PRACTICE ADVISORY[1]
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MANDAMUS AND APA DELAY CASES: AVOIDING DISMISSAL AND PROVING THE CASE

By the National Immigration Litigation Alliance and the American Immigration Council[2]

This advisory provides basic information about filing an immigration-related delay action in federal district court under both the Mandamus Act and the Administrative Procedure Act (APA). It discusses the required elements of successful mandamus and APA actions as well as the jurisdictional concerns that sometimes arise.

Delay lawsuits can be a relatively simple and quick remedy in situations where the government has failed to act when it has a duty to do so. However, there are a number of adverse published decisions, some of which are discussed in this advisory. Although it is helpful to understand these cases—and to identify the weaknesses in the courts' analyses—potential plaintiffs should not be discouraged. Most successful delay cases are unreported and/or do not result in written decisions. Often, the filing of a delay action prompts the government to take whatever action is requested and the case ultimately is dismissed.

I. Mandamus and APA Actions

A. Overview of the Statutes

1. The 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:

> 1361. Action to compel an officer of the United States to perform his duty.

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[2] This update was authored by NILA attorneys Mary Kenney and Tiffany Lieu. The American Immigration Council thanks Theresa A. Queen and Sarah Mathews of Greenberg Traurig, LLP for their assistance with an earlier update of this practice advisory.

> 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.

A mandamus plaintiff must demonstrate that: "(1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) there is no other adequate remedy available to the plaintiff." *Lovitky v. Trump*, 949 F.3d 753, 759 (D.C. Cir. 2020) (citation omitted). Even when a court finds that all three elements are satisfied, the court retains discretion to grant or deny the writ. *Am. Hospital Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); *Wolcott v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011).

Note that the court's mandamus authority is limited to compelling a government official or agency to take action. Courts lack the power to compel the official or agency to act in any particular manner and thus cannot order the official or agency to grant the relief the plaintiff seeks. *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 and because courts typically consider the claims interchangeably, it is advisable to plead both an APA and a mandamus cause of action.

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* at I.B.1.c.

B. Elements of a Successful Delay Action

1. Mandamus

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

(1) the plaintiff has a clear right to the relief requested;

(2) the defendant has a clear, nondiscretionary duty to perform the act in question; and

(3) no other adequate remedy is available.

Am. Hospital Ass'n v. Burwell, 812 F.3d 183, 189 (D.C. Cir. 2016). Some courts mesh these elements in analysis. *See, e.g.*, *Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) (stating that the court often discusses the clear right to relief and clear duty to act elements concurrently). However, for clarity and completeness, this advisory addresses these issues individually.

a. *Does the Plaintiff Have a Clear Right?*

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 v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992) (discussing zone of interest test in considering a mandamus claim); *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970).[3] 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). 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)).

Here, the relevant statute generally will be the Immigration and Nationality Act (INA). Courts look to the purpose of the statute—both the specific statutory provision in question, as well as

[3] The "zone of interest" test is technically a test to determine if a plaintiff has Article III standing, a requirement 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. Courts, however, 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).

the INA generally—to determine whether the mandamus plaintiff is an intended beneficiary of the statute.

Courts have found that the INA establishes a clear right to adjudication of several types of applications. These include timely adjudication of:

- Adjustment of status applications. *See, e.g.*, *Razik v. Perryman*, No. 02-C-5189, 2003 U.S. Dist. LEXIS 13818, *6–7 (N.D. Ill. Aug. 7, 2003) ("Courts have consistently held that [8 U.S.C. § 1255] provides [a noncitizen] with a right to have an application for an adjustment of status adjudicated and imposes a duty upon the Attorney General to adjudicate cases within a reasonable time."); *see also Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (stating that noncitizen plaintiffs "have a right to have their cases adjudicated").

- Special Immigrant Juvenile Status (SIJS) petitions. At least one court has held that vulnerable noncitizen minors seeking to have their petitions for SIJS adjudicated within 180 days fall within the INA's zone of interest. *Yu v. Brown*, 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. 2011) (holding that specific legislation placed a duty on the Immigration and Naturalization Service (INS) to investigate and adjudicate certain petitions for SIJS).

- Special Immigrant Visa (SIV) petitions. At least one court has held that plaintiffs have a clear right to have their visa applications adjudicated under the Iraqi and Afghan SIV Program statutes. *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 295–96 (D.D.C. 2016) (finding that plaintiffs had properly stated a mandamus and APA claim for adjudication of their special immigrant visa applications).

