

THE ABC'S OF AN APA LAWSUIT

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I.

INTRODUCTION

When the government withholds benefits to which our clients are entitled under the Constitution and/or immigration laws of the United States, the most versatile cause of action to which we can resort is that provided by the Administrative Procedures Act (APA), specifically 5 U.S.C. § 702, which reads, in part, "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."¹ The structure of the APA case is simple. The scope of the cause of action for judicial review created by 5 U.S.C. § 702, and what the reviewing court can do, are set forth in 5 U.S.C. § 706:

The reviewing court shall-

- 1) Compel agency action unlawfully withheld or unreasonably delayed; and
- 2) Hold unlawful and set aside agency actions, findings and conclusions found to be (A) arbitrary, capricious, an abusive of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations . . .; (D) without observance of procedure required by law;

This language means what it says, and thus the 5 U.S.C. §§ 702/706 claim has become an established and effective vehicle for immigration benefits litigation.

II.

GETTING GOING

To prosecute a lawsuit against Immigration under the APA, you need only a few books plus a little bit of law. For the purpose of the following discussion we'll assume that

¹ That section of the APA also removes the shield of sovereign immunity in any case seeking injunctive relief against the U.S., its agencies or employees. See B.K. Instruments, Inc. v. United States, 715 F. 2d 713, 725 (2d Cir. 1983).

Immigration has denied you something, say an H-1B petition for a computer programmer, on the ground that the position does not require a bachelor's degree. You do your administrative appeal, if available², because you need "final agency action." Immigration tells you to kiss off. You are now ready to go.

From your handy copy of The Federal Rules of Civil Procedure, you discover that all you need to create a complaint is plead a short, plain statement of the facts showing that the plaintiff is entitled to relief. Appendix 1 hereto is a fill-in-blanks version of a complaint in an APA action against Immigration. You can choose your defendant--the President of the United States, the Secretary of the Department of Homeland Security, or the Regional, District, or Field Office Director who got it wrong, or any combination of them.

Next you file your complaint through the court's ECF electronic filing system, and include summonses for service of process on the defendant(s). Just about all U.S. district court websites have forms for the civil cover sheet and the summons.

Now things start to get fun. Flip to Rule 4(i) and you will find complete and simple instructions about how you serve the United States, its agencies, corporations, officers, and employees. Follow that rule and in the distance or in your mind you will hear your summonses and complaints land on the bureaucrats' desks. By this point your investment in your case might be about two hours, a \$420.00 filing fee, and maybe \$30.00 in assorted expenses. And you have, in the immortal words of Sam Williamson, "sue[d] the bastards."

II.

WHAT HAPPENS NEXT

After calling you and asking for an extension of time in which to answer (the sixty days the Rules give them seems to be insufficient most of the time), defense counsel (almost always an assistant U.S. Attorney) files a motion to dismiss, arguing that you are wrong and that specifically there is no set of facts under which your claim could possibly prevail. You respond with plaintiff's response to defendant's motion to dismiss, in which you lay out your legal theory and show the judge that if you can prove the facts you have alleged, you win.

² You are required to exhaust only those administrative remedies that are expressly required by statute or agency rule. Darby v. Cisneros, 509 U.S. 137, 146 (1993).

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