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Bringing Administrative Procedure Act (APA) Claims to Challenge Immigration Actions

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I. Introduction

The Administrative Procedure Act (APA) applies to all agencies of the federal government and provides general procedures for agency rulemaking and adjudications.¹ In the immigration context, the APA serves as an important tool for challenging immigration laws and policies. APA claims are raised in federal district court² rather than in immigration court and can be used to remedy unlawful immigration actions in several ways. This Practice Advisory provides background information, key questions for and limitations on APA claims, and summaries of recent immigration-related challenges brought under the APA, with a focus on the Fourth and D.C. Circuits.

As an initial matter, we recommend referring to the American Immigration Council's 2013 Immigration Lawsuits and the APA: The Basics of a District Court Action Practice Advisory ("AIC APA Advisory"), which provides an excellent and in-depth discussion of filing immigration-related APA claims in federal court.³ The goal of this Practice Advisory is to both supplement the AIC APA Advisory and offer a more in-depth analysis on the types of claims that can be brought under the APA in light of recent caselaw, with a focus on the Fourth Circuit and D.C. Circuit.

a. *History of Immigration-Related Claims under the APA*

It is important to note that there are jurisdictional limits to using the APA in immigration cases. Generally, APA claims initiated in district court may not be used to challenge removal, but the distinction between removal and other immigration agency action is not always clear. The history of challenges to agency immigration actions is instructive context. Prior to the passage of the Immigration and Nationality Act (INA) in 1952, a habeas petition was the only mechanism through which a non-citizen could challenge her deportation.⁴ However, after the enactment of the INA, the judicial review provisions of the APA provided an additional option for challenging

¹ Todd Garvey, Cong. Research Serv., *A Brief Overview of Rulemaking and Judicial Review* 1 (2017), <https://fas.org/sgp/crs/misc/R41546.pdf>.

² In some circumstances, APA claims may also be raised in petitions for review before circuit courts of appeals. *See, i.e., Judulang v. Holder*, 565 U.S. 42, 45 (2011) (in reviewing Ninth Circuit's dismissal of petition for review, holding that Board of Immigration Appeals' (BIA's) policy of applying § 212(c) relief in deportation cases is arbitrary and capricious under the APA); *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 297 (4th Cir. 2018) (in deciding petition for review, ruling that BIA's failure to sufficiently explain change in position regarding whether offense was a crime involving moral turpitude (CIMT) was arbitrary and capricious).

³ Mary Kenney, Am. Immigration Council, *Immigration Lawsuits and the APA: The Basics of a District Court Action* (2013),

https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/immigration_lawsuits_and_the_a_pa_-_basics_of_a_district_court_action_6-20-13_fin.pdf.

⁴ *Heikkila v. Barber*, 345 U.S. 229, 235 (1953) ("Now, as before, [an immigrant] may attack a deportation order only by habeas corpus.").



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removal.⁵ In 1961, amendments to the INA provided for a streamlined process of judicial review of final removal orders through petitions for review to the federal circuit courts of appeals,⁶ which limited somewhat the APA's application in the deportation context. In 1996, Congress significantly narrowed judicial review of removal orders through the Antiterrorist and Effective Death Penalty Act (AEDPA) (precluding judicial review of final removal orders of immigrants ordered deported for committing certain types of crimes)⁷ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (expanding AEDPA's preclusion of review over criminal deportation orders and further limiting review over many discretionary agency decisions in other immigration contexts).⁸ Under this formulation, prior to 2005, it was generally understood that courts lacked jurisdiction to review some discretionary agency decisions but that nondiscretionary statutory eligibility issues were subject to judicial review. This distinction was further blurred with the passage of the REAL ID Act in 2005, which set out additional jurisdictional bars to judicial review of agency decisions made outside of the removal context.⁹ For example, the Fourth Circuit has held that district courts lack jurisdiction to review adjustment of status denials based on nondiscretionary eligibility issues, even when the individual is not in removal proceedings.¹⁰ These jurisdictional bars have restricted federal courts' review of several APA challenges to immigration laws and policies.

b. Considerations in Bringing an APA Challenge

This Subsection provides a brief overview of important issues to consider in evaluating the appropriateness of an APA suit.¹¹ APA claims are brought in federal district court through the filing of a civil complaint, which initiates the lawsuit. Like civil claims generally, one can seek injunctive relief, such as a temporary restraining order or a preliminary injunction, based on an APA claim.

