NATIONAL IMMIGRATION PROJECT

Lawyers for the Movement

Practice Advisory

Challenging U.S. Passport and N-600 Denials under 8 U.S.C. § 1503[1]

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I. Introduction

8 U.S.C. § 1503 provides pathways for individuals who were denied a right or privilege of nationality to challenge such denials in federal district court and obtain a declaratory judgment that they are indeed a citizen or national of the United States—by birth, naturalization, or derivative citizenship. These claims generally arise in the context of a passport denial or revocation, or a revocation or denial of a request for a certificate of citizenship (N-600).[2]

The statute provides specific procedures for raising claims to U.S. citizenship or nationality by persons both within and outside the United States. The pathway for seeking a declaratory judgment under 8 U.S.C. § 1503 is much clearer for individuals who are within the United States. For those outside the United States, the statute provides for a process to seek entry into the United States, 8 U.S.C. § 1503(b)–(c), to then pursue either a habeas action or a declaratory action under 8 U.S.C. § 1503(a).

This practice advisory will first focus on the requirements to bring an action under 8 U.S.C. § 1503(a) for individuals who are within the United States. This section will also review the limitations on Section 1503(a) actions, in particular for those who are currently in removal proceedings or where the issue of nationality or citizenship arose in or in connection with removal proceedings, unless removal proceedings are terminated.[3] The practice advisory will then discuss the complications faced by individuals outside the United States who have been denied a right or privilege on the basis that they are not a U.S. citizen. Finally, this resource will highlight when individuals outside the United States may want to instead pursue an action under the Administrative Procedure Act (APA).

Notably, there is a limited body of circuit-level case law interpreting the various requirements to bring and succeed in an action under Section 1503 or related action. Much of the circuit-level precedent arises in the U.S. Court of Appeals for the Fifth Circuit, which has issued several decisions that are unfriendly to plaintiffs, limiting the ability of individuals to bring suit under Section 1503 or pursue alternative remedies. In contrast, other U.S. courts of appeals have issued few or no binding decisions interpreting the statute. Given the lopsided development of circuit-level precedent, this resource attempts to identify where the Fifth Circuit alone has issued a binding decision on a given issue.

II. Requisites for suit under 8 U.S.C. § 1503(a)

8 U.S.C. § 1503(a) provides that any person *within* the United States who has been denied a right or privilege of citizenship can bring a federal action to obtain a declaratory judgment that they are

[2] For additional context on the problem of government revocation or denial of benefits or privileges of citizenship, especially in the U.S.-Mexico borderlands, as well as an extensive discussion of litigation strategies to challenge an agency's negative determination of citizenship, see Elizabeth Brodyaga, *Mexican Americans and the Southern Border: So You Think You Were Born Here? Prove it!!,* 17–06 Immigration Briefings 1 (2017).

[3] 8 U.S.C. § 1503(a). A discussion of how to litigate defenses of nationality or citizenship in removal proceedings is outside the scope of this practice advisory.

indeed a citizen or national. This section provides an overview of the requirements and limitations of bringing a Section 1503(a) action.

A. Where to File & Whom to Sue

For persons who are inside the United States, a Section 1503(a) action should be filed in the district where the plaintiff resides or claims residence.[4] This venue requirement is jurisdictional.[5] The proper defendant is the head of the agency that denied the right or privilege.[6] For passport denials, that agency head is the U.S. Secretary of State, and for N-600 denials the agency heads are the U.S. Secretary of Homeland Security or the Director of U.S. Citizenship and Immigration Services (USCIS).

B. Presence in the United States

Section 1503(a) provides that "any person who is within the United States" may file suit.[7] This requirement is legally distinct from whether an individual has been "admitted" into the United States, and on its face should be satisfied whenever an individual is on U.S. soil, including at a port of entry. However, the Fifth Circuit has held that applicants who are physically present on U.S. territory at a port of entry, but have not been admitted, are not within the United States for purposes of bringing a Section 1503(a) action.[8] Some Texas federal district courts have gone further, holding that individuals who are paroled into the United States are not "within" the country for purposes of jurisdiction over a Section 1503(a) action.[9]

C. Statute of Limitations

An action for a declaratory judgment under Section 1503(a) must be filed within **five years** of the final administrative denial of the right or privilege at issue.[10] Federal courts of appeals and district courts that have addressed this issue have held that an individual who has already received a putatively final denial of an application for a citizenship-related benefit or privilege more than five years in the past cannot "restart" the statute of limitations clock by filing a new application or by renewing a prior application through a motion to reconsider or reopen. Rather, the final denial of the first application is the relevant date for statute of limitation purposes.[11]

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[4] 8 U.S.C. § 1503(a).

[5] *Salinas v. Blinken*, No. 1:22-CV-134, 2023 WL 7165868, at *3 (S.D. Tex. Oct. 31, 2023) (citing *Flores v. Pompeo*, 936 F.3d 273, 276 n.2 (5th Cir. 2019)). While the Fifth Circuit has not defined the term "resides" in the context of Section 1503(a) actions, the Southern District of Texas has defined "resides" as "means to use a specific location as one's principal, actual dwelling place in fact, without regard to intent." *Id.* at *4 (quoting *Villafranca v. Pompeo*, 486 F. Supp. 3d 1078, 1083 (S.D. Tex. 2020)).

[6] 8 U.S.C. § 1503(a).

[7] *Id.*

[8] *See Hinojosa v. Horn,* 896 F.3d 305, 316 (5th Cir. 2018).

[9] *See Rocha v. Mayorkas*, 579 F. Supp. 3d 923, 931 (S.D. Tex. 2022).

