UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CARLOS ALVAREZ ESPINO and MARCELA VERDUZCO BOTELLO, Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES; USCIS VERMONT SERVICE CENTER; LAURA B. ZUCHOWSKI, Director, USCIS Vermont Service Center in her Official capacity, Defendants.	)	Case No. 5:21-cv-21

DECISION ON MOTION TO DISMISS
(Doc. 9)

Plaintiff Carlos Alvarez Espino is a Mexican national who entered the United States unlawfully in 1996. He lives in the Chicago area with his wife and adult children. In 2011, the Department of Homeland Security initiated removal efforts against him. In 2018, Mr. Alvarez applied for protection for himself and for his wife, plaintiff Marcela Verduzco Botello, through the U nonimmigrant classification program. The U-visa provides protection against removal and a potential path to legal status for undocumented victims of violent crime. Three years later, Plaintiffs continue to wait for governmental action on Mr. Alvarez's application. Plaintiffs seek injunctive and mandamus relief from this court ordering Defendants to process the application before Mr. Alvarez is removed from the United States.

Defendants have filed a Rule 12(b)(6) motion to dismiss Plaintiffs' claims on the ground that they have failed to plead facts sufficient to make out a claim of unreasonable delay (Doc. 9). In the Government's view, "[p]laintiffs' assertion that the purported delay is 'unreasonable' is

nothing more than a 'naked assertion devoid of further factual enhancement' and is insufficient to plead a claim" (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009)).

Plaintiffs respond that the undisputed facts demonstrate an unreasonable delay, stretching over multiple years and increasing with time. Plaintiffs seek only to be placed on a protected wait list while the U.S. Custom and Immigration Services regional processing office in Vermont reviews and acts on Mr. Alvarez's application. Plaintiffs argue that claims of unreasonable delay are fact-intensive and require discovery to develop a record sufficient to permit an analysis of the factors outlined in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

FACTS

In ruling on a motion to dismiss, the court accepts as true the allegations of the complaint.

In 1996, plaintiff Carlos Alvarez Espino entered the United States without inspection. (Doc. 1 ¶ 26.) He was soon joined by his wife plaintiff Marcela Verduzco Botello and their two small children. (*Id.*) The family settled in the Chicago area, where Mr. Alvarez operates a successful upholstery and furniture repair business. (*Id.*) Mr. Alvarez and his wife now have four children in total. (*Id.* ¶¶ 25–28.)

In August 2002, Mr. Alvarez was robbed at gunpoint after he stopped for gas at a service station in Chicago. (*Id.* ¶ 1.) In the course of the crime, he was assaulted. (*Id.*) He reported the crime to the police and cooperated with the investigation. (*Id.*) The crime qualifies as one of the listed offenses for purposes of the U-visa application process. (*Id.* ¶ 15.) Within the limits of the program, the U-visa affords protection from removal and permission to work for crime victims who lack legal status in the United States. (*Id.* ¶ 13.)

In 2011, the Department of Homeland Security started removal proceedings against Mr. Alvarez. (*Id.* ¶ 33.) Prior counsel overlooked Mr. Alvarez's potential qualification for a U-visa. (*Id.*) His immigration case passed through the various stages of review and has resulted in a final order of removal. (*Id.* ¶¶ 33–35.)

In August 2018, while Mr. Alvarez's appeal to the Board of Immigration Appeals was pending, his current attorney submitted a complete petition for U immigration status. (*Id.* ¶ 35.) The petition is pending before the USCIS regional processing center in Vermont. (*Id.* ¶¶ 35, 37.) Ms. Verduzco has applied for similar protection on a derivative basis. (*Id.* ¶ 36.) The USCIS office has neither ruled on the petition nor placed Mr. Alvarez on the waiting list for people who may qualify for a U-visa. Mr. Alvarez and his wife remain at risk of removal. (*Id.* ¶¶ 35–38.)

ANALYSIS

I. The U-Visa Program

Congress authorized the U-visa program in 2000 as part of a broad effort to extend the protection of the law to noncitizens who were victimized by crimes committed after their arrival in the United States. *See* Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464 (codified at 8 U.S.C. § 1101(a)(15)(U)). The purpose of the U-visa provisions is to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . , while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States." Pub. L. 106-386 at § 1513(a)(2)(A). A person admitted to the program receives protection from removal for four years. The program includes work authorization and a potential route to permanent residency.

