



## Mandamus and APA Actions for Special Immigrant Juvenile Petitions

Practice Advisory<sup>1</sup>  
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## I. Introduction

Special Immigrant Juvenile Status (SIJS)—available to noncitizen minors who cannot reunite with a parent due to abuse, neglect, or abandonment—provides these minors with a path to legal permanent residency in the United States. Although 8 U.S.C. § 1232(d)(2) mandates that United States Citizenship and Immigration Services (USCIS) “shall . . . adjudicate[]” an SIJS petition “not later than 180 days after the date on which the application is filed,” USCIS routinely fails to meet that deadline. While the strategic considerations for each case differ, attorneys representing SIJS petitioners may wish to compel USCIS to adjudicate SIJS petitions by filing suit in federal district court under the Mandamus Act, 28 U.S.C. § 1361, and the Administrative Procedure Act (APA), 5 U.S.C. § 706(1).

This advisory will provide guidance to attorneys seeking to challenge USCIS’s delays in adjudicating SIJS petitions, with a particular focus on Fifth Circuit law. Please note: this advisory does not provide guidance on the eligibility requirements for SIJS. For more information on applying for SIJS, see Children’s Immigration Law Academy (CILA), Pro Bono Guide: Working with Children and Youth in Immigration Cases (Aug. 2020).<sup>2</sup>

## II. Overview of Special Immigrant Juvenile Status

### A. General Background

In 1990, Congress created SIJS to address “hardships experienced by some dependents of United States juvenile courts”—specifically, qualified noncitizen minors—“by providing [them] with the opportunity to apply for special immigrant classification and lawful permanent resident status, with [the] possibility of becoming citizens of the United States in the future.” Special Immigrant Status, Final Rule, 58 Fed. Reg. 42,843, 42,844 (Aug. 12, 1993). Initially, SIJS was available only to abused, neglected, or abandoned noncitizen minors who were eligible for long-term foster care, but over the years Congress broadened the protection, eliminating the requirement that the petitioner be eligible for foster care. See William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. No. 110-457 § 235(d), 122 Stat. 5044 (2008). Now, noncitizen minors eligible for SIJS include those who: are in the custody of the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR); were previously abused, neglected, or abandoned by a parent and are now in the custody of another family member; or are in foster care or in the custody of an appointed guardian.<sup>3</sup>

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<sup>2</sup> <https://www.cilacademy.org/wp-content/uploads/2020/08/CILA-Rept-Final-Web.pdf>. Additional information pertaining to the representation of non-citizen minors can be found at CILA’s online library, <https://cilacademy.org/resources/online-library>.

<sup>3</sup> There are risks and drawbacks to applying for SIJS. For example, noncitizen minors who are not already in removal proceedings must disclose personal information to USCIS and admit to

Under the current statute and regulations, a noncitizen minor must

- be physically present in the United States;
- be under 21 on the date of filing the SIJS petition, Form I-360;<sup>4</sup>
- remain unmarried throughout the adjudication of the SIJS petition and adjustment of status through a Form I-485 application;
- receive a qualifying juvenile court order;
- obtain USCIS's consent to the grant of SIJS;
- and, for cases in which the minor is detained in ORR custody, obtain specific consent from the HHS Secretary.

8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c).<sup>5</sup>

## B. Steps for Obtaining SIJS

Unlike most forms of immigration relief, which are adjudicated exclusively by federal immigration authorities, obtaining SIJS involves both state juvenile courts and USCIS. There are three steps to obtaining SIJS and, from there, lawful permanent residency (LPR): (1) obtaining a custody or dependency order from a state court; (2) petitioning USCIS for SIJS; and (3) adjusting to LPR status, either before USCIS or, if in removal proceedings, an immigration judge. These three steps will be briefly described.

First, before a noncitizen minor can apply for SIJS, she must obtain a custody or dependency order from a state juvenile court, as defined by 8 C.F.R. § 204.11(a). To be eligible for SIJS classification, the SIJS statute requires that the order:

- be issued by a juvenile court (or other similar court, such as a family court) that has jurisdiction to make determinations about the custody and care of the petitioner;
- be issued under state law;
- contain a judicial determination about the custody or dependency of the noncitizen minor;
- contain a determination that reunification with at least one of the minor's parents is not viable due to abuse, neglect, or abandonment; and

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being present in the United States without lawful status. If the SIJS petition is denied, Immigration and Customs Enforcement (ICE) may initiate removal proceedings against them. Further, those who obtain legal status through SIJS are barred from ever filing immigrant petitions on behalf of their biological parents. Attorneys should consider whether SIJS is in their client's best interest and consult CILA's Pro Bono Guide to determine the best form of immigration relief to pursue.

<sup>4</sup> Under the current regulations, so long as a petitioner is under 21 years old at the time she files her I-360 petition, she will not age out of SIJS protection. See U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(a), (d)(2)(i) & (iii). However, state law governs whether a noncitizen minor is subject to juvenile court jurisdiction; in some states, such jurisdiction may end by operation of law when the noncitizen turns eighteen. See *Matter of A-O-C-*, Adopted Decision 2019-03 (AAO Oct. 11, 2019).

<sup>5</sup> Note that 8 C.F.R. § 204.11 has not been revised to account for amendments made to the governing statute.

- contain a determination that it would not be in the minor’s best interest to be returned to her country of nationality or the country where she last resided.

U.S.C. § 1101(a)(27)(J).