- Naturalization applications. Courts also have found that the INA establishes a clear right to relief in the context of delayed naturalization applications where the interview has not yet been conducted. *See, e.g.*, *Hadad v. Scharfen*, No. 08-22608, 2009 U.S. Dist. LEXIS 26147, at *6–7 (S.D. Fla. Mar. 12, 2009) (finding that 8 U.S.C. § 1446(d) establishes "a right to have [an] application for naturalization processed and a decision rendered"); *Olayan v. Holder*, No. 1:08-cv-715-RLY-DML, 2009 U.S. Dist. LEXIS 12825, at *11–12 (S.D. Ind. Feb. 17, 2009) (holding that 8 U.S.C. §§ 1445(c) and 1446(b) and (d) establishes an individual's clear "right to have his naturalization application adjudicated").[4]

[4] Note that where U.S. Citizenship and Immigration Services (USCIS) has failed to make a decision on a naturalization application within 120 days following the "examination" of the applicant, the applicant may seek direct judicial review under 8 U.S.C. § 1447(b). In such cases, the court may either decide the matter itself or remand the matter with appropriate instructions to USCIS to determine the matter. *Id. See* American Immigration Council, *Practice Advisory: How to Get Judicial Relief Under 8 U.S.C. § 1447(b) for a Stalled Naturalization Application* (Oct. 23, 2013), available at: https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_get_j

By contrast, several courts have found that the INA does not create a clear right to relief in the context of certain application adjudication delays. *See L.M. v. Johnson*, 150 F. Supp. 3d 202, 210–11 (E.D.N.Y. 2015) (finding that 8 U.S.C. § 1158(d)(7)—which states that the asylum statute creates no private right of action—precludes a right to enforce statutory deadlines for considering asylum applications, and thus there was no right to relief under the Mandamus Act); *Bayolo v. Swacina*, No. 09-21202-CIV-UNGARO, 2009 U.S. Dist. LEXIS 42604, at *5–6 (S.D. Fla. May 11, 2009) (finding that plaintiff did not demonstrate "a clear right to relief" because "there is no provision in [8 U.S.C. § 1255(a)] which sets a time limit for the Attorney General or USCIS to decide whether to adjust an applicant's status"); *cf. Castillo v. Rice*, 581 F. Supp. 2d 468, 472-74 (S.D.N.Y. 2008) (rejecting plaintiffs' argument that the government failed to schedule interviews for their spouses for K1 and K3 visas because plaintiffs did not have a right to an expedited interview date from the U.S. consulate).

Courts have similarly held that the INA does not create a right for a noncitizen to compel the government to initiate removal proceedings. *See Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos*, 50 F.3d at 847-48; *Giddings*, 979 F.2d at 1109-10; *Gonzalez v. INS*, 867 F.2d 1108, 1109-10 (8th Cir. 1989). In these cases, the plaintiffs—noncitizens who were serving criminal sentences—argued that former 8 U.S.C. § 1252(i), which stated that the Attorney General shall initiate deportation proceedings "as expeditiously as possible after the date of conviction" created a clear right to an immediate deportation hearing. The courts concluded, however, that this provision was enacted for economic, not humanitarian, reasons, and thus the individuals were deemed to be outside the zone of interest of the statute. *Id*.

Significantly, a finding by a court that an individual does not have a "clear right" for purposes of mandamus actions does not preclude a valid action and relief under the APA. For example, in *Almandil v. Radel*, No. 15cv2166 BTM (BGS), 2016 U.S. Dist. LEXIS 94115, at *2 (S.D. Cal. July 18, 2016), the court determined that the asylum provision at 8 U.S.C. § 1158(d)(7) precludes a private action to enforce the statutory timeframes for adjudicating asylum applications, and thus precludes a mandamus action. The court nonetheless held that the statutory timeframes could support a claim for unreasonably delayed adjudication under the APA. *Id*.

b. *Is there a Mandatory Duty?*

Additionally, a plaintiff must show that the defendant official or agency owes a duty to the plaintiff.[5]

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udicial_relief_under_8_u.s.c._ss_1447b_for_a_stalled_naturalization_application_fin_10-23-13.pdf; *see also Smith v. Johnson*, No. 3:16-CV-00066-GNS, 2016 U.S. Dist. LEXIS 97038, at *4 (W.D. Ky. July 26, 2016) ("[I]f an interview is conducted with an applicant, the Court may have jurisdiction if the process is not completed within 120 days of the date of the interview.").

[5] 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.*, *Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) (stating that the court often discusses the clear right to relief and clear duty to act elements concurrently).