There is a catch. The U-visa legislation limits the maximum number of persons accepted to 10,000 per year. 8 U.S.C. § 11084(p)(2). In years since 2010, applications have greatly exceeded this cap and a backlog of thousands of applications has developed. USCIS maintains statistics concerning wait times and posts these on its website. The Vermont Service Center is currently experiencing delays of approximately 58 months. (Doc. 1 ¶ 23.)

In the case of Mr. Alvarez and his wife, their applications have been pending for about two and a half years. (*Id.* ¶¶ 35–38.) They have at least two more years to wait. (*Id.*) In the course of oral argument, Plaintiffs' counsel noted that wait times posted by USCIS have actually increased while Mr. Alvarez has been waiting.

Neither Congress nor USCIS has been blind to the potential consequences of the long wait for U-visa status. In passing the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006), Congress directed the Secretary of Homeland Security to promulgate regulations to implement the statutory U-Visa provisions. *Gonzalez v. Cuccinelli*, 985 F.3d 357 (4th Cir. 2021). The regulation relevant to the application of the U-visa process appears at 8 C.F.R. § 214.14(d). It provides:

> Waiting list. *All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list* and receive written notice of such placement. Priority on the waiting list will be determined by the date the petition was filed with the oldest petitions receiving the highest priority. In the next fiscal year, USCIS will issue a number to each petition on the waiting list, in the order of highest priority, providing the petitioner remains admissible and eligible for U nonimmigrant status. After U-1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed. USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.

(emphasis supplied).

The complaint alleges that USCIS has failed to follow its own regulation. (Doc. 1 ¶¶ 39–43.) Instead of placing all U-visa applicants on a protected waiting list, the agency has created in effect a waiting list to be placed on the waiting list. "USCIS has a large backlog of pending U visa petitions for which it has not made the determination of whether to place the petitioner on the waiting list." (*Id.* ¶ 23.) Placement on the "waiting list for the waiting list" affords neither protection against removal nor an opportunity to request work authorization from USCIS.

More recently, USCIS has adopted a more streamlined alternative to the wait list for U-visa applicants. The parties have drawn the court's attention to Volume III, Chapter 5 of the USCIS Policy Manual creating a "bona fide determination process." An applicant who has not arrived on the wait list may receive both work authorization and deferred action on removal if he or she has filed a bona fide petition and demonstrates to USCIS the absence of a risk to national security or public safety and that he or she "merits a favorable exercise of discretion." An applicant who qualifies skips the wait list entirely and proceeds directly to "final adjudication when space is available under the statutory cap." USCIS Policy Manual, Vol. 3, Ch. 5. Applicants who fail to meet bona fide determination criteria are placed in line for the wait list adjudication.

II. Plaintiffs' Need for Discovery

This case concerns claims of unreasonable delay by a federal agency in carrying out its statutory duties. That the U-visa application process is compromised by substantial delays is indisputable. Delay in receiving a U-visa became inevitable when Congress limited the number of U-visas issued each year to 10,000. The issue before the court is whether the delay in extending the waiting list protections to applicants is unreasonable.

The Administrative Procedure Act requires federal agencies to act "with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. § 555(b). This principle is enforced through 5 U.S.C. § 706(1), which authorizes the federal courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The leading case identifying the factors to be weighed in evaluating claims of unreasonable delay remains *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*").

The *TRAC* decision identified six factors constituting a standard for judicial review of agency delay. The list is not intended to be exhaustive or mandatory. But it has achieved broad acceptance as a framework for review. The six factors are:

1. Whether a "rule of reason" governs the time agencies take to make a decision;
2. Whether Congress has provided a timetable for agency action;
3. Whether a delay affects human health and welfare;
4. The effect of expediting delayed action on other agency activities;
5. The nature and extent of the interests prejudiced by delay; and
6. Scrutiny of delays caused by agency decision-making even in the absence of impropriety.

