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PRACTICE ADVISORY¹

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FAILURE TO APPEAL TO THE AAO: DOES IT BAR ALL FEDERAL COURT REVIEW OF THE CASE?

Generally, before seeking federal court review of a decision of an administrative agency, an individual is first required to exhaust all administrative remedies. If the individual fails to do this, the court may refuse to review the decision. In fact, in some situations, the court will have no jurisdiction over a case if the administrative remedies were not first exhausted.

What about appeals to the Administrative Appeals Office (“AAO”)?² Can a person get review of a U.S. Citizenship and Immigration Services (USCIS) decision in federal court if he or she failed to appeal the decision to the AAO?³

Possibly. The Supreme Court has held that in federal court cases brought under the Administrative Procedures Act (APA), a plaintiff is not required to exhaust non-mandatory administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993). For a case

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² The AAO is an administrative body that considers appeals from decisions of officers of the USCIS in certain types of cases. *See generally* 8 C.F.R. § 103.3. The USCIS website uses the designations Administrative Appeals Office (AAO) and Administrative Appeals Unit (AAU) interchangeably. *See, e.g.*, <http://uscis.gov/graphics/howdoi/repealdenial.htm>; <http://uscis.gov/graphics/howdoi/aau.htm>. This practice advisory will refer to the agency as the AAO as that is the more widely known designation. Note, however, that the regulations use the name AAU. *See, e.g.*, 8 C.F.R. § 103.3(a)(1)(iv).

³ This practice advisory is limited to a discussion of exhaustion and the AAO. The exhaustion requirements related to an appeal to the BIA are different.

to be exempt under *Darby* from the requirement that administrative remedies be exhausted, the following criteria must be met:

- The federal court suit is brought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq.;
- There is no statute that mandates an administrative appeal;
- Either: a) there is no regulation that mandates an administrative appeal; or b) if there is a regulation that mandates an administrative appeal, it does not also stay the agency decision pending the administrative appeal; and
- The adverse agency decision to be challenged is final for purposes of the APA.

This practice advisory will discuss the *Darby* decision and how it may apply to cases involving administrative appeals to the AAO. The arguments suggested here can be used where a client has already missed the deadline for appealing to the AAO or for some other reason is prevented from pursuing an AAO appeal.⁴ Note, however, that we know of no case in which a court has yet applied *Darby* in the context of exhaustion of an administrative appeal to the AAO. There is always a risk that a court will misapply *Darby* and find that exhaustion of an appeal to the AAO is a prerequisite to an APA federal court challenge. If that happens, the federal court case could be dismissed for failure to exhaust. Until there is clear case law on the issue, clients should be counseled fully about the risk involved in deliberately bypassing the AAO and immediately challenging an adverse USCIS decision in federal court.

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Moreover, the case law relating to exhaustion is not limited to immigration cases and varies from circuit to circuit. Attorneys are thus advised to research the case law in their circuits.

What is meant by “exhaustion of administrative remedies”?

The doctrine of exhaustion of administrative remedies governs the timing of federal-court decision-making. *McCarthy v. Madison*, 503 U.S. 140, 144 (1992). When the exhaustion doctrine applies, a party must pursue administrative remedies before seeking relief from a federal court. As a general rule, exhaustion of administrative remedies is required in two circumstances: where 1) Congress mandates exhaustion in the relevant statute;⁵ or 2) a court exercises its discretion and requires that non-mandatory

⁴ There may be situations, for example, where the delay resulting from an appeal to the AAO will cause the individual to lose eligibility for the benefit in question. In this situation, an individual may choose to file suit without first appealing to the AAO.

⁵ An example of a statutory exhaustion requirement is 8 U.S.C. § 1252(d) (“A court may review a final order of removal only if ... the alien has exhausted all administrative remedies available to the alien as of right”).

administrative appeals be exhausted.⁶ As the Supreme Court has explained: “[w]here Congress specifically mandates, exhaustion is required ... Where Congress has not clearly required exhaustion, sound judicial discretion governs.” *McCarthy*, 503 U.S. at 144 (citations omitted).

What did the *Darby* court say about exhaustion of administrative remedies under the APA?

In *Darby*, the Court stated an important exception to the general rules requiring exhaustion. In cases brought under the APA, *Darby* holds that exhaustion of administrative remedies can only be required if a statute or regulation mandates exhaustion prior to judicial review. In APA cases, where there is no statute or regulation that requires that an administrative appeal be pursued prior to judicial review, a federal court does not have the discretionary authority to require exhaustion. *Darby*, 509 U.S. at 154 (1993).

