National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Advisory[1]
May 17, 2024

Recent Trends in Immigration Delay Cases

Noncitizens and their attorneys are experiencing record-breaking delays in the adjudication of benefit applications by U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS). As processing times for most, if not all, applications stretch into years, attorneys increasingly are challenging these delays in U.S. district courts. As a result, there have been dozens of district court decisions—and a handful of court of appeals decisions—in recent years addressing immigration delay suits brought under the Mandamus Act, 28 U.S.C. § 1361, and/or the Administrative Procedure Act (APA), 5 U.S.C. § 706(1).

This practice advisory analyzes trends from decisions issued **only** since 2021, focusing primarily on decisions from the courts of appeals and reported district court decisions.[2] It is not a complete survey of cases since most district court decisions are unreported. Note that some of the referenced district court cases may be on appeal. Consequently, attorneys contemplating a delay lawsuit should independently research decisions within their jurisdiction.

Government Motions to Dismiss

In response to a complaint, the agency may file either an answer or a motion to dismiss. Most district court decisions addressing USCIS and DOS delays occur in response to a motion to dismiss filed by government counsel for the defendant agency. The number of recent decisions addressing motions to dismiss reflects both USCIS's and DOS's increased willingness to litigate delay cases—at least through the motion to dismiss stage. Thus, although USCIS and DOS may be willing to resolve cases involving particularly egregious delays through an immediate adjudication or action taken after the filing of a lawsuit, there is no certainty that such resolution

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[2] For a full discussion of delay lawsuits in the immigration context, see the following practice advisories: Mandamus Actions: Avoiding Dismissal and Proving the Case. Challenging Delays in Refugee Relative Petition Processing in Federal Court, Immigration Lawsuits and the APA: the Basics of a District Court Action, Mandamus and APA Delay Cases: Avoiding Dismissal and Proving the Case, and Mandamus and APA Actions for Special Immigrant Juvenile Petitions, all of which are posted on the practice advisories page practice advisories page of NILA's website.

will occur in any given case. Practitioners must be prepared—and, in fact, should expect—to litigate a motion to dismiss after filing a delay complaint against USCIS or DOS.

The government may move to dismiss a case for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure or for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

1. Rule 12(b)(1): Motions to Dismiss Raising Jurisdictional Grounds

Rule 12(b)(1) motions alleging a lack of jurisdiction often argue one or more of the following, that: (a) review is barred by a provision of the Immigration and Nationality Act (INA); (b) there is no discrete action the agency is required to take (which are requirements in the APA and Mandamus Act); (c) the doctrine of consular nonreviewability bars review (in cases pertaining to consular processing delays); (d) a plaintiff lacks standing or a claim is moot; and/or (e) there is no jurisdiction over a mandamus claim. Each of these arguments is discussed below.

a. 5 U.S.C. § 701(a) and Bars to Judicial Review under the INA

i. 5 U.S.C. § 701(a)(1) and 8 U.S.C. § 1252(a)(2)(B)(ii)

The APA is not available as a cause of action where another statute precludes judicial review. 5 U.S.C. § 701(a)(1). The government frequently moves to dismiss APA delay claims on this basis, arguing that 8 U.S.C. § 1252(a)(2)(B)(ii) precludes review. That statute bars review over "decision[s] or action[s] of the Attorney General or the Secretary of Homeland Security the authority for which is specified under [8 U.S.C. §§ 1151-1382] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under [8 U.S.C. § 1158(a), the asylum statute]."

Two courts of appeals have found that § 1252(a)(2)(B)(ii) does not bar review of claims that USCIS unreasonably delayed adjudication of visa petitions for placement on the U-visa waiting list. *Barrios Garcia v. U.S. Dep't. of Homeland Sec.*, 25 F.4th 430, 443 (6th Cir. 2022); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 374 n.10 (4th Cir. 2021); *see also Moreno v. Wolf*, 558 F. Supp. 3d 1357, 1364-65 (N.D. Ga. 2021); *Lara Santiago v. Mayorkas*, 554 F. Supp. 3d 1340, 1347 (N.D. Ga. 2021); *Tista v. Jaddou*, 577 F. Supp. 3d 1219, 1226-27 (D.N.M. 2021); *accord Lamarche v. Mayorkas*, No. 23-30029-MGM, __ F. Supp. 3d __, 2023 WL 5759587, *2-3 (D. Mass. 2023) (same with respect to humanitarian parole for Afghans).

