



CHALLENGING SIJS DENIALS UNDER THE ADMINISTRATIVE PROCEDURE ACT

National Immigration Litigation Alliance
in collaboration with Children's Immigration Law Academy
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CILA-NILA Partnership



Provide trainings, resources and technical assistance (Texas) related to appellate and litigation practice



Some emphasis on matters originating within Fifth Circuit



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- *Ready to Win—Moving Beyond Trying Cases at the IJ Level*
- *Legal Writing, Advanced Immigration Legal Research*
- *Introduction to Federal Court Practice Parts I and II*
- *Advanced Immigration Legal Research*
- *Litigating SIJS Delay Cases: Mandamus and APA*
- *Attorneys Fees Under the Equal Access to Justice Act*
- *Winning at the BIA*
- *Nuts and Bolts of Habeas Corpus Petitions*
- *Niz-Chavez, Pereira & NTA's*

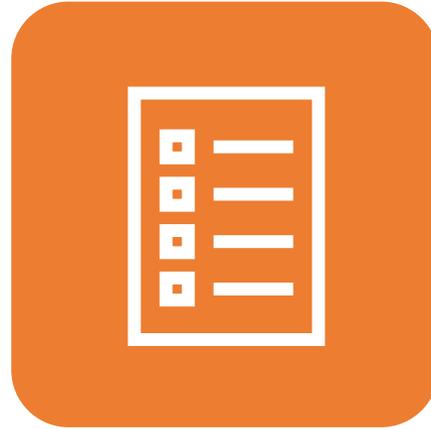
Coming soon:

- *Petitions for Review and Judicial Stays of Removal (5th Circuit)*

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What is the Administrative Procedure Act?

- Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*
 - Judicial review provisions
 - Provides for federal district court review of unlawful agency action
 - Allows for recovery of non-monetary relief– i.e., injunctive or declaratory relief
 - Mechanism to challenge:
 - USCIS’ denial of a SIJS petition
 - USCIS’ denial of a SIJS-related adjustment application where the denial is not based on discretion and the plaintiff is not in removal proceedings

Nuts and Bolts: Where to Sue?

- Federal district court
- Venue for suits against federal agency or federal official acting in their official capacity is governed by 28 U.S.C. § 1391(e)
- Suit may be brought where:
 - A defendant resides (including location of a federal agency);
 - A substantial part of the events giving rise to claim occurred; or
 - The plaintiff resides if not real property is involved

Nuts and Bolts: When to Sue?

- Generally, 6-year statute of limitations for suits against United States, its agencies and officials
 - 28 U.S.C. § 2401(a)
- Note, 4-year statute of limitations for civil actions under federal statute enacted after Dec. 1, 1990
 - Because this may apply to some or all SIJS challenges, safest course is to sue within 4 years
- Statute of limitations runs from date of agency decision or action

Nuts and Bolts: Who Are the Parties?

- Plaintiff: person seeking SIJS benefit
 - Minors generally must have someone sue on their behalf
 - Fed. Rule Civ. Pro. 17(c)(2) provides that:
 - a minor may sue by a “next friend” or by a guardian ad litem; and
 - The court must appoint a guardian ad litem, or issue another appropriate order to protect the minor’s interest
- Defendant: agency and agency official
 - 5 U.S.C. § 702 provides that an action seeking injunctive relief shall name the federal officer, by name or title, responsible for compliance
 - See [*Whom To Sue And Whom To Serve In Immigration-Related District Court Litigation*](#)

What is Jurisdictional Basis for an APA Claim?

- APA does not grant a court jurisdiction
- Instead, jurisdiction is based on 28 U.S.C. § 1331 (granting federal district courts jurisdiction over all federal questions)
- However, the APA does waive the United States' sovereign immunity, which is a jurisdictional requirement
 - Waiver applies to request for injunctive or declaratory relief

Are There Limits on When a Court May Exercise Jurisdiction Over an APA Claim?

- Under 28 U.S.C. § 701(a), a court may not review an APA claim if another statute precludes judicial review:
 - INA § 242(a)(2)(B)(i) – limits review over any judgment for relief under § 245
 - Scope of provision will be decided in *Patel v. U.S. Attorney General*, No. 20-979 (currently pending)
 - Denial of SIJS-related adjustment application in exercise of USCIS' discretion would be barred
 - INA § 242(a)(2)(B)(ii) – limits review certain discretionary decisions:
 - Does not limit review of specific consent denial, *Zheng v. Pogash*, 416 F. Supp. 2d (S.D. Tex. 2006)
 - Likely would bar review of:
 - Denial of a SIJS-related humanitarian waiver of a ground of inadmissibility;
 - ~~Denial of an SIJS-related adjustment of status application if denied in USCIS' exercise of discretion~~
 - INA § 242(b)(9) – requires review of all issues arising from removal proceedings to be heard in court of appeals
 - Would bar review adjustment of status if client then placed in removal