Next, after the noncitizen minor obtains the state order, she must submit a Form I-360 Petition for Special Immigrant Juvenile Status to USCIS, including documentary evidence in support of the noncitizen’s eligibility for SIJS and the state court order. 8 C.F.R. § 204.11(d). Additionally, the noncitizen minor must obtain USCIS’s consent to the grant of SIJS. *See* 8 U.S.C. § 1101(a)(27)(J)(iii). If the petitioner is in ORR custody, she must also obtain specific consent from HHS. 1101 U.S.C. § (a)(27)(J)(iii)(I). After reviewing the petition, USCIS will issue: an approval, denial, Request for Evidence (RFE), or Notice of Intent to Deny (NOID). Throughout, the noncitizen bears the burden of establishing eligibility. *See* 8 U.S.C. § 1361; 8 C.F.R. § 103.2(b)(1).

Finally, after an SIJS I-360 petition is granted, the noncitizen minor may apply for legal permanent residency via a Form I-485 application. 8 U.S.C. §§ 1255, 1427. However, because a requirement for an adjustment of status application is that a visa number must be available, 8 U.S.C. § 1255(a), a minor with an approved SIJS petition cannot file an I-485 application until his or her priority date becomes current.

### C. Timing of Adjudication of SIJS Petitions and USCIS’s Delays

In a provision entitled “Expeditious adjudication,” 8 U.S.C. § 1232(d)(2), Congress required that “[a]ll applications for special immigrant status,” *i.e.*, I-360 petitions, “shall be adjudicated . . . not later than 180 days after the date on which the application is filed.” Notwithstanding that mandate, USCIS routinely fails to adjudicate SIJS petitions within 180 days and has a backlog of these petitions numbering in the tens of thousands.<sup>6</sup>

### D. Considerations About Whether to Press for Prompt Adjudication of SIJS Petitions

Before deciding to file suit to compel USCIS to adjudicate an I-360 petition, the SIJS petitioner and her attorney should discuss fully whether accelerating the adjudication of the SIJS petition is in her best interest.

While SIJS provides a pathway to legal permanent residency, a noncitizen with an approved SIJS petition is in limbo, and denied many important rights, until she can adjust to LPR status. For example, SIJS alone, without an adjustment of status application, does not constitute relief from removal. Nor does an approved Form I-360 confer work authorization. Additionally, the noncitizen must stay in the United States and remain unmarried until she can adjust status.

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<sup>6</sup> USCIS does not publish the number of outstanding SIJS petitions. However, “[a]s of September 24, 2018, the National Benefits Center, which handles all SIJ petitions, had a backlog of 32,518 SIJ petitions, with 23,589 of them pending for more than 180 days.” *Galvez v. Cuccinelli*, No. C19-0321RSL, 2020 U.S. Dist. LEXIS 184469, at \*7-8 (W.D. Wash. Oct. 5, 2020).

Critically, an SIJS petitioner can only apply for adjustment of status once a visa number is available. Visa number availability is determined based on the petitioner's priority date—the date that USCIS received the noncitizen minor's I-360 petition. Because the number of SIJS visas is subject to an annual quota and is further capped by country of origin, petitioners from countries with long queues for visa numbers, such as El Salvador, Guatemala, Honduras, and Mexico, may have to wait several years to adjust status. Attorneys should consult the Department of State's Visa Bulletin<sup>7</sup> to determine whether a visa number is available for a noncitizen with an approved SIJS petition. (SIJS visas are considered fourth-preference employment-based visas.)

This visa number backlog creates a dilemma for those SIJS petitioners from El Salvador, Guatemala, Honduras, and Mexico who are in removal proceedings. Only USCIS, not an immigration judge, has jurisdiction to approve or deny SIJS petitions. While the I-360 petition is pending before USCIS, many immigration judges will grant continuances of the removal proceedings. However, once the SIJS petition has been approved, immigration judges may be reluctant to grant further continuances to allow the SIJS recipient to await a visa number in order to file an adjustment of status application. As a result, in some cases, it may *not* be in the client's best interest to seek to compel USCIS to adjudicate the I-360 petition before a visa number is available, since an immigration judge could deny continuances to await the availability of the visa number, particularly where the petitioner's priority date is several years away.<sup>8</sup> Conversely, where a noncitizen's petition has been pending for several years and a visa number is available, it may behoove the noncitizen to seek a prompt decision regarding the form I-360 petition. In those situations, SIJS petitioners may be able to challenge USCIS's delay in adjudicating I-360 petitions in federal district court under the Mandamus Act and the APA, as will be discussed below.

### III. Mandamus and APA Actions

#### A. Overview of the Statutes

##### 1. Mandamus Act

In general, the Mandamus Act, 28 U.S.C. § 1361, can be used to compel administrative agencies to act. It provides in full:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

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<sup>7</sup> See U.S. Dep't of State, Visa Bulletin, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>.

<sup>8</sup> For more on this topic, see CILA, Certification, Backlogs and Visa Retrogression: Advocating for SIJ beneficiaries to remain in the US to adjust status, <https://cilacademy.org/2018/12/12/certification-backlogs-and-visa-retrogression-advocating-for-sij-beneficiaries-to-remain-in-the-us-to-adjust-status>.

“Three elements must exist before mandamus can issue: (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available.” *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980)).

Note that the court’s mandamus authority is limited to compelling a government official to take action, which here is compelling USCIS to adjudicate the petition. A court lacks the power to compel the official to act in any particular way and thus cannot order the agency to approve an application. *See Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992) (“Mandamus is an appropriate remedy ‘only when the plaintiff’s claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt.’ Thus, mandamus is not available to review the discretionary acts of officials.” (quoting *Nova Stylings, Inc. v. Ladd*, 695 F.2d 1179, 1180 (9th Cir. 1983))). In short, the outcome of a successful mandamus action will be that the agency adjudicates a claim, but there is no guarantee that the agency will approve the application; the adjudication could result in a denial.