Both *Barrios Garcia* and *Gonzalez* found that § 1252(a)(2)(B)(ii) did not apply because there was no statutory grant of discretion involved in the adjudication of U visas for placement on the waiting list; rather, both courts found that the U visa statute mandated that DHS adopt regulations for the U visa program and that the ensuing regulations mandated that USCIS place eligible applicants on the U visa waiting list. *Barrios Garcia*, 25 F.4th at 443-46; *Gonzalez*, 985 F.3d at 374 n.10. In contrast, at least one district court held that it lacked jurisdiction under § 1252(a)(2)(B)(ii) to review USCIS's pace of adjudicating U visa petitions. *Butanda v. Wolf*, 516 F. Supp. 3d 1243, 1248-50 (D. Colo. 2021); *but see id.* at 1250 (finding § 1252(a)(2)(B)(ii)) barred jurisdiction over claims of delayed adjudication of work authorization applications in pre-

waitlist U visa cases).

At least two other courts of appeals also have addressed jurisdiction over challenges to agency policies alleged to have caused delayed adjudications. In *Thigulla v. Jaddou*, the Eighth Circuit held that, under § 1252(a)(2)(B)(ii), it lacked jurisdiction over a challenge to USCIS's policy to hold—and thus delay—adjudication of adjustment of status applications for which priority dates had retrogressed such that a visa number was no longer immediately available. 94 F.4th 770, 775-76 (8th Cir. 2024). The court reasoned that this policy was adopted pursuant to Congress' grant of discretion to DHS to adopt regulations pertaining to adjustment of status, and thus fell within § 1252(a)(2)(B)(ii). *Id*. In a challenge to the same policy, the Fifth Circuit reached the same result, but additionally relied upon earlier Fifth Circuit precedent which held that § 1252(a)(2)(B)(ii) precluded review over USCIS's pace of adjudication. *Cheejati v. Blinkin*, 97 F.4th 988, 992-93 (5th Cir. 2024).

ii. 5 U.S.C. § 701(a)(1) and 8 U.S.C. § 1182(a)(9)(B)(v)

In cases involving unlawful presence waivers, the government has invoked 8 U.S.C. § 1189(a)(9)(B)(v), which strips federal courts of "jurisdiction to review a decision or action" regarding such waivers. Numerous courts have concluded that this bar does not apply to "agency inaction" under the APA, and thus have exercised jurisdiction over claims that USCIS has unreasonably delayed adjudicating these waivers. *See, e.g.*, *Saavedra Estrada v. Mayorkas*, No. 23-2110, -- F.4th --, 2023 WL 8096897, *5-7 (E.D. Penn. Nov. 21, 2023); *Escobar v. Miller*, No. :23-cv-399-MSN-WEF, 2024 WL 98393, *3-4 (E.D. Va. Jan. 8, 2024); *Novack v. Miller*, No. 23-CV-10635-AK, 2024 WL 1346430, *4 (D. Mass. Mar. 29, 2024); *Lara-Esperanza v. Mayorkas*, No. 23-cv-01415-NYW-MEH, 2023 WL 7003418, *5 (D. Colo. Oct. 24, 2023); *but see Lovo v. Miller*, No. 5:22-cv-00067, 2023 WL 3550167, *3-4 (W.D. Va. May 18, 2023) (holding that § 1189(a)(9)(B)(v) bars a challenge to USCIS' failure or refusal to act on an application to waive unlawful presence).

iii. 8 U.S.C. § 1158(d)

In asylum cases, the government has argued that there is no jurisdiction to enforce the processing time found in § 1158(d). While courts agree with this, several have held that they still have jurisdiction to consider claims of unreasonable delay under the APA, 5 U.S.C. § 555(b). *See, e.g., Doe v. DHS*, No. 23-CV-2, 2024 WL 1603567, at *2 (E.D. La. Apr. 12, 2024); *Azeez v. DHS*, No. CV 23-7507-KK-ASx, 2024 WL 1109289, at *3 (C.D. Cal. Feb. 15, 2024); *Zheng v. Mayorkas*, No. 4:23-cv-02707-KAW, 2024 WL 130157, at *4-5 (N.D. Cal. Jan. 11, 2024); *Yovo v. USCIS*, No. 2:23-cv-02329-JTF-tmp, 2023 WL 8654438, at *3-4 (W.D. Tenn. Dec. 14, 2023); *Girges v. Sec'y, DHS*, No. 6:22-cv-158-GAP-LHP, 2022 WL 2774211, at *2-3 (M.D. Fla. Jun. 8, 2022).

iv. 5 U.S.C. § 701(a)(2)

The APA also precludes review where agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). In *Barrios Garcia*, the Sixth Circuit held that this provision did not bar its review of a challenge to unreasonable delay in adjudicating the plaintiff's placement on the U visa waiting list, finding that the U visa statute contained meaningful standards by which to

measure the agency's action. 25 F.4th at 445-447; *see also, e.g.*, *Segovia v. Garland*, No. 1:23-cv-1478-AT, 2024 WL 122348 (N.D. Ga. Mar. 21, 2024) (also finding that the pace of adjudicating a provisional unlawful presence waiver is not "committed to agency discretion by law"); *Azeez*, 2024 WL 1109289, at *3 (same, for asylum applications); *Akhter v. Blinken*, No. 2:23-cv-1374, 2024 WL 1173905, *4-5 (S.D. Ohio Mar. 19, 2024) (same, for I-130 petition).

b. Nondiscretionary Duty to Act

To prevail on a delay claim under either the APA or the Mandamus Act, a plaintiff must show that "an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Thus, a motion to dismiss may argue that USCIS or DOS has no mandatory duty to act in cases regarding delayed adjudication.

