The AAO may affirm the denial for a different reason than the Service Center—a reason which may be more difficult to overcome than the reason(s) set forth in the initial decision.

Not expeditious. While the Service Center is supposed to forward an appeal to the AAO within 45 days of receipt, such transmittals often take longer in practice. The AAO's [processing time](#), which is currently within six months, runs from the date the AAO receives the file.

In sum, unless you need to supplement the administrative record, you should seriously consider filing suit instead. Some practitioners have received approval notices shortly after serving complaints on USCIS. In cases where USCIS won't budge, you will have the opportunity to present your case to a decision-maker who is independent of, rather than part of, USCIS. For more information on challenging USCIS denials of visa petitions in federal court, please see the Council's practice advisory, [Litigation for Business Immigration Practitioners](#) (June 3, 2016).