## 2. APA

The APA also allows litigants to challenge an agency’s unreasonable delay. The APA requires agencies to conclude matters “within a reasonable time,” 5 U.S.C. § 555(b), and authorizes a federal court to “compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1). To be entitled to relief under the APA, a plaintiff must show either that the agency unlawfully withheld action it was required to take, such as when an agency fails to meet a congressionally-set deadline, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999), or that the agency unreasonably delayed taking “a discrete agency action that it is required to take,” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). As with mandamus, a court is only able to compel the agency to act; it cannot compel the agency to decide the application in favor of the plaintiff.

## 3. Similarities

Generally, a plaintiff who seeks to compel unreasonably delayed action “under the Mandamus Act and the APA must make essentially the same showing for both claims.” *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008). Similarly, a plaintiff who succeeds under either the Mandamus Act or the APA is entitled to the same relief: a court order compelling the government to take the withheld, nondiscretionary action. *See id.* at \*825-26; *see also* 14 Wright & Miller, Fed. Prac. & Proc. § 3655 (4th ed.) (“[I]n suits seeking to compel agency action, the relief [available under the APA and mandamus] functionally may overlap.”). Because of the similarities in requirements and in the potential remedy, it is advisable to plead both an APA and a mandamus cause of action, particularly because courts typically consider the claims interchangeably. This is particularly true because mandamus relief is not available where there is an adequate remedy at law, and some courts find that APA relief is such a remedy. *See infra*, §III.B.1.c.

## B. Elements of a Successful Delay Action

### 1. Mandamus

As noted above, to successfully plead a mandamus claim, a plaintiff must demonstrate that:

(1) the plaintiff has a clear right to the relief,

- (2) the defendant has a clear duty to act, and
- (3) no other adequate remedy is available.

*Jones*, 609 F.2d at 781.

*a. Clear right to relief*

To determine whether a plaintiff has a clear right to relief, courts look to whether “the plaintiff falls within the ‘zone of interest’ of the underlying statute.” *Giddings*, 979 F.2d at 1108 (discussing zone of interest test in consideration of a mandamus claim); *see also Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (establishing the zone of interest test in context of prudential standing under the APA).<sup>9</sup> The “zone of interest” test requires that “the interests sought to be protected by the complainant . . . arguably [be] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Giddings*, 979 F.2d at 1108 (alteration in original) (quoting *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153-54). This test is a two-part inquiry. “First, the court must determine what interests the statute *arguably* was intended to protect, and second, the court must determine whether the ‘plaintiff’s interests affected by the agency action in question are among them.’” *Bangura v. Hansen*, 434 F.3d 487, 499 (6th Cir. 2006) (quoting *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998)). In the immigration context, the “zone of interest” test requires that a mandamus plaintiff show that the Immigration and Nationality Act (INA) provides a clear right to the action sought and that the plaintiff is arguably the intended beneficiary of that right.

Here there should be no question that the relief sought—to have an SIJS petition adjudicated within 180 days—falls within the “zone of interest” protected by 8 U.S.C. §§ 1101(a)(27)(J) and 1232(d)(2). First, Congress explicitly sought to protect the interests of vulnerable noncitizen minors, given that it created SIJS to alleviate the “hardships experienced by some dependents of United States juvenile courts by providing qualified [noncitizens] with the opportunity to apply for special immigrant classification and lawful permanent resident status, with possibility of becoming citizens of the United States in the future.” Special Immigrant Status, Final Rule, 58 Fed. Reg. 42,843, 42,844 (Aug. 12, 1993). And Congress contemplated that this interest included the right to “expeditious adjudication,” specifically mandating that SIJS petitions “*shall* be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.” 8 U.S.C. § 1232(d)(2) (emphasis added). Thus, an SIJS petitioner who seeks to compel the agency’s compliance with this statutory deadline is seeking to protect this legislative interest.

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<sup>9</sup> The “zone of interest” test is technically a test to determine if a plaintiff has Article III standing, a prerequisite for a court to exercise jurisdiction. *See Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153-54; *Giddings*, 979 F.2d at 1108. However, courts apply this test when determining whether the elements of a mandamus claim are met—that is, whether the plaintiff has a right to the mandamus relief requested and whether the defendant owes a duty to the plaintiff. *See Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995); *Lin v. Chertoff*, 522 F. Supp. 2d 1309, 1316 (D. Colo. 2007).



Indeed, in *Yu v. Brown*, the only case to squarely address this issue, the court held that applicants for SIJS and for adjustment of status fell "within the zone of interest of the INA provisions." 36 F. Supp. 2d 922, 930 (D.N.M. 1999); *see also Pierre v. McElroy*, 200 F. Supp. 2d 251, 253 (S.D.N.Y. 2001) (holding that specific legislation placed a duty on the Immigration and Naturalization Service (INS) to investigate and adjudicate certain petitions for special immigrant juvenile status).

