The United States Citizenship and Immigration Services (USCIS) issues thousands of decisions each day on a wide range of benefit applications. USCIS also issues no decisions because of bureaucratic delays on thousands of other cases. In many instances, USCIS’s denial of an immigration benefit or USCIS’s inaction on adjudicating a benefit application is subject to judicial scrutiny.

This Practice Memorandum puts down in writing some intuitive guidance on drafting an effective complaint for immigration-related litigation. It is not an exhaustive analysis of the law and does not purport to say what the law is. It should be read and understood as a missive from one attorney to another describing best practices for winning in immigration litigation. It does not take the place of individual legal advice provided by a lawyer.

1. Why First Impressions Matter: The Role of the Complaint

When a client approaches an attorney with a problem, the client does so because he or she wants the attorney to solve the problem. This is not an unreasonable expectation, after all, that is what most attorneys market themselves as: problem-solvers. However, in immigration litigation this is seldom so. Immigration attorneys do not have green cards they can cut and distribute. They have no power to approve petitions or adjudicate long-delayed applications. Immigration attorneys cannot administer oaths of allegiance.

Where litigation is contemplated against USCIS, it is practical to think of the

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1 This paper was originally presented at the AILA Pacific Northwest 2008 Regional Conference on Immigration Law.
2 Immigrant Law Group PC is a public-interest-focused, private law firm in Portland, Oregon specializing in removal defense, immigration appellate defense, and affirmative immigration litigation. For more information about the firm and its attorneys, please refer to the webpage www.ilgrp.com. Questions about this practice memo can be directed to Stephen Manning, smanning@ilgrp.com.
dynamic a bit differently. The true decision-maker is the judge and the agency in immigration litigation. Judges, by their constitutional role, decide cases. A decision in your client’s favor can solve the client’s problem. The agency, USCIS, who is the intended defendant, created the client’s problem (which is why it is the defendant) because it failed to properly administer its statutory role. If motivated, USCIS can grant relief too which would also solve the client’s problem. But the judge and the agency are only potential problem-solvers because, of course, they can create more problems for the client (and the attorney) by denying the claim. The role of the attorney, then, is not necessarily to solve the problem. Instead, the attorney presents the problem and, with the tools of litigation such as the complaint, motions, briefing, argument and discovery, the attorney influences the decision-makers to solve the client’s problem.

In federal court, the process of presenting the problem to the court is initiated by a simple and straightforward process: filing a complaint. The complaint, as a document, is the first introduction of the problem to the court and, in some cases, to the agency. It is the first document to have a chance to leave an impression on the potential problem-solvers. First impressions matter a great deal.

2. The General Framework For Determining The Types of USCIS Decisions That Can Be Challenged In A Lawsuit.

In most affirmative lawsuits challenging a denial of an immigration benefit, the cause of action will be rooted in the Administrative Procedures Act, 5 U.S.C. § 701 et. seq (APA). The APA provides a waiver of sovereign immunity that permits an individual aggrieved by an agency action to seek judicial review. 5 U.S.C. § 702. See e.g., Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 510 n.4 (1999) (holding that § 702 provides waiver of sovereign immunity in immigration context). There are two questions which will almost always govern what types of USCIS decisions can be challenged in an APA-based lawsuit: (1) is the decision a final decision and (2) does one of the below-listed preclusion rules apply?

Under the APA, only final agency decisions are reviewable. A decision is final for APA purposes when the decision marks the “‘consummation’ of the agency’s decision-making process-it must not be of a merely tentative or interlocutory nature” and “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Bennett v. Spear,

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3 Standing, in the APA-context, is both a Constitutional and statutory requirement in all lawsuits. For many types of USCIS decisions the aggrieved party, as the one who has standing, is generally apparent. However, there are instances where standing is more complex, especially in visa petitioning process. See Matter of Sano, 19 I&N Dec. 299, 300 (BIA 1985).

In applying the Bennett finality principle, the Ninth Circuit looks to “whether the [action] amounts to a definitive statement of the agency’s position, whether the [action] has a direct and immediate effect on the day-to-day operations of the party seeking review, and whether immediate compliance [with the terms] is expected.” Industrial Customers of Northwest Utilities v. Bonneville Power Admin., 408 F.3d 638, 646 (9th Cir. 2005).

For immigration purposes, the finality requirement will not generally pose difficulty. By regulation when USCIS denies an application or petition, the denial must be in writing and served on the applicant or petitioner. 8 C.F.R. § 103.3(a)(1)(i). In most situations, such a decision will satisfy the finality requirement because it will have determined the rights and obligations and the parties are expected to obey it. In some circuits, including the Ninth Circuit, the denial of an adjustment of status application (form I-485) satisfies the final agency action so long as removal proceedings are not under way.