With respect to claims that USCIS delayed adjudicating a U visa applicant's eligibility for placement on the waiting list, recent decisions from the Fourth Circuit and at least two district courts hold that USCIS has a mandatory duty to adjudicate the applications within a reasonable time. *See, e.g., Gonzalez*, 985 F.3d at 374 n.10; *Moreno*, 558 F. Supp. 3d at 1364-65; *Lara Santiago*, 554 F. Supp. 3d at 1347-48.

Relying on 5 U.S.C. § 555(b), which requires agencies "to conclude a matter presented to it" within "a reasonable time," several district courts have recognized that DOS has a duty to adjudicate immigrant visa petitions and/or schedule interviews for such petitions within a reasonable time. *See, e.g.*, *Ahmed v. Bitter*, No. 4:22-cv-02474, __ F. Supp. 3d __, 2024 WL 1340255, at *3 (S.D. Tex. 2024) (finding jurisdiction over claim "to compel the Government to observe the reasonable-time mandate with respect to adjudication of" an I-824 petition); *Akhter*, 2024 WL 1173905, at *4-5 (finding a nondiscretionary duty to review and adjudicate visa applications); *Iqbal v. Blinken*, No. 2:23-cv-01299-KJM-KJN, 2023 WL 7418353, at *6-7 (E.D. Cal. Nov. 8, 2023) (same); *Mahmood v. Blinken*, No. 23-1596, 2023 WL 6323796, at *5-6 (E.D. Pa. Sept. 28, 2023) (finding nondiscretionary duty for embassies and the NVC to adjudicate visa petitions within a reasonable time); *Ghalambor v. Blinken*, No. 23-9377-MWF (BFMx), 2024 WL 653377, at *2-3 (C.D. Cal. Feb. 1, 2024) (finding nondiscretionary duty to schedule visa interviews within a reasonable time).

However, several other courts, including the Fourth Circuit, have dismissed delay claims, finding that USCIS did not have a nondiscretionary duty to act within a particular timeframe with regard to the adjudication at issue. *See, e.g.*, *Gonzalez*, 985 F.3d at 366-71 (finding no mandatory duty to adjudicate employment authorization applications of U visa petitioners within a reasonable time); *Moreno*, 558 F. Supp. 3d at 1366-67 (same); *Hasan v. Wolf*, 550 F. Supp. 3d 1342, 1347 (N.D. Ga. 2021) (finding that "the pace of adjudicating U-Visa petitions is statutorily committed to the discretion of the Secretary, and by extension, USCIS"); *Hildago Canevaro v. Wolf*, 540 F.Supp.3d 1235, 1242, 1243 (N.D. Ga. 2021) (finding that "[b]ecause there are no requirements, statutory or regulatory, regarding when USCIS must determine which petitioners are [U Visa] waitlist eligible, Plaintiffs' claims are non-reviewable" and that claims regarding delays in EADs for U Visa applicants are also discretionary); *Mueller v. Blinkin*, 682 F. Supp. 3d 528, 534-37 (E.D. Va. 2023) (finding no statutory or regulatory duty for DOS to review every visa petition); *Heidarnejad v. USCIS*, No. 1:23-CV-1083-DII, __ F.Supp.3d __, 2024 WL 1107432, at *3

(W.D. Tex. 2024) (finding that the nondiscretionary duty to adjudicate a visa petition attaches only after USCIS' investigation of the facts of the case is complete); *Niknam v. U.S. Dep't of State*, No. 3-cv-01380-PAB-SBP, 2024 WL 709636, at *3-4 (D. Colo. Feb. 21, 2024) (finding that DOS does not have a nondiscretionary duty to schedule a visa interview for a family-based petition); *see also Azam v. Bitter*, No. 23-4137 (RMB), 2024 WL 912516, at *6-9 (D.N.J. Mar. 4, 2024) (finding nondiscretionary duty to review and adjudicate visa applications, *but* no duty to do so within a certain time frame absent claims of bad faith or abdication of responsbility).