*b. Mandatory duty*

Additionally, a plaintiff must show that the defendant—here, USCIS—owes a mandatory duty to the plaintiff.<sup>10</sup>

Courts in the Fifth Circuit have long recognized that where a noncitizen has a right to apply for a benefit, there is an accompanying, nondiscretionary duty for USCIS to adjudicate that application. *See M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 595 (W.D. Tex. 2019) (“While the USCIS’s decision to grant or deny a U Visa petition is discretionary, the question of whether that adjudication has been unlawfully withheld or unreasonably delayed is not.”); *Ayyub v. Blakeway*, No. SA-10-CV-149-XR, 2010 U.S. Dist. LEXIS 82739, at \*14–15 (W.D. Tex. Aug. 13, 2010) (same with respect to naturalization application); *Elmalky v. Upchurch*, 3:06-CV-2359-B, 2007 U.S. Dist. LEXIS 22353, at \*7–9 (N.D. Tex. Mar. 28, 2007) (same, adjustment of status application); *Goldschmidt v. U.S. Att’y Gen.*, 3-07-CV-670-AH, 2007 U.S. Dist. LEXIS 77472, at \*3 (N.D. Tex. Oct. 18, 2007 (same); *Fu v. Reno*, No. 99-0981, 2000 WL 1644490, \*5 (N.D. Tex. Nov. 01, 2000) (same); *Hu v. Reno*, 2000 WL 425174, at \*5 (N.D. Tex. April 18, 2000) (same). Indeed, this position has been widely adopted across the federal court system. *See Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (concluding that diversity visa applicants have a right to have their applications adjudicated); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (concluding that visa applicants had a right to have their applications adjudicated).

The duty also must be owed specifically to the plaintiff. In *Giddings*, the Fifth Circuit clarified that, although the INA imposes “a duty on the Attorney General to deport criminal [noncitizens],” this duty was not “owed to the [noncitizen]” and therefore the plaintiff had failed to satisfy the second element of a mandamus claim. 979 F.2d at 1110. The court explained that this conclusion was founded on the distinction between “imposing a duty on a government official and vesting a right in a particular individual.” *Id.* (citing *Gonzalez v. INS*, 867 F.2d 1108, 1109 (8th Cir. 1989)). In contrast, the duty to adjudicate an SIJS application within 180 days is clearly owed to the SIJS plaintiff.

*c. No other remedy available.*

Lastly, a mandamus plaintiff must show that no other remedy is available. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004); *United States v. Denson*, 603 F.2d 1143, 1147 n.2 (5th Cir.

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<sup>10</sup> The existence of a clear right and a mandatory duty are closely related. Courts frequently consider the factors jointly, without analytically distinguishing between them. *See, e.g., Elmalky v. Upchurch*, No. 3:06-CV-2359-B, 2007 U.S. Dist. LEXIS 22353, at \*6–11 (N.D. Tex. Mar. 28, 2007).



1979). A remedy is adequate if it can afford full relief to the plaintiff on the issue being litigated. *Carter v. Seaman*, 411 F.2d 767, 773 (5th Cir. 1969).

The government could argue, and some courts have agreed, that the availability of APA relief precludes granting mandamus relief. *Sawan*, 589 F. Supp. 2d at 826 (explaining that because “[t]he APA provides a remedy for unlawfully delayed agency action[,] mandamus is not necessary for relief”); *see also Ahmadi v. Chertoff*, 522 F. Supp. 2d 816, 818 n.3 (N.D. Tex. 2007) (same). Nevertheless, even if a court ultimately denies a mandamus claim in favor of an APA claim, because the caselaw is so closely intertwined, it is advisable to bring both mandamus and APA claims.

*d. Equitable considerations: Is the delay so egregious that mandamus is warranted?*

Even where the three “legal requirements for mandamus jurisdiction have been satisfied, however, a court may grant relief only when it finds compelling equitable grounds.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (quoting *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005)). Thus, even if a plaintiff establishes a clear right to the relief, that the defendant has a mandatory duty to act, and that no other adequate remedy is available, the plaintiff also must establish that “the agency’s delay is so egregious as to warrant mandamus.” *In re Core Commc’n, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (citation omitted). That analysis is guided by the six factors laid out in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984), which are discussed fully below, *see infra* § III.B.2.c Action that is unreasonably delayed. Thus, notwithstanding the congressional command that SIJS petitions “shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed,” 8 U.S.C. § 1232(d)(2) (emphasis added), practitioners should fully argue the six *TRAC* factors.

2. APA

The APA requires that, “within a reasonable time, each agency shall proceed to conclude a matter presented to it,” 5 U.S.C. § 555(b), and that “[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1).

*a. The agency failed to take a discrete agency action that it is required to take*

Courts have found that this requirement is identical to the requirement of a mandamus claim, that the plaintiff have a clear right to a mandatory duty. *See Sawan*, 589 F. Supp. 2d at 825 (“A plaintiff . . . who seeks relief for immigration delays under the Mandamus Act and the APA must make essentially the same showing for both claims.”); *Indep. Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (explaining that a claim seeking mandamus under the Mandamus Act is essentially the same as one for relief under § 706 of the APA).

*b. Unlawfully withheld action*

Some courts distinguish between action that is “unreasonably delayed” and action that is “unlawfully withheld.” These cases hold that the distinction between the two “turns on whether Congress imposed a date-certain deadline on agency action.” *Forest Guardians*, 174 F.3d at 1190. Action is “unreasonably delayed” where “an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions—such as the APA’s general admonition that agencies conclude matters presented to them ‘within a reasonable time[.]’”