1. **Jurisdiction:** The APA is not a jurisdictional statute and does not provide a court with the initial authority to hear the case. The jurisdictional basis for APA claims is 28 U.S.C. § 1331, Federal question, which provides a general grant of subject matter jurisdiction to federal district courts in "all civil actions arising under the Constitution, laws, or treaties of the United States." This means that a federal court will have jurisdiction to hear an APA claim under 28 U.S.C. § 1331, not the APA.

⁵ *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52-53 (1955) (recognizing the APA as an additional avenue for judicial review of removal proceedings).

⁶ Former INA § 106, added by P.L. 87-301, § 5(a), 75 Stat. 651 (1961).

⁷ See AEDPA § 440(a), 8 U.S.C. § 1105a(1)(10) (West Supp. 1998).

⁸ Pub. L. No. 104-208, 110 Stat. 3009-549 (1996) (codified at 8 U.S.C. § 1252 (2000)).

⁹ REAL ID Act, P.L. 109-13, Division B, 119 Stat. 302 (2005).

¹⁰ *Lee v. USCIS*, 592 F.3d 612, 620-21 (4th Cir. 2010).

¹¹ Because the AIC APA Advisory considers these topics in detail, this Practice Advisory only briefly touches on these principles. See AIC APA Advisory, *supra* note 3, for more information about the basic principles and processes for bringing immigration-related APA claims.



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2. Statute of Limitations: Although the APA does not explicitly establish its own statute of limitations, there is a general six-year statute of limitations for civil actions brought against the United States. As discussed by the AIC APA Advisory, all courts that have ruled on the issue have applied the general six-year statute of limitations to APA claims.¹² This means that an APA claim must be filed within six years of the agency action being challenged.
3. General Limitations on Judicial Review: There are several general limitations to judicial review of APA claims, which, if applicable, would prevent the court from considering the claim, including:
 - Determinations committed to agency discretion;¹³
 - Where judicial review is precluded by statute;¹⁴
 - Where administrative remedies have not been exhausted;¹⁵
 - When agency action is not final;¹⁶ and
 - When the action is taken by the President (particularly relevant under the current administration, which has sought to enact immigration policies through a combination of agency-promulgated rules and presidential proclamations).¹⁷
4. Jurisdictional Bars of the INA: More specifically, the INA lays out several jurisdictional bars at 8 U.S.C. § 1252, which often preclude judicial review for APA and non-APA immigration-related claims.¹⁸ Though not an exhaustive examination, some of the most commonly applied bars are:

¹² *Id.* at 3.

¹³ 5 U.S.C. § 701(a)(2). This exception extends to “an agency’s decision not to prosecute or enforce,” which is “generally committed to an agency’s absolute discretion,” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), in addition to situations where the authorizing statute provides for the exercise of unreviewable discretion, *Make the Rd. New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020).

¹⁴ 5 U.S.C. § 701(a)(1).

¹⁵ While this is a general requirement, the Supreme Court noted some limitations to this in *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (holding that in APA cases, administrative exhaustion is required only when it is mandated by statute or regulation). See AIC APA Advisory, *supra* note 3, at 11, for more information.

¹⁶ Agency action is final if two conditions are satisfied: “First, the action must mark the consummation of the agency’s decision-making process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted). An example of this requirement in the immigration context is *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 612 (S.D.N.Y. 2018) (holding that Office of Refugee Resettlement’s (ORR’s) policy of requiring director-level review before certain immigrant minors are released from custody was final agency action because ORR had already adopted the policy and legal consequences flowed from it).

¹⁷ *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). However, if a rule, and not the presidential proclamation, has the operational effect, then it is reviewable under the APA. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (ruling that regulations that implement an executive order are reviewable under the APA).

¹⁸ See 5 U.S.C. § 701(a)(1).