The Court based its holding on Section 10(c) of the APA, 5 U.S.C. § 704, which establishes when judicial review is available under the APA. *Darby*, 509 U.S. at 146.⁷ The Court explained that this section “by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.” *Id.*

Why is *Darby* significant?

Darby is significant because it eliminates a potential barrier to judicial review in APA cases. As one way to control their expanding dockets, courts are dismissing cases in which the plaintiff did not exhaust all available administrative appeals – even optional appeals not mandated by statute or regulation. As a result, in cases in which a court has this discretionary authority, there is always a risk that the federal court suit will be

⁶ For cases discussing exhaustion as being within a court’s discretion, *see, e.g., Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002); *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003).

⁷ Section 10(c) states that “final agency action” is reviewable under the APA in federal court. 5 U.S.C. § 704. This section further explains that:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to a superior agency authority.

5 U.S.C. § 704.

dismissed if the individual did not exhaust all optional administrative remedies. Where *Darby* applies, however, a court cannot dismiss an APA case on this basis.⁸

Does *Darby* apply to a case involving an administrative appeal to the AAO?

We are not yet aware of any case considering how *Darby* would apply to a case in which an appeal to the AAO was available. There is a strong argument, however, that under the *Darby* analysis, exhaustion of many AAO appeals should not be required. If a court were to accept this argument, then the federal court case could not be dismissed solely because the individual did not first appeal to the AAO.

For your client to be exempted, under *Darby*, from an appeal to the AAO, you will need to demonstrate that your client's case satisfies numbers 1, 2, and 4 below as well as the criteria of *either* number 3(a) or 3(b):

1. That the federal court case has been brought pursuant to the APA;
2. That there is no statute that mandates an appeal to the AAO;
3. That either:
 - a. There is no regulation that mandates an appeal to the AAO; or
 - b. If there is a regulation that mandates an appeal, it does not also stay the agency decision pending the appeal to the AAO; and
4. That the agency decision is final for purposes of the APA.

Each of these criteria is discussed below.

1. The federal court case must be brought pursuant to the APA.

For the *Darby* exception to exhaustion to apply, the first requirement is that the suit must be brought under the APA. Because *Darby* is based upon specific language in the APA, it only applies to APA cases.

Thus, you will only be able to argue that exhaustion to the AAO is not required under *Darby* if your federal case is brought under the APA. In many cases relevant here, the APA is the appropriate cause of action for a challenge to the agency denial of your client's immigration application. The APA provides a cause of action for judicial review of agency action where a person has suffered a "legal wrong" or been "adversely affected or aggrieved by" agency action. 5 U.S.C. § 702. Thus, the APA provides the statutory basis for challenges to many USCIS decisions outside of the removal context. *See, e.g.,*

⁸ Note, however, that exhaustion is only one of several issues related to whether a federal court will hear a case. Thus, even if there is no exhaustion problem, there may be other barriers to judicial review. For example, there is a statutory bar to federal court review in at least two types of cases that can be appealed to the AAO. INA §§ 212(h) and 212(i) both specifically limit judicial review. 8 U.S.C. §§ 1182(h) and (i). A full discussion of jurisdiction and other requirements for federal court review is beyond the scope of this practice advisory.

Spencer Enterprises, Inc. v. U.S.A., 345 F.3d 683 (9th Cir. 2003) (APA challenge to denial of immigrant investor visa); *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002) (APA challenge to denial of a religious worker visa); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800 (E.D. La. 1999) (APA challenge to denial of H-1B specialty visa); *Yeboah v. U.S. DOJ*, 223 F. Supp. 2d 650 (E.D. Pa. 2002) (APA challenge to denial of Special Immigrant Juvenile Status).

If a case is not brought under the APA, the *Darby* exception will not apply. As the Supreme Court specifically noted, courts will continue to have discretion to require exhaustion in cases not governed by the APA. *Darby*, 509 U.S. at 154-55. Thus, *Darby* will not apply if the suit is solely a mandamus action under 28 U.S.C. § 1361 or one for declaratory relief under 28 U.S.C. § 2201. In these cases, a court clearly would retain the discretionary authority to require a plaintiff to first appeal to the AAO. *See, e.g., Volvo GM Heavy Truck Corp v. U.S. DOL*, 118 F.3d 205 (4th Cir. 1997) (Applying *Darby* to plaintiff's APA claim but not to its declaratory judgment and constitutional claims); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106 (E.D.N.Y. 2003) (mandamus petition dismissed for failure to exhaust where petitioner did not appeal to the AAO).

