



**Agency Delay Litigation:
Opposing a Government Motion to Dismiss**

Practice Advisory¹
October 4, 2019

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I. Introduction

Increasingly, U.S. Citizenship and Immigration Services (USCIS) and other immigration-related agencies are delaying adjudication of immigration benefit requests. In response to these delays, many noncitizens, their employers and their family members are challenging these delays in federal district court, asking that the court order the agency to decide their cases without further delay. Practitioners file these lawsuits under the mandamus statute, 28 U.S.C. § 1361, and/or the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06.² When a delay case succeeds, plaintiff may be eligible to petition for attorney fees under the Equal Access to Justice Act.³

Filing suit to challenge delayed adjudication often prompts the government to render a decision early in the litigation. The government agency may decide the application or petition at issue prior to its deadline for responding to the lawsuit, thereby fully resolving the case. Where the government does not immediately resolve the case, however, it must file a responsive pleading within 60 days after service of the suit on the United States Attorney pursuant to Federal Rule of Civil Procedure (FRCP) 12(a)(2) —either by filing an answer or a motion to dismiss under FRCP 12(b). In a motion to dismiss, agencies most often challenge the court’s subject matter jurisdiction (FRCP 12(b)(1)) and/or whether the suit states a claim for which relief can be granted (FRCP 12(b)(6)).⁴

This advisory summarizes the most frequently raised claims for dismissal under FRCP 12(b)(1) and 12(b)(6) and arguments that can be made in response. With respect to many of these claims, the courts are divided. The advisory provides cites to illustrative cases but does not include cites to all decisions on any particular issue. Practitioners are encouraged to research the case law of the jurisdiction in which they plan to file suit to supplement the examples provided here.

For more information about filing a “delay claim,” the term used in this advisory to refer to mandamus or APA actions to challenge adjudication delays, see the Council’s Practice Advisory *Mandamus Actions: Avoiding Dismissal and Proving the Case*. For more information about the APA, see these Council Practice Advisories: *Litigation for Business Immigration Practitioners* and *Immigration Lawsuits and the APA – The Basics of a District Court Action*.

² Congress provided a separate statutory remedy in INA § 336(b) authorizing naturalization applicants to file an action in federal district court if USCIS fails to adjudicate the application 120 days after interviewing the applicant. That remedy is not discussed in this advisory.

³ For more information on EAJA requirements, see the Council’s and National Immigration Project of the National Lawyers Guild’s Practice Advisory, *Requesting Attorneys’ Fees Under the Equal Access to Justice Act*.

⁴ FRCP 12(b) sets forth additional grounds that a defendant can raise in a motion to dismiss, for example, improper venue (FRCP 12(b)(3)) or insufficient service of process (FRCP 12(b)(5)). This advisory addresses only the two most frequently raised grounds.

II. Elements of Delay Claims

A. What are the jurisdictional basis for and elements of a mandamus claim?

The Mandamus Act itself provides the federal district courts with jurisdiction. 28 U.S.C. § 1361. The federal district courts may order a remedy: “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” *Id.* To succeed, a plaintiff must establish: 1) a clear right to the relief requested; 2) a clear duty by the defendant to perform the act; and 3) no other adequate remedy is available. *See, e.g., Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002); *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998).

B. What are the jurisdictional basis for and elements of an APA delay claim?

The APA does not provide a court with jurisdiction; instead, federal district courts have subject matter jurisdiction pursuant to 28 U.S.C. § 1331, the federal question statute. *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977). The APA does provide a plaintiff with a cause of action. However, a district court will lack jurisdiction over an APA claim if either 1) a statute precludes judicial review or 2) the action at issue is “committed to agency discretion by law.” 5 U.S.C. § 701(a)(1)-(2).

