

## FEDERAL LITIGATION TO ADDRESS USCIS ADJUDICATION DELAYS

With unprecedented delays in USCIS adjudications, federal litigation needs to be part of every immigration lawyer's practice.

There are 2 main causes of action for immigration delay lawsuits:

- 1) Mandamus—for extraordinary delays. A Petitioner can be said to be aggrieved only when they are denied a legal right by someone who has a legal duty to do something and abstains from doing it.

The Mandamus Act gives district courts jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. A federal court will entertain a petition for writ of mandamus only when "(1) the petitioner has shown a clear right to the relief sought; (2) the respondent has a clear duty to do the particular act requested by the petitioner; and (3) no other adequate remedy is available. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); [http://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/mandamus\\_actions\\_avoiding\\_dismissal.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/mandamus_actions_avoiding_dismissal.pdf).

- 2) APA for delays that are unreasonable

Section 555 of the APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). With some exceptions, any person "adversely affected or aggrieved" by agency action, including a "failure to act," or "unreasonable delay," can seek judicial review of such action or inaction when the action is a "final agency action for which there is no other adequate remedy in a court," but judicial review is not available when "(1) statutes preclude judicial review; or (2) agency action is committed to

agency discretion by law." 5 U.S.C. §§ 701-706;

Courts also regularly apply the six factors set forth in *Telecomm Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("TRAC").

(1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. Although the TRAC factors are widely cited with regard to whether a court should issue mandamus to compel agency action, courts have also been quick to point out that "mandamus is a drastic remedy, suitable only in extraordinary situations. Courts often cite to the TRAC factors when issuing Mandamus confusing the APA cause of action with the Mandamus cause of action.

Cases that would be good cases to file Mandamus/APA claims on

- 1) When the statute or regulation requires processing in a specific time period (L 30 days, 751 and 829 90 days), and adjudication has well exceeded this –couple delays with the fact that conditional residence was meant to be a 2 year period not a 5 year period....

Delays in processing conditional residence removal results in delayed naturalization because USCIS won't naturalize a conditional resident. Delays can abrogate the statutory

3 year period of residence required for naturalization if married to a U.S.C. and defeat the intent of the naturalization statute.

2) Where the statutory scheme is completely abrogated because of the delay. A good example of this is F cos to H where the F loses cap gap employment on September 30. Clearly the intent of the regulation was to provide continuity of employment which is defeated by the delay of the adjudication of the H petition.

3) Where the law requires a person to have proof of residence and USCIS will not provide it  
Permanent residents are legally required to carry their green card with them if age 18 or older. Section §264(e) of the Immigration and Nationality Act states that all permanent residents must have “at all times” official evidence of permanent resident status. A photocopy is not acceptable. If found guilty of this misdemeanor, the penalty set by law is a fine of up to \$100 and up to 30 days in jail.

--processing for I-90 and no evidence of residence given and attempts at getting evidence of residence through 800 number fail (detail the 800 absurd requirements)

--751/829 receipt has expired and no evidence of residence given

--court grant of residence, and no evidence of residence given

(for all of these show attempts to secure evidence of residence)

Courts want to be the last option, not the first.

4) For naturalization delayed cases, there are 2 causes of action

--Mandamus

--336(b)-this can only be used where the interview took place more than 120 days ago.

There is an advantage of 336(b) complaint as it divests USCIS of jurisdiction to deny the natz. 336(b) asks the Court for de novo review of the naturalization. Normally, the

complaint requests both Mandamus and 336(b), as sometimes the Court will grant the Mandamus and not the 336(b). Section 336(b) divests USCIS of jurisdiction to adjudicate the naturalization application.

5) Cases pending beyond normal processing times, spell out TRAC factors

--large fees paid for the service of an adjudication set out the fees and the rational for USCIS raising them. Remind Court that USCIS is a fee-funded agency and Plaintiff is a fee-paying customer (USCIS has stripped “customer” and “service” from its mission statement). Cite from the Federal Register for the most recent fee increase. The F.R. includes estimated time to adjudicate each type of case.

<https://www.federalregister.gov/documents/2016/10/24/2016-25328/us-citizenship-and-immigration-services-fee-schedule>

--Sense of congress that immigrant benefits be processed in 180 days, nonimmigrant benefits in 30 days 8 U.S.C. §1571(b).

--The overall average case processing time surged by **46 percent** over the past two fiscal years and **91 percent** since FY 2014. Case processing times increased substantially in FY 2018 and FY 2019 even as case receipt volume appeared to markedly decrease.

-- <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-uscis-processing-delays>; AILA Doc. No. 19012834 (January 30, 2019) <https://egov.uscis.gov/processing-times/historic-pt> (published 3/31/19 and shows average processing times since 2015) <https://www.oig.dhs.gov/sites/default/files/assets/2018-03/OIG-18-58-Mar18.pdf> (OIG says USCIS processing times are wrong).

--any humanitarian factors (stepchildren are in another country IV processing and can't be reunited with biological parent until biological parent adjusts, terminal illness and estate reasons for needing to become a USC before death, humanitarian factors might

include state laws that place foreign nationals in stays authorized by the Attorney General in jeopardy if they are encountered by state officials, ie. Florida.

--the failure to be able to renew a driver's license where driving is a must for employment and parenting

--always detail the efforts you have made to resolve the case

How many 800 number calls? How much time on hold? How many times disconnected?

How many call backs did you miss as they can happen anytime day or night within 72 hours or even longer. Mention the new case inquiry system is useless, if appropriate.

--ombudsman inquiries, yes make them

--congressional inquiries

--if you can, show that cases filed much more recently were adjudicated than yours

--mandamus is to obtain an adjudication, not to get a particular adjudication. Thus, mandamus can result in a NOID, RFE or denial.

Don't be afraid to go into Federal Court. Mandamus is a great place to start!