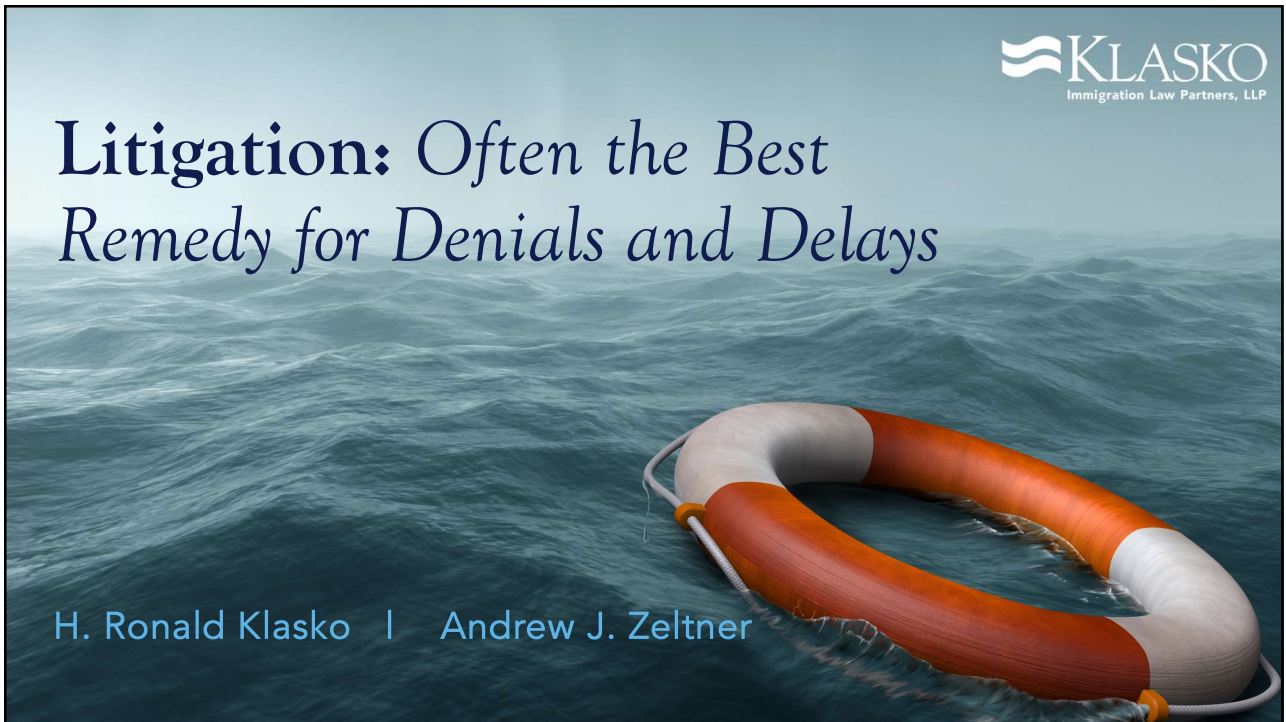


Litigation: Often the Best Remedy for Denials and Delays

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Why Litigation?

- Unprecedented denials, especially H-1B
- Unprecedented delays, including suspension of premium processing
 - Litigation often best or only option
 - Many / most federal court filings result in prompt approvals

The Administrative Record

- Plan ahead and build a strong record to set the stage for litigation should it become necessary
- With very limited exceptions, you CANNOT supplement the record during litigation
- Attach independently verifiable evidence to support the arguments made in the petitioner's letter
- Use an expert in the field in which the beneficiary will be employed

Your Petition is Denied - - Do You Have a Good Case for Successful Litigation?

- Mistakes of fact or law in denial
- Decision based on policy vs. law
- Inconsistencies with prior decisions
- Good record



Motion to Reopen, Appeal or Federal Court

- 4 options:
 - When best to refile?
 - When best to file MTR?
 - When best to appeal to AAO?
 - When best to litigate in federal court?

Advantages and Disadvantages of Appeal to AAO

- Advantages
 - Easier and less costly
 - May be able to supplement record
 - AAO may correct obvious error
 - Does not preclude federal court review
- Disadvantages
 - Must be within 30 days
 - Denial rate high
 - AAO follows USCIS policy
 - Likely to get stronger denial decision
 - Process is slow
 - Does not stay unlawful presence

Advantages and Disadvantages of Litigation in Federal Court

- Advantages
 - Good chance of prompt settlement (approved)
 - Judge is lawyer and decides based on law
 - Can choose court in which to file
 - Chances of success may be greater
 - Government may be required to pay legal fees
 - May be able to get judge to maintain status of employee during pendency
- Disadvantages
 - More expensive
 - Must agree to be plaintiff
 - Deference to government
 - Bound by administrative record

Exhaustion of Administrative Remedies

- Administrative appeal not required for USCIS denials
- Issue if appeal pending

Venue

- Federal District Court
 - Where company headquarters are located
 - Where beneficiary resides
 - Where worksite is located
 - Where USCIS Service Center is located
 - Washington, DC

Standing of Plaintiff

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



Litigation Steps

- Complaint
- Settlement?
- Answer
- Motion to Dismiss (unlikely)
- Discovery unlikely
- Government motion to reopen
 - Issue new RFE or NOID
 - Approve
- Cross Motions for Summary Judgment

Mandamus

- To compel a federal agency or officer
- To perform a nondiscretionary duty
 - Must be a clear duty by government officer or employee to act
- Owed to the plaintiff
 - No other adequate remedy
- Remember: Mandamus is to compel ACTION, not necessarily APPROVAL
- When to file

Allaying Litigation Fears

- Fear of Retaliation: Most litigators report no evidence whatsoever that USCIS...
 - Has retaliated against employers or individuals who file suit
 - Has the desire, will, or resources to retaliate
- Publicity: Client information in court filings can be kept confidential
- Timing: A good case can be settled faster than an AAO appeal

Questions?