2. You must show that there is no statute that mandates an AAO appeal.

The *Darby* exception will not apply if there is a statute that *mandates* that a particular administrative appeal be exhausted prior to federal court action. In cases in which an AAO appeal is available, this requirement is easily met. There is no statutory reference to the AAO in the INA at all, and thus no statutory mandate that AAO appeals be exhausted prior to federal court review.

3. You must also show that either there is no regulation that mandates an appeal, or if there is a regulation mandating an appeal, that it does not explicitly stay the agency decision while the appeal is pending at the AAO.

This requirement consists of two subparts. If you can demonstrate *either* subpart you will have satisfied this requirement.

a. You must show that there is no regulation that mandates exhaustion to the AAO.

This requirement can be met by showing that no regulation mandates an appeal to the AAO. There are numerous regulations that address AAO appeals from specific types of cases.⁹ As discussed below, the majority of these regulations do not mandate exhaustion

⁹ The AAO can hear appeals in approximately 40 different types of cases, including, for example: certain employment-based visa petitions; special immigrant visa petitions, such as for religious workers and juveniles; VAWA self-petitions; non-immigrant visa petitions for certain temporary workers and for fiancées/fiancés; and orphan petitions.

of an appeal to the AAO prior to federal court review. This practice advisory does not discuss every AAO regulation, however, and attorneys are advised to identify the regulation relevant to the particular case to ensure that it does not mandate an AAO appeal prior to judicial review.

For a regulation to mandate exhaustion, courts generally have held that the regulatory language must be explicit.¹⁰ Where there is no explicit mandate, any administrative appeal that may be available is considered optional. Under *Darby*, a court will not have discretion to require exhaustion of such an optional administrative appeal.

Much of the regulatory language concerning AAO appeals permits these appeals but does not explicitly mandate them.¹¹ Under these regulations, an appeal would be optional rather than mandatory. For example, the general regulation governing the AAO is explicitly permissive, stating simply that certain unfavorable agency decisions “may be appealed” to the AAO. 8 C.F.R. § 103.3(a)(1)(ii). A number of the regulations pertaining to appeals of specific types of cases repeat this same language. *See, e.g.*, 8 U.S.C. § 223.2 (denial of refugee travel document); 8 C.F.R. § 204.4(g)(1) (denial of Amerasian petition). Another regulation also states that the denial of a petition “shall be appealable” to the AAO. 8 C.F.R. § 204.5(n)(2) (employment based and special immigrant visas).

The Ninth Circuit has considered language that is almost identical to that described above, and held that this language permits an appeal but does not mandate exhaustion of administrative remedies. *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997). Consequently, the court in that case found that the *Darby* exception applied. In *Young*, the plaintiff in an APA lawsuit challenged the revocation of her fourth preference visa petition. The regulations in existence at the time stated that a petitioner “may” appeal a revocation

¹⁰ *See, e.g., Shawnee Trail Conservancy v. U.S.D.A.*, 222 F.3d 383 (7th Cir. 2000) (exhaustion mandatory where regulation stated that federal district court review would be premature unless the plaintiff exhausted administrative remedies); *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409 (D.C. Cir. 1998) (exhaustion mandated where the statute allowed review of “final” orders and the regulations defined a final order “for purposes of judicial review” as being an order following an administrative appeal); *see also Glisson v. U.S. Forest Service*, 55 F.3d 1325 (7th Cir. 1995) (considering similar regulatory language); *U.S. v. Menendez*, 48 F.3d 1401, 1412 n.15 (5th Cir. 1995) (identifying statutes that might impose a mandatory exhaustion requirement).

¹¹ DHS has indicated that it is considering proposing a regulation that would mandate exhaustion of AAO appeals as a prerequisite to judicial review. *See* 69 Fed. Reg. 37504, 37526-27 (June 28, 2004). This item has been on the agency’s regulatory agenda for several years without any action, however, so there is no way to predict if or when the agency will actually publish a proposed rule.

decision and that such “appeal[] shall lie to the Board of Immigration Appeals.” *Young*, 114 F.3d at 882. The court found that while these regulations “allow” a petitioner an administrative appeal, and direct that such an appeal will be to the BIA, they “provide that the appeal itself is optional.” *Id.* Moreover, the court found that because it was an optional administrative appeal, the plaintiff could proceed with the APA suit without having pursued the administrative appeal to the BIA.

A number of other AAO regulations state only that an individual is to be notified of his or her “right to appeal” to the AAO. *See e.g.*, 8 C.F.R. § 204.6(k) (investor visa); 214.2(k)(4) (fiancée). Considering exactly this language in another context, the Ninth Circuit has held that this constitutes an “optional” appeal only and does not mandate exhaustion. *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (concerning optional appeal to the BIA of a denial of a family-based visa petition).

b. If there is a regulation mandating an appeal, you must show that it does not explicitly stay the agency decision while the appeal is pending at the AAO.