[10] 8 U.S.C. § 1503(a). An individual can only file one N-600 request for a certificate of citizenship. 8 CFR § 341.5(e). Any filing after the first N-600 application must be a motion to reconsider or reopen the original N-600. *Id.*

[11] *See Gonzalez v. Limon*, 926 F.3d 186, 190 (5th Cir. 2019); *Henry v. Quarantillo,* 684 F. Supp. 2d 298, 307 (E.D.N.Y. 2010), *aff'd*, 414 F. App'x 363 (2d Cir. 2011); *Bensky v. Powell,* 391 F.3d 894, 898 (7th Cir. 2004); *Heuer v. U.S. Sec'y of State,* 20 F.3d 424, 426–27 (11th Cir. 1994) (per curiam).

An individual who files a Section 1503(a) action more than five years after a final administrative denial may argue that the five-year deadline is not jurisdictional and seek equitable tolling of the filing deadline.[12] Statutes of limitations are generally non-jurisdictional claim-processing rules and should only be treated as jurisdictional if Congress has clearly stated that the limitation in question is meant to be jurisdictional.[13] The language of Section 1503(a) provides no indication that Congress intended the five-year statute of limitations to serve as a jurisdictional limit. Thus, practitioners filing beyond the five-year deadline should consider equitable tolling arguments.

D. Final Administrative Denial

8 U.S.C. § 1503(a) requires a "final administrative denial" to bring suit. Generally, an agency action is "final" when the action (1) is one by which "rights or obligations have been determined" and (2) marks the "consummation" of the agency's decision-making process—i.e., is not "merely tentative or interlocutory."[14] An agency action may be final even where an individual has not exhausted available administrative appeals.[15]

Some U.S courts of appeals and district courts have required that the person filing suit first demonstrate exhaustion of available administrative remedies.[16] Notably, though, Section 1503(a) itself does not contain an exhaustion requirement, and not all courts have held that exhaustion of administrative remedies is required.[17]

Few courts have discussed what constitutes adequate exhaustion for purposes of a "final administrative denial" for Section 1503(a) review, and those that have engaged in that discussion have been imprecise and vague.[18] But the following should suffice to meet the "final administrative denial" requirement of Section 1503(a):

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[12] Equitable tolling is generally available to toll non-jurisdictional statutes of limitations in "extraordinary circumstances." *See Holland v. Florida,* 560 U.S. 631, 645–46, 649 (2010) ("A nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor of equitable tolling." (citation omitted)); *see also Tankoano v. U.S. Citizenship & Immigr. Servs.,* 652 F. Supp. 3d 812, 816 (S.D. Tex. 2023) (presuming without addressing the issue that equitable tolling would be available in a Section 1503(a) action). *But see Cardona v. Mayorkas*, No. 1:20-cv-132, 2021 WL 5242972 at *5 (S.D. Tex. 2021) (finding equitable tolling unavailable because five-year period is "jurisdictional") (citing *Gonzalez*, 926 F.3d at 188).

[13] *Wilkins v. United States*, 598 U.S. 152, 157 (2023); *see also United States v. Wong*, 575 U.S. 402, 409–10 (2015).

[14] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

[15] *See*, *e.g., Ortega-Morales v. Lynch,* 168 F. Supp. 3d 1228, 1234–42 (D. Ariz. 2016) (explaining the difference between finality, which "prevents courts from reviewing agency decisions that have no real effect," and exhaustion, which requires inter-agency review, before noting that Section 1503 only requires finality); *see also Darby v. Cisneros*, 509 U.S. 137, 144–45 (1993).

[16] *See Poole v. USCIS Pittsburgh Field Off.*, No. 24-1297, 2024 WL 3439777, at *1 (3d Cir. July 17, 2024) (per curiam) (citing *United States v. Breyer,* 41 F.3d 884, 892 (3d Cir. 1994)); *Rios-Valenzuela v. Dep't of Homeland Sec.,* 506 F.3d 393, 396 (5th Cir. 2007); *see also Harris v. Dep't of Homeland Sec.,* 18 F. Supp. 3d 1349, 1355–56 (S.D. Fla. 2014); *Place v. Dep't of Homeland Sec.*, No. 10-cv-781, 2010 WL 1416136, at *2 (D. Md. Apr. 6, 2010).

[17] Many decisions do not even address the exhaustion requirement, but at least one district court has examined the issue in depth and determined that Section 1503(a) does not require statutory or prudential exhaustion. *See Ortega-Morales,* 168 F. Supp. 3d at 1234–42 (finding an initial N-600 denial adequately final and holding that Section 1503(a) actions did not require either statutory or prudential exhaustion).

[18] In a recent Third Circuit unpublished decision applying published precedent that Section 1503(a) includes an exhaustion requirement, the Court seemingly collapsed exhaustion and finality into one concept. Here, the administrative action was a notice from USCIS that the agency was reopening its decision to approve Poole's

- an appeal to the USCIS Administrative Appeals Office (AAO) from a denial of an N-600[19];
- a passport revocation or denial letter.[20]

E. Preclusion of Other Remedies

Generally, district courts have held that Section 1503(a) is the exclusive remedy *for a person within the United States* to seek a declaration of citizenship or nationality, though most court of appeals have not ruled on this issue.[21] Because Section 1503(a) is the exclusive means of review, courts are precluded from reviewing similar claims brought under the Administrative Procedure Act (APA) or mandamus statute.[22] As such, we discourage practitioners from bringing these additional claims as the government's forthcoming motion to dismiss would protract the litigation unnecessarily. Importantly, the case law on alternative remedies for those *outside* the United States is not as clear, which will be discussed *infra* in Section III.B.

