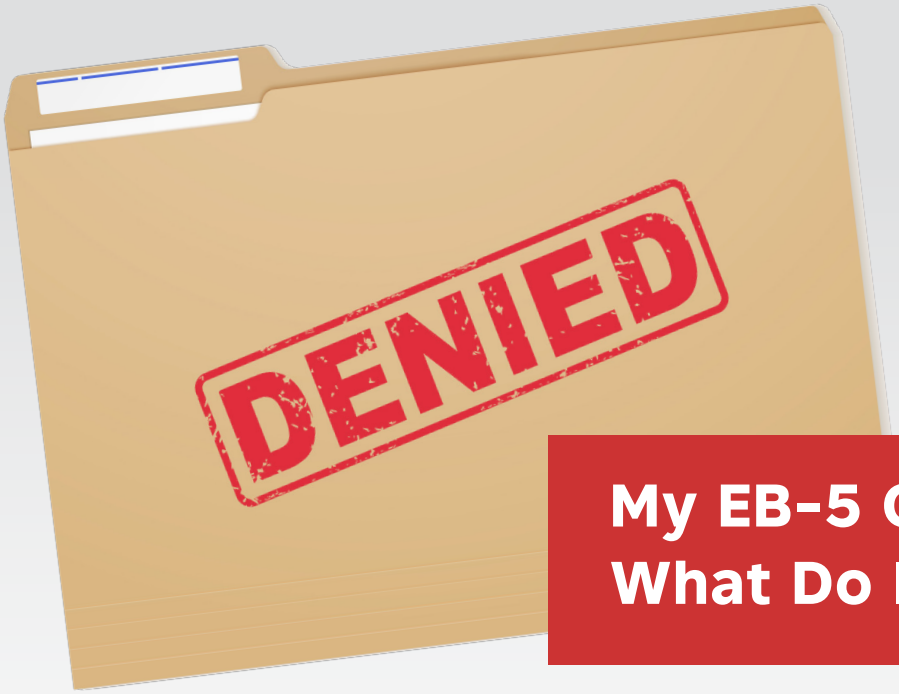

My EB-5 Case Was Denied. What Do I Do Now?

MATT GALATI
PRINCIPAL, THE GALATI LAW FIRM LLC

EB-5 petitions/applications are sometimes denied. It happens. Nobody goes into the EB-5 process expecting a denial. And many times, denials are not the applicant's fault. Yet the statistics show that denials happen more often than one might think. According to Fiscal Year 2020 data from USCIS shown in the table below, a significant number of applicants faced denials.

Surprise denials are hardly uncommon throughout the program's history. A case in point are the loan collateral cases in the mid 2010s where whether they admitted it or not, USCIS changed its policies regarding the adjudication of the use of loan proceeds for EB-5 capital seemingly overnight, with no warning to investors, attorneys, and agents. Investment strategies that were long accepted as valid were suddenly leading to mass denials. Only after significant litigation – heading all the way to the D.C. Circuit Court of Appeals – did USCIS finally relent and apply the plain meaning of the regulations to its adjudication policies. Similar situations have occurred in EB-5 history such as when USCIS was forced to back track on what was accepted as kosher, for example: the reversal of the use of tenant occupancy as an input to economic modeling, as well as the use of third-party currency exchangers as opposed to traditional banks (most notably among Vietnamese investors).

Denials happen. Hopefully they won't happen to you or your company's petition. However, if a denial does occur, this article addresses the options available to applicants, the pros and cons of each, and some specific nuances relating to some types of denials and the various paths forward.

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FISCAL YEAR 2020				
FORM TYPE	CASES APPROVED	CASES DENIED	TOTAL CASES ADJUDICATED	DENIAL RATE
I-526	904	236	1,140	20.7%
I-829	732	62	194	7.8%
I-924	45	45	90	50%

Source: https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf. (Notably, USCIS data does not segregate Form I-485 adjudications by underlying visa type and, accordingly, it is not possible to specify the relevant EB-5 related denial rate.)

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What options are legally available?

In contesting a denial, one is faced with two basic options: 1) fight the denial with USCIS or 2) fight the denial in federal court. Importantly, EB-5 stakeholders are not usually required to exhaust administrative remedies before going to federal court. In the seminal case Darby v. Cisneros, the Supreme Court of the United States held that unless a statute or regulation requires "exhaustion of administrative remedies," an aggrieved applicant may take his or her suits to federal court. Fortunately, most immigration-related applicants facing a denial need not exhaust the administrative remedies discussed below.