Plaintiffs identify specific factual issues on which they seek discovery regarding these factors. These include:

1. "Rule of reason"

   Although Defendants assert in their papers that they follow a "first in; first out" rule in acting on U visa applications, Plaintiffs seek discovery on the actual procedures adopted by the agency. That the waiting time for Plaintiffs has actually increased while they have been waiting to get on the wait list indicates that other

factors affect the treatment of their application. The continuous expansion of the wait time raises issues about the agency's application of appropriate resources to the U visa program. The recent adoption of the "bona fide application" procedure with the right to skip the wait list altogether if accepted also complicates the question of what "rule of reason" is actually applied. The court agrees with the plaintiffs that factual development will assist the court and the parties to consider this essential factor more fully.

2. Congressional timetable

This is not a factor that requires factual development. Congress provided no timetable. The parties disagree over the import of the annual limit of 10,000 U visas, but these issues are legal, not factual, in nature.

3. Human health and welfare and interests prejudiced by delay

It is indisputable that the multi-year delay in placing Plaintiffs on the protected wait list places them at significant risk of removal. Accepting the allegations of the complaint as true, Plaintiffs qualify for a protected status on the wait list that has been denied while Mr. Alvarez is subject to removal proceedings. Timely action would protect him from deportation; delay leaves him exposed despite the existence of a path to legal status.

There is, of course, a flip side to Mr. Alvarez's narrative of exposure to harm and legal prejudice. The Government responds that Mr. Alvarez seeks only to cut in line and that any relief afforded to him and his family comes at a reciprocal cost to other applicants. This may or may not be true. In the absence of concrete information about how the wait list is managed and how greater numbers of applicants might

receive the protection of the wait list without disturbing the statutory limitation of 10,000 U-visas per year, the court and the parties are engaged in guesswork about the facts in the context of a motion to dismiss. Such a procedure, contrary to the position of the plaintiffs, is inappropriate. Discovery will reveal the truth about the relative harm to Plaintiffs and to the agency mission caused both by current practices and by any alternatives proposed by Plaintiffs.

4. Effect of expediting action on other agency activities

Similarly, the court is in no position to evaluate this factor without information about the practical consequences of reducing the five-year delay to reach a protected status on the waiting list. Counsel for the agency describe the process as a zero-sum game in which advancing one family's application delays another's. It may be that simple. As the recent move to expedited protection for "bona fide applicants" indicates, however, there may be measures which will extend protection to more applicants sooner without compromise of the agency's mission. This is not a factor which can be properly weighed on the basis of counsel's well-intentioned representations. It is a fact-specific factor that requires testimony or other discovery from agency staff who actually know the facts.

5. Interests prejudiced by the delay

Similar to the third *TRAC* factor, the fifth factor suggests that discovery is required in this case. Discovery will reveal the truth about the relative harm to Plaintiffs and to the agency mission caused both by current practices and by any alternatives proposed by Plaintiffs.

6. Bad faith or impropriety

Bad faith is not an issue in this case. As the *TRAC* decision makes clear, the presence of good faith and good intentions by the agency does not remove the court's obligation under the APA to examine the issues of delay.

With the exception of the second factor (Congressional timetable) and the sixth (bad faith), these factors all demonstrate the need for a period of discovery to give substance to the court's consideration of the *TRAC* factors.

Other courts have seen the discovery issue in similar terms. In *Gonzalez*, the Fourth Circuit remanded a case very similar to this one because "[a] claim of unreasonable delay is necessarily fact dependent and thus sits uncomfortably at the motion to dismiss stage and should not typically be resolved at that stage." 985 F.3d at 375. The court noted that "we do not know enough about how the agency implements its rules and exceptions" and identified "resource constraints" as an important issue on remand. *Id.* at 376.