F. Interaction with Removal Proceedings

The statute provides that a Section 1503(a) action may not be "instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceedings of this chapter or any other act; or (2) is in issue in any such removal proceeding."[23] In practice, courts have generally interpreted this bar as follows:

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certificate of citizenship and that the agency intended to deny the certificate. In affirming the district court's dismissal of the case, the Third Circuit held that Poole "has not shown that he has exhausted his remedies *such* that there is a final administrative denial," because he did not claim that USCIS had reopened and denied the application. Here, the issue was that there was no final agency action—USCIS had only sent a notice—yet the Court termed it both an issue of exhaustion and finality. *Poole*, 2024 WL 3439777 at *1.

[19] 8 CFR §§ 341.6, 103.3(a); *see Rios-Valenzuela*, 506 F.3d at 396 (noting that petitioner had exhausted his administrative remedies by filing an N-600 and appealing its denial); *Ramos Funez v. Sessions*, No. 6:18-CV-06413-MAT, 2019 WL 4451484, at *5 (W.D.N.Y. Sept. 17, 2019) (same).

[20] The regulations do not provide for additional appeal or review of a passport denial or revocation where such denial or revocation was made on the basis that the applicant is not a U.S. national. *See* 22 CFR § 51.70(b)(5).

[21] Only one court of appeals—the Fifth Circuit—has directly addressed this question. *See Cambranis v. Blinken,* 994 F.3d 457, 466 (5th Cir. 2021). The D.C. Circuit has held in dicta that Section 1503(a) provides "an adequate avenue to assert [] citizenship claims" without directly addressing the requirements for an alternative remedy to preclude APA review. *See Xia v. Tillerson*, 865 F.3d 643, 655 (D.C. Cir. 2017). However, district courts have overwhelmingly held that Section 1503(a) provides an adequate remedy and precludes APA review of citizenship claims brought by those within the United States. *See, e.g., Marquez v. Pompeo,* No. 20-cv-3225*,* 2022 WL 43492, at *4 (D.D.C. Jan. 5, 2022) (collecting cases); *Dvash-Banks v. Pompeo,* No. 18-cv-523, 2019 WL 911799, at *6 (C.D. Cal. Feb. 21, 2019), *aff'd sub nom. E. J. D.-B. v. United States Dep't of State*, 825 F. App'x 479 (9th Cir. 2020); *Harris,* 18 F. Supp. 3d at 1359–60; *Esparza v. Clinton*, No. 6:12-cv-925, 2012 WL 6738281, at *1 (D. Ore. Dec. 21, 2012); *Raya v. Clinton*, 703 F. Supp. 2d 569, 575 (W.D. Va. 2010). *But see Valerio v. Limon*, 533 F. Supp. 3d 439, 458–64 (S.D. Tex. 2021) (holding that Section 1503(a) did not bar court from examining APA claims challenging the revocation or denial of declarations of citizenship where necessary witnesses to citizenship claim were deceased and plaintiffs would thus be unduly burdened by the evidentiary requirements of Section 1503(a)).

[22] Most of the case law in this area focuses on the preclusion of remedies for purposes of APA actions. However, the mandamus statute, 5 U.S.C. § 704, also provides for judicial review only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. *See Hassan v. Holder,* 793 F. Supp. 2d 440, 445–46 (D.D.C. 2011) (holding that mandamus review is not available where a plaintiff can bring a Section 1503(a) action); *see also Raya*, 703 F. Supp. 2d at 575.

[23] 8 U.S.C. § 1503(a).

Section 1503(a) action initiated before removal proceedings have begun: If an individual files an 8 U.S.C. § 1503(a) action and the government subsequently initiates removal proceedings, the individual may continue the Section 1503(a) action despite the ongoing removal proceedings.[24]

Individual currently in removal proceedings: If an individual is currently in removal proceedings, or is pursuing a direct appeal of a removal order, the individual is barred from bringing an action for a declaration of citizenship under 8 U.S.C. § 1503(a).[25] Rather, any claims to U.S. citizenship must be raised in the removal proceedings and any negative determination can only be challenged by filing a petition for review (PFR).[26]

Formerly in removal proceedings: The question of when a Section 1503(a) claim can be brought in cases where an individual was previously in removal proceedings, but such proceedings have concluded and all direct appeals have been exhausted or waived, presents a trickier question.

i. **Application filed during removal proceedings:** If a N-600 or passport application was filed during removal proceedings and the application was denied, a Section 1503(a) action challenging said denial after the termination of removal proceedings will likely face a motion to dismiss on the basis that the claim "arose by reason of, or in connection with any removal proceedings."[27]

   However, where the passport application is refiled or a motion to reconsider or reopen is filed on the previously denied N-600 *after* the termination of removal proceedings, most courts that have addressed the question have found that the Section 1503(a) claim is not barred.[28] As discussed in subsection iii below, however, a few district courts have taken a more restrictive view on applications filed after the termination of removal proceedings.

ii. **Application filed and denied *before* removal proceedings initiated:** Some district courts have found that where an application for a benefit or privilege was filed *and* denied before removal proceedings were initiated, and the removal proceedings have since terminated, a subsequent Section 1503(a) suit should not be barred.[29] However, at least one district court has held that in such a scenario, the individual must file a new application for a passport after the termination of removal proceedings *before* bringing suit under Section 1503(a).[30]