c. Consular Nonreviewability

In cases involving delays in consular processing of immigrant visas, USCIS has moved to dismiss arguing that the doctrine of consular non-reviewability bars district court review of such delay. In *Al-Gharawy v. DHS*, a district court rejected the government's argument, following what it found to be the majority view of District of Columbia district court decisions. 617 F. Supp. 3d 1, 11-12 (D.D.C. 2022). The court analyzed at length the reasons why the doctrine of consular nonreviewability did not apply "where a consular officer has not rendered a final decision," as long as the plaintiff "merely ask[s] that the Court require the consular officer to render *a* decision—regardless of what that decision might be." *Id.* at 11; *see also id.* at 11-17 (citing cases and fully analyzing the issue). Another D.C. district court again agreed in *Giliana v. Blinken* and further rejected the government's argument that a visa "refusal" was a final decision subject to consular nonreviewability. The court agreed that "when an 'application is still undergoing administrative processing, even where a refusal has been relayed, the decision is not final,' and thus 'claims alleging unreasonable delay while a case remains suspended in 'administrative processing' are not barred by the doctrine of consular nonreviewability.'" 596 F. Supp. 3d 13, 18 (D.D.C. 2022) (internal quotations omitted) (citing cases).

Numerous other courts have reached the same result. *See, e.g.*, *Raouf v. U.S. Dep't of State*, No. 23-cv-302-LM, __ F.Supp.3d __ , 2023 WL 8020484, at *1-3 (D.N.H. 2023); *Jahangiri v. Blinken*, No. DKC 23-2722, 2024 WL 1656269, at *5-6 (D. Md. Apr. 17, 2024); *Sharifymoghaddam v. Blinken*, No. 23-cv-1472-RCL, 2024 WL 939991, at *4 (D.D.C. Mar. 5, 2024); *Taherian v. Blinken*, No. SACV 23-01927-CJC (ADSx), 2024 WL 1652625, at *4 (C.D. Cal. Jan. 16, 2024).

d. Standing and Mootness

In some cases, USCIS or DOS may move dismiss, arguing that the request is moot because the defendant already has taken whatever action is requested in the complaint, or that the plaintiff lacks standing and thus lacks a right to the relief requested. In *Al-Gharawy*, the court rejected the government's argument that a plaintiff has no standing to bring a claim against the DOS Secretary in a consular processing delay case. 617 F. Supp. 3d at 10. Defendants relied upon decisions from the D.C. Court of Appeals which held that, under the INA, the Secretary has no authority to review a consular officer's determination with respect to a visa application. *Id*. The *Al-Gharawy* court distinguished these cases, however, finding that they did not apply to the Secretary's authority over "the *timing* by which the consular officer considers the applications presented to her." *Id.*; *cf. Ramirez v. Blinken*, 594 F. Supp. 3d 76, 89-90 (D.D.C. 2022) (rejecting argument that DOS Secretary was not a proper party for similar reasons).

In contrast, *Al-Gharawy* dismissed claims against the Department of Homeland Security (DHS) and/or USCIS for lack of standing. Because the plaintiffs only filed suit challenging the delay in adjudicating I-130 visa petitions after USCIS had forwarded the approved petitions to DOS's National Visa Center for further processing, the court held that USCIS and DHS had no further role in the process, and there was no relief that it could grant plaintiffs from these defendants. 617 F. Supp. 3d at 6, 9. Because the ability to redress an injury is essential to a party's standing, the court concluded that the plaintiffs had no standing with respect to the claims against these defendants. *Id*. at 9-10. In so holding, the court rejected as speculative the plaintiffs' argument that the consular officer might return their cases to USCIS for reconsideration. *Id*.; *cf. Ali v. U.S. Dep't of State*, 676 F. Supp. 3d 460, 467-68 (E.D.N.C. 2023) (finding no standing for the claim regarding DHS's Controlled Application Review and Resolution Program (CARRP) because plaintiff had sued only DOS defendants); *Giliana*, 596 F. Supp. 3d at 23-24 (finding no standing with respect to a CARRP claim because plaintiff failed to allege sufficient facts to show he was subject to this program).

At least one judge reached the same result by applying the mootness doctrine. *Arab v. Blinken*, 600 F. Supp. 3d 59, 66-67 (D.D.C. 2022) (finding claim against DHS and USCIS moot where USCIS had completed its processing prior to suit being filed).

In *Ramirez v. Blinken*, the court rejected the government's argument that the claims of plaintiffs whose visas had been "refused" following a consular interview were moot. 594 F. Supp. 3d at 87. The court found that refusal of a visa at that stage was "often not final" as "a refusal may be entered for 'administrative processing,' and applicants may have an opportunity to provide additional information." *Id.*

a. No Jurisdiction to Review Mandamus Claim

One requirement for a writ of mandamus is that there exists no adequate remedy at law. *See, e.g.*, *Am. Hospa Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). In some recent cases, courts have dismissed mandamus claims after finding that the APA provides an adequate remedy at law. *See*, *e.g.*, *Tista*, 577 F. Supp. 3d at 1231; *Moreno*, 589 F. Supp. 3d at 1365; *Ahmed v. Bitter*, No. 4:22-cv-02474, __ F. Supp. 3d __, 2024 WL 1340255, at *4 (S.D. Tex. Mar. 28, 2024); *Infracost Inc. v. Blinken*, No. 23-CV-2226 JLS (MSB), __ F.4th __, 2024 WL 1914368, at *5 (S.D. Cal. Apr. 30, 2024); *Osechas Lopez v. Mayorkas*, 649 F. Supp. 3d 1278, 1286 (S.D. Fla. 2023).