*Id.* (quoting 5 U.S.C. § 555(b)). Action is “unlawfully withheld” where Congress provided a specific deadline for the action. *Id.*

The importance of this distinction is that where action is unreasonably delayed, courts generally balance the factors laid out in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984), to determine whether to compel agency action and, depending on the competing equities, may choose not to compel unreasonably delayed action. See *infra* § III.B.2.c Action that is unreasonably delayed. In contrast, “when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, *must* compel the agency to act.” *Forest Guardians*, 174 F.3d at 1190 (emphasis added); see also *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 & n.11 (9th Cir. 2002) (explaining that where “Congress has specifically provided a deadline for performance by the [agency],” it has “removed the traditional discretion of courts in balancing the equities before awarding injunctive relief,” and thus the court must compel the agency to act); *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (stating that when an agency fails “to meet a hard statutory deadline” the APA “leaves no space for discretion when a court addresses an unlawfully withheld agency action”); *In re Paralyzed Veterans of Am.*, 392 F. App’x 858, 860 (Fed. Cir. 2010) (noting that because “Congress clearly imposed . . . a date-certain deadline to issue a final regulation . . . the agency has no discretion in deciding to withhold or delay the regulation, and failure to comply is unlawful”).

However, this position has not been uniformly adopted. See *Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 462 n.5 (8th Cir. 2018) (questioning the Fourth Circuit’s reasoning in *South Carolina*); *In re Barr Labs.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (considering whether to exercise the court’s equitable powers to enforce a statutory deadline and ultimately refusing to order the agency to comply with the congressionally-imposed deadline, noting that equitable relief “does not necessarily follow a finding of a violation”).

Most frequently, courts have ordered agencies to comply with congressionally imposed deadlines in the context of complex agency rulemaking. See *Forest Guardians*, 174 F.3d at 1187 (requiring the Department of the Interior (DOI) to promulgate a final regulation as required by the Endangered Species Act (ESA)); *Badgley*, 309 F.3d at 1177 (compelling DOI to comply with deadlines set by the ESA); see also *Ctr. for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 970-71 (N.D. Cal. 2013); *Am. Acad. of Pediatrics v. U.S. Food & Drug Admin.*, 330 F. Supp. 3d 657, 664 (D. Mass. 2018).

However, at least one court has found that USCIS unlawfully withheld action in violation of binding regulations. In *Rosario v. USCIS* the court held that USCIS was obligated to issue work authorizations within the 30-day time limit set by agency regulations. 365 F. Supp. 3d 1156, 1161–63 (W.D. Wash. 2018).

Based on this precedent, practitioners should argue that because the SIJS statute provides a specific deadline—that SIJS petitions must be adjudicated within 180 days—USCIS has unlawfully withheld agency action and the court is required to compel USCIS to act. However, because federal courts have not uniformly followed the reasoning of *Forest Guardians*, *Badgley*, and *South Carolina*, practitioners should also be prepared to argue in the alternative that USCIS’s failure to adjudicate SIJS petitioners is action that is unreasonably delayed.

*c. Action that is unreasonably delayed: the TRAC factors*

In assessing claims that agency action has been unreasonably delayed under § 706(1) of the APA (as well as in mandamus claims, *see infra*, § III.B.1.d.), courts consider the six guiding principles articulated in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984), to determine if the agency's delay is unreasonable:

- (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 sometimes described as a "test," the D.C. Circuit has emphasized that the enumerated factors are "hardly ironclad, and sometimes suffer from vagueness" but "nevertheless provide[] useful guidance in assessing claims of agency delay." *TRAC*, 750 F.2d at 80. These six general principles provide a basis for courts to determine "whether the agency's delay is so egregious as to warrant mandamus." *Id.* at 79. Accordingly, "[b]ecause these factors function not as a hard and fast set of required elements, but rather as useful guidance . . . their roles may differ depending on the circumstances." *Am. Hosp. Ass'n*, 812 F.3d at 189-90 (citation omitted). "[I]n situations where plaintiffs allege that agency delay is unreasonable despite the absence of a specific statutory deadline, the entire *TRAC* factor analysis may go to the threshold jurisdictional question: does the agency's delay violate a clear duty?" *Id.* at 190. As relevant to SIJS petitions, in contrast, "where the statute imposes a deadline or other clear duty to act, the bulk of the *TRAC* factor analysis may go to the equitable question of whether mandamus *should* issue, rather than the jurisdictional question of whether it *could*." *Id.* (emphasis in original).

The six-factor *TRAC* principles have been adopted widely and applied to unreasonable delay claims, including by district courts in the Fifth Circuit. Some district courts have considered the six-factor standard to be binding authority, *see Sawan*, 589 F. Supp. 2d at 831 (citing *Nat'l Grain Feed Ass'n, v. OSHA*, 903 F.2d 308, 310 (5th Cir. 1990), which it notes "adopt[ed] [the] *TRAC* factors"); *M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 598 (W.D. Tex. 2019) (same), though at least one district court has described the *TRAC* factors as "not binding," *Chuttani v. USCIS*, No. 3:19-CV-02955-X, 2020 U.S. Dist. LEXIS 230040, at \*7 n.26 (N.D. Tex. Dec. 8, 2020). Moreover, they are applied

routinely to immigration delay claims, *see, e.g., Yu*, 36 F. Supp. 2d at 934-35 (applying *TRAC* factors to conclude that INS was obligated to adjudicate SIJ and status adjustment applications).<sup>11</sup>

i. First and Second *TRAC* Factors

In evaluating the first and second *TRAC* factors, courts consider whether the statutory scheme provided by Congress supplies the content for the necessary "rule of reason" that must govern the time it takes an agency to make a decision. *TRAC*, 750 F.2d at 80; *see also Khan v. Johnson*, 65 F. Supp. 3d 918, 930 (C.D. Cal. 2014). While failure to adhere to a congressionally set deadline is a factor that strongly favors a plaintiff, some courts have found that a delay longer than a congressionally set timeframe is not *per se* unreasonable, such that a court is required to compel the agency to act. *See In re Barr Labs.*, 930 F.2d at 74 (considering whether to exercise the court's equitable powers to enforce a statutory deadline and ultimately refusing to order the agency to comply with the congressionally-imposed deadline, noting that equitable relief "does not necessarily follow a finding of a violation").