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- **Challenges to expedited removal:** 8 U.S.C. § 1252(a)(2)(A) provides that “no court shall have jurisdiction to review” matters relating to expedited removal (as laid out in § 1225(b)(1)), with a few enumerated exceptions in § 1252(e). This bar limits judicial review of individuals’ placement in expedited removal proceedings to a few narrow issues and forecloses judicial review of individual credible fear determinations.¹⁹ However, the bar does not extend to “[c]hallenges on [the] validity of the [expedited removal] system” and preserves judicial jurisdiction over challenges to expedited removal policies.²⁰ Such actions must be brought in the District Court for the District of Columbia within 60 days.²¹
- **Denials of discretionary relief:** 8 U.S.C. § 1252(a)(2)(B) generally bars judicial review of the grant or denial of some discretionary forms of immigration relief, including waivers of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status.²²
- **Claims that can only be brought via petitions for review:** Multiple subsections of § 1252 channel judicial review of certain immigration-related claims through petitions for review in the appropriate circuit court of appeals, thus foreclosing district court suits. Claims that can only be raised in a petition for review include: (1) challenges to “an order of removal,”²³ (2) “all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien,”²⁴ and (3) “any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment.”²⁵

¹⁹ 8 U.S.C. § 1252(a)(2)(A)(iii), (e)(2); *see also DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020) (upholding constitutionality of § 1252(e) jurisdictional bars to judicial review of negative credible fear determination).

²⁰ 8 U.S.C. § 1252(e)(3)(A). The D.C. Circuit recently ruled that despite these jurisdictional bars, it retained jurisdiction to review DHS’s expansion of expedited removal to all individuals without documentation who have resided in the United States for less than two years, *Make the Rd. New York v. Wolf*, 962 F.3d 612, 623 (D.C. Cir. 2020), and heightened requirements for establishing a credible fear of persecution in such interviews, *Grace v. Barr*, 965 F.3d 883, 896 (D.C. Cir. 2020).

²¹ 8 U.S.C. § 1252(e)(3)(A), (B). There are additional limitations on the types of relief a court can order in reviewing a challenge to expedited removal. *Id.* § 1252(e)(1).

²² *Id.* § 1252(a)(2)(B)(i). However, “constitutional claims or questions of law” regarding the denial of such discretionary relief may be “raised upon a petition for review” of a final order of removal. *Id.* § 1252(a)(2)(D).

²³ *Id.* § 1252(a)(5).

²⁴ *Id.* § 1252(b)(9). The Supreme Court recently reaffirmed that the “targeted language” of § 1252(b)(9) “does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined.” *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (ellipsis and internal quotation marks omitted).

²⁵ 8 U.S.C. § 1252(a)(4).



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- **The exclusive jurisdiction provision:** 8 U.S.C. § 1252(g) deprives any court of jurisdiction to hear “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.” The purpose of § 1252(g) is to bar review of discretionary government actions and rather than “cover[ing] all claims arising from deportation proceedings or impos[ing] a general jurisdictional limitation,”²⁶ the jurisdictional bar is limited to the three specific, enumerated actions.²⁷

II. Types of APA Claims

There are four main types of APA claims. The first type of claim challenges an agency’s failure to abide by notice and comment procedures in promulgating new rules. The second type of claim alleges arbitrary and capricious agency action, which is based on unsound reasoning. The third concerns agency action that is not in accordance with law, that is, violates federal law or the Constitution. The fourth and final type of claim addresses unreasonable delay in agency decisionmaking. Each of these types of claims is addressed in turn below.

a. Violation of Notice and Comment Rulemaking

Background:

The APA governs agency rulemaking. The term “rule” is defined very broadly under the APA and includes any “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”²⁸ Notice and comment rulemaking procedures under 5 U.S.C. § 553 are the most commonly used, but agencies may choose or may be required to use a number of other rulemaking options, including formal, hybrid, direct final, and negotiated rulemaking.²⁹

²⁶ *Regents of the Univ. of California*, 140 S. Ct. at 1907 (internal quotation marks omitted).

²⁷ *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (“We did not interpret this language to sweep in any claim that can technically be said to arise from the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves.”) (internal quotation marks omitted); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (“The provision applies only to three discrete actions that the Attorney General may take: her decision or action to *commence* proceedings, *adjudicate* cases, or *execute* removal orders.”) (internal quotation marks omitted). The Supreme Court has ruled that § 1252(g) barred judicial review of DHS’s alleged targeting of certain immigrants for removal based on their political affiliations, *AAADC*, 525 U.S. at 487, but not the rescission of Deferred Action for Childhood Arrivals (DACA). *Regents of the Univ. of California*, 140 S. Ct. at 1907.