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[24] *Rios-Valenzuela,* 506 F.3d at 397.
[25] 8 U.S.C. § 1503(a)(2).
[26] *See* 8 U.S.C. § 1252(b)(5).
[27] 8 U.S.C. § 1503(a)(1); *see also Rios-Valenzuela,* 506 F.3d at 397.
[28] *Rios-Valenzuela,* 506 F.3d at 399 ("We do not read the exception as forever hanging an albatross around the neck of those who first raise citizenship as a defense in a removal proceeding. . . . [F]or example, once removal proceedings have run their full course and terminated, any future citizenship claim would not arise in those removal proceedings."); *see also Ortega v. Holder,* 592 F.3d 738, 745 (7th Cir. 2010) (finding no jurisdictional impediment to a Section 1503(a) action where plaintiff reinstated administrative action after termination of removal proceedings).
[29] *See Raya*, 703 F. Supp. 2d at 574–75 (collecting cases).
[30] *See Garza v. Bennett*, No. 17-cv-158, 2017 WL 7248899, at *7–9, *8 n.7 (S.D. Tex. Oct. 28, 2017) (interpreting *Rios-Valenzuela,* 506 F.3d at 398). This decision does not address the requirements for a petitioner whose claim is based on a denied N-600. Presumably, in a court that follows the logic of *Garza v. Bennett*, a petitioner would need to file a motion to reopen or reconsider the previously denied N-600 after the termination of removal proceedings.

iii. **Application filed *after* removal proceedings terminated:** Most courts have found that an application for a benefit or privilege filed *after* removal proceedings are terminated is a proper basis for a Section 1503(a) claim.[31] However, at least two district courts have held that they lacked jurisdiction even over Section 1503(a) claims based on an N-600 filed after the termination of removal proceedings.[32] These outlier courts instead held that the plaintiff's only route to judicial review of citizenship was to file a motion to reopen removal proceedings and then appeal any denial first to the Board of Immigration Appeals, and then as a PFR.[33]

G. Standard of Review and Burden of Proof

Federal district courts exercise *de novo* review over determinations of an individual's citizenship claim.[34]

Most courts of appeals have not determined the precise burden of proof structure that applies in Section 1503(a) actions. Generally, however, practitioners bringing Section 1503(a) claims report that the burden has been on the plaintiff to show citizenship by a "preponderance of the evidence"—i.e., that it is more likely than not—that he or she is a United States citizen.[35] But where there was a valid N-600, naturalization certificate, or passport previously issued, practitioners should argue for a stricter standard on the government using the burden-shifting framework wherein the plaintiff never has to prove that he or she is a United States citizen, but rather must only make a prima facie showing of citizenship before shifting the burden to the government to establish by "clear, unequivocal, and convincing evidence" that the individual is not a U.S. citizen.[36]

Decisions from the Fifth Circuit suggest that the burden of proof remains with the plaintiff throughout a Section 1503(a) action and does not shift to the government.[37] The D.C. Circuit, however, has held that "[t]he threshold showing required of a section 1503 plaintiff is minimal," requiring the plaintiff only to make a prima facie showing of citizenship, before shifting the burden to the government to prove by clear and convincing evidence that the plaintiff is not a U.S. citizen.[38] The D.C. Circuit based its holding on *Perez v. Brownell,* where the Supreme Court held

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[31] *See Rios-Valenzuela,* 506 F.3d at 399; *Ortega,* 592 F.3d at 745.
[32] *See Boker v. Barron*, No. 22-CV-703, 2023 WL 5879592, at *3 (D. Md. Sept. 11, 2023); *Nguyen v. U.S. Citizenship & Immigr. Servs.*, No. 1:09-CV-2211, 2010 WL 3521910, at *3–4 (M.D. Pa. Aug. 31, 201).
[33] *Boker,* 2023 WL 5879592 at *3; *Nguyen,* 2010 WL 3521910, at *5 n.8.
[34] *See, e.g., Mathin v. Kerry,* 782 F.3d 804, 805 (7th Cir. 2015), *as amended on denial of reh'g* (July 7, 2015); *Hizam v. Kerry,* 747 F.3d 102, 108 (2d Cir. 2014); *Richards v. Sec'y of State, Dep't of State,* 752 F.2d 1413, 1417 (9th Cir. 1985); *Reyes v. Neelly,* 264 F.2d 673, 674 (5th Cir. 1959).
[35] *Martinez v. Sec'y of State,* 652 F. App'x 758, 761 (11th Cir. 2016); *Mathin,* 782 F.3d at 807; *Patel v. Rice*, 403 F. Supp. 2d 560, 562 (N.D. Tex. 2005), *aff'd,* 224 F. App'x 414 (5th Cir. 2007); *De Vargas v. Brownell,* 251 F.2d 869, 870–71 (5th Cir. 1958); *Delmore v. Brownell,* 236 F.2d 598, 600 (3d Cir. 1956); *Mah Toi v. Brownell*, 219 F.2d 642, 643 (9th Cir. 1955); *Lue Chow Kon v. Brownell*, 220 F.2d 187, 189 (2d Cir. 1955).
[36] *See*, *e.g.*, *Xia*, 865 F.3d at 656 (passport revocation context).
[37] *Patel*, 403 F. Supp. 2d at 563 n.2 (citing *Reyes,* 264 F.2d at 675).
[38] *Xia*, 865 F.3d at 656; *see also Alzokari v. Dep't of State*, No. 20-CV-937 (TSC), 2021 WL 4622459, at *3 (D.D.C. Oct. 7, 2021) (emphasizing that the D.C. Court of Appeals held that the burden-shifting framework—and the "minimal" burden placed on plaintiffs—applies in Section 1503(a) claims).

that in a Section 1503(a) case, "the individual need make only a prima facie case establishing his citizenship by birth or naturalization" before the burden of proof shifts to the government to respond with "clear, unequivocal, and convincing evidence" rebutting the plaintiff's showing of citizenship.[39] Outside of the Fifth Circuit, therefore, practitioners should argue that the burden of proof shifts to the government once the plaintiff has established a prima facie showing of citizenship.[40]

District courts in jurisdictions where the court of appeals have not ruled on the burden of proof have often been able to evade ruling on the issue by finding that a plaintiff is a U.S. citizen within a Section 1503(a) challenge irrespective of which burden of proof applies.[41] We therefore recommend that practitioners outside of the Fifth Circuit and D.C. Circuit continue arguing for a burden-shifting framework, but submit all the evidence available, such that a court could find that the client is a U.S. citizen under either standard.