A final agency decision that is subject to any of the following rules, though, cannot be challenged via an APA-action:

1. If the decision-making power is so committed to agency discretion that no meaningful standards of law exist by which to evaluate the appropriateness of the decision. See Spencer Enterprises, Inc. v. USA, 345 F.3d 683, 688 (9th Cir. 2003) (statutory scheme provided meaningful standard to adjudge correctness of investor visa denial); Ana International, Inc. v. Way, 393 F.3d 886, 890 (9th Cir. 2004) (IIRIRA’s jurisdictional limitations on discretionary decisions are broader than APA’s).

2. If additional administrative procedures are required to be exhausted. Ma v. Reno, 114 F.3d 128 (9th Cir. 1997).

3. If another statute, such as § 242(a)(2), precludes judicial review. See Ana International, 393 F.3d at 891.


Generally, any final USCIS action that is not a final removal order or embodied in a final removal order, can be challenged in an affirmative lawsuit in district

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4 The AILF Legal Action Center published a Practice Advisory explaining in detail the exhaustion requirement and exceptions to it. See Mary Kenney, American Immigration Law Foundation, Failure To Appeal To The AAO: Does It Bar All Federal Court Review Of The Case?, July 22, 2004, available at www.ailf.org.
The most common types of decisions that could be challenged in an affirmative lawsuit will involve USCIS’s decision to deny a particular application or petition. When USCIS denies a case, it must do so in writing explaining its reasons therefor. 8 C.F.R. § 103.3(a) (providing general obligation to issue written denials). These include denials of:

(a) visa petitions seeking immediate or preference relative status, e.g., Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006);
(b) applications for family unity benefits under section 301 of the Immigration Act of 1990, Hernandez v. Reno, 91 F.3d 776 (5th Cir. 1996);
(c) petitions for refugee or asylee relative status;
(e) applications for naturalization after USCIS has made a merits decision; Chan v. Gantner, 464 F.3d 289, 291-92 (2d Cir. 2006);
(f) applications for waivers of grounds of inadmissibility;
(g) applications for classification as an immigrant investor, Spencer Enterprises, 345 F.3d at 688 (immigrant investor visa);
(h) applications for adjustment of status, Abboud v. INS, 140 F.3d 843 (9th Cir. 1998);
(i) applications for skilled worker classification, Louisiana Philharmonic Orchestra v. INS, 44 F.Supp.2d 800 (E.D. La. 1999) (H-1B).

Other agency actions that are reviewable but do not take the form of a written decision include:

(j) delayed adjudication of naturalization;
(k) delayed adjudication of adjustment of status applications;
(l) USCIS’s refusal to issue appropriate documentation or evidence of status.

4. Drafting the Opening Document: The Complaint.

There are several pragmatic and procedural steps that must be taken to file an affirmative lawsuit. The items below are a sample of the common procedural rules associated with drafting a complaint. The reader is urged to consult more

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5 The INA provides that removal orders can be reviewed only on a petition for review. Section 242(a)(1) provides that judicial review of removal orders is governed by chapter 158 of 28 U.S.C. which is the section relating to petitions for review of final administrative agency decisions.
comprehensive resources published by AILA, e.g., Robert Pauw, Litigating Immigration Cases in Federal Court (AILA Feb. 2007), and the Practice Advisories published by the American Immigration Law Foundation available at www.ailf.org.

Chapter III of the Federal Rules of Civil Procedure, which contains Rules 7-16, governs pleadings and motions practice before the U.S. District Courts. Other relevant rules not discussed here, but certainly deserving of study, are the rules in Chapter II (Rules 3-6) that specify how to serve documents, prepare and present summons, and calculate timing.

