



PRACTICE ADVISORY¹
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**FAILURE TO APPEAL TO THE AAO:
DOES IT BAR ALL FEDERAL COURT REVIEW OF THE CASE?**

I. Introduction.

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 exhaust, 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

Probably. The Supreme Court has held that in federal court cases brought under the Administrative Procedure Act (APA), a plaintiff is not required to exhaust non-mandatory administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993). For a case to be exempt under *Darby* from the requirement that administrative remedies must be exhausted, the following criteria must be met:

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² The AAO is an administrative body that considers appeals from decisions of USCIS officers in certain types of cases. *See generally* 8 C.F.R. § 103.3. *See also* “The Administrative Appeals Office (AAO),” <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao>. This practice advisory will refer to the AAO as that is the more widely known designation. Note, however, that the regulations were never updated to reflect the creation of the U.S. Department of Homeland Security. *See generally* 6 U.S.C. §§ 111, 271. The regulations still refer to the “appellate jurisdiction of the Associate Commissioner, Examinations” and to the administrative body as the 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 and does not apply to decisions of the Board of Immigration Appeals.

- The federal court suit is brought pursuant to the 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 lower courts have applied *Darby* to cases involving administrative appeals to the AAO. There are strategic reasons for not filing an administrative appeal, such as the high percentage of denials affirmed by AAO or the risk that the AAO will affirm on a different ground that may be even harder to overcome in court. However, there is always the 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. Clients should be counseled fully that this risk exists, even if it is minimal.

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.

II. What is meant by “exhaustion of administrative remedies”?

The doctrine of exhaustion of administrative remedies governs “the timing of federal-court decisionmaking.” *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;⁴ or (2) a court exercises its discretion and requires that non-mandatory administrative appeals be exhausted.⁵ As the Supreme Court has explained: “[w]here Congress specifically mandates, exhaustion is required . . . [W]here Congress has not clearly required exhaustion, sound judicial discretion governs.” *McCarthy*, 503 U.S. at 144 (citations omitted).

III. 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,

⁴ An example of a statutory exhaustion requirement is 8 U.S.C. § 1252(d)(1) (“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”).

⁵ For cases discussing exhaustion as being within a court’s discretion, *see, e.g., Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004); *Iddir v. INS*, 301 F.3d 492, 498 (7th Cir. 2002) (and cases cited therein).

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 146.⁶ 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.*

IV. 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 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.⁷

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

There is generally a strong argument that under the *Darby* analysis, exhaustion of remedies by appealing to the AAO is not required. Pursuant to this argument, a federal court APA challenge to a USCIS decision could not be dismissed solely because the individual did not first appeal to the AAO. This section provides litigants with guidance on how they can establish that, under the *Darby* doctrine, an appeal to the AAO is not required, using specific case examples. This section also discusses some circumstances under which courts are still requiring exhaustion through an appeal to the AAO.

⁶ 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 superior agency authority.

Id.

⁷ 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.

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 criterion 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 provides an appropriate cause of action for a challenge to the denial of your client's immigration application or petition. 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—outside the removal context—the APA often provides the statutory basis for challenges to many USCIS decisions. *See, e.g., Shalom Pentecostal Church v. Acting Sec'y USDHS*, 783 F.3d 156 (3d Cir. 2015) (APA challenge to denial of religious worker immigrant visa petition); *Spencer Enters., Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003) (APA challenge to denial of immigrant investor visa petition); *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800 (E.D. La. 1999) (APA challenge to denial of H-1B specialty occupation visa petition).

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 retains the discretionary authority to require a plaintiff to first appeal to the AAO. *See Henriquez v. Ashcroft*, 269 F. Supp. 2d 106 (E.D.N.Y. 2003) (dismissing mandamus petition 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* the exhaustion of a particular administrative appeal 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, 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.⁸ As discussed below, the majority of these regulations do not mandate exhaustion 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.⁹ Where there is no explicit mandate, any administrative appeal that may be available is considered optional. In *EG Enters., Inc. v. DHS*, 467 F. Supp. 2d 728, 732 (E.D. Mich. 2006), the district court concluded that, under *Darby*, an employer who missed the appeal deadline to the AAO did not have to exhaust prior to suing over USCIS' denial of its H-1B petition for a specialty occupation worker.¹⁰ See also *RCM Techs., Inc. v. USDHS*, 614 F. Supp.

⁸ 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.

⁹ See, e.g., *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (holding that the court has no authority to require a party to exhaust when the relevant authority permits an appeal to the superior administrative authority, but does not require such appeal); *Shawnee Trail Conservancy v. USDA*, 222 F.3d 383, 389 (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. Dep't of Agriculture*, 134 F.3d 409, 411 (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); *United States v. Menendez*, 48 F.3d 1401, 1412 n.15 (5th Cir. 1995) (identifying statutes that might impose a mandatory exhaustion requirement).