There presently is no requirement that an administrative appeal be filed for a denied I-924 or I-526. An I-829 is a little more complicated. Upon an I-829 denial, the regulations require USCIS to issue a "Notice to Appear" which is essentially an indictment/summons commencing immigration court proceedings. Federal law generally limits federal courts from intervening from the removal, i.e., the deportation process. In other words, convincing a federal court to entertain jurisdiction of a case where an applicant is in removal proceedings is quite difficult. But USCIS does not uniformly attempt to deport every denied I-829 investor. Notably, in an important 2011 case (*Kyu Seock Lee v. USCIS,, 2011 WL 10858556*) a court held that narrow exceptions exist regarding the challenging of I-829 denials, specifically acts occurring before removal proceedings begin and questions raised that exceed the scope of an immigration court's authority. This could be in essence also establishing a race to the particular courthouse – investors to federal courts and USCIS to immigration courts.

Beware though, that the lack of exhaustion as a prerequisite is subject to change. At the time of this writing, the EB-5 Regional Center program is amidst the 2021-22 lapse and various legislative proposals are being discussed to revive it. Section P of the "*EB-5 Reform and Integrity Act of 2021*" (a/k/a the Grassley-Leahy bill) would strip courts of reviewing denied I-526 or I-924 filings without exhaustion of "all administrative appeals." In other words, any such denials might become subject to Administrative Appeals Office (AAO) adjudication prior to going to federal court (the AAO decides appeals of denials across a great many visa types.) It remains to be seen whether this provision will become law.

Option 1 Fight the Denial with USCIS:

a) Should a Motion to Reopen or Reconsider Be Filed?

The language of a USCIS denial notice provides the applicant with notice and the opportunity to file Form I-290B, Notice of Appeal or Motion. One use of this form is to submit additional documents and/or legal arguments to the same office , i.e., the Immigrant Investor Program Office (IPO) that issued the denial decision in the first place. These motions can take one of three forms:

- **A Motion to Reopen** – a motion to reopen allows an EB-5 petitioner the opportunity to state new facts and include new documentary evidence demonstrating eligibility. For example, suppose an EB-5 business plan was not Matter of Ho compliant, or suppose that an I-526 lacked a particular document tying together the source of funds. A Motion to Reopen allows the applicant to submit these items into the administrative record for additional consideration.
- **A Motion to Reconsider** – these motions argue that the denial was "based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the case record at the time of the decision." They are purely legal filings, offering no evidence or new facts.
- **Combined Motions** – it is possible to make a combined or hybrid filing. In my practice, virtually all filings have not only included new facts and evidence, but also contested the basis of the denial. Oftentimes there will be both new evidence that can be submitted and legal bases to attack the denial, it is hardly surprising that these combined motions are popular.

It is generally thought that these Motions will trigger re-examination by the same adjudicator who issued the denial notice. Accordingly, they may work exceptionally

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FORM I-526

FISCAL YEAR 2019			FISCAL YEAR 2020			FISCAL YEAR 2021		
Dismissed	Sustained	Remanded	Dismissed	Sustained	Remanded	Dismissed	Sustained	Remanded
56	2	13	36	2	6	32	2	3

FORM I-924

FISCAL YEAR 2019			FISCAL YEAR 2020			FISCAL YEAR 2021		
Dismissed	Sustained	Remanded	Dismissed	Sustained	Remanded	Dismissed	Sustained	Remanded
15	0	1	6	0	1	2	0	0

Source: https://www.uscis.gov/sites/default/files/document/aao-decisions/USCIS_and_AAO_Data_for_Publishing_Thru_FY21_revisedtoincludeVAWA.pdf

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well where mistakes have been made – either by USCIS or the attorney making the filing. However, they seemingly do not work well where an adjudicator's decision evidences bias or a fundamental misunderstanding of the filing. In such cases, it is probably best to advance the application to someone else's desk at the agency.

The cost of filing is $675. Legal fees, of course, vary from lawyer to lawyer. These motions must be filed within 33 days of the denial decision, although extensions currently exist due to the COVID-19 pandemic. Unfortunately, USCIS does not publish processing times for these kinds of filings. While there are certainly outliers, such motions are generally decided within weeks or a few months.

These motions may also be favorable to "complete the record" of review for the AAO or a federal court action later. If an applicant has any regrets regarding a failure to advance a particular piece of evidence or legal argument, such motions may be helpful even if a second denial is expected.

b) Should an Appeal to the AAO be Made?

According to USCIS' website, the AAO exists "to ensure consistency and accuracy in the interpretation of immigration law and policy." USCIS generally issues "appellate decisions as non-precedent decisions, which apply existing law and policy to the facts of a given case." The AAO unit sits separately from the front-line adjudicators at the IPO. AAO adjudicators are often thought to have more advanced training, and therefore, a more reasoned analysis – if only to buttress defenses against future federal court actions.