H. Discovery, Trial Procedure, and Evidence

Discovery and a bench trial are available in Section 1503(a) actions. Because Section 1503(a) actions are subject to *de novo* review, the plaintiff is not bound by what was submitted to the agency or an administrative record. This means that both parties can conduct depositions under oath of potential witnesses, obtain documentary evidence, and present live testimony in front of a judge. All of the evidence obtained in discovery and used either in a motion for summary judgment or at trial is aimed at one thing: to show that the plaintiff is a U.S. citizen, under either the preponderance of the evidence standard or burden-shifting framework. A judge weighs the evidence, as well as the credibility of any witness testimony at deposition or trial, to make the final determination of citizenship.[42]

The district court's *de novo* review and the plaintiff's ability to present live testimony can be to the plaintiff's benefit, especially where the underlying administrative record is sparse and contains contradictory information, as live, credible testimony can be used to explain away the contradictions. However, the *de novo* standard does place an evidentiary burden on the plaintiff that may be difficult to meet where testifying family members are unavailable to testify, for instance if they have passed away.

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[39] *See Perez v. Brownell,* 356 U.S. 44, 47 n.2 (1958); *see also Xia*, 865 F.3d at 652; *Delmore,* 236 F.2d at 600.
[40] *See also Moncada v. Blinken*, 680 F. Supp. 3d 1190, 1204 (C.D. Cal. 2023) (applying the burden-shifting framework wherein an individual only bears the initial burden of showing a prima facie claim of citizenship before shifting to the government to prove the individual is not a citizen by clear and convincing evidence).
[41] *See*, *e.g.*, *Moran v. Mayorkas*, No. 21-CV-2323 (SRN/ECW), 2024 WL 1653742, at *7 (D. Minn. Apr. 17, 2024) ("The Court, while *skeptical* of the Defendants' proposed evidentiary threshold [preponderance of the evidence], need not determine the appropriate standard of proof for the purpose of resolving this case. Because the Court ultimately finds that Mr. Valadez Moran has demonstrated he is more likely than not a U.S. citizen by birth, the Court concludes that he would prevail under either standard." (emphasis added)); *Arthur-Price v. Blinken*, 690 F. Supp. 3d 916, 924 n.4 (N.D. Ill. 2023) ("[B]ecause the Court concludes that it is more likely than not that Arthur-Price was born in the United States, the Court need not determine whether a lower burden of persuasion should apply.").
[42] *See Moran*, 2024 WL 1653742, at *4–5 ("The Court finds, having weighed and assessed the credibility of all of the evidence before it," that it is more likely than not that Moran is more likely than not a U.S. citizen by birth).

Section 1503(a) actions are inherently fact-specific adjudications, and so there likely will not be a court decision on-point with the facts of a practitioner's case. Practitioners must therefore review the individual's claim and find where the weaknesses in the story lies, find what documentary and testimonial evidence the individual can gather to submit to the court to explain away the weaknesses in the case, and then present the information to the court in such a way that the court finds the evidence credible.

Practitioners should consider what documentary and testimonial evidence is available. When doing so, practitioners should keep in mind that the government will be assessing the same documentary and testimonial evidence, and so practitioners should work closely with their clients to understand all potential evidence, both good and bad. As for documentary evidence, "primary evidence of birth in the United States" is a birth certificate filed "within one year of the date of birth[.]"[43] "A contemporaneously filed foreign birth record creates a presumption of alienage,"[44] and some courts will afford less evidentiary weight to delayed birth certificates than those that are contemporaneously filed.[45] The lack of a birth record, however, is not dispositive,[46] as secondary documentary evidence may also be submitted.[47] Secondary evidence may include, but is not limited to, "hospital birth certificates, baptismal certificates, medical and school records, certificates of circumcision, other documentary evidence created shortly after birth but generally not more than 5 years after birth, and/or affidavits of persons having personal knowledge of the facts of the birth."[48] Testimonial evidence, whether the plaintiff's, a family member, midwife, community member, or other individual, can be used to tell the individual's story, with the judge determining each witness's credibility. Practitioners may also consider deposing individuals from bureau of vital statistics offices, particularly in cases where questions around the recording of birth certificates might arise.[49] Live testimony will be given at trial. However, it is prudent to gather a witness's testimony in an affidavit or deposition that can be submitted to the court in place of live testimony during trial if the witness becomes unavailable.[50] Lastly, depending on the specific circumstances of the case, practitioners might consider engaging on expert who can speak on various practices, such as how birth certificates were recorded, the use of midwives, and the need for Mexican birth certificates for school and vaccinations, for instance.

It is useful to review case law on granted and denied Section 1503(a) actions to see how individuals successfully or unsuccessfully combined documentary and testimonial evidence. In *Moran*, 2024 WL 1653742, the plaintiff successfully met both the lower burden-shifting framework and the higher preponderance of the evidence standard and convinced the court that it was more likely than not that he is a U.S. citizen. Here, Adrian Moran claimed that he was a U.S. citizen as his mother,

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[43] 22 CFR § 51.42(a).
[44] *Sanchez v. Kerry*, No. 4:11-CV-02084, 2014 WL 2932275, at *4 (S.D. Tex. June 27, 2014), *aff'd*, 648 F. App'x 386 (5th Cir. 2015).
[45] *Trejo v. Blinken*, No. 1:22-CV-047, 2024 WL 2091356, at *3 (S.D. Tex. May 9, 2024).
[46] *Mathin*, 782 F.3d at 807.
[47] 22 CFR § 51.42(b).
[48] *Id.*
[49] Such testimony is particularly useful in the case where the individual was born outside the hospital with the help of a midwife.
[50] *See*, *e.g.*, *Trejo*, 2024 WL 2091356, at *1 n.1 (submitting the midwife's testimony via deposition because she passed away before she was able to testify at the bench trial); *Arthur-Price*, 690 F. Supp. 3d at 917 (admitting into evidence a letter from plaintiffs' parents' friend that was signed under penalty of perjury because she passed away prior to trial).

