

MANDAMUS AND UNREASONABLE DELAY LITIGATION: WHEN ALL ELSE FAILS

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Authority

JURISDICTION

- Jurisdiction under 28 U.S.C §1331 federal question
- Mandamus Statute, 28 U.S.C. 1361

CAUSE OF ACTION

- 28 U.S.C. §1361 action to compel officer of U.S. to perform duty
- APA, 5 U.S.C. §555(b), within a reasonable time, agency shall conclude matter

Mandamus vs. APA Delay

- Mandamus is to compel an agency to perform an act that it has a duty to perform. Generally, for extraordinary delays.
 - Clear right of plaintiff to the requested relief
 - Plaintiff within “zone of interests” of statute
 - Duty of government to adjudicate

Mandamus vs. APA Delay

cont'd.

- No other adequate remedy available
 - e.g., adjustment of status can be renewed in removal proceedings
- APA is to seek redress for unreasonable delays. Courts use TRAC factors (Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984))

What is a Reasonable Time TRAC Factors

- 1) whether the time an agency takes to render a decision is governed by the rule of law;
- 2) where Congress has provided a timetable or other indication of the speed in which it expects an agency to act, then the enabling statute and statutory scheme may supply content for this rule of reason;
- 3) delays in the realm of economic regulation are less tolerable when human health and welfare are at stake;

What is a Reasonable Time TRAC Factors

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- 4) consideration of the effect of expediting delayed action on agency actions of higher or competing priority;
- 5) the nature and extent of the interests prejudiced by delay; and
- 6) the impropriety of agency lassitude is not required to find that agency action has been unreasonably delayed.

Recommended Steps Detail these

- Congressional inquiry
- 1-800 number and resulting indignities (spell these out)
- Emails to the agency
- Ombudsman

Facts Matter

- If there are compelling factors which necessitate an adjudication, or elevate the need for an adjudication, include these factors

When is Mandamus/APA Complaint Recommended

- 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
- Conditional residence
 - Couple delays with the fact that conditional residence was meant to be a 2 year period, not a 5 year period
 - 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. Delays in processing conditional residence removal result in delayed naturalization because USCIS won't naturalize a conditional resident.

- Where the statutory or regulatory 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.

- Where the law requires a person to have proof of residence and USCIS will not provide it (I-90 filed, 829 or 751 receipt expired, Court grants residence)
- 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.

- Case is pending well beyond published processing times, especially if coupled with humanitarian factors
- Do not file for these in cases with quota retrogression

What to do When Published Processing Times Increase Rapidly

- 526 and 829-Instead of recovering from the already-dramatic 37% decrease in processing volume last quarter, IPO processing volume fell another 60% in Q2. To look at raw numbers, IPO was processing over 4,000 I-526 per quarter this time last year, but processed less than a 1,000 I-526 in FY2019 Q2. Four times fewer!
<https://blog.lucidtext.com/2019/06/26/fy2019-q2-eb-5-petition-processing-report/>
- Published 526 processing times doubled in one month

Allegations in Complaint

- Fees doubled to provide service
- We are Customers
- Show charts showing drastic decrease in processing (see next slides)
- Defeats statutory intent
- Explain harm to the beneficiary (this is tough as it is normally only economic harm)
- 8 U.S.C. §1571(b) sense of Congress that nonimmigrant benefit will be processed within 30 days and immigrant benefit within 180 days

Cite Processing Time Delays and Fee Increases in December 2016

- Consider citing to or documenting the following in the Complaint:
- 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>
- 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

Cite Processing Time Delays and Fee Increases in December 2016

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- USCIS “net backlog” exceeding 2.3 million delayed cases at the end of FY 2017. This total amounts to more than a 100 percent increase over the span of one year despite only a four percent rise in case receipts during that period.
- AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under The Trump Administration
- <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).

- Cite normal processing times and use % in times of how much longer your case has taken
- I-129
 - 4% decrease in adjudications 2017-2018.
 - 10% increase in adjudications 2014-2018.
 - 130% increase in processing time 2015-2019.
- I-485
 - 4% increase in adjudications 2017-2018.
 - 10% increase in adjudications 2014-2018.
 - 88% increase in processing time 2015-2019.
- I-526
 - 54% increase in adjudications 2015-2018.
 - 227% increase in processing time 2015-2019.

- I-751
 - 119% increase in processing time 2015-2019.
- I-765
 - 21% decrease in adjudications 2017-2018.
 - 19% decrease in adjudications 2015-2018.
 - 92% increase in processing time 2015-2019.
- I-829
 - 31% increase in adjudications 2014-2018.
 - 209% increase in processing time 2015-2019.
- N-400
 - 5% increase in adjudications 2015-2018.
 - 74% increase in processing time 2015-2019.

Naturalization Delays

- Mandamus, APA; and
- 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 application. 336(b) asks the Court for de novo review of the naturalization. Normally, the complaint requests both Mandamus, APA and 336(b), as sometimes the Court will grant one and not the other.

Mandamus Against DOS

- The Immigration and Nationality Act ("INA"), which governs visa processing, "confers upon consular officers exclusive authority to review applications for visas." [Saavedra Bruno v. Albright, 197 F. 3d 1153, 1156, 339 U.S. App. D.C. 78 \(D.C. Cir. 1999\)](#); see [INA § 201\(b\)\(2\)\(A\)\(i\), INA §§ 101\(a\)\(9\), \(16\)](#). A "consular officer is required by law to act on visa applications" and may not hold them in abeyance. [Patel v. Reno, 134 F. 3d 929, 932 \(9th Cir. 1997\)](#). Likewise, [22 C.F.R. § 42.81\(a\)](#) mandates that "when a visa application has been properly completed and executed before a consular officer in accordance with the provisions of the INA and the implementing regulations, the consular office must either issue or refuse the visa." [Alwan v. Risch, 2019 U.S. Dist. LEXIS 53692, 2019 WL 1427909](#). See [Afghan & Iraqi Allies v. Pompeo, 2019 U.S. Dist. LEXIS 14465, 2019 WL 367841](#)

Mandamus Against DOS

(continued)

- Impact of consular nonreviewability
- Parties
- Venue

Government Defenses

- No “unreasonable” delay
- Within published processing times
- Skipping ahead of others in line
- No right to adjudication
- Timing of adjudication is discretionary
- Security clearances - - national security
- Need to exhaust remedy of removal hearing (adjustment of status) (INA§242 (a)(2)(b)(ii))
- Consular nonreviewability

Where to File

28 U.S.C. § 1391(e)

- Where Defendant resides
- Where a substantial part of the events of omissions giving rise to the claim occurred
- Where the Plaintiff resides if no real property is involved in the action
- For a business, residence is the principal place of business
- D.C. is always safe

Who has Standing to be a Plaintiff

- Petitioner always has standing
- Sometimes beneficiary has standing (zone of interests test)

Who are the Defendants?

- USCIS - - Director; Service Center Director; Field Office Director; Secretary of DHS
- FBI and AG if security check delays
- Secretary of State if consular case

Discussions with Client

- EAJA fees and separate agreement who gets them
- The risk of denial
- Who should/can pay in H-1B Mandamus

[Sample mandamus pleadings](#)

<https://www.aila.org/.../administrative-litigation-task-force...>