To establish a delay claim under the APA, a plaintiff must establish: 1) a non-discretionary duty to take a *discrete* agency action and 2) unreasonable agency delay in acting on that duty. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). These elements are derived from the following three sections of the APA:

1. Section 702 provides that “a person suffering legal wrong because of agency action ... is entitled to judicial review thereof. 5 U.S.C. § 702. “Agency action” includes the failure to act. *S. Utah Wilderness Alliance*, 542 U.S. at 62.
2. Section 555(b) provides: “With due regard for the convenience and necessity of the parties or their representatives, and ***within a reasonable time***, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b) (emphasis added).
3. Section 706 authorizes federal courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

III. Motion to Dismiss

Frequently, the government will move to dismiss a delay claim under FRCP 12(b)(1) for alleged lack of jurisdiction and/or FRCP 12(b)(6) for alleged failure to state a claim for relief.⁵ The following discusses each rule and outlines possible arguments that may be raised in response to a

⁵ In these cases, the government is represented by an attorney in the Department of Justice’s Office of Immigration Litigation or an Assistant U.S. Attorney in the U.S. Attorney’s Office for the federal district in which plaintiff filed suit.

motion to dismiss on either ground. Practitioners should make all arguments that apply to their case.

A. FRCP 12(b)(1): Dismissal for Lack of Subject Matter Jurisdiction

1. Common bases for FRCP 12(b)(1) dismissal

A motion to dismiss under FRCP 12(b)(1) challenges the court’s authority to hear the case. For mandamus claims, the mandamus statute provides the basis for jurisdiction. 28 U.S.C. § 1361. For APA claims, jurisdiction is based on 28 U.S.C. § 1331, which provides courts with jurisdiction over federal questions—that is, claims involving either the U.S. Constitution or federal law or regulations.

Most often, the government challenges the court’s subject matter jurisdiction in one or more of three ways. First, the government may argue that the plaintiff lacks standing, meaning the legal capacity to sue. For a mandamus or APA action, the plaintiff must have Article III standing⁶ and must be within the “zone of interests” the applicable statute was intended to protect.⁷ Generally, the individual or entity that filed the petition or application will be able to establish standing. In contrast, not all courts agree that the interests of a beneficiary in a petition filed on his or her behalf by an employer or family member are among those that the applicable INA provision is intended to protect. *See Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 130-32 (D.D.C. 2012) (finding congressional intent behind INA §§ 204(a)(1)(F), 204(a)(5), 212(a)(5) was to protect U.S. workers and that beneficiary’s interests were “inconsistent with” this intent); *Pai v. USCIS*, 810 F. Supp. 2d 102, 107, 111 (D.D.C. 2011) (finding that beneficiary abroad lacked concrete injury because of uncertainty as to entry into the United States to work for the petitioner and congressional intent behind INA §§ 203(b)(3), 212(a)(5)(A) was to protect U.S. workers, while beneficiary’s interests are “seemingly inconsistent”). Some courts have concluded that visa applicants cannot challenge a delay in visa adjudication because, as foreign nationals residing outside of the United States, they have no constitutional right to enter the United States. *See Kodra v. Sect’y, Dep’t of State*, 903 F. Supp. 2d 1323, 1327 (M.D. Fla. 2012) (finding plaintiff visa applicant lacked standing for both delay and visa refusal claims); *but see Matushkina v.*

⁶ For standing under Article III of the Constitution, a plaintiff must have suffered an “injury in fact,” meaning harm to a legally protected interest that is 1) “concrete and particularized” and “actual or imminent;” 2) “fairly traceable to: the challenged conduct; and 3) “likely to be redressed” by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

⁷ To be within the “zone of interests,” a plaintiff’s claims must be among those the statute “arguably” was intended to protect or regulate and the injuries suffered must be “proximately caused” by the alleged statutory violation. *See Lexmark Int’l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128-30 (2014). The Court in *Lexmark* indicated that the zone of interests test is not jurisdictional because determining whether a cause of action is valid is a question of the court’s “statutory or constitutional *power* to adjudicate the case” rather than of subject matter jurisdiction. *Id.* at 128 n.4 (emphasis in original, internal citations omitted).

Nielsen, 877 F.3d 289, 293-94 (7th Cir. 2017) (right of entry is not a prerequisite for visa applicant to have standing).