²⁸ Garvey, *supra* note 1, at 1 (citing 5 U.S.C. § 551(4)).

²⁹ *Id.* See also *id.* at 3-6 for in-depth explanations of the different rulemaking procedures.



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Under § 553, there are two requirements for notice and comment rulemaking that agencies must follow:

1. Notice: The agency is required to provide the public with adequate notice of a proposed rule. The APA requires that the following information be made available to the public in order to satisfy the notice requirement: “(1) the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”³⁰ This is generally achieved by publication of a notice of proposed rulemaking in the *Federal Register*.³¹
2. Reasonable and meaningful opportunity to participate: The agency is also required to allow time for interested persons or parties to comment on the proposed rule through the submission of written comments.³² While there is no minimum period of time required for an agency to accept comments, the length of the comment period is a factor that courts have considered in determining whether an agency allowed for an adequate opportunity for comment.³³ Agencies must also demonstrate that they considered “significant” comments,³⁴ which courts have defined as those that “raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.”³⁵

Failure to comply with these procedures renders an agency rule invalid.³⁶ Notably, notice and comment requirements only apply to “legislative” rules, those made pursuant to congressionally delegated authority; they do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”³⁷ Agencies can also bypass the notice and comment requirements if they show “good cause” for finding that these procedures “are impracticable, unnecessary, or contrary to the public interest.”³⁸ However, courts have found that

³⁰ 5 U.S.C. § 553(b).

³¹ *Id.*

³² *Id.* § 553(c).

³³ Garvey, *supra* note 1, at 2 (citing *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012)).

³⁴ *Id.* at 3 (citing *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015)).

³⁵ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

³⁶ See, e.g., *Capital Area Immigrants’ Rights Coal. v. Trump*, Civ. Action No. 19-2117, 2020 WL 3542481, at *23 (D.D.C. June 30, 2020).

³⁷ 5 U.S.C. § 553(b)(A); Garvey, *supra* note 1, at 2. “Rules that carry the force and effect of law are known as legislative rules. These rules are to be distinguished from non-legislative rules, such as interpretive rules and policy statements, which lack the force and effect of law.” Garvey, *supra* note 1, at 1 n.5. An example of this distinction in the immigration context is in the litigation over the rescission of DACA. The Fourth Circuit ruled that the DHS memo rescinding DACA “doesn’t replace agency discretion with a new binding rule of substantive law”; “therefore[, it] falls on the policy end of the spectrum, and thus was exempt from notice and comment under the APA.” *Casa De Maryland v. DHS*, 924 F.3d 684, 702-03 (4th Cir. 2019) (citations and internal brackets and quotation marks omitted).

³⁸ 5 U.S.C. § 553(b)(3)(B).



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“the good-cause inquiry is meticulous and demanding” and that the agency must point to “more than an unsupported assertion,” including “factual findings” and “record support proving the emergency.”³⁹ Several other narrow exceptions exist, and of particular relevance to immigration-related claims is the foreign affairs exception, which exempts rules from notice and comment requirements where “a military or foreign affairs function of the United States” is involved.⁴⁰

Application in Recent Case:

CAIR Coalition v. Trump (D.D.C.)

Failure to comply with notice and comment requirements recently led to the vacatur of the Trump Administration’s rule barring asylum for individuals who transited through a third country without seeking asylum prior to arriving in the United States, otherwise known as the third country transit ban.⁴¹ In *CAIR Coalition v. Trump*, the D.C. District Court vacated the rule based on the conclusion that the Administration “unlawfully dispensed” with notice and comment procedures in issuing it.⁴² The Departments of Justice (DOJ) and Homeland Security (DHS) invoked two exceptions to the APA’s notice and comment requirements: (1) that they had shown good cause to forgo such procedures because a surge of asylum seekers would otherwise be incentivized to rush into the U.S. during the rule’s notice and comment period and (2) that the rule involved a foreign affairs function.⁴³ The Court found that neither of these exceptions applied and thus the rule was not exempt from the APA’s notice and comment requirements, making its promulgation unlawful.⁴⁴

b. Arbitrary and Capricious Agency Action

Background:

Courts commonly apply the arbitrary and capricious standard of review to agency actions.⁴⁵ This standard applies to factual determinations and rule changes in rulemaking proceedings, including notice and comment rulemaking, in addition to certain discretionary determinations made by agencies, such as agency adjudications.⁴⁶ The Supreme Court delineated this standard in

³⁹ *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706-07 (D.C. Cir. 2014) (internal quotation marks omitted).

