

# The Cost of Assuming the Litigation Costs

by **Bradley B. Banias** 

Most assume that the cost of district court litigation is higher than filing an administrative appeal. But is it? To file an administrative appeal for most denials, the filing fee alone is \$630. And before the government even responds, you have to draft an entire appellate brief. So, your client incurs a majority of the costs associated with the appeal before the government even reviews it.

However, where further exhaustion of remedies is not required and district court jurisdiction is clear,<sup>1</sup> as described below, district court litigation costs less to get an initial response from the government and the same to get to a final decision. Further, if you win, you may be entitled to attorney's fees. So, before writing off district court litigation when challenging a routine denial, read on.

## The Cost to Get a Response

The up-front costs of initiating a lawsuit in district court comprise the filing fee and the cost of drafting the complaint. The filing fee in most district courts is \$400. To draft a sufficient complaint, you need

only allege that: (1) the court has jurisdiction and venue; and (2) the agency issued a final decision that aggrieved the plaintiff (and attach that decision as an exhibit). That's it. Of course, as part of the jurisdictional allegations, you will need to allege that: (1) venue is proper; (2) no jurisdictional bar applies; and (3) either you have exhausted administrative remedies or you are not required to exhaust any further remedies. Further, you may choose to highlight certain egregious facts for strategic purposes, but as a matter of law, you need only allege jurisdiction is proper and that a final agency action aggrieved your client. Thus, the time and cost of initiating a civil action is the sum of the filing fee (\$400) and drafting the complaint (about two hours of work).

The government then has 60 days to respond. During this window, the chance for settlement is at its highest because the government attorneys will be reviewing the denial, getting the agency's view, (ideally) acquiring the certified administrative record, and recommending a strategy to the agency. By the time an answer or motion to dismiss is filed, the government has decided to defend the denial or delay.



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Thus, the cost of getting your client's case in front of a government attorney that may recommend settlement is much less in district court litigation than it is through an administrative appeal because your client does not incur the cost of an entire appellate brief simply to get a government response. Rather, your client bears only the cost of drafting a complaint, which should be minimal. Further, unlike

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an administrative appeal, the government attorneys reviewing the district court challenge consider the potential consequences of a published decision reversing the agency, as well as paying for attorney's fees if the denial is substantially unjustified.

### The Cost to Get a Decision

The cost to fully brief a routine challenge to a denial should be the same as drafting an administrative appellate brief. After the government answers, the procedures are very simple: you file an opening brief, the government responds, and you reply. That's it. Further, before you file your opening brief, the government is required to provide you with the certified administrative record. This record should contain all information that the adjudicator relied on directly or indirectly to issue his or her denial. The complete record contains all of the facts of your case because there is no traditional civil discovery in routine challenges to denials. No depositions. No interrogatories. No requests for production. So, the costs of getting a decision in district court include the cost of reviewing the record and briefing the case.

The cost of drafting your motion for summary judgment in district court and your administrative appellate brief should be nearly equal. Yes, the district court challenge will have different standards of review,

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but it will contain the same substantive arguments and it will be just as complex or simple. And because there is typically no discovery in routine denial challenges, there are no hidden costs to getting to a decision. Further, if your motion for summary judgment is strong enough, the government may reconsider settlement because, again, the attorneys defending the denial are aware that a published district court decision can have a ripple effect and subject their client to paying your attorney's fees.

### The Cost to Recoup Your Costs

If you win, district court litigation provides a mechanism to recoup your costs through a motion for fees under the Equal Access to Justice Act (EAJA). An EAJA award is far from a sure thing. You have to show that you were a prevailing party, the government's position was substantially unjustified,

and your reasonable costs. If you succeed, however, you can recoup your client's entire cost, including the costs of drafting the EAJA motion. There is no similar mechanism for recouping costs upon winning an administrative appeal.

Before dismissing district court litigation as too expensive, examine your client's claims and with an eye toward district court litigation:

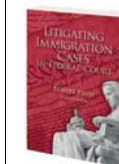
- Is jurisdiction in federal court clear?
- Does the client need to exhaust remedies?
- Is the denial discretionary or legal?

If these basic issues are not impediments, federal litigation may be more cost effective than an administrative appeal. Of course, it may not be. But by simply considering federal litigation, you can confidently tell your client you are giving him or her the best, cost-effective strategy for challenging a denial.

<sup>1</sup> For an excellent discussion of jurisdictional issues, including exhaustion of administrative remedies, related to challenging denials in district court, see R. Pauw, *Litigating Immigration Cases in Federal Court*, 21-23 (AILA 3d Ed. 2013).

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