Second, the government may argue that the plaintiff has failed to meet one or more of the threshold requirements for mandamus or APA relief. Courts are divided as to whether this is a jurisdictional issue, or instead raises a FRCP 12(b)(6) issue for failure to state a claim for which relief can be granted. *Cf. Ahmed v. Dep't of Homeland Sec.*, 328 F.3d 383, 386-87 (7th Cir. 2003) (explaining that if a motion to dismiss contends that the plaintiff cannot meet the requirements for mandamus—such as claiming that plaintiff has no clear right to a decision—then the court would be deciding whether the plaintiff failed to state a claim for relief and not addressing jurisdiction); *Citizens for Responsibility & Ethics in Washington v. Trump*, 924 F.3d 602, 606 (D.C. Cir. 2019) (quoting *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (“[T]hreshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction.”)). This advisory addresses challenges to threshold requirements for mandamus or APA claims as raising FRCP 12(b)(6) issues, *see infra* § III.B. However, practitioners should be aware that the government may raise this issue as a challenge to jurisdiction under FRCP 12(b)(1).

Third, the government may argue that there is an independent bar to judicial review which precludes the court from exercising jurisdiction. Most often, it will cite to INA § 242(a)(2)(B)(i) or (ii), which bar jurisdiction over discretionary decisions in certain immigration cases. In other cases, the government may raise the doctrine of consular nonreviewability.

a. What if the government claims that INA § 242(a)(2)(B)(i) bars a claim challenging delayed adjudication of an adjustment application?

As relevant here, INA § 242(a)(2)(B)(i) bars judicial review of “any judgment regarding the granting of relief under section ... 245.” INA § 245(a) is clear that the ultimate decision as to granting adjustment of status is discretionary and thus barred from review. But Congress said nothing in INA § 245(a) about the timing of adjudication. Also, courts have held that USCIS’ failure to act is not a “judgment” within the meaning of INA § 242(a)(2)(B)(i). *See Iddir*, 301 F.3d at 497 (explaining that “judgment” means only actual discretionary decisions to grant or deny adjustment of status). Irrespective of whether USCIS’ ultimate denial of an application to adjust status to permanent residence is barred from judicial review as discretionary, the agency’s failure to adjudicate is not. *See, e.g., Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1137 (D. Ariz. 2008) (finding that while review of a denial of an adjustment application might be precluded, review of delay is not); *Ahmadi v. Chertoff*, 522 F. Supp. 2d 816, 818-19 & n.4 (N.D. Tex. 2007) (same and citing cases).

b. What if the government claims that INA § 242(a)(2)(B)(ii) bars a claim challenging delayed adjudication?

In relevant part, INA § 242(a)(2)(B)(ii) bars review over any “decision or action” of the Department of Homeland Security (DHS) “the authority for which is specified under this subchapter to be in the discretion of the Secretary of Homeland Security.” In most jurisdictions, a court will be persuaded that the plain meaning of the statute makes it inapplicable

to delay claims. First, INA § 242(a)(2)(B)(ii) applies only to a “decision or action” by the DHS Secretary. USCIS has not rendered a “decision” if the petition or application is pending. Some courts have found that an agency’s failure to act is not an “action.” See *Kashkool*, 553 F. Supp. 2d at 1138; *Soneji v. Dep’t of Homeland Sec.*, 525 F. Supp. 2d 1151, 1155 (N.D. Cal. 2007); *Liu v. Novak*, 509 F. Supp. 2d 1, 6 (D.D.C. 2007). But some courts have concluded that the pace of adjudication is an “action,” finding that it is part of the discretionary review process for adjusting status. See *Beshir v. Holder*, 10 F. Supp. 3d 165, 174-75 (D.D.C. 2014); *Safadi v. Howard*, 466 F. Supp. 2d 696, 699-700 (E.D. Va. 2006).⁸

Second, INA § 242(a)(2)(B)(ii) applies only if the authority for the decision or action is “specified under this subchapter to be in the discretion” of the DHS Secretary. The Supreme Court construed this language as barring judicial review only if Congress specifically granted discretionary authority in an applicable statute. *Kucana v. Holder*, 558 U.S. 233, 246-48 (2010).