2. Rule 12(b)(6): Motions to Dismiss Alleging a Failure to State a Claim Upon Which Relief Can Be Granted

USCIS also frequently moves to dismiss delay cases for failure to state a claim under Rule 12(b)(6), arguing that the plaintiff has not demonstrated that the delay in the case is unreasonable for purposes of either the Mandamus Act or the APA. Courts generally consider whether an agency's delay is unreasonable by considering the six factors set forth in *Telecomms. Rsch. & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984), although some courts have held

that they should not conduct a full analysis under *TRAC* at the motion to dismiss stage because further factual development is necessary.[3]

a. Review of *TRAC* Factors Not Suitable at MTD Stage

Courts are divided as to whether it is appropriate to consider the *TRAC* factors in adjudicating a motion to dismiss, or whether the parties should be allowed to further develop the facts relevant to the factors through discovery before conducting the analysis. Two courts of appeals and at least one district court have determined that, because review of the *TRAC* factors is fact intensive, it is not an appropriate consideration at the motion to dismiss state where the plaintiff has not yet had an opportunity to develop the facts through discovery. *See Gonzalez*, 985 F.3d at 375 ("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."); *Barrios Garcia*, 25 F.4th at 451 (quoting *Gonzalez* on this point but nevertheless reviewing *TRAC* factors); *Al Gharawy*, 617 F. Supp. 3d at 17-18; *Akbar v. Blinken*, No. 23-cv-1054-LL-BLM, 2023 WL 8722119, at *4 (S.D. Cal. Dec. 18, 2023); *Salihi v. Blinken*, No. 23-cv-718-MMA-AHG, 2023 WL 8007348, at *7 (S.D. Cal. Nov. 17, 2023); *Girges v. Sec'y, DHS*, No. 6:22-cv-158-GAP-LHP, 2022 WL 2774211, at *4 (M.D. Fla. June 8, 2022); *Iqbal v. Blinken*, No. 2:23-cv-01299-KJM-KJN, 2023 WL 7418353, at *7-8 (E.D. Cal. Nov. 9, 2023); *Segovia v. Garland*, No. 1:23-cv-1478-AT, 2024 WL 1223481, at *14-15 (N.D. Ga. Mar. 21, 2024); *Velagapudi v. USCIS*, No. 4:22-CV-295 SRW, 2022 WL 4447409, at *5-8 (E.D. Mo. Sept. 23, 2022); *Taherian v. Blinken*, No. SACV 23-01927-CJC (ADSx), 2024 WL 1652625, at *4 (C.D. Cal. Jan. 16, 2024); *accord Mahmood v. Blinken*, No. 23-1596, 2023 WL 6323796, at *7 (E.D. Pa. Sept. 28, 2023) (considering Third-Circuit-specific version of factors and finding it inappropriate at the MTD stage).[4]

Note, however, that several district courts have held the opposite. *See, e.g.*, *Jahangiri v. Blinken*, No. DKC 23-2722, 2024 WL 1656269, at *8-12 (D. Md. Apr. 17, 2024) (finding courts can

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[3] These factors are: (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." *TRAC*, 750 F.2d at 80 (citations and internal quotation marks omitted).

[4] The 4 factors under *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin. (OCAWU)*, 145 F.3d 120 (3d Cir. 1998), are: (1) "the length of time that has elapsed since the agency came under a duty to act"; (2) "the reasonableness of the delay . . . in the context of the statute authorizing the agency's action"; (3) "the consequences of the agency's delay"; and (4) "any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." *Id.* at 123 (internal quotation marks omitted).

consider *TRAC* factors at motion to dismiss stage); *Chhajed v. Jaddou*, No. 2:23-cv-483, 2024 WL 1332258, at *3 (S.D. Ohio Mar. 27, 2024) (finding courts can consider *TRAC* factors at this stage, but only to determine if plaintiffs' claims for relief are plausible); *Da Fonseca v. Emmel*, No. 23-3300 (JEB), 2024 WL 519603, at *3-4 (D.D.C. Feb. 9, 2024) (courts may evaluate *TRAC* factors at this stage where the record contains sufficient facts to do so); *Mottahedan v. Oudkirk*, No. 23-3486 (CKK), 2024 WL 124750, at *3 (D.D.C. Jan. 11, 2024) (stating that, in the D.C. District Court, the majority view is that it is appropriate to apply the *TRAC* factors at the motion to dismiss stage).

