



Litigation Literacy: Options for Universities, Hospitals, and Research Institutions

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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.



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Daniel B. Lundy
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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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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
- Costs:
 - Fee arrangements/success fees
 - EAJA
 - Multiple plaintiffs with the same issue can drive the price down
- Publicity: Client information in court filings can be kept confidential
- Time: A good case can be settled faster than an AAO appeal



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F, J, M Unlawful Presence Litigation

- Guilford College v. Nielsen
 - Declaratory judgment complaint
 - Plaintiffs – 4 colleges and universities; AFT; two MAVNI recruits
 - Amicus curiae brief filed by many universities
 - F, J, M unlawful presence memo challenged based on:
 - Violation of APA rulemaking requirements
 - Memo conflicts with INA
 - Inconsistent with 21 years of interpretation



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F, J, M Unlawful Presence Litigation (continued)

- 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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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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Mandamus/APA Delay Cases - - General Issues

- Preliminary steps
- Arguments and contents of complaint
- Possible outcomes
- Timing



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Mandamus for OPT EAD Applications

- Historic processing times
- Unprecedented delays in 2019
- Lack of agency communication/inability to expedite
- Prejudice to student
 - Delay in employment
 - Loss of job
 - Reduction in OPT time
 - Must complete OPT within 14 months following completion of study



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Mandamus for OPT EAD Applications (continued)

- Practical issues
 - Finding attorney
 - Legal fees
 - Student never appears in court
 - Likely result
 - Approval of EAD
 - Timing



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Mandamus for Other Petitions

- H-1B
- I-140
- I-485



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Declaratory Judgments - - Review of USCIS Denials



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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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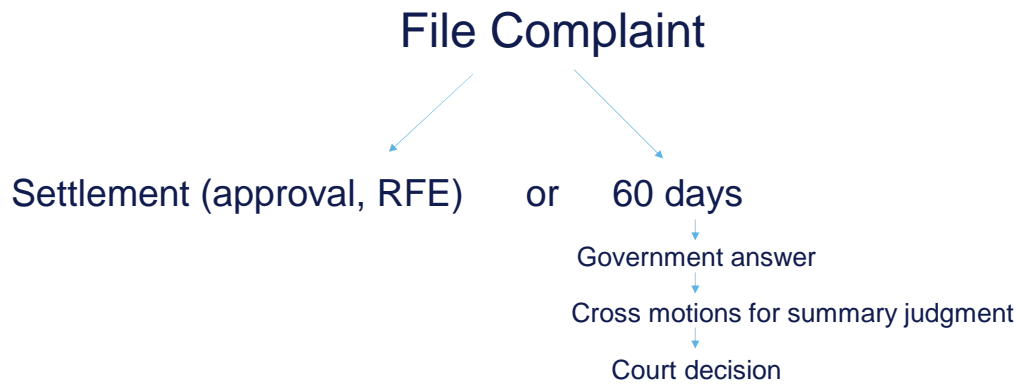
Standing of Plaintiff

- 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
- O-1, EB-1 Extraordinary Ability
- OPT/CPT Issues

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Litigating H-1B Specialty Occupation 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



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Litigating Extraordinary Ability (O-1, EB-1) Denials

- Challenging failure to meet 3 criteria
- Challenging “final merits analysis”



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Denials of Change of Status Based on CPT/OPT Time

- Issue: USCIS denying change of status if F-1 completed more than 12 months of CPT and OPT combined
- USCIS position: F-1 can accrue no more than 12 months of CPT and OPT combined as part of same degree program
- USCIS position contrary to ICE position
- Law: 8 CFR 212.2(f)(10)
 - One year or more of full time CPT makes F-1 ineligible for OPT
 - any amount of less than full time CPT and less than one year of full time CPT should not render F-1 ineligible for post-completion OPT.



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Denials of Change of Status Based on CPT/OPT Time (continued)

- Legal theories for declaratory judgment complaint
 - Improper interpretation of regulation
 - Inconsistent with ICE
 - Student punished for DSO authorization of CPT
 - Requires rulemaking (APA)
- Possible issue with unlawful presence



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Takeaways

- Litigation has become a necessary tool in today's environment
- Creative solutions can make internal discussions about supporting litigation easier
- Litigation may be the only way to resolve some delayed cases and denials
- Litigation is the best way to limit harmful policy changes



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Questions?



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