Rule 8 sets forth the required contents of a complaint. Fed. R. Civ. Pro. 8(a) (“Fed. Rule”). It must contain (1) a short and plain statement of the court’s jurisdiction, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for relief. Fed. Rule 8. The pleading “shall be simple, concise, and direct.” Fed. Rule 8(e)(1). The Supreme Court recently interpreted Rule 8 in a case involving anti-trust litigation. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007). In Bell Atlantic Corp, the Supreme Court held that to state a claim under the Sherman Act requires a pleader to present “[f]actual allegations [which] must be enough to raise a right to relief above the speculative level[].” 127 S.Ct. at 1965. The Supreme Court abrogated its earlier holding in Conley v. Gibson, 355 U.S. 41, 47 (1957) that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” While the Supreme Court stated that Bell Atlantic Corp. was not intended to create a heightened pleading standard, Bell Atlantic Corp, 127 S.Ct at 1966, in practice it has been and will be seen to do just that. In the Ninth Circuit, Bell Atlantic Corp has initially been read to create a heightened pleading for Sherman Act cases. See Skaff v. Meridian North America Beverly Hills, LLC, 506 F.3d 832, 842 (9th Cir. 2007). The District Courts, though, have applied Bell Atlantic Corp in contexts outside of the Sherman Act to dismiss complaints for failure to state a claim. See, e.g., Rush v. Oregon Steel Mills, 2007 WL 2417386 (D. Or. 2007) (No CV-06-1701-AS) (employment discrimination); Sooz S. v. Carpenter, 2008 WL 53118 (W.D. Wash. 2008) (No. C07-5388BHS) (tort action); Walker v. United States, 2007 WL 4562887 (W.D. Wash. 2007) (No. C07-5513RJB) (tort action).

Rules 10 and 11 describe the format of the complaint. The complaint must contain a caption setting forth the name of the court, the title of the action, the file number and the name of all the parties. FRCP 10(a). Each allegation should be a separate numbered paragraph which facilitates the answer. FRCP 10(b). The complaint must be signed by at least one attorney of record. FRCP 11(a). In many court locations, all filings except for the complaint are now done electronically with the U.S. Court’s CM/ECF system. The complaint must be
conventionally filed. A PDF version of the complaint must be sent to the court on a CD-ROM at the time of filing so it can be uploaded to the CM/ECF system. \(^6\)

Rule 15 permits a plaintiff to amend or supplement the complaint. FRCP 15(a). One amendment is permitted as of right so long as a responsive pleading has not been filed. FRCP 15(a). Importantly, a USCIS defense motion to dismiss is not a responsive pleading. Miles v. Dept. of the Army, 881 F.2d 777, 781 (9th Cir. 1988). In cases where USCIS’s first defense is a motion to dismiss, a carefully filed amended complaint should work to moot the motion. Further amendments are permitted only by leave of the court and only when justice so requires. FRCP 15(a). The Ninth Circuit uses a five-factor test to determine if leave to amend is appropriate. Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004). These factors are whether the amendment is sought in bad faith, whether it was brought with undue delay, whether there is prejudice to the opposing party, whether there is a futility in allowing the amendment, and whether the plaintiff has previously amended the complaint. Id.; DCD Programs, Ltd., v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987) (describing the five factors and explaining that “rule 15’s policy of favoring amendments to pleadings should be applied with extreme liberality”) (internal citations omitted).

5. First Impressions

The pragmatic steps – which in this author’s view are the most important – are easily overlooked in the large amount of work necessary to spin out a lawsuit. The key pragmatic step is inventorying the reasons for initiating suit. The inventory of reasons why and why not to sue is useful to screen out cases which will not likely be successful, will likely create bad law, or will engender little forward progress toward satisfying a client’s interests. It will create a unified approach to bringing the case, eliminate easily anticipated counter-claims or defenses, and minimize the “surprise” element present in every lawsuit.

Immigration litigation presents issues unlike those in most all other types of civil litigation. It is almost always an all-or-nothing approach with small room to negotiate desired outcomes. Either the law and facts are on your side, or they are not. USCIS does not appear to settle cases for nuisance value. Statutes are designed to protect government interests even when those interests diverge from the interests of justice or of the public.

\(^6\) A note of caution: many immigration cases contain sensitive personal information. Some immigration cases, because of the political nature of immigration and the inherent human drama involved in such cases, also attract media attention. When filing documents with the district court, it is wise to factor in the need for privacy of personal information by redacting some items such as dates of birth, Social Security numbers, and the like.
Filing a lawsuit also introduces a whole new rule regime, different decision-makers, and several actors each of whom have different experience with immigration statutes, varying degrees of competency on immigration, and their own institutional and personal interests. For example, a suit in district court will bring into play the Federal Rules of Civil Procedure, the local rules of procedure and the chamber practices of a particular judge. The decision-makers include, obviously, the judge and, less obviously, the agency’s regional and upper-level legal counsel who will influence the course of action taken by the U.S. attorney. The number of actors proliferates to include the judge’s law clerks, the court clerk, the U.S. attorney and the supervisory staff, and a whole host of agency actors – few of whom you will deal with person to person. The litigator’s ability to influence the process, given the complexity of the interlocking rules and the sheer number of different thinkers and players, will depend in large part on the organization of the lawsuit and preparedness.