Courts have 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, e.g.*, *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 *8–9 (N.D. Tex. Mar. 28, 2007) (same and citing case, adjustment of status application); *Goldschmidt v. U.S. Att'y Gen.*, 3-07-CV-670-AH, 2007 U.S. Dist. LEXIS 77472, at *5 (N.D. Tex. Oct. 18, 2007 (same); *Fu v. Reno*, No. 99-0981-L, 2000 U.S. Dist. LEXIS 16110, *14 (N.D. Tex. Nov. 01, 2000) (same); *Hu v. Reno*, 2000 U.S. Dist. LEXIS 5030, at *9-10 (N.D. Tex. April 18, 2000) (same).

The duty also must be owed specifically to the plaintiff. In *Giddings v. Chandler*, 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 1104, 1110 (5th Cir. 1992). 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)).

While the duty must be mandatory or ministerial, mandamus actions can be used to compel the government to exercise its discretion in a case where the government has failed to take any action. For example, the court may order the defendant to adjudicate an application or petition. *See, e.g., Villa v. DHS*, 607 F. Supp. 2d 359, 363 (N.D. N.Y. 2009) (finding duty to adjudicate adjustment application in a reasonable amount of time); *Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D. Pa. 2003) (granting mandamus where government failed to perform ministerial duties as to an individual's derivative citizenship petition); *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (explaining that the agency has a duty to adjudicate adjustment of status applications under the diversity lottery program); *Yu v. Brown*, 36 F. Supp. 2d 922, 930 (D.N.M. 1999) (finding duty to process SIJS and adjustment of status applications in a reasonable amount of time); *Patel v. Ren*o, 134 F.3d 929, 933 (9th Cir. 1997) (finding a that consular officer had a duty to adjudicate visa application). *But see Orlov v. Howard*, 523 F. Supp. 2d 30, 38 (D.D.C. 2007) (defendants have no duty to increase the pace at which they are adjudicating an adjustment application).

Critically, while courts may compel the government to take action in accordance with a mandatory duty, courts may not order the defendant to exercise its discretion in any particular manner. *See Han v. Dep't of Justice*, 45 F.3d 333, 337-38 9th Cir. 1995) (explaining that mandamus is available with respect to discretionary acts only if there are "statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised"); *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (explaining that the Attorney General has discretion to grant or deny an application, but does not have discretion to simply never adjudicate an adjustment application). As a result, counsel should be aware that filing a mandamus action may result in a prompt denial of the application by the agency.

c. *Is There Another Remedy Available?*

Finally, a mandamus plaintiff must show that no other remedy is available. *See Wolcott v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011); *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-381 (2004). A remedy "is adequate if it is 'capable of affording full relief as to the very subject matter in question.'" *Wolcott*, 635 F.3d at 768 (citation omitted).

Pursuant to this requirement, courts have denied mandamus relief where the plaintiff did not exhaust available administrative remedies. *See, e.g., Mejia-Gomez v. DHS/ICE*, No. 05-5000 (JBS), 2006 U.S. Dist. LEXIS 94801, at *4 n.3 (D.N.J. Mar. 31, 2006) ("Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise." (citation omitted)); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106, 108 (E.D.N.Y. 2003) (same).[6]

Some courts have found that the availability of APA relief precludes mandamus relief. *See M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 598 (W.D. Tex. 2019) (dismissing mandamus claim because the APA provides a remedy for unlawfully delayed action); *Ali v. Frazier*, 575 F. Supp. 2d 1084, 1090-91 (D. Minn. 2008) (same); *Valona v. U.S. Parole Comm'n*, 165 F.3d 508, 510 (7th Cir. 1998) (same). By contrast, other courts have found that no other adequate remedy exists where the immigration agency failed to timely process immigration applications. *See, e.g.*, *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999) (finding no other available remedy for SIJS relief). Nevertheless, 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. Hos. 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 Comms, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). 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), discussed in full *infra* at I.B.2.a.ii. Thus, practitioners should fully argue the six *TRAC* factors to demonstrate that the "extraordinary" remedy of mandamus is warranted. *Wolcott v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011).

[6] Failure to exhaust may be excused in limited circumstances. *See*, *e.g.*, *Iddir v. INS*, 301 F.3d 492, 498 (7th Cir. 2002) (outlining exceptions and finding exhaustion not warranted where the possibility of future deportation proceedings which would resolve the issue was indefinite).

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 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); *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008) (same).

i. 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 v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). 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* I.B.2.a.ii. In contrast, "when an entity governed by the APA fails to comply with a statutorily imposed 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); *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018).

This position has not been uniformly adopted, however. *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) (refusing to order the agency to comply with the congressionally imposed deadline and noting that equitable relief "does not necessarily follow a finding of a violation").