In responding to a motion to dismiss that raises the *TRAC* factors, it generally makes sense for practitioners to begin with this argument before addressing the *TRAC* factors, particularly considering the number of decisions that find the government's delay reasonable under the *TRAC* factors, as discussed below.

b. Consideration of *TRAC* Factors

Where courts do consider whether the plaintiff has made a plausible claim of unreasonable delay, they generally do so by analyzing the allegations in the complaint under the *TRAC* factors. Consequently, review of these decisions—both those finding that a plausible claim was alleged and those granting the government's motion to dismiss—is helpful prior to drafting a complaint.

i. Plaintiff Alleged a Plausible Claim of Unreasonable Delay

While it has become increasingly difficult to survive a motion to dismiss based on the TRAC factors, courts are most inclined to deny such motions where there are questions as to whether the agency's adjudication process is governed by a rule of reason. Thus, plaintiffs will have a better chance of surviving dismissal if they are able to make specific allegations that the agency has failed to follow a reasonable, orderly adjudication process.

In *Barrios*, the Sixth Circuit found that the third and fifth *TRAC* factors, which concern health, welfare and prejudice, favored the plaintiffs, citing the allegations of harm experienced by the plaintiffs due to the delay. 25 F.4th at 452. The court further found that these allegations, coupled with the length of the delays, were sufficient to support an unreasonable delay claim with respect to adjudication of the U visa petitions for plaintiffs' placement on the waiting list. *Id*. Significantly, the court rejected the government's argument that its U visa adjudications were governed by a rule of reason, noting that plaintiffs had adequately alleged that the "first-in, first-out" process claimed by the government was not followed. *Id.* at 453. *See also, id.*, 25 F.4th 453-455 (rejecting all other government arguments regarding the *TRAC* factors); *Ramirez v. Blinken*, 594 F. Supp. 3d at 91-96 (finding plausible claim of unreasonable delay under *TRAC* factors); *Tista*, 577 F. Supp. 3d at 1229-31 (same); *Akhter v. Blinken*, No. 2:23-cv-1374, 2024 WL 1173905, at *5-6 (S.D. Ohio Mar. 19, 2024) (finding sufficient unreasonable delay claim under *TRAC* factors and noting that discovery will be important, especially as to first and fourth factors)**;** *Chhajed v. Jaddou*, No. 2:23-cv-483, 2024 WL 1332258, at *4 (S.D. Ohio Mar. 27, 2024) (finding plaintiffs' claims regarding EB-5 visa delays plausible under *TRAC* where they alleged defendants failed to follow rule of reason in adjudicating and plaintiffs have waited 4

years for adjudication); *accord Saavedra*, 2023 WL 8096897, at *7-9 (relying on the Third Circuit's four factor test, see n. 5, *supra*, rather than *TRAC* but reaching the same result).

ii. Plaintiff Failed to Allege a Plausible Claim of Unreasonable Delay

Courts have dismissed cases under the *TRAC* factors even where there has been a long delay. In *Da Costa v. Immigr. Inv. Program Off.*, the D.C. Circuit held that the plaintiffs had "not stated a legally viable claim that USCIS unreasonably delayed adjudicating the I-526 petitions," relying primarily on its finding that USCIS applies a "rule of reason" with respect to adjudication of these petitions and that granting plaintiffs' relief "would involve disfavored line-jumping" by placing them ahead of others who filed their petitions earlier. 80 F.4th 330, 339 (D.C. Cir. 2023); see also, *id.*, at 341 (finding reasonable USCIS's processing of I-526 petitions from nationals of countries as to which visas are currently available prior to processing those where visas are not yet available); *id*. at 343-346 (evaluating the other *TRAC* factors).

Numerous district courts similarly have granted the government's motion to dismiss after applying the *TRAC* factors. *See, e.g., Hildago Canevaro*, 540 F.Supp.3d at 1244-45; *Ahmed*, 2024 WL 1340255, at *4-6; *N-N v. Mayorkas*, 540 F. Supp. 3d 240, 260-64 (E.D.N.Y. 2021); *Osechas Lopez*, 649 F.Supp.3d at 1288-90; *Mohammad v. Blinkin*, 548 F. Supp. 3d 159, 165-69 (D.D.C. 2021); *Su v. Mayorkas*, _ F. Supp.3d _, 2023 WL 7209630, *5-7 (N.D. Cal. 2023); *Yilmaz v. Jaddou*, _ F.Supp.3d. _, 2023 WL 7389848, *4-6 (C.D. Cal. 2023); *Azeez*, 2024 WL 1109289, at *4-6; *Davila v. Cohan*, No. 23-CV-1532 JLS (BLM), 2024 WL 711618 (S.D. Cal. Feb. 21, 2024); *Doe,* 2024 WL 1603567, at *3-5; *Zheng*, 2024 WL 130157, at *5-8; *Yovo*, 2023 WL 8654438, at 4-7; *Kamat v. USCIS*, No., 2024 WL 342304, at *3-10 (W.D. Wash. Jan. 30, 2024).