Even were there a regulation mandating exhaustion of an appeal to the AAO, exhaustion still would not be required under *Darby* unless that regulation also required a stay of the agency decision pending the administrative appeal. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 826 (9th Cir. 2002) (*Darby* exception to exhaustion applied where mandatory exhaustion provision did not also make the agency decision inoperative while the appeal was pending); *DSE, Inc. v. USA*, 169 F.3d 21 (D.C. Cir. 1999) (Applying *Darby* and finding exhaustion not required where the filing of an administrative appeal did not render the agency determination inoperative while the appeal was pending).

One regulation appears to render the agency decision inoperative while the AAO appeal is pending. *See* 8 C.F.R. § 214.11(r) (application for a T non-immigrant visa). However, this provision does not also mandate an AAO appeal as a prerequisite to judicial review. Thus, the *Darby* exception should still apply. *Accord Young*, 114 F. 3d at 882 (*Darby* applied where the regulations rendered the agency decision inoperative during the administrative appeal but did not also mandate the administrative appeal).

4. You must show that the agency decision is final under the APA.

Distinct from the question of exhaustion, the APA also requires that an agency decision be final before it can be challenged in federal court. 5 U.S.C. § 704; *see also Darby*, 509 U.S. at 144 (distinguishing between doctrines of finality and exhaustion of administrative remedies). A decision is final when a “decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Id.* In most cases, the adverse CIS decision denying a petition or application will be a final decision under this standard.

Several courts have refused to apply *Darby*, however, where an individual pursued an optional administrative appeal and then also filed an APA action while this appeal remained pending. *Ma v. Reno*, 114 F.3d 128 (9th Cir. 1997); *Acura v. Reich*, 90 F.3d

1403 (9th Cir. 1996); *Wilt v. Gilmore*, 2003 U.S. App. LEXIS 6876 (4th Cir. 2003) (unpublished); *Cossio v. Hawk*, 1998 U.S. Dist. LEXIS 2433 (D.D.C. 1998) (unpublished). Presumably, the courts in these cases would not have been able to require exhaustion had the individuals bypassed the administrative appeal altogether, since the administrative review was optional. Because the administrative review was underway, however, each court held that there was not yet a “final” agency decision, and dismissed the suits on this basis.

Thus, it is likely that a court would find that the agency decision was not final if an AAO appeal was pending at the time that the APA suit was filed. There may also be other situations in which adverse agency action is not final for purposes of the APA. For example, a notice of intent to revoke a visa petition most likely would not be a final agency decision subject to challenge in federal court under the APA. Thus, prior to filing suit, you must be sure that you are challenging a final agency decision.

How have lower courts applied *Darby* in other contexts?

As far as we know, no court has yet considered whether an administrative appeal to the AAO is required prior to an APA suit under the *Darby* analysis. A number of circuit courts have applied the *Darby* analysis in cases involving regulatory language similar to that governing appeals to the AAO. These decisions can be used to support an argument that, under *Darby*, an administrative appeal to the AAO is not required in an APA suit.

There also have been court decisions that found that particular statutory or regulatory provisions mandate exhaustion. These decisions are helpful to demonstrate that the regulatory language pertaining to an AAO appeal falls far short of the mandatory language contemplated by *Darby*. The following lists relevant cases applying *Darby* by circuit.

First Circuit: There does not yet appear to be a published decision applying the *Darby* standard in an APA case. However, in *Trafalgar Capital Assoc., Inc. v. Cuomo*, 159 F.3d 21 (1st Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999), the Court considered, in the context of determining when a statute of limitations accrues, the distinction made in *Darby* between “permissive” and “mandatory” administrative appeals.

Second Circuit: The Second Circuit has found a mandatory exhaustion requirement where the regulation states that an administrative review procedure is a “prerequisite to seeking judicial review.” *S.E.C. v. Stewart*, 374 F.3d 184 (2d Cir. July 6, 2004); *see also Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90 (2d Cir. 1998) (finding that the statute mandates exhaustion); *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 46 n.4 (2d Cir. 1993) (mandatory exhaustion language in regulation). More troubling, the Second Circuit also held that, with regard to the denial of an adjustment of status, exhaustion is required once proceedings have begun. The Court based its holding on the regulation that allows an individual to renew an adjustment application in proceedings, apparently finding – without any analysis of the regulation in question – that it was a mandatory exhaustion requirement. *Howell v. INS*, 72 F.3d 288 (2d Cir. 1995). *But see*

Pozdniakiv v. INS, 354 F.3d 176 (2d Cir. 2003) (requesting further briefing in APA case challenging denial of advance parole where there was no statutory or regulatory exhaustion requirement).