Practitioners may want to consider an "unlawfully withheld" claim—in addition to an unreasonable delay claim, *see infra*—in cases involving delayed adjudication of a petition for

special immigrant juvenile status as Congress mandated that USCIS decide those petitions within 180 days of the filing date. 8 U.S.C. § 1232(d)(2).[7]

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

ii. 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*, § I.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;
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> (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. 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).

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[7] While the asylum statute also has an adjudications deadline, Congress specified that this provision did not create an enforceable or private right of action. *See* 8 U.S.C. §§ 1158(d)(5), (7). Consequently, courts have refused to enforce it in suits brought by asylum applicants. *See, e.g., L.M. v. Johnson*, 150 F. Supp. 3d 202, 209 (E.D.N.Y. 2015); *Pesantez v. Johnson*, 2015 U.S. Dist. LEXIS 124508, at *15 (E.D.N.Y. 2015). In *Pesantez*, however, the court found that the statutory deadlines, although not enforceable, were instructive in evaluating the reasonableness of USCIS' delay. 2015 U.S. Dist. LEXIS 124508, at *15.

The six-factor *TRAC* principles have been adopted widely. Some district courts have considered the six-factor standard to be binding authority, *see Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008); *M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 598 (W.D. Tex. 2019), 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 both mandamus and APA claims. *See, e.g.*, *Yu v. Brown*, 36 F. Supp. 2d 922, 934-35 (D.N.M. 1999) (applying *TRAC* factors to conclude that INS was obligated to adjudicate SIJ and status adjustment applications).[8]

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 Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 293-94 (D.D.C. 2016) (finding unreasonable delay when statutes provided a clear nine-month timeline for adjudicating Special Immigrant Visas for certain Iraqi and Afghan nationals); *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). 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" and concluded that USCIS had "unreasonably delayed" adjudication of SIJ petitions. *Id.* at 21.[9]

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[8] Although the unreasonableness of 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.").

[9] Note that the *Galvez* plaintiffs did not argue that the SIJS petitions had been unlawfully withheld under *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002); accordingly, the court had no occasion to consider that argument.

A plaintiff may look to regulations or internal operating procedures to find out if the agency itself has set guidelines.[10] Plaintiffs also may look to what the agency's average adjudication period is; [11] however, just because a delay is "not unusual" does not make it reasonable. *See Jefrey v. INS*, 710 F. Supp. 486, 488 (S.D.N.Y. 1989).

Courts have found delays in adjudicating immigration applications to be unreasonable when the delays are lengthy. *Compare Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1147 (D. Ariz. 2008) (finding that the nearly six-year delay in adjudicating plaintiff's adjustment application was unreasonable); *Aslam v. Mukasey*, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (finding a nearly three-year delay in the adjudication of an adjustment application unreasonable), *with Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657 & n.6 (N.D. Tex. 2005) (finding 15-month delay was not unreasonable, but noting that decisions from other jurisdictions suggest that delays approximating two years may be unreasonable).

Third and Fifth TRAC Factors

Under the third and fifth *TRAC* factors, which are generally analyzed together, a 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. 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 prolonged detention of a noncitizen while an application is pending may be a strong humanitarian factor to highlight in a case.

In some cases, 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 (noting the government argument that delay is beneficial 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), others recognize that "'the consequences of the indefinite . . . delay in adjudication of [her] application'

[10] However, considering all circumstances of a case, the agency's delay may be unreasonable even if it does not extend beyond the agency-specified timeframe. *See Singh v. Ilchert*, 784 F. Supp. 759, 764 (N.D. Cal. 1992) (finding that "the mere fact that the INS promulgates a regulation establishing a time period in which applications must be adjudicated does not, in and of itself, mean that an adjudication within the time period cannot constitute unreasonable delay").

[11] For example, USCIS provides processing time reports by office and type of filing at its USCIS Processing Time Information web page.

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 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").

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. USCIS frequently argues 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.'"); *L.M. v. Johnson*, 150 F. Supp. 3d 202, 213 (E.D.N.Y. 2015); *Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1362 (D. Nev. 1995), *aff'd Indep. Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997).

Other courts have roundly rejected this argument for several reasons. Some have found that there is insufficient evidence in the record as to the existence of a queue, the plaintiff's place in the queue, or USCIS' procedures for determining the order of adjudications. *See*, *e.g.*, *Doe v. Risch*, 398 F. Supp. 3d 647, 658 (N.D. Cal. 2019) (noting that defendants did not establish the number of pending derivative asylum applications or the existence of a queue); *Solis v. Cissna*, No: 9:18-00083-MBS, 2019 U.S. Dist. LEXIS 229051, at *51-52 (D.S.C. July 11, 2019) (rejecting USCIS' argument that plaintiff's U visa petition should not be prioritized where there was no evidence that the agency adjudicated petitions "in the order in which they are received"). Other courts conclude that a lack of resources is a political problem which should not adversely impact the plaintiff. *See*, *e.g.*, *Zhou v. FBI*, No. 07-cv-238-PB, 2008 U.S. Dist. LEXIS 46186, at *22 (D.N.H. June 12, 2008) (explaining that "[i]t is not the aggrieved applicants who have created th[e lack of resource] 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) (same); *see also 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").