Juana Moran, was born in the United States and had lived in the country the requisite amount of time before giving birth to Moran abroad. The government had a birth record from the Mexican government for Juana Moran on file, with the place of birth in Texas, but there was no birth record or hospital record from Texas. The government also had a sworn statement from Juana Moran that she was not born in the United States. However, Adrian Moran introduced fifteen exhibits and presented live testimony from himself and his mother at the bench trial. Juana Moran testified about the circumstances surrounding the sworn statement she gave the government, and the court found the sworn statement not credible in the face of various other consistent credible testimony over many years and the circumstances surrounding the statement. Adrian Moran also submitted secondary evidence regarding his mother's citizenship, including an affidavit from her father, a baptism record indicating the baptism took place in Texas, academic records from a high school in Texas, standardized testing results from Texas, childhood immunization records from Texas, and the results of his mother's polygraph test. Despite the lack of a birth certificate from America, Adrian Moran was able to present sufficient credible evidence to convince the court that it was more likely than not that he is a U.S. citizen by virtue of his mother's birthright citizenship.

For another brief example, in *Trejo*, 2024 WL 2091356, the plaintiff was similarly able to meet the preponderance of the evidence standard despite the presence of a foreign birth certificate and a lack of a domestic birth certificate. Here, Trejo's parents credibly testified, over the course of many years, that the foreign birth record was fraudulently obtained. Additionally, there was no birth certificate from Texas because Trejo was not born in a hospital. But Trejo submitted as evidence records from the City of Brownsville showing that someone—likely a midwife—had submitted a request for a Texas birth certificate days after Trejo was born, that contained a "Received" stamp and date on the paper, and that the City Secretary had also prepared an internal memorandum a few years later stating that a Texas birth certificate had been filed for Trejo, and the certificate should have been issued, but "unknown obstacles stymied" that process.[51]

What these examples show is that it is critical that practitioners critically examine their client's case, find every possible inconsistency or hole in the story, and then find, if possible, the documentary secondary evidence and sworn testimony that is credible and can explain away any potential issue.[52]

I. Attorney's Fees

The Equal Access to Justice Act (EAJA) authorizes payment of attorney's fees and costs in litigation against the government where the plaintiff substantially prevailed and the government's

[51] *See also Arthur-Price*, 690 F. Supp. 3d at 917– 27 (describing in detail the secondary evidence submitted, the evidence examined, and ultimately finding the plaintiff was more likely than not a U.S. citizen despite a delayed birth certificate and inconsistent evidence).

[52] *Compare id.* at 919 (describing a letter submitted from the Children's Hospital in Oakland detailing that the hospital had destroyed "all records for the time period" of plaintiff's birth "in accordance with state and hospital document retention policies," before finding it was more likely than not that plaintiff had been born in Oakland), *with Mathin*, 782 F.3d at 805 (noting that plaintiff had not submitted any evidence from the hospital to confirm that records from the time period at issue had been destroyed in holding that the district court's finding that plaintiff had not presented sufficient evidence to show he was born in the U.S. was not clearly erroneous).

position was not substantially justified.[53] Practitioners should include a request for attorney's fees as part of the prayer for relief in the complaint.[54]

III. Individuals Outside the United States

The previous sections addressed the procedure and hurdles for individuals inside the U.S. who seek a declaration of citizenship. The process is significantly more complicated for individuals who seek such a declaration but have already been deported or are otherwise outside the United States.

A. Process for Seeking Declaration of Citizenship under 8 U.S.C. §§ 1503(b)–(c)

8 U.S.C. §§ 1503(b)–(c) ostensibly provide a process for individuals who are outside the United States to seek entry for the purpose of filing a habeas action and/or a declaratory action under 8 U.S.C. § 1503(a). This section offers an overview of the process laid out by the statute and potential complications.[55]

First, as is the case under Section 1503(a), an individual outside the United States must seek a right or privilege as a national of the United States and be denied said right or privilege on the basis of non-nationality.[56] Following such denial, an individual cannot immediately pursue suit for a declaratory judgment. Rather, he or she must apply to a consular official in the country where the individual resides for a certificate of identity.[57] However, not everyone with a claim to citizenship is eligible for a certificate of identity. The statute limits the certificate of identity to persons who have previously been present in the United States or persons under 16 years of age who were born abroad to a U.S. citizen parent.[58] Before issuing a certificate of identity, the consular official must determine that the applicant has a good faith belief that he or she is a national of the United States and that there is a "substantial basis" for such a claim.[59]

If the consular official denies the application for a certificate of identity, the applicant may appeal such denial to the Secretary of State.[60] The appeal may be submitted either directly to the consular official who issued the initial denial or to the Office of Consular Affairs.[61] If the Secretary of State denies the appeal, that denial can then be challenged in U.S. district court through a habeas proceeding.[62]

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[53] 28 U.S.C. § 2412(d); 5 U.S.C. § 504.

[54] *See* American Immigration Council, National Immigration Litigation Alliance & National Immigration Project, *Practice Advisory: Requesting Attorneys' Fees Under the Equal Access to Justice Act* (Mar. 23, 2021), https://nipnlg.org/work/resources/requesting-attorneys-fees-under-equal-access-justice-act.

[55] The Sections 1503(b)–(c) process has rarely been used, and there is no authoritative government source that establishes exactly what should or will happen when an individual follows the procedures outlined in Sections 1503(b)–(c). As such, individuals who attempt to follow the statutory requirements may encounter a different process or treatment when they seek a certificate of identity and then present themselves for entry at the border.