These are the important elements in a pre-filing inventory:

(a) A succinct, specific understanding of the client’s immigration goal – this may not be the same as the goal for the litigation. A statement such as “to win the case” is unhelpful. Instead, is the goal to “obtain permanent residence under the NACARA program” or “to read the file the government has compiled about the client”? In this sense, the litigation becomes a tool to achieve these goals. By knowing at the outset what the client’s goal is, the ability to negotiate, settle, or direct outcomes of the litigation is simpler. The litigation is not the end-all, rather it is a tool to achieve a goal.

(b) A careful analysis of the court’s jurisdiction. Carefully set out the statutory basis for jurisdiction and address the ancillary concepts of Constitutional standing, zone of interests, and the basis for the causes of action. In defending actions, it is easy for the government to seek dismissal of a claim or entire case for want of jurisdiction. E.g., Hanif v. Dep’t of Homeland Security, 472 F. Supp.2d 914 (E.D. Mich. 2007) (granting USCIS motion to dismiss APA challenge to I-130 revocation and denial for want of jurisdiction). A motion to dismiss is almost a universal defense strategy in immigration litigation; consequently, having set forth the jurisdictional basis ahead of time will aid in responding to the motion to dismiss or setting up the case to avoid a motion to dismiss entirely.

(c) A careful analysis of each cause of action. Like the jurisdictional analysis, the cause of action analysis should be probing into the weaknesses of the claim. Claims which are unlikely to survive a motion to dismiss can be used strategically by dropping them, using them as negotiation chips, or helping to frame larger issues.
An educated guess of how the lawsuit will be received and acted on by the agency. This is a planning tool, not a prognostication of the outcome. Certainly, if we were able to know how the judges would rule, no losing lawsuits would ever be filed. These are guesses informed by past government behavior and experience with the individual actors involved in the lawsuit. It is true that there is a limited range of typical agency responses. Addressing which ones are most likely in your case eliminates surprise and permits the strategic planning – in other words, manipulating (in a non-pejorative sense) the process to obtain the desired result. For example, in a mandamus action seeking to force adjudication of a name-check delayed naturalization application, the government typically responds with a motion to remand to the agency. See, e.g., Aytes, USCIS Associate Director, FBI Name Checks Policy and Process Clarification for Domestic Operations, Dec. 21, 2006 (eliminating typical agency response of expedite treatment in name-check delay mandamus). Because this is such a likely response, the litigator can beforehand analyze whether a remand would further the client’s overall immigration goal. A litigator can be proactive in making a settlement offer to the government preempting a motion to remand by, as an example, offering to agree to a remand in which the agency has 30, 60, or 90 days to adjudicate the case.

The frame of the case. Each lawsuit has a theory: applying the law to the facts in a particular way produces the result the litigator desires. The frame of the case takes the “theory of the case” one step further by putting the “theory” into an understandable story with protagonists, antagonists, villains, and dastardly deeds. Every piece of writing such as the complaint, summary judgment and responsive motions, will tell parts of the story. An example will illustrate this point: imagine a woman who was granted asylum. She files a petition for alien relative under section 208, form I-730, to classify her children as asylees and the family’s reunification. However, the petition was filed more than two years after she was granted asylum and, thus, it is untimely under the regulations. She has good reasons for filing late: she was suffering from a mental illness caused by post-persecution trauma. Nevertheless, the agency denied the petition. In suing the government, a good frame would place the denial in the context of the asylum process itself. Thus, it is the difference between referring to the case as “the denial of the I-730” versus the case about “the woman who was persecuted and suffered and wants to have her children with her”.

The AILF Legal Action Center’s Litigation Clearinghouse maintains a large list of cases in which remands were sought or ordered. The reader should refer to the LAC’s Delayed Naturalization Issues page published at http://www.ailf.org/lac/natz_delay0806.shtml.
Framing the case is not about confusion or obfuscation. In fact, these are the antithesis of a good frame. A good frame provides the human context in which the case unfolds. Given the government’s unhealthy overemphasis on minutiae and agency-speak, it is easy to fall into the same trap and make a case about form numbers, form types, and internal agency policies – things which few outside the immigration world understand.

An effective complaint serves two purposes. First, it sets the lawsuit in motion because it contains all of the required elements. Second, it is the opening document in the case frame – it introduces to the judge, the judge’s clerks, and the U.S. attorney the problem that must be solved. First impressions matter.