¹⁰ The court noted that USCIS concurred in its cross-motion for summary judgment that the employer was not required to exhaust. *Id.* at 733. The court also cited to 8 U.S.C. § 1329 (INA § 279), as a basis for its jurisdiction. *Id.* However, the court's reliance on this provision is misplaced, as a 1996 amendment limited district court jurisdiction under the provision to suits brought by the United States and specifically precluded its use to establish jurisdiction for suits against the United States, its agencies or officers.

2d 39 (D.D.C. 2009) (plaintiffs can seek judicial review of H-1B petition denials, since AAO appeal optional, but plaintiffs cannot enjoin an alleged policy change, which was not binding on adjudicators and thus not final agency action). 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 C.F.R. § 223.2(g) (denial of reentry permit or refugee travel document applications); 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 visa petitions).¹²

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 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. *See also Chu Inv., Inc. v. Mukasey*, 256 F. App'x 935, 936 (9th Cir. 2007) (unpublished) (finding that, under *Darby*, no AAO appeal was required from a prospective employer’s review of a denial of its immigrant visa petition for an intracompany manager).

¹¹ Over a decade ago, DHS indicated it was 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). As DHS continues to include this proposal without taking any action, there is no way to predict if or when the agency will actually publish a proposed rule. *See* 80 Fed. Reg. 77776, 77778 (Dec. 15, 2015).

¹² In *ASP, Inc. v. Holder*, No. 5:12-CV-50-BO, 2012 U.S. Dist. LEXIS 188426, *8 (E.D.N.C. Dec. 11, 2012), the court read this regulation as mandating AAO exhaustion from the denial of an employment-based immigrant visa petition and cited as authority cases that are distinguishable: *Howell v. INS*, 72 F.3d 288, 293 (2d Cir. 1995) (exhaustion required because plaintiff was in deportation proceedings and could renew her adjustment application before the immigration judge); *Oddo v. Reno*, 17 F. Supp. 2d 529, 531 (E.D. Va. 1998), *aff'd without opinion*, 175 F.3d 1015 (4th Cir. 1999) (*dicta* because plaintiff filed suit challenging I-140 revocation only after appeal denied at AAO, but court said she had exhausted by pursuing her right to appeal).

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 petition); 8 C.F.R. § 214.2(k)(4) (fiancée petition). 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), *abrogated on unrelated ground as recognized by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010) (*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. United States*, 169 F.3d 21, 27 (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 T nonimmigrant status). 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 USCIS decision denying a petition or application will be a final decision under this standard. For example, in *Ore v. Clinton*, 675 F. Supp. 2d 217, 223-24 (D. Mass. 2009), the district court applied *Darby* and determined that per 8 C.F.R. § 214.2(l)(10), the appeal of an L-1 petition denial was optional (“may be appealed”) and that a “failure to [timely] take an optional appeal to the AAO” made the adverse decision “final.”

In *Pinho v. Gonzales*, 432 F.3d 193, 200, 202 (3d Cir. 2005), the Third Circuit held that an AAO decision was final when there was no proceeding pending in which the agency could review the disputed adjustment decision. USCIS denied Pinho’s adjustment application after determining that he was statutorily ineligible, and the AAO affirmed this decision on appeal. Pinho challenged the AAO decision in district court, which also affirmed, and then again on appeal to the Third Circuit. That court held that the agency decision was final notwithstanding the

possibility that, if Pinho were placed in removal proceedings, he could renew his adjustment application; the mere *possibility* of future proceedings did not render the decision non-final. *Id.* at 201-02. Instead, citing *Darby*, the court concluded that the decision was final because no statute or regulation required exhaustion; and that there was no administrative appeal from the AAO decision, which “was ‘operative’ from the moment it was entered.” *Id.* at 202.

Beware, however, that if you file an optional administrative appeal for your client, you should await a final decision on this optional appeal before filing a federal court action. Several courts have refused to apply *Darby* where an individual pursued an optional administrative appeal and then also filed an APA action while this appeal remained pending. *See, e.g., Bangura v. Hansen*, 434 F.3d 487, 501 (6th Cir. 2006), *Wilt v. Gilmore*, 2003 U.S. App. LEXIS 6876 (4th Cir. 2003) (unpublished); *Ma v. Reno*, 114 F.3d 128 (9th Cir. 1997). Presumably, under *Darby*, 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, a court likely 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 also may 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 is not 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.

VI. How have lower courts applied *Darby* in contexts not involving the AAO?

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—particularly in Circuits in which the courts have not addressed *Darby* in the context of an AAO appeal.