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 is not relevant.

II. THRESHOLD ISSUES

A. Jurisdiction and Cause of Action

The Mandamus Act itself provides the court with jurisdiction over mandamus claims. *See* 28 U.S.C. § 1361. The APA, 5 U.S.C. § 551 *et seq.*, does not provide an independent basis for subject-matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977). Instead, jurisdiction for an APA delay claim is found in 28 U.S.C. § 1331, which provides a federal court with jurisdiction over federal questions. The APA serves as the cause of action. *See* 5 U.S.C. §§ 555(b), 706(1). Because some courts grant relief for agency delay under the APA rather than the mandamus statute, practitioners will want to include both claims. For the court to have jurisdiction over the APA claim, 28 U.S.C. § 1331 must be alleged.

Defendants often move to dismiss a delay case, alleging either or both a lack of jurisdiction and a failure to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The court's subject-matter jurisdiction is a separate issue from the court's authority to grant mandamus relief. *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189-90 (D.C. Cir. 2016) (rejecting the district court's conclusion that the jurisdictional inquiry and merits analysis of a claim "merged"); *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003). Subject-matter jurisdiction is a threshold question that determines whether the court has the power to decide the case in the first place. *Ahmed*, 328 F.3d at 387. In evaluating a challenge to a court's subject matter jurisdiction, a court "must accept as true all nonfrivolous allegations of the complaint." *Wolcott v. Sebelius,* 635 F.3d 757, 763 (5th Cir. 2011) (quoting *McClain v. Panama Canal Comm'n*, 834 F.2d 452, 454 (5th Cir. 1987)). 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 Rule 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 (internal quotation marks omitted) (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 of whether it has authority to grant the particular relief. *Ahmed*, 328 F.3d at 386-87; *see also Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008) (reasoning that the plaintiff's claim that pre-interview naturalization application was unreasonably delayed may ultimately fail on the merits but was "not so insubstantial and frivolous as to defeat subject-matter jurisdiction"). Further, with regard to mandamus claims, some courts have cautioned that they must "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).

In challenging jurisdiction, the government may cite 8 U.S.C. § 1252(a)(2)(B) and argue 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 certain discretionary immigration decisions. Numerous courts have rejected this argument. *See, e.g., Labaneya v. USCIS*, 965 F. Supp. 2d 823, 827 (E.D. Mich. 2013) (collecting cases); *Geneme v. Holder*, 935 F. Supp. 2d 184,

190 (D.D.C. 2013) (collecting cases). However, other courts have dismissed delay cases on this basis. *See e.g.*, *Safadi v. Howard*, 466 F. Supp. 2d 696, 700 (E.D. Va. 2006) (stating that 8 U.S.C. § 1252(a)(2)(B) precludes review of a mandamus action to compel adjudication of an adjustment application).

B. Mootness

A case becomes moot, and therefore no longer presents a case or controversy for purposes of Article III "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (citation omitted). Federal courts do not have the authority to decide moot cases and, thus, if subsequent events resolve the parties' dispute, courts must dismiss the case as moot. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087 (9th Cir. 2011).

A mandamus action becomes moot once the agency takes action—e.g., renders a decision on an application. *Mamigonian v. Biggs*, 710 F.3d 936, 942 (9th Cir. 2013) (finding that a mandamus petition was moot when, the day after it was filed, USCIS rendered a decision on the adjustment-of-status applications in question). Some courts have also held that a mandamus action becomes moot when the agency issues an intent to deny letter. *Markandu v. Thompson*, No. 07-4538 (JLL), 2008 U.S. Dist. LEXIS 46136, at *7–8 (D.N.J. June 10, 2008); *Ariwodo v. Hudson*, No. H-06-19072006 U.S. Dist. LEXIS 68613, at *3 (S.D. Tex. Sept. 25, 2006). Other courts have denied mandamus claims after the agency takes steps to adjudicate the application. *See, e.g.*, *Kaur v. Mukasey*, No. C-07-1167RSL, 2008 U.S. Dist. LEXIS 28946, at *5-6 (W.D. Wash. Apr. 9, 2008) (finding request for mandamus to adjudicate an adjustment of status application moot where the agency issued a notice of intent to revoke the underlying visa petition).

