



Pre-Suit Letters: An Alternative Option?

by **Bradley B. Banias** 

Pre-suit letters—letters giving notice of possible legal action to potential defendants and their attorneys—are ubiquitous in civil practice, yet they are foreign to immigration practice. Like private civil litigators, the attorneys that defend the relevant agencies in federal court immigration litigation have incentive to avoid litigation if it is in the best interest of their client agency. Thus, immigration practitioners should consider using pre-suit letters as an alternative tool to address an agency denial or delay.

Pros of Pre-Suit Letters

First, a pre-suit letter is an opportunity to make your case to the attorney—an Office of Immigration Litigation (OIL) attorney, an Assistant U.S. Attorney (AUSA), or both—who is charged with advising his or her agency clients about the litigation risks associated with a particular denial. Because litigation risks may be specific to a particular district or relate to ongoing litigation, agency adjudicators are likely unaware of such risks. Therefore, a pre-suit letter addressed to OIL and the local U.S. Attorney's

office may be the first time a decision is reviewed to determine whether it is defensible in a particular jurisdiction, whether it could affect ongoing litigation elsewhere, or whether the agency is even willing to defend its reliance on a sensitive policy.

Second, a pre-suit letter has significant practical advantages. It is inexpensive to draft and send. You control the timing by setting a deadline for the government to respond. You can even send a pre-suit letter while you seek other avenues of relief. Most importantly, you waive no other avenue of relief by sending a pre-suit letter. And you control who gets the letter.

Third, any response will help you advise your client. Ideally, an OIL attorney or an AUSA will see your letter, agree with your argument, contact agency counsel, and advise them to “make this go away.” But lesser responses can be helpful, too. For example, let's say that the government attorney indicates that, regardless of the merits of the decision, the agency's position is that the court lacks jurisdiction to review the decision. This could indicate that the government recognizes the merits of the decision as

“You control the timing by setting a deadline for the government to respond. You can even send a pre-suit letter while you seek other avenues of relief. Most importantly, you waive no other avenue of relief by sending a pre-suit letter.”



weak, and that an administrative appeal could be your best course of action. Of course, other inferences could be drawn from such a response, but in a real case, you will have the advantage of actually communicating with the government's attorney and reading between the lines for yourself.

Cons of Pre-Suit Letters

First, you may get no response, and attempting to read the agency's silence can be dangerous. Second, the agency may use your pre-suit letter to reopen

TOOLBOX



Immigration
Litigation
Toolbox

+ LOCKER

DCBAR Continuing Legal Education

Classes Qualify for MCLE Credit in ALL States

Don't Miss

Avoiding Ethical Pitfalls in Immigration Law

Tuesday, April 8, 2014
5:30 p.m. to 7:45 p.m.

Did you know that the highest number of annual disciplinary cases prosecuted in the District of Columbia for the past five years have been immigration related? Discover the ethical issues that, if not addressed properly, can result in serious sanctions against practitioners by their local bars and/or by the Executive Office for Immigration Review (EOIR).

This class will help you identify:

- The sources of ethical rules
- Tools necessary to spot ethical issues
- Tips on how to avoid falling into harmful situations.

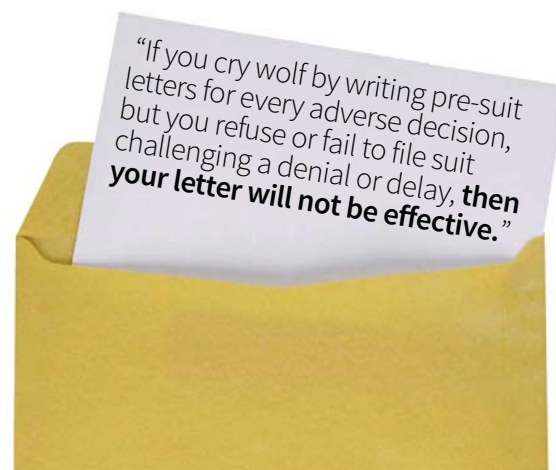
2.0 Ethics Credit Hours

Learn more and register today at www.dcbbar.org/cle or call 202-626-3488

its previous denial and strengthen it. However, this risk attaches to all appeals or challenges. Third, you may upset your local agency contacts by threatening litigation. However, if you have a good relationship with your local officers, then such relationship has likely already weathered the tribulations of disagreement.

The “Cry Wolf” Principle

Regardless of the pros and cons of pre-suit letters, their effectiveness is controlled by the “cry wolf”

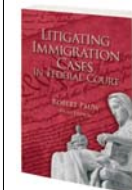


principle. If you cry wolf by writing pre-suit letters for every adverse decision, but you refuse or fail to file suit challenging a denial or delay, then your letter will not be effective. This does not mean you have to file suit every time you send a pre-suit letter, but it does mean that, if the right case presents itself and a pre-suit letter goes ignored, you should be prepared to file suit. And in the right case, you will have a good chance of success, regardless of any inexperience in federal litigation.

Thus, the secret to effective pre-suit letters is case selection. Absurd denials—such as where the agency denies for failure to respond to a Request for Evidence (RFE), but you have a receipt that shows the agency received your client’s RFE response—are good candidates for pre-suit letters. In contrast, a 37-page denial for failure to demonstrate entitlement to EB-1 status may not be the best candidate for a pre-suit letter. Whether or not a pre-suit letter is effective is, ultimately, up to you, but before you can make a pre-suit letter effective, you must consider it as an option.

BRADLEY B. BANIAS, a former attorney with DOJ’s Office of Immigration Litigation, is developing a nationwide, federal court immigration litigation practice at Barnwell, Whaley, Patterson and Helms in Charleston, SC. The author’s views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

BOOK



Litigating Immigration Cases in Federal Court

+ LIBRARY

RECORDED

Litigation Track Recordings, AC13

+ LOCKER