⁴⁰ 5 U.S.C. § 553(a)(1).

⁴¹ *Capital Area Immigrants’ Rights Coal.*, 2020 WL 3542481, at *1.

⁴² *Id.* at *21.

⁴³ *Id.* at *4, *12.

⁴⁴ *Id.* at *21.

⁴⁵ See 5 U.S.C. § 706(2)(A).

⁴⁶ Garvey, *supra* note 1, at 14. With regard to agency adjudications, while APA claims are most frequently brought in federal district court, arbitrary and capricious claims can be raised in petitions for review challenging BIA decisions. See *Judulang*, 565 U.S. at 45; *Jimenez-Cedillo*, 885 F.3d at 297.



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Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co., explaining that an action is arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁴⁷

The Court further clarified the contours of arbitrary and capricious review, calling it “narrow” and cautioning that “a court is not to substitute its judgment for that of the agency.”⁴⁸

Application in Recent Case:

DHS v. Regents of the University of California (Supreme Court)

The arbitrary and capricious standard was thrust into the spotlight recently when the Supreme Court issued its decision in *DHS v. Regents of the University of California*, holding that DHS’s rescission of Deferred Action for Childhood Arrivals (DACA) was arbitrary and capricious under the APA.⁴⁹ Relying on the Fifth Circuit’s decision on Deferred Action for Parents of Americans (DAPA) and the Attorney General’s conclusions on DACA, DHS initially rescinded DACA based solely on its determination that the program was unlawful.⁵⁰ After the D.C. District Court vacated the rescission, finding that it was arbitrary and capricious because DHS failed to offer adequate explanation, DHS issued a new memorandum providing additional reasons for the rescission.⁵¹

The Supreme Court first found that it had authority to review the rescission of the policy because 8 U.S.C. § 1252’s jurisdictional bars were inapplicable and the rescission was not an “agency action . . . committed to agency discretion by law” under 5 U.S.C. § 701(a)(2) because it was not merely an enforcement policy.⁵² In evaluating the rescission, the Supreme Court refused to consider DHS’s additional rationale issued after the district court ruling, deeming them “impermissible *post hoc* rationalizations.”⁵³ The Court further declined to evaluate the propriety of DHS’s contention that the DACA program was unlawful.⁵⁴ Instead, it determined that DHS acted arbitrarily and capriciously in ending the program without considering ending benefit eligibility while continuing immigration enforcement forbearance, when both the Fifth Circuit’s

⁴⁷ 463 U.S. 29, 43 (1983).

⁴⁸ *Id.*

⁴⁹ 140 S. Ct. 1891.

⁵⁰ *Id.* at 1903.

⁵¹ *Id.* at 1904, 1908-09.

⁵² *Id.* at 1905-07.

⁵³ *Id.* at 1909.

⁵⁴ *Id.* at 1910.



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and Attorney General's unlawfulness findings were based solely on the programs' extension of benefits.⁵⁵ DHS further failed to consider whether individuals had legitimately relied on the program.⁵⁶ Thus, the Supreme Court concluded, the rescission was arbitrary and capricious because DHS failed to consider important aspects of the problem.⁵⁷

c. Agency Action not in Accordance with Law

Background:

The APA further provides for agency action to be set aside when it is “not in accordance with law;”⁵⁸ “contrary to constitutional right, power, privilege, or immunity;”⁵⁹ or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”⁶⁰ This occurs when the agency action runs afoul of a regulation, federal statute, or the Constitution.

Application in Recent Cases:

***Perez v. Cuccinelli* (Fourth Circuit)**

In *Perez v. Cuccinelli*,⁶¹ on rehearing en banc, the Fourth Circuit reversed its prior decision in *Perez v. Cissna*, in which it upheld under the APA United States Citizenship and Immigration Services' (USCIS's) interpretation of the INA's special immigrant juvenile (SIJ) provision at 8 U.S.C. § 1101(a)(27)(J)(i) as requiring a permanent custody order from a state court as a predicate order.⁶² After determining that USCIS's interpretation of the statute was not entitled to *Chevron* deference because the statute's language is clear and unambiguous, the en banc panel ruled that USCIS's interpretation of the SIJ provision was “not in accordance with law” under 5 U.S.C. § 706(2)(A) because it contradicted the plain language of the statute, which did not require permanent non-viability of reunification or a permanent custody order, and impermissibly intruded into issues of state domestic relations law.⁶³

***O.A. v. Trump* (D.D.C.)**

In *O.A. v. Trump*, the plaintiffs challenged a November 9, 2018, DOJ and DHS rule that, in concert with a presidential proclamation issued the same day, rendered immigrants who entered

⁵⁵ *Id.* at 1910-13.