AAO appeals are also filed with Form I-290B. However, the timeframe for filing an appeal can be longer than a motion to reopen or reconsider. An applicant may note the appeal within 33 days of the decision and then be granted an additional 30 days to file an appeal brief with the AAO, effectively doubling the timeframe. Similarly, when filing a motion to reopen, applicants can include new evidence to the AAO and this evidence need not be proven to be unavailable during the initial adjudication.

While the AAO may provide relief for some applicants, in this author's opinion it should generally not be relied upon as an

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effective means for reversing a denial as the AAO's track record shows that the vast majority of EB-5 cases filed with the AAO are dismissed. The Table below for the past three fiscal years illustrate this point for I-526 and I-924 filings.

Processing times for filings with the AAO are also highly problematic. The AAO states that it is their goal to complete all reviews of appeals within 180 days. At the time of this writing, their progress towards this goal has been dismal, both within the EB-5 context and more generally.

TIMELINESS OF FISCAL YEAR 2022 FIRST QUARTER COMPLETIONS (OCTOBER - DECEMBER 2021)

FORM TYPE	CASE TYPE	COMPLETED 0-180 DAYS	QUARTERLY COMPLETION
Cumulative total of all completions	-	28.92%	830
I-526	Alien Entrepreneur	0%	2
I-924 (Term)	Termination of a Regional Center	0%	0

Source: https://www.uscis.gov/administrative-appeals/aao-processing-times

Between the low success rates suggesting that most EB-5 denials are "rubberstamped" by the AAO and the slow processing times, it is hard to imagine why someone would want to take a case there unless they absolutely had no other option. One can also understand why the provisions of the Grassley-Leahy reforms mandating AAO appeals were met with such vociferous opposition. Indeed, the most likely result of the typical AAO appeal is a much delayed, yet better reasoned denial which may be more difficult to contest in federal court later as opposed to taking a denial directly to a federal judge.

Nevertheless, there are some benefits to AAO appeals. There is the opportunity to advance new evidence in an effort to complete the record. And yes, *some* denials do get reversed or remanded. Some attorneys simply aren't comfortable going to federal court and the AAO may be their best option. Nevertheless, on balance, it is something I believe should be avoided wherever possible, especially if an initial denial is poorly reasoned and may be susceptible to attack in the federal court later.

Option 2 Fight the Denial in Federal Court

Assuming jurisdiction is available, there are some clear advantages to a federal court suit. Immigration denials can be challenged in federal court under the Administrative Procedure Act ("APA") which allows courts to set aside agency decisions not based on reasoned decision making. In stark contrast to agency appeals or motions, the statute of limitations on an APA suit is six years. Notably, however, most courts will not accept jurisdiction where an I-290B is pending.

Although judges may be deferential to USCIS decisions, they are a wholly separate branch of government, immune to USCIS' internal politics, and better equipped to apply the law. The scope of review can also be broader. USCIS adjudicators, i.e., USCIS employees are beholden to the agency's regulations, guidance, and ever-changing interpretations, while litigants in federal court can challenge those regulations, guidance, and interpretations themselves. Moreover, it may be easier to for litigants cite existing court precedents in similar suits to persuade the judge, as USCIS often ignores district court decisions as not being binding upon the agency more generally.

In addition, the filing cost of a complaint is presently $402, although there of course will be significant legal costs. Upon filing and serving the Complaint upon USCIS and the Department of Justice, the defendant(s) must respond to the complaint within 60 days.

Oftentimes, the mere filing of a complaint is enough to get USCIS to reconsider its denial. Rather than defend the suit which drains valuable government resources, USCIS may be inclined to reopen the denial through a new Request for Evidence or perhaps approve the previously denied matter outright.

If such settlement cannot be reached, the Department of Justice usually files the certified administrative record with the reviewing court. This record generally cannot be modified, thus a litigant's efforts to add evidence after the denial are best reserved for I-290B filings as discussed above. Generally, such matters are resolved by the Court through Motions for Summary judgment, whereby the Court will review the decision against applicable case law, applicable statutes and regulations, and the APA itself.

Most immigration filings are shielded from public view online via the Public Access to Court Electronic Records (PACER) service, and accordingly it is very difficult (if not impossible) to estimate how many cases settle. Further, with this semi-privacy, it can be difficult to predict how long a federal court action will take if a case is not resolved within the first 60 days of filing and service.

A judge's decisions on the merits, however, should be fully public. Legal research regarding these decisions and overall trends can help paint an accurate picture of how particular issues will be handled by courts. Following a decision, either party may appeal to a Circuit Court and (although unlikely) even to the Supreme Court of the United States itself.

Necessarily though, every case is different, and lawyers can disagree with rich route to remedy a denial is best. There is no one-size fits all remedy. Close consultation with experienced attorneys following denials is an absolute must.