RECENT CASES BY TYPE OF APPLICATION/PETITION

1. **I-601A Provisional Unlawful Presence Waivers**
    a. *Saavedra Estrada v. Mayorkas, No. 23-2110,* __ F.4th __, 2023 WL 8096897 (E.D. Penn. Nov. 21, 2023)
    b. *Escobar v. Miller*, No. :23-cv-399-MSN-WEF, 2024 WL 98393 (E.D. Va. Jan. 8, 2024)
    c. *Lovo v. Miller*, No. 5:22-cv-00067, 2023 WL 3550167 (W.D. Va. May 18, 2023)
    d. *Novack v. Miller*, No. 23-CV-10635-AK, 2024 WL 1346430 (D. Mass. Mar. 29, 2024)
    e. *Segovia v. Garland*, No. 1:23-cv-1478-AT, 2024 WL 122348 (N.D. Ga. Mar. 21, 2024)
    f. *Lara-Esperanza v. Mayorkas*, No. 23-cv-01415-NYW-MEH, 2023 WL 7003418 (D. Colo. Oct. 24, 2023)

2. **Consular processing**
    a. *Ahmed v. Bitter*, No. 4:22-cv-02474, __ F. Supp. 3d __, 2024 WL 1340255 (S.D. Tex. Mar. 28, 2024)
    b. *Infracost Inc. v. Blinken*, No. 23-CV-2226 JLS (MSB), __ F.4th __, 2024 WL 1914368 (S.D. Cal. Apr. 30, 2024)

c. *Heidarnejad v. USCIS,* No. 1:23-CV-1083-DII, __ F.Supp.3d __, 2024 WL 1107432 (W.D. Tex. 2024)
d. *Mueller v. Blinkin*, 682 F. Supp. 3d 528 (E.D. Va. 2023)
e. *Giliana v. Blinken,* 596 F. Supp. 3d 13, 18 (D.D.C. 2022)
f. *Ramirez v. Blinken*, 594 F. Supp. 3d 76, 89-90 (D.D.C. 2022)
g. *Arab v. Blinken,* 600 F. Supp. 3d 59, 66-67 (D.D.C. 2022)
h. *Raouf v. U.S. Dep't of State*, No. 23-cv-302-LM, __ F.Supp.3d __ , 2023 WL 8020484 (D.N.H. 2023)
i. *Al-Gharawy v. DHS*, 617 F. Supp. 3d 1 (D.D.C. 2022)
j. *Mohammad v. Blinkin*, 548 F. Supp. 3d 159, 165-69 (D.D.C. 2021)
k. *Akhter v. Blinken*, No. 2:23-cv-1374, 2024 WL 1173905 (S.D. Ohio Mar. 19, 2024) (I-130 consular interview)
l. *Ghalambor v. Blinken*, No. 23-9377-MWF (BFMx), 2024 WL 653377 (C.D. Cal. Feb. 1, 2024) (I-130 consular interview)
m. *Iqbal v. Blinken*, No. 2:23-cv-01299-KJM-KJN, 2023 WL 7418353 (E.D. Cal. Nov. 9, 2023) (I-130 consular interview)
n. *Mahmood v. Blinken*, No. 23-1596, 2023 WL 6323796 (E.D. Pa. Sept. 28, 2023) (I-130 consular interview)
o. *Niknam v. U.S. Dep't of State*, No. 3-cv-01380-PAB-SBP2024 WL 709636 (D. Colo. Feb. 21, 2204) (I-130 consular interview)
p. *Davila v. Cohan*, No. 23-CV-1532 JLS (BLM), 2024 WL 711618 (S.D. Cal. Feb. 21, 2024) (administrative processing after I-130 interview)
q. *Taherian v. Blinken*, No. SACV 23-01927-CJC (ADSx), 2024 WL 1652625 (C.D. Cal. Jan. 16, 2024) (administrative processing after I-130 interview)
r. *Noori v. Blinken*, No. 23-1463 (TJK), 2024 WL 939990 (D.D.C. Mar. 5, 2024) (I-130)
s. *Akbar v. Blinken*, No. 2:23-cv-01133-JHC, 23cv1054-LL-BLM, 2023 WL 8722119 (S.D. Cal. Dec. 18, 2023) (I-130)
t. *Lee v. Blinken*, No. 23-cv-1783 (DLF), 2024 WL 639635 (D.D.C. Feb. 15, 2024) (K-1 visa)
u. *Jahangiri v. Blinken*, No. DKC 23-2722, 2024 WL 1656269 (D. Mar. Apr. 17, 2024) (K-1 visa)
v. *Sharifymoghaddam v. Blinken*, No. 23-cv-1472-RCL, 2024 WL 939991 (D.D.C. Mar. 5, 2024) (I-140 visa)
w. *Ahmadi v. Scharpf*, No. 23-cv-953, 2024 WL 551542 (DLF) (D.D.C Feb. 12, 2024) (J-1 visa)