Multiple trial court decisions have reached the same conclusion. *See Pandya v. Cuccinelli*, No. 5:20-cv-01541-JMC, 2021 WL 119304, at *1–2 (D.S.C. Jan. 13, 2021); *Gonzalez v. U.S. Dep't of Homeland Sec.*, 500 F. Supp. 3d 1115 (E.D. Cal. 2020); *Romero Ramires v. Wolf*, 1:20-CV-00203, 2020 WL 6146393 (D.N.M. Oct. 20, 2020); *Carranza v. Cuccinelli*, No. 2:19-cv-3078-BHH, 2020 WL 5810516 (D.S.C. Sept. 30, 2020); *Camarena v. Cuccinelli*, No. 19 C 5643, 2020 WL 550597, at *1 (N.D. Ill. Feb. 4, 2020); *M.J.L. v. McAleenan*, 420 F. Supp. 3d 588 (W.D. Tex. 2019); *Patel v. Cissna*, 400 F. Supp. 3d 1373, 1384 (M.D. Ga. Aug. 20, 2019); *Rodriguez v. Nielsen*, No. 16-CV-7092 (MKB), 2018 WL 4783977 (E.D.N.Y. Sept. 30, 2018); *Solis v. Cissna*, No. 9:18-cv-00083-MBS, 2018 WL 3819099 (D.S.C. Aug. 10, 2018); *Haus v. Nielsen*, No. 17 C 4972, 2018 WL 1035870 (N.D. Ill. Feb. 23, 2018).

Other courts have been willing to weigh the *TRAC* factors on the basis of the pleadings alone. See *N-N v. Mayorkas*, No. 19-CV-5295(EK), 2021 WL 1997033, at *15 (E.D.N.Y. May 18, 2021) ("[E]xpediting the delayed action would essentially allow Plaintiffs to 'jump the line,' resulting in the redistribution of agency resources but no agency-wide net gain.") This court is unwilling to reach conclusions about the potential impact of a ruling on agency resources without a factual record.

Defendants argue that the complaint does not adequately address the complexity of the regulatory investigation or the extent to which Mr. Alvarez contributed to the delay. *Reddy v. Commodity Futures Trading Comm'n*, 191 F.3d 109, 120 (2d Cir. 1999). The first point does not support dismissing the action because further factual development will better inform the parties and the court about the nature of the regulatory process and the decisions reached by the government in creating the multiple layers of wait lists. The second point also fails because the complaint alleges that Mr. Alvarez filed for a U-visa as soon as the possibility became known to him, and contributed little to the delay.

Some courts have determined that the pace of agency decision-making concerning the U-visa wait list is wholly discretionary and beyond review under the APA. *See Butanda v. Wolf*, No. 1:20-cv-01155-DDD-STV, 2021 WL 327714, *5 (D. Colo. Feb. 1, 2021) ("This court lacks jurisdiction to review or compel Defendants' pace of adjudication of [plaintiff's] U-Visa application); *see also Hidalgo Canevaro v. Wolf*, No. 1:20-CV-3553-SCJ, 2021 WL 2283870 (N.D. Ga. May 20, 2021); *Lara Santiago v. Mayorkas*, No. 1:20-CV-4508-CAP, 2021 WL 3073690 (N.D. Ga. Apr. 16, 2021). These rulings suffer from a degree of circularity. Cases analyzing delay within the framework of the *TRAC* factors generally concern mandatory actions for which no specific time limit is provided. This case follows this pattern. The applicable

regulation states that eligible applicants must be placed on a protected waiting list but it does not say when. If the absence of a time limit is enough to defeat judicial review under the APA, then occasions when the *TRAC* factors are called into service will be extremely rare. When the agency must perform a non-discretionary function is a question which the APA and the *TRAC* line of cases require courts to answer.

CONCLUSION

For these reasons, the court DENIES the motion to dismiss (Doc. 9). The court allows a period of six months for appropriate discovery. The parties shall submit a proposed scheduling order within 30 days. Either side may file a motion for summary judgment or other dispositive motion after February 1, 2022. For the same reasons, the court defers any ruling on the mandamus petition until the factual record is better developed.

The court renews its request to the Department of Homeland Security for time to complete its work in this case without interruption through the removal of Carlos Alvarez Espino or his wife Marcela Verduzco Botello while the case is pending. The court appreciates the forbearance of the Department in allowing time for the court and the parties to reach a resolution of this case as quickly as reasonably possible.

Dated at Burlington, in the District of Vermont, this 18th day of August, 2021.

/s/ Geoffrey W. Crawford
Geoffrey W. Crawford, Chief Judge
United States District Court