[56] 8 U.S.C. § 1503(b).

[57] *Id.*; *see also* 22 CFR § 50.11; 7 FAM 1150 App. H(a)–(c).

[58] 8 U.S.C. § 1503(b).

[59] 7 FAM 1170 App. H(a)(2).

[60] 7 FAM 1190 App. H.

[61] *Id.*

[62] *Hinojosa,* 896 F.3d at 312.

If the consular official grants a certificate of identity, the individual may use the certificate to travel to a U.S. port of entry and seek admission.[63] The individual will be treated as an applicant for admission and will be subject to the inadmissibility provisions of the Immigration and Nationality Act, found at INA 212, or 8 U.S.C. § 1182.[64] At this point, immigration officers may either admit the person or find the person inadmissible and detain and place them in removal proceedings.[65] If the person is admitted, they can then seek a declaratory action under Section 1503(a), as described above.

Individuals arriving at the border without a valid visa or passport may be treated as inadmissible for not having proper entry documents and thus subjected to expedited removal.[66] Individuals subjected to an expedited removal order who make a claim to citizenship should have an opportunity to have their claim reviewed by an immigration judge.[67]

If an immigration judge determines that an individual is a U.S. citizen—or is otherwise admissible on another basis—the judge should terminate proceedings and release the individual into the United States, where he or she can pursue an action under Section 1503(a) to obtain a declaration of citizenship.[68]

If the Immigration Judge has made a final determination of inadmissibility—which may result in the individual being removed—the individual can then pursue judicial review of the inadmissibility determination only through a petition for habeas corpus.[69] In habeas proceedings, an individual can raise the citizenship claim with the court.[70]

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[63] 8 U.S.C. § 1503(c)

[64] *Id.; see also* 7 FAM 1160 App. H(b)(6).

[65] 8 U.S.C. § 1255(b)(2)(A). If an individual is treated as an "applicant for admission" and placed in removal proceedings, the individual then must establish that he or she is "clearly and beyond doubt entitled to be admitted and []not inadmissible." 8 U.S.C. 1229a(C)(2). In the case of individuals claiming citizenship as the basis for admission, this standard requires them to establish citizenship "clearly and beyond doubt"—a higher standard than the "preponderance of the evidence" or prima facie burden required to obtain a declaratory judgment under Section 1503(a). This means that such individuals have a higher burden of proving their claim of citizenship, and accordingly will need to present stronger evidence—testimonial and documentary evidence—to prove their claim. And to reemphasize, because these individuals are seen as applicants for admission, they could remain detained throughout the ensuing proceedings.

[66] 8 U.S.C. § 1182(a)(7); *Id.* § 1225(b)(1)(A)(i); *see also* Petition for Writ of Certiorari, *Hinojosa v. Horn* (No. 19-461) at 20–21, *cert. denied,* 139 S. Ct. 1319 (2019) (outlining practical hurdles inherent in applying for admission under Section 1503(c)).

[67] 8 CFR § 235.3(b)(5)(iv).

[68] *See Hinojosa*, 896 F.3d at 317–318 (Dennis, J., dissenting) (describing this onerous process); *see also* 8 CFR § 235.3(b)(5)(iv) (where an immigration judge determines that an individual placed in expedited removal proceedings is a citizen, the immigration judge should terminate proceedings and vacate the expedited removal order).

[69] 8 U.S.C. § 1503(c); *see also* Petition for Writ of Cert., *Hinojosa* (No. 19-461) at 21.

[70] Although the statute clearly authorizes raising a citizenship claim through a habeas proceeding, there are no contemporary examples of this happening. *See Rusk v. Cort*, 369 U.S. 367, 379 (1962) (citing S. Rep. No. 1137 82d Cong., 2d Sess. at 50), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). As such, we cannot describe how a court will treat such a claim, or what the court's power is. If practitioners plan on bringing this claim, please reach out to Michelle Mendez at michelle@nipnlg.org.

Advocates have raised concerns that the Sections 1503(b)–(c) procedure is highly burdensome, confusing, and prejudicial, as it potentially subjects individuals claiming citizenship to removal proceedings and detention and does not provide a clear or timely process for obtaining judicial review of the citizenship claim.[71] Given the hurdles and uncertainties posed by this procedure, advocates may want to pursue judicial review of citizenship claims through alternative avenues, which are discussed in the following section.

B. Alternative Avenues to Obtain Judicial Review of Denials of Citizenship from Outside the United States

Given the complications entailed in seeking review under Sections 1503(b)–(c), individuals outside the United States may wish to consider filing suit under the APA to obtain judicial review of any agency denial of a benefit or privilege of citizenship.

In 1962, the Supreme Court held in *Rusk v. Cort* that the procedures laid out in Sections 1503(b)–(c) were unduly burdensome and not an adequate alternative to review under the APA.[72] The *Rusk* court held that it would confound congressional intent to find that "a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States."[73] Under *Rusk,* APA review of agency determinations of non-citizenship should remain available notwithstanding 8 U.S.C. §§ 1503(b)–(c).

The Fifth Circuit, however, has distinguished *Rusk* and held that individuals outside the country making a claim to a judicial determination and declaration of citizenship who do not follow the procedure laid out in Sections 1503(b)–(c) risk a court determination that their claims are barred.[74] In *Hinojosa v. Horn,* the Fifth Circuit examined the cases of two individuals who, while residing in Mexico, sought review of the State Department's denial or revocation of their passports via a complaint for declaratory and injunctive relief under the APA and petition for habeas corpus.[75] The court held that Sections 1503(b)–(c) provide an adequate alternative remedy to APA review, and thus precluded the plaintiffs from seeking review of their claims to citizenship under the APA.[76] The Fifth Circuit concluded further that by failing to follow the procedure laid out in Sections 1503(b)–(c), the plaintiffs had not exhausted available administrative remedies and so were unable to seek habeas relief.[77]

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[71] *See* Petition for Writ of Certiorari, *Hinojosa v. Horn* (No. 19-461) at 20–21, *cert. denied,* 139 S. Ct. 1319 (2019); Elizabeth Brodyaga, *Mexican Americans and the Southern Border: So You Think You Were Born Here? Prove it!!* at 11–12.

