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APA Unreasonable Delay and Writ of Mandamus Litigation

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VOLS Immigration Project

Presenters

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Types of cases?

- Yes mandamus:
 - I-589 (pre- or post-interview)
 - Visa petitions (e.g. I-130, I-360...), I-730
 - Adjustment of status
 - U-visa BFD
 - Naturalization pre-interview
- No mandamus:
 - Waivers (e.g. I-601A, I-212...)
 - Humanitarian parole, military PIP, etc.
 - Not-yet-current priority date
- State Department:
 - Pre-interview
 - 221(g) refusal/administrative processing
- Something else entirely:
 - Natz post-interview: 8 U.S.C. Sec. 1447(b)
 - 120 days, hard deadline. Venue: only where the applicant resides

Prior to Filing Mandamus

- Why does this particular client need a prompt adjudication?
 - Gather facts for why this delay is “unreasonable”
- Current-life, in-USA facts. E.g.:
 - No EAD/removable (e.g. U BFD, I-730)
 - Job offer/security clearance
 - SBA loan
 - Mortgage
 - In-state tuition/FAFSA for derivative children
- Current-life home country facts
 - Derivative family member extremely sick, or in acute danger
 - Wants to visit elderly/ailing family member in a third country before they die

Prior to Filing Mandamus

- **Expedite request**
- Also can have client try:
 - In-person inquiry
 - Congressional liaison inquiry
 - USCIS ombudsman
 - AILA liaison inquiry
- Demand letter? Probably not: Fed. R. Evid. 408

Goals: (1) “Why” facts into the administrative record (discovery very limited)
(2) Tell the judge “your honor, we tried everything else first”

Prior to Filing Mandamus

- Ready to go forward with interview?
 - Evidence
 - Country conditions
- Counsel the client: filing mandamus places certain facts into the public record
- Retribution by agency?

Basis of a mandamus action

- Administrative Procedure Act (APA), 5 U.S.C. § 701-706
- Administrative Procedure Act (APA), 5 U.S.C. § 555
- Mandamus Act, 28 U.S.C. § 1361
- Federal Question jurisdiction, 28 U.S.C. § 1331

So what's reasonable?

- 8 U.S.C. § 1571(b)
- 8 U.S.C. § 1158(d)(5)(A):

The procedure established under paragraph (1) shall provide that-

- (ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;
- (iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

n.b. 8 U.S.C. § 1158(b)(7): No private right of action

- Check USCIS for historic median processing times for an application type:
- Agency doesn't (shouldn't) get to decide what is reasonable or not



Venue: 28 U.S.C. § 1391(e)(1)

(A): Any defendant resides

- Don't do D.D.C. or D.Md. just because Sec'y DHS/head of USCIS is there, they'll kick it

(B): Substantial part of acts or omissions

(C): Plaintiff resides

Do check case law in your potential jdx where you have options. Some are better for certain issues than others!

Timeline

- FRCP 4(i) : Service on United States and its officers
- FRCP 12(a)(2) : 60 days for answer or MTD
- Then local rules and local practice kicks in
 - MTD
 - MTD/MSJ? FRCP 56(d)
 - Administrative record
 - MSJ

Jurisdictional challenges

- 8 U.S.C. § 1252(a)(2)(B)(ii)
 - “. . . other than the granting of relief under section 1158(a) of this title.”
 - *Reyna v. Hott*, 921 F.3d 204, 209 (4th Cir. 2019): “when § 1252 strips courts of jurisdiction to review decisions or actions for which authority is ‘specified ... to be in the discretion of the Attorney General or the Secretary of Homeland Security,’ such discretionary authority may not be implied; it must be explicitly conferred in the statute.” (Citing *Kucana v. Holder*, 558 U.S. 233, 243 n.10 (2010)).
- APA: Final agency action; non-discretionary action; no meaningful standards
 - *He v. Chertoff*, 528 F. Supp. 2d 879, 882-83 (N.D. Ill. 2008)
- Arguing Unreasonable Delay vs. Unlawful Withholding under 5 U.S.C. § 706

Substantive standard (most jdx)

Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984):

- 1) the time agencies take to act, which must be governed by a “rule of reason”;
- 2) whether “Congress has provided a timetable”;
- 3) whether “human health and welfare are at stake,” in which case delays are “less tolerable”;
- 4) the effect of expediting “on agency activities of a higher or competing priority”;
- 5) the “interests prejudiced by delay”; and
- 6) whether there has been agency “impropriety” contributing to the delay.

TRAC, 750 F.2d at 80.

TRAC factors not exclusive

“The Supreme Court has not, so far, provided clear guidance on how to determine how long is too long to wait for an agency adjudication. But most lower courts have followed the D.C. Circuit's decision in [*TRAC*], which ‘list[s] factors that are relevant to determining whether agency action has been unreasonably delayed.’ . . . The district court is not limited to these factors and is not required to use them. But the TRAC factors offer helpful guidance in this inquiry, even if they do not define the entire field.”

Gonzalez v. Cuccinelli, 985 F.3d 357, 375 (4th Cir. 2021)

TRAC on MTD?

Yes: e.g., *Ahmed v. U.S. Dep't of Homeland Security*, No. 21-cv-893 (APM), 2022 WL 424967, at *4 (D.D.C. Feb. 11, 2022)

No: e.g., *Begum v. United States Dep't of State*, No. 22-cv-00478-JMC, 2022 WL 16575703, at *6 (D. Md. Oct. 31, 2022)

Gonzalez, 985 F.3d at 375: “On this record, however, we lack sufficient information to resolve this issue on a motion to dismiss. 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. . . . We also think that Plaintiffs have pled sufficient facts to show that their interests are weighty, implicate health and welfare, and are harmed by the long wait. The agency may be able to refute these contentions, but at this stage we may review only Plaintiffs’ pleadings.”

Discovery

- “To justify discovery related to agency action in an APA case, a party must make a strong preliminary showing of bad faith or improper behavior by the agency. Naked assertions of bad faith are insufficient. Thus, a party must make a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency’s possession indicative of bad faith or an **incomplete record**.”

Morina v. Mayorkas, No. 22-CV-02994 (LJL), 2023 WL 22617, at *11 (S.D.N.Y. Jan. 3, 2023) (internal citations omitted, emphasis added)

MSJ

- Evidence
 - FRCP 56(c)(2), (4); (e); (h)
 - FRE 801-807 (hearsay); 1002 (Best Evidence rule)
 - *Martinez v. Hott*, 527 F. Supp. 3d 824, 831-34 (E.D. Va. 2021)
 - *Jane Doe 1 v. Nielsen*, 357 F. Supp. 3d 972 (N.D. Cal. 2018)
- Rule 56(d)
 - *Munoz-Barba v. Mayorkas*, No. 23-CV-03675-JCS, 2024 WL 2818850 (N.D. Cal., June 3, 2024)

Common government arguments

- TRAC Factor 4 and Line Skipping
- Congressional appropriations, generally; various federal hiring freezes
- COVID & related backlogs
- Operation Allies Welcome
- Border crisis
- LIFO necessary to prevent EAD fraud
- “Sense of Congress” and non-binding timelines

Two closing thoughts:

(1) Reputation is everything

(2) Let's not kill the goose that lays the golden eggs

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