Some courts have also found that a mandamus action is moot when the applicant is no longer eligible for the benefit requested. *See, e.g.*, *Nyaga v. Ashcroft*, 323 F.3d 906, 914–16 (11th Cir. 2003) (affirming district court's finding that the plaintiff's claim to compel adjudication of his adjustment application was moot because the applicant's eligibility for an immigrant visa under the diversity visa program expired at the end of the fiscal year); *see also Sadowski v. INS*, 107 F. Supp. 2d 451, 454 (S.D.N.Y. 2000) (finding that mandamus claim was moot because the petitioner, having turned twenty-one, no longer qualified for a derivative immigrant visa). *But see P.K. v. Tillerson*, 302 F. Supp. 3d 1, 11 (D.D.C. 2017) (ordering State Department to reserve diversity visas until controlling Supreme Court decision was decided);[12] *Harriott*, 277 F. Supp. 2d at 543-45 (ordering INS to approve citizenship application nunc pro tunc where court found

[12] In mandamus petitions involving the diversity visa lottery, a court may decide not to dismiss the petition as moot based on ineligibility if the complaint had been filed before the end of the fiscal year. *See Nyaga*, 323 F.3d at 915 n.7 (noting that plaintiff's case was arguably distinguishable from a case where complaint filed before end of year); *Paunescu*, 76 F. Supp. 2d 896, 898 (N.D. Ill. 1999) (granting summary judgment on mandamus claim where complaint filed before end of the fiscal year and court granted a preliminary injunction). *But see Keli v. Rice*, 571 F. Supp. 2d 127, 135–36 (D.D.C. 2008) (dismissing mandamus claim as moot where the petitioner did not seek injunctive relief prior to the fiscal year deadline and instead filed the mandamus complaint ten days before the deadline).

that the plaintiff sustained a claim of equitable estoppel based on agency's affirmative misconduct).

C. Consular Nonreviewability

If a person is seeking to compel a U.S. embassy or consulate to adjudicate a visa application or petition abroad, the government likely will argue that such a claim is barred under the doctrine of consular nonreviewability. The premise of the doctrine is that Congress granted consular officers the authority and discretion over visa decisions and, consistent with Congress' plenary power over immigration, courts lack jurisdiction to review these purely discretionary decisions. *See, generally Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015); *Kliendienst v. Mandel*, 408 U.S. 753 (1972); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999). Some courts have rejected this argument, reasoning that the consular officer had a duty to act—by either issuing or refusing the visa—under the regulations. *See, e.g., Patel v. Reno*, 134 F.3d 929, 932-33 (9th Cir. 1997) (ordering U.S. Consulate in Bombay to adjudicate immigrant visa applications); *Rivas v. Napolitano*, 714 F.3d 1108, 1111–1113 (9th Cir. 2013) (ordering U.S. Consulate in Ciudad Juarez to adjudicate regulatory request for reconsideration of visa refusal); *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 291(D.D.C. 2016) (holding the doctrine of consular nonreviewability "does not preclude Plaintiffs from challenging the Government's failure to decide"); *Assad v. Holder*, No. 2:13-00117, 2013 U.S. Dist. LEXIS 156880,*6–10 (D.N.J. Nov.1, 2013) (finding jurisdiction over mandamus claim seeking to compel the U.S. Embassy in Guyana to adjudicate an immigrant visa application); *Saavedra Bruno*, 197 F.3d at 1159-60; *see also Ibrahim v. United States Dep't of State*, No. 19-610 (BAH), 2020 U.S. Dist. LEXIS 61753, *13-15 (D. D.C. April 8, 2020) (citing cases).

III. PROCEDURES

Delay cases are civil actions over which the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on the courts' websites. Practitioners should be familiar with both sets of rules.

Whom to Sue and Serve: Because mandamus actions seek to force an officer or employee of the government of the United States to take an action, the officer named as a defendant must be one who can carry out the action that is sought. See, e.g., *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (dismissing claims against non-consulate defendants who are without power to issue visas). It is better to be over inclusive in naming defendants, and if it is unclear which officer had the duty to act, also name the agency/department. For more information about identifying defendants and about service, please see NILA, the American Immigration Council and the National Immigration Project's Practice Advisory, Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation.

Venue: Pursuant to 28 U.S.C. § 1391(e), venue for mandamus and APA actions is proper in the judicial district in which the defendant "resides," "a substantial part of the events or omissions giving rise to the claim occurred," or the plaintiff "resides." 28 U.S.C. § 1391(e). The government frequently moves to dismiss cases brought in District of Columbia under 28 U.S.C.