In *Galvez v. Cuccinelli*, the Western District of Washington considered a claim that USCIS was obligated to adjudicate SIJS petitions within 180 days and had violated the APA by failing to do so. No. C19-0321RSL, 2020 U.S. Dist. LEXIS 184469, at \*19-22 (W.D. Wash. Oct. 5, 2020) (notice of appeal filed Dec. 4, 2020). Analyzing the first two *TRAC* factors, the court found that

Congress prioritized the adjudication of SIJ petitions, requiring that requests for special immigrant status filed by vulnerable youth be adjudicated within 180 days. Congress unambiguously intended the adjudication to be expeditious, providing a clear and mandatory deadline.

*Id.* at \*21. Notwithstanding Congress' specification of a 180-day deadline, the court found that this deadline was "not absolute" under "governing case law"—presumably referencing the *TRAC*-related caselaw which holds that a statutory deadline is but one factor to consider in determining whether delay is unreasonable. *Id.* Nevertheless, the court also emphasized that the statutory timeframe "provides the frame of reference for determining what is reasonable," concluding that USCIS had "unreasonably delayed" adjudication of SIJ petitions. *Id.* at \**Id.*

In so concluding, the court rejected USCIS's argument that "USCIS is authorized to extend the [180-day] deadline at any point by asking the [applicants] for additional information." *Id.* at 22. USCIS contended, without providing any support, that an SIJS petition is not actually 'filed' for purposes of 8 U.S.C. §1232(d)(2) if necessary information is missing. The court rejected this argument, explaining that "[t]he agency interprets the statute in such a way that the 180-day period is nothing more than a target adjudication date that can be delayed, repeatedly and for extended periods of time, at the whim of the agency." *Id.* It found that "the agency's redefinition of 'filed' to

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<sup>11</sup> Although the unreasonableness of the delayed action is not explicitly incorporated into the requirements for a mandamus claim, the *TRAC* court articulated these factors in the context of a mandamus claim. *TRAC*, 750 F.2d at 79 ("In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus.").

authorize delays Congress proscribed is not reasonable in light of the statutory text and its legislative purpose.” *Id.* at 24. The court similarly rejected USCIS’s claim that it could stop—or toll—the 180-day deadline anytime it determined that additional information was needed. *Id.*

The *Galvez* court did not explicitly analyze each of the *TRAC* factors but instead implicitly concluded that, because the first two factors so strongly favored the plaintiffs, USCIS had violated the APA by failing to adjudicate SIJS petitions within 180 days.<sup>12</sup> While practitioners can argue that, as in *Galvez*, these two factors alone dictate a favorable decision, explaining why the other factors also support a favorable decision will bolster the case.

ii. Third and Fifth *TRAC* Factors

Under the third and fifth *TRAC* factors, the court must consider the impact that the delays have on human health and welfare, and the nature and extent of the interests prejudiced by delay. *TRAC*, 750 F.2d at 80. With regard to these factors, which are typically analyzed together, courts have found that delays in the immigration context jeopardize human welfare and significantly prejudice noncitizens. See *Asmai v. Johnson*, 182 F. Supp. 3d 1086, 1096 (E.D. Cal. 2016) (concluding that an asylee’s welfare was “damaged by this unreasonable delay and the insecurity of his immigration status”); *Hosseini v. Napolitano*, 12 F. Supp. 3d 1027, 1035 (E.D. Ky. 2014) (crediting the plaintiff’s allegation that a delayed adjudication creates “impediments to travel and adverse impacts to [the noncitizen’s] employment”); *Geneme v. Holder*, 935 F. Supp. 2d 184, 194 (D.D.C. 2013) (same); *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1145 (D. Ariz. 2008) (same).

The impact of delays on the welfare of noncitizen minors petitioning for SIJS will usually be great. The delay in adjudicating an I-360 petition prevents the minor from planning for the future and living securely in the United States. For minors who are eligible to adjust status based on their priority date but are still awaiting an I-360 adjudication, that delay directly prevents them from applying for LPR status and obtaining the right to work. Since SIJS petitioners lack parental support, such delays significantly jeopardize their welfare.

In related contexts, USCIS has argued that delays in adjudications actually *favor* applicants because USCIS would simply deny the petition if it were compelled to adjudicate the petition promptly. See, e.g., *Geneme*, 935 F. Supp. 2d at 194 (“The government, in turn, argues that [plaintiff] actually benefits from the delay because it allows USCIS to consider the possibility that it should grant her application at a later date rather than simply denying it now.”). While some courts have accepted that rationale, see *Bemba v. Holder*, 930 F. Supp. 2d 1022, 1032 (E.D. Mo. 2013); *Khan v. Scharfen*, 08–1398 SC, 2009 U.S. Dist. LEXIS 28948, at \*26-27 (N.D. Cal. Apr. 6, 2009), the majority of courts have recognized that “the consequences of the indefinite . . . delay in adjudication of [her] application’ are also considerable.” *Geneme*, 935 F. Supp. 2d at 194 (quoting *Al-Rifahe v. Mayorkas*, 776 F. Supp. 2d 927, 937 (D. Minn. 2011) (noting that “Ms. Geneme presumably would not have

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<sup>12</sup> Note that the plaintiffs in *Galvez* did not specifically argue that the SIJS petitions had been unlawfully withheld under *Badgley*, 309 F.3d at 1177, such that the court was required to compel agency action. See Complaint, No. C19-0321RSL (W.D. Wash. Mar. 5, 2019), ECF No. 1.; Pls.’ Mot. for Summ. J., No. C19-0321RSL (W.D. Wash. May 1, 2020), ECF No. 6. Accordingly, the court had no occasion to pass on those arguments.

brought this suit unless she preferred the likelihood that her application would be denied to the uncertainty of not knowing when it would be adjudicated”). A similar response could be made should USCIS argue this in an SIJS delay case. Further, even if the SIJS petition were denied, a denial would enable a petitioner to move forward by, for example, returning to state court to secure a conforming order or seeking administrative or judicial review of the denial.