⁵⁶ *Id.* at 1913-15.

⁵⁷ *Id.* at 1915-16.

⁵⁸ 5 U.S.C. § 706(2)(A).

⁵⁹ *Id.* § 706(2)(B).

⁶⁰ *Id.* § 706(2)(C).

⁶¹ 949 F.3d 865 (4th Cir. 2020) (en banc).

⁶² *Perez v. Cissna*, 914 F.3d 846, 856 (4th Cir. 2019).

⁶³ *Perez*, 949 F.3d at 872-76.



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the United States at the southern border outside of an official port of entry after that date ineligible for asylum.⁶⁴ Plaintiffs alleged that the Rule violated the INA's provision at 8 U.S.C. § 1158(a)(1), which states that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum.”⁶⁵ The Court agreed and vacated the rule as both “not in accordance with law” and “in excess of statutory . . . authority” under 5 U.S.C. § 706(2)(A) and (C).⁶⁶

d. Unreasonable Delay

Background:

The fourth and final type of APA claim concerns delays in agency decisionmaking. The APA provides that, “within a reasonable time, each agency shall proceed to conclude a matter presented to it”⁶⁷ and authorizes federal courts to “compel agency action unlawfully withheld or unreasonably delayed.”⁶⁸

Application in Cases:

***Safadi v. Howard* (E.D. Va.)**

In *Safadi v. Howard*, the Eastern District of Virginia held that, under 8 U.S.C. § 1252(a)(2)(B)(ii), which divests courts of jurisdiction over suits seeking review of discretionary USCIS actions or decisions, it lacked jurisdiction to review an APA claim challenging the pace at which USCIS processed a status adjustment application.⁶⁹ However, the Court clarified that it did “not address[] . . . the question whether jurisdiction would exist in a district court to review

⁶⁴ 404 F. Supp. 3d 109, 116-17 (D.D.C. 2019).

⁶⁵ *Id.* at 117.

⁶⁶ *Id.* at 151-53.

⁶⁷ 5 U.S.C. § 555(b).

⁶⁸ *Id.* § 706(1). Courts generally consider several factors, known as the *TRAC* factors, in determining whether a delay is reasonable: “(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *Telecommc’ns Research Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (citations and internal quotation marks omitted).

⁶⁹ 466 F. Supp. 2d 696, 700 (E.D. Va. 2006). *See* 5 U.S.C. § 701(a)(2) (providing that the APA does not apply where “statutes preclude judicial review”).



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plaintiff's case where USCIS refused altogether to process an adjustment application or where the delay was so unreasonable as to be tantamount to a refusal to process the application."⁷⁰

Aslam v. Mukasey (E.D. Va.)

Subsequently, in *Aslam v. Mukasey*, the Eastern District of Virginia rejected the jurisdictional bar applied in *Safadi*, ruling "it is clear from the text of the INA that Congress intended the Secretary of Homeland Security to process and act on applications. If the pace of the Secretary's decision were immune from judicial review, the Executive Branch could unilaterally impose a *de facto* moratorium on all adjustment of status applications simply by delaying a final decision."⁷¹ The Court further held that, pursuant to the *TRAC* factors, the plaintiff, a Pakistani national whose adjustment of status application had been pending for almost three years, had established unreasonable delay under the APA, and ordered expedited processing.⁷²

Beshir v. Holder (D.D.C.)