3. Asylum

a. *Yilmaz v. Jaddou*, _ F.Supp.3d. _, 2023 WL 7389848 (C.D. Cal. 2023)
b. *Su v. Mayorkas*, _ F. Supp.3d _, 2023 WL 7209630 (N.D. Cal. 2023)
c. *Azeez v. DHS*, No. CV 23-7507-KK-ASx, 2024 WL 1109289 (C.D. Cal. Feb. 15, 2024)
d. *Doe v. DHS*, No. 23-CV-2, 2024 WL 1603567 (E.D. La. Apr. 12, 2024)
e. *Girges v. Sec'y, DHS*, No. 6:22-cv-158-GAP-LHP, 2022 WL 2774211 (M.D. Fla. Jun. 8, 2022)

f. *Zheng v. Mayorkas*, No. 4:23-cv-02707-KAW, 2024 WL 130157 (N.D. Cal. Jan. 11, 2024)
g. *Yovo v. USCIS*, No. 2:23-cv-02329-JTF-tmp, 2023 WL 8654438 (W.D. Tenn. Dec. 14, 2023)

4. U visa waiting list/BFD

a. *Barrios Garcia v. U.S. Dep't. of Homeland Sec.*, 25 F.4th 430 (6th Cir. 2022)
b. *Gonzalez v. Cuccinelli*, 985 F.3d 357 (4th Cir. 2021)
c. *Moreno v. Wolf*, 558 F. Supp. 3d 1357 (N.D. Ga. 2021)
d. *Lara Santiago v. Mayorkas*, 554 F. Supp. 3d 1340 (N.D. Ga. 2021)
e. *Tista v. Jaddou*, 577 F. Supp. 3d 1219 (D.N.M. 2021)
f. *Hasan v. Wolf,* 550 F. Supp. 3d 1342 (N.D. Ga. 2021)
g. *Butanda v. Wolf,* 516 F. Supp. 3d 1243 (D. Colo. 2021)
h. *N-N v. Mayorkas*, 540 F. Supp. 3d 240 (E.D.N.Y. 2021)
i. *Hildago Canevaro v. Wolf*, 540 F.Supp.3d 1235 (N.D. Ga. 2021)
j. *Arenales-Salgado-De-Oliveira v. Jaddou*, No. 23-61167, 2024 WL 68291 (S.D. Fla. Jan. 5, 2024)

5. Investor visa

a. *Da Costa v. Immigr. Inv. Program Off.*, 80 F.4th 330 (D.C. Cir. 2023)
b. *Osechas Lopez v. Mayorkas*, 649 F. Supp. 3d 1278 (S.D. Fla. 2023)
c. *Mukkavilli v. Jaddou*, No. 23-5138, 2024 WL 1231346 (D.C. Cir. Mar. 22, 2024)
d. *Chhajed v. Jaddou*, No. 2:23-cv-483, 2024 WL 1332258 (S.D. Ohio Mar. 27, 2024)
e. *Da Fonseca v. Emmel*, No. 23-3300 (JEB), 2024 WL 519603 (D.D.C. Feb. 9, 2024)
f. *Kamat v. USCIS*, No. 2:23-cv-01133-JHC, 2024 WL 342304 (W.D. Wash. Jan. 30, 2024)
g. *Mottahedan v. Oudkirk*, No. 23-3486 (CKK), 2024 WL 124750 (D.D.C. Jan. 11, 2024)
h. *Mukkavilli v. Jaddou*, No. 23-5138, 2024 WL 1231346 (D.C. Cir. Mar. 22, 2024)
i. *Velagapudi v. USCIS*, No. 4:22-CV-295 SRW, 2022 WL 4447409 (E.D. Mo. Sept. 23, 2022)

6. I-730 petition

a. *Mohamed v. Jaddou*, No. 23-902 (JRT/LIB), 2024 WL 477098 (D. Minn. Feb. 7, 2024)
b. *Salihi v. Blinken*, No. 23-cv-718-MMA-AHG, 2023 U.S. Dist. LEXIS 206644 (S.D. Cal. Nov. 17, 2023)

7. Adjustment of Status

a. *Thigulla v. Jaddou,* 94 F.4th 770 (8th Cir. 2024)
b. *Cheejati v. Blinkin,* 97 F.4th 988 (5th Cir. 2024)