### iii. The Fourth *TRAC* Factor

Under the fourth factor, the court will consider the effect of expediting delayed action on agency activities of a higher or competing priority. *TRAC*, 750 F.2d at 80. In other contexts, USCIS has argued that relief in a particular case is not justified because it would allow the person to jump the queue. Some, though not all, courts have accepted this. *See, e.g., Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (noting that “a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain”) (quoting *In re Barr Labs.*, 930 F.2d at 75); *see also Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004)) (explaining that when “the agency charged with handling asylum applications ‘operates in an environment of limited resources, . . . how it allocates these resources to address the burden of increasing claims is a calculation that courts should be loathe to second guess.’”); *Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1362 (D. Nev. 1995) (following *In re Barr Labs.*), *aff’d Indep. Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997); *L.M. v. Johnson*, 150 F. Supp. 3d 202, 213 (E.D.N.Y. 2015).

Other courts have roundly rejected this argument, however. *See, e.g., Doe v. Risch*, 398 F. Supp. 3d 647, 658 (N.D. Cal. 2019) (rejecting this argument and reasoning that defendants “do not establish that there is a queue, however, let alone [plaintiff’s] place therein,” and noting absence of evidence of a number of petitions pending longer than plaintiff’s); *Solis v. Cissna*, Civil Action No: 9:18-00083-MBS, 2019 U.S. Dist. LEXIS 229051, at \*51-52 (D.S.C. July 11, 2019) (“[T]here is an absence of proof that USCIS adjudicates petitions according to the rule of reason it professes to follow. And, without evidence demonstrating that USCIS adjudicates petitions in the order in which they are received, USCIS cannot show that such activity is entitled to any higher a priority than adjudicating Plaintiffs’ eligibility, particularly in light of how long Plaintiffs have already waited.”); *Aslam v. Mukasey*, 531 F. Supp. 2d 736, 745 (E.D. Va. 2008) (concluding that “the prospect that other applicants deprived of timely adjudications may follow [the successful petitioner] and seek judicial recourse is no justification for withholding relief that is legally warranted”); *Zhou v. FBI*, No. 07-cv-238-PB, 2008 U.S. Dist. LEXIS 46186, at \*22 (D.N.H. June 12, 2008) (explaining that “the fact that the relevant agencies lack sufficient resources to timely process all [ ] applications is ultimately a problem for the political branches . . . . It is not the aggrieved applicants who have created this problem, and it would not be appropriate for the courts to shift the burdens of this . . . onto the shoulders of individuals immigrants”); *Tang v. Chertoff*, 493 F. Supp. 2d 148, 158 (D. Mass. 2007) (noting that the lack of sufficient agency resources is a “policy crisis” but finding that “it is not plaintiffs who ask the Court to take on the burden of remedying this crisis. Rather, it is defendants who ask the Court to relieve the pressure by excusing them from their statutory duty and letting the cost fall on immigrant plaintiffs. I will follow the law and leave it for the political branches to fix the system.”).

Moreover, here, it is in some SIJS petitioners’ interest to have their SIJS petitions pending until a visa is available. *See* § II.D Considerations About Whether to Press for Prompt Adjudication



of SIJS Petitions, *see supra*. Therefore, unlike with other forms of immigration claims, the concern that an order compelling an agency to act would simply move the plaintiff ahead of others waiting for SIJS petitions to be adjudicated is less relevant.

#### iv. The Sixth TRAC Factor

The sixth factor, whether an agency's impropriety contributed to the delay, helps a plaintiff if bad faith is present, but its absence does not impair an otherwise strong claim. *TRAC*, 750 F.2d at 80. Thus, absent special circumstances showing bad faith, this factor generally will be irrelevant in the SIJS context.

## IV. Additional Issues with Mandamus/APA Claims

### A. Jurisdiction

Plaintiffs bringing mandamus and APA claims should allege subject matter jurisdiction under both the mandamus statute, 28 U.S.C. § 1361, and the federal question statute, 28 U.S.C. § 1331. Because the APA does not provide an independent basis for subject matter jurisdiction, *see Califano v. Sanders*, 430 U.S. 99, 105 (1977), it is necessary for the plaintiff to plead subject matter jurisdiction under the general federal question jurisdiction statute, 28 U.S.C. § 1331.

Practitioners should note that a court's subject matter jurisdiction is distinct from the court's authority to grant mandamus relief. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016) (rejecting the district court's conclusion that the jurisdictional inquiry and merits analysis of a claim "merged"). Subject matter jurisdiction, which pertains to a court's ability to decide the case, is a threshold determination that may be challenged through a Rule 12(b)(1) motion to dismiss. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). In evaluating a challenge to a court's subject matter jurisdiction, a court "must accept as true all nonfrivolous allegations of the complaint." *Id.* (quoting *McClain v. Panama Canal Comm'n*, 834 F.2d 452, 454 (5th Cir. 1988)). In contrast, the failure to state a valid mandamus claim is an attack on the merits of the claim and may only be raised through a Rule 12(b)(6) motion to dismiss. *Bell v. Hood*, 327 U.S. 678, 682 (1946). To withstand a 12(b)(6) motion to dismiss for failure to state a claim, a plaintiff "must plead 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Wolcott*, 635 F.3d at 763 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)).