APA Provides a Cause of Action

- APA provides the plaintiff with a basis to sue the agency for unlawful action
- Available where Congress has not provided another avenue for suit
- But plaintiffs must demonstrate they fall within the “zone of interests” protected by the law invoked
- Test:
 - What are the interests the statute arguably is intended to protect?; and
 - Are the plaintiff’s interests among these?
- SIJS plaintiffs have been found to satisfy this test; *see, e.g., Yu v. Brown*, 36 F. Supp. 2d 922, 930-31 (D. N.M. 1999)

What Agency Action is Reviewable?

- USCIS decisions in individual cases, including:
 - The denial of an I-360 SIJS petition
 - The denial of an SIJS adjustment application on non-discretionary grounds
- APA also provides means to challenge USCIS policies, such as:
 - State court reunification authority policy
 - *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D. N.Y. 2019)
 - *A.O. v. Cuccinelli*, 457 F. Supp. 3d 777 (N.D. Cal. 2020)
 - *Moreno Galvez v. Cuccinelli*, 492 F. Supp. 3d 1169 (W.D. Wash. 2020)
 - *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D. Cal. 2018)

What Action is Reviewable? (cont.)

- Must be “final” agency action
 - Test for determining finality:
 - The action must be consummation of agency decision-making process; it cannot be tentative or interlocutory in nature; and
 - The action must determine rights or be one from which legal consequences flow.
- *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).
- USCIS’ denial of specific consent for a state court dependency hearing has been found to be final agency action, *Zheng v. Pogash*, 416 F. Supp. 2d 550, 556 n.9 (S.D. Tex. 2006)
 - As has USCIS’ state court reunification policy, *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D. N.Y. 2019)

Must Administrative Remedies be Exhausted Before Suit can be Filed?

- Under the APA, agency action is not final if there is a mandatory exhaustion requirement
- Under *Darby v. Cisneros*, 509 U.S. 137, 154 (1993), the test for this is:
 - Whether a statute mandates an administrative appeal; or
 - Whether a regulation mandates an administrative appeal AND the regulation renders the agency decision inoperative while the appeal is pending
- No statute or regulation mandates an appeal of a denial of an I-360 petition or an adjustment of status application to the Administrative Appeals Office, so exhaustion is not required

What Relief can the Court Order and What are Possible Standards of Review?

- Under 5 U.S.C. § 706, a court can:
 - Compel agency action unlawfully withheld or unreasonably delayed
 - This is similar to a mandamus action
 - *See* [Mandamus and APA Actions for Special Immigrant Juvenile Petitions](#)
 - Hold unlawful and set aside agency action that is, inter alia:
 - Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;
 - Contrary to constitutional right or power;
 - In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
 - Without observance of procedures required by law.

SIJS Case Examples

- *Flores-Zabaleta v. Nielsen*, 367 F. Supp. 3d 208 (S.D. N.Y. 2019) (holding that USCIS exceeded its authority by second-guessing the family court's decision)
- *Perez v. Cuccinelli*, 949 F. 3d 865 (4th Cir. 2019) (holding USCIS' denial based on requirement of a permanent custody order conflicted with SIJS statute)
- *Budhathoki v. Nielsen*, 898 F. 3d 504 (5th Cir. 2018) (finding USCIS did not exceed its statutory authority by concluding state court orders not sufficient to establish SIJ status)
- *Rivas Rodriguez v. Carroll*, No. 4:01406, 2020 WL 6728838 (S.D. Tex. Sept. 16, 2020) (upholding USCIS' denial of I-360 on basis that state court did not have jurisdiction over an 18-year-old)
- *Alvarez-Sosa v. Barr*, 369 F. Supp. 3d 492 (E.D.N.Y. 2019) (finding no error where USCIS denied I-360 because state court had not ruled at the time petition was filed)

Is Discovery Permitted in APA Cases?

- Generally, discovery is not permitted
- Instead, review is based on the administrative record
- An exception to this rule is where the claim is that the agency failed to issue a decision within a reasonable time
 - Where no decision has been made, there is no administrative record and limited discovery may be allowed

Are Attorneys' Fees Available?

- The Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq.*, authorizes payment of attorneys' fees and costs where, inter alia:
 - The plaintiff prevailed; and
 - The government's position was not substantially justified
- Advisable to include a request for attorneys' fees in the prayer for relief in the complaint
- *See* [Requesting Attorneys' Fees Under the Equal Access to Justice Act](#)