§ 1404(a), asking courts to exercise their discretion to transfer venue to the district where the plaintiff resides or where the application or petition is pending. [13] *See, e.g.*, *Aishat v. U.S. Dep't of Homeland Sec.*, 288 F. Supp. 3d 261, 272 (D.D.C. 2018) (transferring mandamus case that involved a "Texas-based Plaintiff seeking to compel the USCIS's Texas-based field officers to adjudicate his application").

Filing Fee: Parties instituting a civil action in district court are required to pay a filing fee pursuant to 28 U.S.C. § 1914. A complaint may be accompanied by an application to proceed *in forma pauperis* if the plaintiff is unable to pay the filing fee.

Injunctive/Declaratory Relief: A mandamus suit is an action for affirmative relief, as compared to injunctive relief, which typically seeks to prohibit improper action. Although 28 U.S.C. § 1361 does not authorize injunctive relief, mandamus jurisdiction permits a flexible remedy. Furthermore, the same complaint may request declaratory, injunctive, and mandamus relief. For example, the court could declare a policy or regulation illegal, enjoin its enforcement, and order affirmative relief all at the same time.

IV. SPECIFIC IMMIGRATION-RELATED DELAY CONTEXTS

A. U Visa Waiting List Determinations

In recent years, U visa[14] petitioners have sued over USCIS' extensive delays in processing their petitions. By statute, USCIS may not grant more than 10,000 principal U visas in any given fiscal year. *See* 8 U.S.C. § 1184(p)(2)(A). Because there are more U visa petitioners each year than available visas, the regulations require USCIS to place all eligible U visa petitioners on a waiting list. 8 C.F.R. § 214.14(d)(2). Upon placement on this list, the U visa petitioner is

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[13] But note that some courts have found that venue is not proper in the district where a noncitizen plaintiff resides because a noncitizen plaintiff, even if an LPR, does not "reside" in the United States for purposes of venue. *Compare Ou v. Chertoff*, No. C-07-3676 MMC, 2008 U.S. Dist. LEXIS 108848, *3-4 (N.D. Cal. Mar. 12, 2008) (finding that, for venue purposes, a noncitizen is "assumed not to reside in the United States" and transferring case to District Court for the District of Columbia) (internal quotation marks and citations omitted)), *with Kumar v. Mayorkas*, No. 12-06470, 2013 U.S. Dist. LEXIS 135924, *9-14 (N.D. Cal. Sept. 23, 2013). In any event, courts have found jurisdiction if there is some "act or omission" that can form a basis for venue pursuant to 28 U.S.C § 1391(e)(2). *See, e.g.*, *Ibrahim v. Chertoff*, No. 06-2071, 2007 U.S. Dist. LEXIS 38352, *13 (S.D. Cal. May 24, 2007) (finding that nonresident noncitizens do not "reside" in any district for venue purposes, but nevertheless finding proper venue because events significant to the case occurred in the district); *Taing v. Chertoff*, 526 F. Supp. 2d 177, 180 (D. Mass. 2007) (finding venue in Massachusetts where, among others, a substantial part of the events giving rise to the claim occurred in Massachusetts and the USCIS Boston Region/District Office denied the application).

[14] The nonimmigrant U visa allows undocumented noncitizens who were victims of qualifying crimes and who assisted in the detection, investigation, or prosecution of the qualifying criminal activity to apply for and receive a nonimmigrant visa. 8 U.S.C. § 1101(a)(15)(U); *see also* 8 C.F.R. § 214.14(a)(5).

protected from removal from the United States while awaiting final adjudication of the U visa petition; petitioners on the waiting list also may receive work authorization. *Id*.

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. Because this delay can be four or more years—during which time the U visa petitioner remains unprotected—dozens of petitioners have sued USCIS.[15] Many of the resulting decisions address USCIS' motions to dismiss, with conflicting results.

In *Gonzalez v. Cuccinelli*, 985 F.3d 357, 2021 U.S. App. LEXIS 1012, *35 (4th Cir. Jan. 14, 2021), the Fourth Circuit reversed the district court's dismissal of plaintiffs' claim that USCIS unreasonably delayed deciding whether to place them on the waiting list. The court emphasized the factual nature of an unreasonable delay claim and indicated, first, that plaintiffs alleged "weighty" health and welfare interests and harm from the delay and, second, that there was insufficient evidence in the record to determine whether the agency's implementation of its "first in, first out" process, and exceptions to this process, were reasonable. *Id*. Numerous district courts agree with this result. *See*, *e.g.*, *Gonzalez v. U.S. DHS*, No. 2:20-cv-1262 WBS JDP, 2020 U.S. Dist. LEXIS 210641, 25-33 (E.D. Cal. Nov. 10, 2020); *Romero-Ramires v. Wolf*, No. 1:20-CV-203-KWR-SMV, 2020 U.S. Dist. LEXIS 195854, at *4-8 (D. N.M. Oct.20, 2020); *M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 598 (W.D. Tex. 2019).