Accordingly, a court first assesses whether a plaintiff's "claim is plausible enough to engage the court's jurisdiction," before considering the separate question whether it has authority to grant the particular relief. *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003); *see also Burwell*, 812 F.3d at 190; *Rios v. Ziglar*, 398 F.3d 1201, 1207 (10th Cir. 2005) (concluding that district court had subject matter jurisdiction over a plaintiff's immigration mandamus claim, but affirming the dismissal on the merits); *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008) (noting that while the plaintiff's mandamus claim may ultimately fail on the merits, it was not so insubstantial and frivolous as to defeat subject-matter jurisdiction). Further, with regard to mandamus claims, the Fifth Circuit has explicitly "cautioned" courts to "avoid tackling the merits under the ruse of assessing jurisdiction." *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 506 (5th Cir. 2018) (quoting *Wolcott*, 635 F.3d at 763); *see also McClain*, 834 F.2d at 454 ("The court should not look to the merits in deciding the jurisdictional question.").

## B. Venue

Pursuant to 28 U.S.C. § 1391(e), venue for a mandamus or APA claim is proper in the judicial district in which the defendant “resides”; in which a substantial part of the events or omissions giving rise to the claim occurred; or in which the plaintiff resides. Thus, plaintiffs have the choice of suing either in the district where USCIS resides (D.D.C.) or the district where the plaintiff lives.

## C. Naming the Correct Defendant

Because mandamus/APA actions seek to force an individual U.S. employee to take an action, the proper defendant varies depending on the precise case. A mandamus action to compel adjudication of an application for a benefit pending at a USCIS service center, such as an SIJS petition pending at the National Benefits Center, should name the USCIS Director and the Service Center Director as defendants, and could also name the Secretary of the Department of Homeland Security.<sup>13</sup>

## D. Statutory Bars to Review under 8 U.S.C. § 1252(a)(2)(B)

In mandamus cases in other immigration contexts, the government cites 8 U.S.C. § 1252(a)(2)(B)(ii) and argues that the pace of adjudication is a discretionary agency function over which the court has no jurisdiction. This section strips federal courts of jurisdiction to review “any decision or action of the Attorney General the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.” (Emphasis added). A mandamus action over a delayed SIJS petition is not a challenge to a discretionary action authorized by the relevant subchapter of the Immigration and Nationality Act. To the contrary, it is an action seeking to enforce action by USCIS for which Congress has imposed a mandatory deadline. 8 U.S.C. § 1232(d)(2) (“All [SIJS] applications . . . shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.”); *see also Kucana v. Holder*, 130 S. Ct. 827 (2009). Thus, this argument, if raised by USCIS, is unlikely to be successful.<sup>14</sup>

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<sup>13</sup> For more information on how to choose the correct defendant and related procedural issues, such as proper service, please see NILA’s, NIP’s and AIC’s practice advisory, *Whom to Sue and Whom to Serve in Immigration-related District Court Litigation* (May 28, 2020), <https://immigrationlitigation.org/wp-content/uploads/2020/05/Sue-and-Serve-PA.5.29.2020-Update-FINAL-NILA.pdf>.

<sup>14</sup> In *Bian v. Clinton*, the Fifth Circuit concluded that 8 U.S.C. § 1252(a)(2)(B) precluded review of the plaintiff’s claim that USCIS had unreasonably delayed adjudicating her adjustment of status application. 605 F.3d 249, 255 (5th Cir. 2010). Because the adjustment statute “does not specify a deadline or even a time frame for adjudication of applications,” the court concluded that the pace of adjudicating adjustment applications was a discretionary “interim decision[]” covered by § 1252(a)(2)(B).

*Bian* should not apply to SIJS undue delay claims for two reasons. First, *Bian* was vacated as moot because the underlying adjustment of status application was granted, No. 09-10568, 2010 U.S. App. LEXIS 27333 (5th Cir. Sept. 16, 2010). Although the court in *Chuttani*, 2020 U.S. Dist. LEXIS

## V. Conclusion

Mandamus and APA lawsuits can be a highly effective way to resolve extended delays in SIJS petition processing. In some cases, the filing of the lawsuit alone will result in the prompt adjudication of the petition, without the need for further litigation. Even where this does not happen, these cases are straightforward and generally will be resolved at the summary judgment stage. They are a particularly helpful tool where the delay is preventing the noncitizen minor from immediately applying for adjustment of status and gaining the employment authorization which comes with that application.

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230040, at \*6 n.22, stated that *Bian* is “still binding precedent,” that conclusion was in error. See *Asgeirsson v. Tex. Attorney Gen.*, 696 F.3d 454, 459 (5th Cir. 2012) ( The Fifth Circuit “has consistently held that vacated opinions are not precedent[.]”); *Balfour Beatty Constr., L.L.C. v. Liberty Mut. Fire Ins. Co.*, 968 F.3d 504, 516 n.20 (5th Cir. Aug. 3, 2020) (Where an opinion is “vacated by agreement of the parties, [that action] nullif[ies] any persuasive value” that the original opinion had.). Second, even if it had not been vacated, *Bian* is distinguishable because, unlike the adjustment of status statute, the SIJS statute includes mandatory language regarding the pace of adjudications.