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: In *Global Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 84–85 (1st Cir. 2016), which was not an APA action, the Court in *dicta* discussed *Darby* with regard to what constitutes “final agency action” under the APA. In *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21 (1st Cir. 1998), 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: In *Sharkey v. Quarantillo*, 541 F.3d 75, 90 (2d Cir. 2008), the Court concluded that an individual who challenged USCIS’ purported rescission of her lawful permanent resident

status without complying with rescission procedures was not subject to any administrative exhaustion requirement. Citing the holding in *Darby*, the Second Circuit noted that the government had “not pointed to any statute or regulation that expressly mandates exhaustion of her claims.” *Id.* In contrast, 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.” *SEC v. Stewart*, 374 F.3d 184 (2d Cir. 2004); *see also Bastek v. Federal Crop Ins. 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). The Second Circuit also has held that, with regard to the denial of an adjustment of status, exhaustion is required once removal 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 Pozdniakov 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: In *Massie v. USHUD*, 620 F.3d 340, 359 (3d Cir. 2010), the Court held that an administrative appeal to the superior agency authority was not mandatory when the relevant regulation solely provided that a party “may file” an appeal with the superior agency authority. *See also Pinho v. Gonzales*, 432 F.3d 193, 200, 201-02 (3d Cir. 2005), Section V.4, *supra*.

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).

Fifth Circuit: The Fifth Circuit determined 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. *United States 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. *Id.* at 1411, n.15. Additionally, in an unpublished decision, *AAA Bonding Agency Inc. v. USDHS*, 447 F. App’x 603, 612 (5th Cir. 2011), the Fifth Circuit applied the *Darby* doctrine when there was no statute or regulation that explicitly required exhaustion. Nonetheless, in *Dresser v. MEBA Med. & Benefits Plan*, 628 F.3d 705, 710 (5th Cir. 2010), the Fifth Circuit indicated that exhaustion is required when the relevant statute provided that a particular action “shall be” appealed to the superior agency authority.

Sixth Circuit: The Sixth Circuit relied on *Darby* when it determined that a statute and regulation 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, 1059 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157-58 (2003). Furthermore, in *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 427 (6th Cir. 2016), the Court explained that an administrative appeal was optional when the relevant authority provided for an “opportunity for review,” and “that such review shall occur not later than 10 days after issuance of [the agency’s] order.” The court concluded that exhaustion is

optional when the relevant authority provides that a party “may” appeal an agency’s decision to the relevant superior agency authority. However, the court dismissed the APA claim, finding that Mr. Haines had an adequate remedy under a different statute. *Id.*

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. USDA*, 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. v. Dep’t. of the Interior*, 53 F.3d 1466 (8th Cir. 1995) (finding that under *Darby* there was no need to exhaust optional administrative remedies). However, in *Kakaygeesick v. Salazar*, 389 F. App’x 580 n.2 (8th Cir. 2010) (per curiam), an unpublished decision, the Eighth Circuit concluded that the agency regulation required appeal of an Administrative Law Judge decision concerning a Native American land claim to a superior administrative body.

Ninth Circuit: *See Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (finding appeal optional when 1987 immigration regulations at issue provided petitioner with a “right to appeal” to the BIA and did not trigger an exhaustion requirement for an APA suit); *Chang v. United States*, 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). In *Gonzales v. DHS*, 508 F.3d 1227, 1232 n.4 (9th Cir. 2007), the Court explained that under *Darby*, since no statute or rule mandates administrative review of the denial of applications to adjust status to lawful permanent resident due to statutory ineligibility, statutory exhaustion was not required. *Id.* at 1232–33.

Tenth Circuit: In *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1055 n.3 (10th Cir. 1993), the Tenth Circuit noted in a footnote that, under *Darby*, a regulation requires exhaustion when it provides that the agency decision is not final if it is subject to an administrative appeal. In *Jech v. Dep’t of Interior*, 483 F. App’x 555, 560 (10th Cir. 2012), an unpublished decision, the Tenth Circuit held that exhaustion was mandatory under the relevant regulations.

Eleventh Circuit: In *Nat’l Parks Conservation Assoc. v. Norton*, 324 F. 3d 1229 (11th Cir. 2003), the Court discussed *Darby* in the context of the “finality” requirement of the APA. Additionally, in *Mejia Rodriguez v. USDHS*, 562 F.3d 1137, 1145 n.16 (11th Cir. 2009), the Eleventh Circuit explained in a footnote that an appellant challenging an adverse AAO decision is not required to request that the BIA reopen the removal proceeding.

D.C. Circuit: In *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384 (D.C. Cir. 1995), the Court determined that because an administrative appeal was optional, exhaustion prior to an APA suit was not required. *See also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (holding that the district court has no authority to require a party to exhaust when the relevant authority permits an appeal to the superior administrative authority, but does not require it); *United States v. Hughes*, 813 F.3d 1007, 1010 (D.C. Cir. 2016) (rejecting the government’s

exhaustion claim as it failed to identify a specific statute or regulation requiring exhaustion). In contrast, in *Marine Mammal Conservancy, Inc. v. Dep't of Agriculture*, 134 F.3d 409 (D.C. Cir. 1998), the Court held that exhaustion under the APA was required where regulations made exhaustion a prerequisite to judicial review and the finality of the ALJ decision was suspended pending the administrative appeal.