Third Circuit: There does not yet appear to be a published decision applying the *Darby* standard in an APA case.

Fourth Circuit: See *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1334 n.2 (4th Cir. 1995) (In APA suit, court cites *Darby* and notes that there is no statute mandating exhaustion of administrative remedies). In an unpublished decision, the Fourth Circuit has also held, however, that *Darby* does not apply where an individual pursued an optional administrative appeal and then also filed an APA action while this appeal remained pending. *Wilt v. Gilmore*, 2003 U.S. App. LEXIS 6876 (4th Cir. 2003) (unpublished).

Fifth Circuit: The Fifth Circuit has found that regulatory provisions that permit an individual to “seek wholly discretionary review within the agency but do not require this as a prerequisite for judicial review,” do not trigger the exhaustion requirement of the APA. *U.S. v. Menendez*, 48 F.3d 1401 (5th Cir. 1995). In a footnote, the Court provided examples of statutory and regulatory language that would mandate exhaustion in APA claims under *Darby*. Among these examples were the former judicial review provisions of the INA, former 8 U.S.C. § 1105a(c), and a regulation relating to appeals before the BIA. *Menendez*, 48 F.3d at 1411, n.15.

Sixth Circuit: The Sixth Circuit relied on *Darby* when it determined that a statute and regulations that simply provide an administrative avenue that a party “may” pursue, do not mandate exhaustion prior to an APA suit. *Dixie Fuel Co. v. Commissioner, SSA*, 171 F.3d 1052 (6th Cir. 1999).

Seventh Circuit: The Seventh Circuit has been clear about what statutory or regulatory language will trigger an exhaustion requirement under *Darby*. In *Shawnee Trail Conservancy v. U.S.D.A.*, 222 F.3d 383 (7th Cir. 2000), the regulations in question stated that federal district court review would be premature unless the plaintiff had exhausted administrative remedies. The Court found this to be a mandatory exhaustion requirement. See also *Glisson v. U.S. Forest Service*, 55 F.3d 1325 (7th Cir. 1995) (considering similar regulatory language).

Eighth Circuit: See *Coteau Properties Co. Department of the Interior*, 53 F.3d 1466 (8th Cir. 1995) (finding that under *Darby* there was no need to exhaust optional administrative remedies).

Ninth Circuit: The Ninth Circuit has been clear that permissive regulatory language regarding an administrative appeal does *not* constitute the mandatory exhaustion requirement necessary in an APA case. See *Young v. Reno*, 114 F.3d 879, 882 (9th Cir. 1997) (finding that regulations that “allow a petitioner to seek intra-agency review ... and direct that such review will be by the BIA,” to be “optional.”); *Abboud v. INS*, 140 F.3d

843, 847 (9th Cir. 1998) (1987 immigration regulations at issue which provided petitioner with a “right to appeal” to the BIA, was optional and did not trigger an exhaustion requirement for an APA suit); *Chang v. U.S.*, 327 F.3d 911, 922 (9th Cir. 2003) (statutory provision stating that an LPR “may” request review of a decision did not expressly mandate review). The Ninth Circuit has also been clear, however, in holding that *Darby* does not apply where an individual pursues an optional administrative appeal and then also filed an APA action while this appeal remained pending. *Ma v. Reno*, 114 F.3d 128 (9th Cir. 1997); *Acura v. Reich*, 90 F.3d 1403 (9th Cir. 1996).

Tenth Circuit: See *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1055 n.3 (10th Cir. 1993) (noting that under *Darby*, exhaustion was mandated by regulation that stated that agency decision not final under the APA if it is subject to an administrative appeal).

Eleventh Circuit: There does not yet appear to be a published decision applying the *Darby* standard in an APA case. In *National Parks v. Conservation Association v. Norton*, 324 F. 3d 1229 (11th Cir. 2003), however, the Court discussed *Darby* in the context of the “finality” requirement of the APA.

D.C. Circuit: See *Atlantic Tele-Network v. F.C.C.*, 59 F.3d 1384 (D.C. Cir. 1995) (finding that because an administrative appeal was optional, exhaustion prior to an APA suit was not required); but cf. *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409 (D.C. Cir. 1998) (exhaustion under the APA required where regulations made exhaustion a prerequisite to judicial review and the finality of the ALJ decision was suspended pending the administrative appeal).