In contrast, in adjudicating unreasonable delay APA claims, the D.C. District Court has held that the pace of adjustment of status adjudications is unreviewable.⁷³ In *Beshir v. Holder*, where an Ethiopian citizen waited over two years for a decision on her adjustment application, the D.C. District Court found that, pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii), it lacked jurisdiction to review the pace of adjudication.⁷⁴ The Court reasoned that "the plain language of the relevant federal statutes, the absence of a congressionally mandated timeline, and the national security considerations implicated by the adjudication process all support the conclusion that the pace of adjudicating Beshir's adjustment application is discretionary."⁷⁵

III. Additional Fourth Circuit and D.C. Circuit APA Immigration Caselaw

Below are summaries of additional significant Fourth Circuit and D.C. Circuit decisions addressing APA challenges to immigration actions.

⁷⁰ *Safadi*, 466 F. Supp. 2d at 700.

⁷¹ 531 F. Supp. 2d 736, 741 (E.D. Va. 2008) (footnote omitted).

⁷² *Id.* at 743-47.

⁷³ *Beshir v. Holder*, 10 F. Supp. 3d 165, 173 (D.D.C. 2014). District courts and circuit courts of appeals across the country are divided on this issue. *Id.* at 172-73 (collecting cases).

⁷⁴ *Id.* at 173-74.

⁷⁵ *Id.* at 173.



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Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020) (jurisdiction and arbitrary and capricious agency action)

Plaintiffs challenged *Matter of A-B-* and the corresponding USCIS Guidance for asylum officers regarding credible fear interviews as arbitrary and capricious. The D.C. Circuit first held that the INA did not divest the district court of jurisdiction to hear challenges to the validity of *Matter of A-B-* and the corresponding USCIS Guidance. It further ruled that (1) *Matter of A-B* and the Guidance's requirement that asylum applicants demonstrate governments condoned or were "completely helpless" to protect victims and (2) the Guidance's requirement that asylum officers apply the law of the Circuit where asylum seekers were physically located during credible fear interviews were arbitrary and capricious but (3) the Guidance's explanation of circularity with proposed particular social groups was not arbitrary and capricious and (4) the Guidance's and *Matter of A-B-*'s statements that non-governmental gang and domestic violence claims generally do not meet the credible fear standard were not arbitrary and capricious or contrary to law.

Make the Rd. New York v. Wolf, 962 F.3d 612 (D.C. Cir. 2020) (jurisdiction, committed to agency discretion, violation of notice and comment rulemaking, and arbitrary and capricious agency action)

The D.C. District Court initially enjoined DHS's expansion of expedited removal to all individuals without documentation who have resided in the United States for less than two years, finding that it had jurisdiction to review the action and that plaintiffs were likely to succeed on the merits of their APA notice and comment and arbitrary and capricious claims. The D.C. Circuit reversed, determining that despite the INA's jurisdictional bars, it retained jurisdiction to review the expansion of expedited removal but that plaintiffs failed to show a likelihood of success on the merits of their APA claims because the expansion was committed to agency discretion by the INA.

Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018) (arbitrary and capricious agency action)

In ruling that petitioner's Maryland conviction for sexual solicitation of a minor, which did not require that the perpetrator know the victim's age, was a crime involving moral turpitude (CIMT), the Board of Immigration Appeals (BIA) went against its prior precedent holding that a sexual offense against a child is a CIMT only if the perpetrator knew or should have known that the victim was a minor. On petition for review, the Fourth Circuit held that the BIA's decision was arbitrary and capricious because the BIA failed to acknowledge and explain its change in position. The Court remanded to the BIA for it to consider the issue anew.

Moore v. Frazier, 941 F.3d 717 (4th Cir. 2019) (jurisdiction and agency action not in accordance with law)

The Fourth Circuit ruled that it had jurisdiction to review USCIS's non-discretionary application of an amended version of a statute that changed eligibility criteria to I-130 petitions



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that were pending when the legislation was passed. However, the Court upheld the application of the amended statute to these petitions as proper.

Roland v. USCIS, 850 F.3d 625 (4th Cir. 2017) (jurisdiction)

The Fourth Circuit held that it lacked jurisdiction to review USCIS's denial of an I-130 petition based on the applicant's risk because the determination was an unreviewable discretionary agency decision under the INA.

Lee v. USICS, 592 F.3d 612 (4th Cir. 2010) (jurisdiction)

The Fourth Circuit ruled that it lacked jurisdiction to review plaintiff's APA challenge to a USCIS regulation that rendered him ineligible for adjustment of status because the INA explicitly precluded judicial review and the sole mechanism for juridical review of a legal issue arising from the denial of adjustment of status was a petition for review from a final order of removal.