[72] 369 U.S. at 374–75, 379.

[73] *Id.* at 375.

[74] *Hinojosa,* 896 F.3d at 310–16. *But see Valerio*, 533 F. Supp. 3d at 461–64 (holding, in the context of claims brought by plaintiffs within the U.S., that *Hinojosa*'s case-specific analysis did not bar a court from finding that APA claims concerning declarations of citizenship were barred in all instances).

[75] *Hinojosa,* 896 F.3d at 310. Both plaintiffs whose claims were examined by the Fifth Circuit in *Hinojosa* filed their complaints while standing on U.S. soil outside a port of entry on the southern border. One plaintiff, Villafranca, also brought a claim under 8 U.S.C. § 1503(a), which the Fifth Circuit rejected on the basis that she was not "within the United States." *Id.* at 315–16; *see also supra* n.8.

[76] *Id.* at 310–14. *But see id.* at 317–20 (Dennis, J., dissenting) (finding, in dissent, that Sections 1503(b)-(c) do not provide an adequate alternative remedy to APA review).

[77] *Id.* at 314–15.

Rusk's holding that individuals residing outside the United States may bring an APA claim to challenge their denial of citizenship may remain good law outside of the Fifth Circuit. Notably, two district courts in the jurisdiction of the D.C. Circuit have held that *Rusk* is still good law and that Sections 1503(b)–(c) do not provide an adequate remedy so as to preclude APA review of agency citizenship determinations where plaintiffs are outside the United States.[78] Thus, these courts have allowed APA suits to proceed rather than requiring plaintiffs to comply with the burdensome and complex process laid out in Sections 1503(b)–(c).[79]

Practitioners considering an APA suit challenging an agency's denial of a benefit or privilege of citizenship may want to consider potential downsides to seeking APA review—notably that, in suing under the APA, review is presumptively limited to the administrative record.[80] For this reason, where possible, practitioners should submit detailed evidence as part of any administrative appeal of a denial to create a stronger administrative record for APA review.

A reviewing court may find that its remedial power under the APA is limited and the only remedy for a finding that an agency acted unlawfully is remand to the agency, not a declaration of citizenship.[81] However, the Supreme Court held in *Rusk* that "a declaratory judgment is available as a remedy to secure a determination of citizenship" even outside of Section 1503(a) claims; practitioners can rely upon this language for the proposition that a declaration of citizenship is an available remedy for an action brought under the APA and the Declaratory Judgment Act.[82] Practitioners should carefully craft their APA complaints to identify the negative determination of citizenship as part of the final agency action being challenged.[83]

IV. Conclusion

8 U.S.C. § 1503 provides individuals who are denied a right or privilege of nationality with pathways to seek a declaratory judgment that they are a citizen or national of the United States. Section 1503(a) provides the procedures for individuals currently residing within the United

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[78] *Gonzalez Boisson v. Pompeo*, 459 F. Supp. 3d 7, 14 (D.D.C. 2020); *Chacoty v. Pompeo,* 392 F. Supp. 3d 1, 12 (D.D.C. 2019).

[79] *Gonzalez Boisson*, 459 F. Supp. 3d at 14; *Chacoty*, 392 F. Supp. 3d at 12.

[80] For an overview of the requirements to bring suit under the APA, see American Immigration Council, National Immigration Litigation Alliance & American Bar Association, *Practice Advisory: Immigration Lawsuits and the APA: The Basics of a District Court Action* (Sept. 22, 2021), https://immigrationlitigation.org/wp-content/uploads/2021/09/2021.09.22-APA-FINAL.pdf. The presumption that the review is limited to the administrative record may be rebutted. *See*, *e.g.*, *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1081–82 (7th Cir. 2016) ("An exception exists if a plaintiff seeking discovery can make a significant showing that it will find material in the agency's possession indicative of bad faith or an incomplete record."). The incomplete record exception may be particularly useful in obtaining extra-record discovery in passport revocations or denials, because the Department of State may have records relating to the individual that are not within the record. *See* Brodyaga, *supra* n.2 (discussing the "suspicious birth attendant" list).

[81] *See Gonzalez Boisson v. Pompeo,* No. CV 19-2105 (JDB), 2020 WL 4346913, at *4 (D.D.C. July 29, 2020).

[82] *Rusk,* 369 U.S. at 372.

[83] For additional suggestions on how to frame APA suits seeking determinations of citizenship to achieve declarations of citizenship, see Brodyaga, *supra* n.2, (noting that an APA claim may be of particular importance in passport revocation situations, because the Department of State bears the burden of proving that the individual is not a citizen, rather than the individual as in Section 1503(a) proceedings).

States, whereas Sections 1503(b)–(c) applies to those residing outside the U.S. Although this statute provides a critical tool for individuals to challenge denials of a right or privilege of nationality, the statute imposes stringent requirements, particularly for those outside the country, and there is minimal case law and limited interpretive resources available to guide practitioners. It is therefore important for practitioners to follow the requirements of the statute; ascertain whether there is relevant case law in their particular circuit; gather compelling and credible documentary and live testimony regarding the claim; and, where the court has not ruled on certain issues such as the relevant burden of proof or exhaustion, advocate for the position most friendly to the plaintiff.