In contrast, the Seventh Circuit affirmed a district court's dismissal of this claim. *Calderon-Ramirez v. McCament*, 877 F.3d 272, 275-276 (7th Cir. 2017). It found that there was no basis for granting mandamus relief where there was nothing in the record showing that Ramirez's wait times were more unreasonable than those of petitioners ahead of him on the wait list. It also found that, while the government conceded at oral argument that it could expedite these petitions, Ramirez failed to show that his situation warranted such action. With respect to Ramirez's APA claim, the court found that the wait time was not unreasonable both because of the "exponential[]" increase in the backlog and because USCIS had devoted additional resources to processing these petitions. *Id*. at 276; *see also*, *Butanda v. Wolf*, No. 1:20-cv-01155-DDD-STV, 2021 U.S. Dist. LEXIS 18075 (D. Colo. Feb. 1, 2021); *Patel v. Cuccinelli*, No. 6:20-101-KKC, 2021 U.S. Dist. LEXIS 3793 (E.D. Ky. Jan. 8, 2021); *Garcia v. U.S. DHS.*, No. 1:20-cv-457, _ F. Supp. 3d _, 2020 U.S. Dist. LEXIS 242051 (W.D. Mich. Dec. 16, 2020).

These cases demonstrate the importance of pleading sufficient facts to set a plaintiff apart from others in line to be placed on the U visa wait list and/or to demonstrate that USCIS failed to follow its own rules regarding the order in which it makes these determinations or the exceptions which allow a more expeditious processing. In accord with this, one district court within the Seventh Circuit specifically distinguished *Calderon-Ramirez* and denied a motion to dismiss on the basis that the plaintiff before it alleged facts that "differentiate her situation in a manner that

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[15] In a number of these cases, the plaintiffs also challenged USCIS' delay in deciding whether to grant pre-waiting list employment authorization. *See* 8 U.S.C. § 1184(p)(6). Generally, courts have determined that this is a discretionary decision over which they have no jurisdiction. *See*, *e.g*., *Gonzalez*, 2021 U.S. App. LEXIS 210641, at *13-35; *Butanda*, 2021 U.S. Dist. LEXIS 18075, at *15-16; *M.J.L*, 420 F. Supp. 3d at 599.

might plausibly make it appropriate for USCIS to expedite her petition." *Garcia v. U.S. DHS*, No. 19-cv-1265, 2019 U.S. Dist. LEXIS 222683, at *13 (N.D. Ill. Dec. 30, 2019); *see also Haus v. Nielsen*, No. 17 C 4972, 2018 WL 1035870, at *4 (N.D. Ill. Feb. 23, 2018) (denying motion to dismiss and refusing to hold "as a matter of law" that a three-year delay was reasonable).[16]

B. SIJS Petitions

Congress mandated that petitions for Special Immigrant Juvenile Status (SIJS) must be adjudicated within 180 days of the filing of the petition. 8 U.S.C. § 1232(d)(2). Consequently, there are specific arguments that can be made when considering a challenge to a delayed SIJS petition. For a complete discussion of these arguments, *see* NILA's and the Children's Immigration Law Academy's practice advisory, *Mandamus and APA Actions for Special Immigrant Juvenile Petitions*, available at: https://immigrationlitigation.org/wp-content/uploads/2021/01/2021.1.7-SIJS-Mandamus-APA-PA-FINAL-FINAL.pdf.

C. Asylum Applications

There also are specific considerations and arguments to be made with respect to asylum applications. For a complete discussion of these, *see* the American Immigration Lawyers Association's and the American Immigration Council's practice advisory, *Mandamus Actions in the Asylum Context: Avoiding Dismissal and Proving the Case*, available at: https://www.aila.org/infonet/mandamus-actions-in-the-asylum-context-avoiding.

[16] Note that Tahirih Justice Center and Arnold and Porter filed a putative class action challenging U visa wait list and EAD delays. *N.N. v. McAleenan*, No. 1:19-cv-05295 WFK (E.D. N.Y. Sept. 17, 2019); *see also* Tahirih Class Action Lawsuit on Behalf of Applicants for U Visas, https://www.tahirih.org/wp-content/uploads/2019/09/Tahirih-Info-Sheet-on-U-Visa-Class-Action.pdf. As of the date of the advisory, counsel in the case are encouraging practitioners to continue to file delay cases on behalf of their clients because no decisions have yet been reached in the case. Contact Tahirih Justice Center for updates on case developments.