



When All Else Fails: Pursuing Litigation to Overcome Denials and Delays

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H. Ronald Klasko
Managing Partner

Ron is the Managing Partner of Klasko Immigration Law Partners. Ron has extensive experience with business immigration federal court litigation and chairs AILA's Administrative Litigation Task Force. He is co-counsel on the Guilford College case, which has produced a nationwide preliminary injunction preventing implementation of USCIS' F and J unlawful presence memo. He was the lead attorney on the famous Matters of Walsh and Pollard case, which established the key precedent for treaty investor visas. Ron is a former National President and 3-term General Counsel of AILA. He is the only lawyer ever to be honored twice with AILA's highest honor, the Founders Award. Ron has been selected for Best Lawyers in America annually since 1991. *Who's Who Legal* in Corporate Immigration named him as the most well-respected immigration lawyer in the world. A graduate of Lehigh University (B.A. 1971), Ron received his law degree from the University of Pennsylvania School of Law (J.D. 1974).



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Bill Stock is a founding partner of Klasko Immigration Law Partners, LLP and has been providing immigration assistance and solutions to leading multinational corporations, universities, research institutions, hospitals, and individuals for over 25 years.

He is a Past President of the American Immigration Lawyers Association and has addressed national conferences organized by AILA, NAFSA, SHRM and other professional organizations. He is a member of the Board of Directors of the American Immigration Council, a national foundation working to strengthen America by honoring our immigrant history and shaping how America thinks about and acts towards immigrants and immigration.

A graduate of the University of Minnesota Law School, Bill is featured in *The Best Lawyers in America*, *The Chambers Global Guide*, *Human Resources Executive* magazine, *Pennsylvania Super Lawyers*, *Who's Who in America* and other guides to prominent lawyers. In 2017, he was elected a Fellow of the American Bar Foundation.



William A. Stock
Partner



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Daniel B. Lundy
Partner

Mr. Lundy manages his firm's EB-5 Developer & Regional Center practice and has successfully represented numerous immigrant investors in their EB-5 petitions and applications. He is involved in some of the most complex EB-5 cases in the industry and is routinely involved in complex appeals and litigation related to the EB-5 program. Mr. Lundy is uniquely adept at addressing the impact of SEC complaints on investors' immigration processes and dealing with projects where there have been allegations of fraud or misappropriation. Mr. Lundy has extensive experience litigating all types of immigration cases for clients and challenging adverse actions by USCIS or other immigration agencies in federal court, having litigated over 70 immigration cases to date. Most recently, he has been deeply involved in litigating USCIS denials of EB-5 petitions based on material change and redemption agreements. He has also advised clients on the immigration aspects of EB-5 projects that have been involved in civil litigation.



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Addressing Employer Barriers to Litigation

- Fear of retaliation: Most litigators report no evidence at all that USCIS has retaliated or has the resources or will to do so
- Fear of high costs:
 - Fee arrangements/success fees
 - EAJA fees
- Fear of adverse publicity: Client information in court filings can be kept confidential
- Fear of extensive timeframe: A good case can be settled faster than an AAO appeal

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Mandamus – Seeking Action on Delayed Adjudication

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Mandamus vs. APA Unreasonable Delay

- Bases:
 - Mandamus is to compel an agency to perform an act that it has a duty to perform, generally, for extraordinary delays
 - Clear right of plaintiff to the requested relief
 - Duty of government to adjudicate
 - No other adequate remedy available
 - APA unreasonable delay is a basis for requesting a court to order an adjudication if the delay is “unreasonable”
- Goal is to compel an adjudication, not a specific result



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When Is Mandamus/APA Complaint Recommended?

- Case is pending well beyond published processing times, especially if coupled with humanitarian factors
- Where the statutory or regulatory scheme is completely abrogated because of the delay (e.g. F-1 change of status to H-1B where the F-1 loses cap gap employment on September 30)



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Issues in Mandamus Cases

- Does the company have to be a plaintiff?
- Does the company have to pay the legal fees?
- What are the possible outcomes?
- What is the timing?



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Tips on Filing Mandamus/APA Delay Cases

- Preliminary steps
- Arguments and contents of complaint
- Venue



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Declaratory Judgments – Challenging USCIS Denials of Business Immigration Petitions



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Determining Best Option Following a Denial

- Refiling the petition
- Filing a motion to reopen/reconsider
- Filing an appeal to the AAO
- Challenging agency denial in federal court



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Factors for Successful Litigation

- Mistakes of fact or law in denial
- Decision based on policy vs. law
- Inconsistencies with prior decisions
- Prior litigation – did someone already win/lose your case?
- Good record



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Standards for APA Challenges to Agency Denials

- Standard: APA directs reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions” that are:
 - Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law
 - Not supported by substantial evidence
 - In excess of statutory jurisdiction, authority, or limitations, or short of statutory right
 - Without observance of procedure required by law



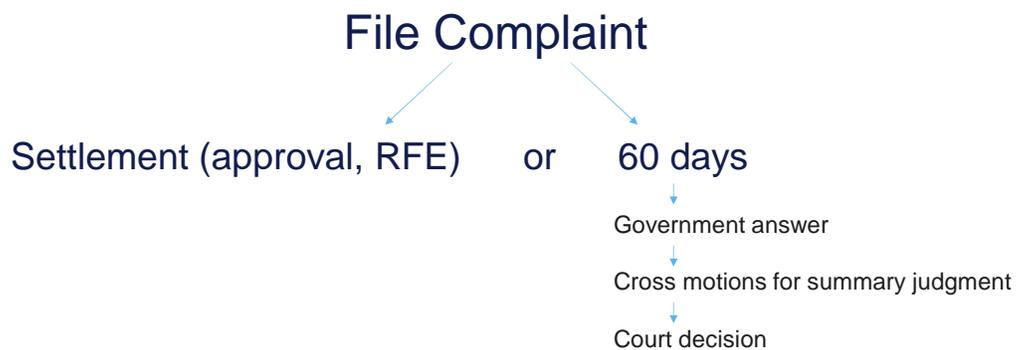
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Standing of Plaintiff

- Usual plaintiff: Petitioning employer
- Does beneficiary have standing?

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Steps and Timing in Declaratory Judgment Cases



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Hot Issues for Declaratory Judgment Litigation

- H-1B Specialty Occupation
- H-1B Employer-Employee Relationship
- L-1A Managers and Executives



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Litigating Specific H-1B Denials

- Specialty occupation denials
 - “Specific specialty” – denied because USCIS states job impermissibly requires multiple acceptable degrees
 - Degree is “normally” required – denied because USCIS states occupation does not “normally” require a specialized degree
- Employer/employee relationship
 - Right to control/third party worksites
 - Unavailability of specific, non-speculative work



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Litigating Other Business Petition Denials

- L-1 denials
 - USCIS determines that role is not executive or managerial
 - USCIS determines that position does not involve specialized knowledge
 - Legal arguments



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F, J, M Unlawful Presence Litigation

- Declaratory judgment complaint
- Plaintiffs
 - Four colleges and universities
 - AFT



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F, J, M Unlawful Presence Litigation

- Legal arguments
- Opinion of Judge Biggs (May 3, 2019)
 - Nationwide preliminary injunction
 - “Plaintiffs will likely succeed on the merits”
- Next steps in litigation
- Ramifications of the litigation



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Questions?



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For Further Information



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