Applying *Kucana*, courts have held that Congress did not grant the DHS Secretary discretion to fail to adjudicate an application or petition. See *Asmai v. Johnson*, 182 F. Supp. 3d 1086, 1091-92 (E.D. Cal. 2016) (relying on *Kucana*, the court concluded that USCIS’ failure to decide an adjustment of status application was not a discretionary decision specified by statute). However, even post-*Kucana*, some courts have conflated the agency’s discretion to approve an application with discretion as to when to adjudicate. See *Gonzalez v. Cissna*, 364 F. Supp. 3d 579, 584 (E.D.N.C. 2019), *appeal pending*, No. 19-1435 (4th Cir. Apr. 23, 2019) (INA § 242(a)(2)(B)(ii) bars jurisdiction to compel USCIS to adjudicate work authorization applications because 8 U.S.C. § 1184(p)(6) gives the agency discretion over granting work authorization to those with a pending, bona fide U visa application); *Mohsenzadeh v. Kelly*, 276 F. Supp. 3d 1007, 1012-13 (S.D. Cal. 2017) (no jurisdiction over unreasonable delay claim because grant of discretionary authority to adjust status, found in INA §§ 209 (for refugees) and 245, includes the pace of adjudication); *Beshir*, 10 F. Supp. 3d at 171 & n.2, 173-76 (same).⁹

Third, in addition to the statute’s plain language, other evidence that Congress did not intend inaction to be discretionary is the “sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application,” except for nonimmigrant petitions for intracompany transferees, which should be processed “not later than 30 days” after filing. Immigration Services and Infrastructure Improvements Act of 2000, 8 U.S.C. § 1571(b); see *Khan v. Johnson*, 65 F. Supp. 3d 918, 930 (C.D. Cal. 2014) (citing cases).

⁸ Other courts identified the “internal inconsistency” of *Safadi* and similar decisions for concluding that the pace of adjudication is not subject to judicial review as long as the agency “is making reasonable efforts.” This qualification implies that a court has “some authority to review the reasonableness of the agency’s efforts.” *He v. Chertoff*, 528 F. Supp. 2d 879, 885 (N.D. Ill. 2008) (citation omitted).

⁹ *Beshir* recognized the split on this issue within D.D.C. and also cited to differing decisions from other district courts. See 10 F. Supp. 3d at 172.

c. What if the government claims consular nonreviewability?

With limited exceptions, courts will not review a consular officer's decision to deny a visa because of the longstanding doctrine of consular nonreviewability. *See, e.g., Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015). The Department of State may invoke the consular nonreviewability doctrine as depriving the court of subject matter jurisdiction when a plaintiff sues over a consular officer's failure to act on a visa application. But consular officers are required by regulation to either issue or refuse a visa after receiving a properly completed and executed application. 22 C.F.R. § 42.81(a). The Ninth Circuit recognized this material distinction: “[W]hen the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul’s discretion, jurisdiction exists.” *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1998).

2. Facial vs. factual challenges to subject matter jurisdiction— what is the difference?

If the government’s motion challenges only the sufficiency of plaintiff’s allegations, sometimes referred to as a “facial” challenge, then the plaintiff has no evidentiary burden. *See Carter v. HealthPort Tech., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). The court will decide by accepting the factual allegations as true and drawing all reasonable inferences in plaintiff’s favor. *See, e.g., Carter*, 822 F.3d at 56-57; *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). Treating the allegations as true avoids “tackling the merits under the ruse of accepting jurisdiction.” *Ahmed v. Dep’t of Homeland Sec.*, 328 F.3d 383, 386-87 (7th Cir. 2003) (quoting *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981)); *see also Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003) (if jurisdictional challenge implicates merits, court should find jurisdiction) (citing *Garcia v. Copenhagen, Bell & Assocs.*, 104 F.3d 1256, 1261 (11th Cir. 1997)).

If, with its motion, the government includes evidence that raises factual issues as to whether subject matter jurisdiction exists, then the plaintiff will need to submit rebuttal evidence. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see also Morrison*, 323 F.3d at 924-25 & n.5 (in a factual challenge, court is free to weigh the evidence). The court’s consideration of evidence outside of the pleadings does not convert the FRCP 12(b)(1) motion to dismiss into a summary judgment motion. *See Safe Air for Everyone*, 373 F.3d at 1039 (citation omitted).

B. FRCP 12(b)(6): Failure to State a Claim for Which Relief Can Be Granted

A FRCP 12(b)(6) motion to dismiss challenges the sufficiency of the complaint. In delay cases, the government frequently will move to dismiss under FRCP 12(b)(6) on the basis that the plaintiff is unable to meet one or more elements of a mandamus or APA claim and thus is not entitled to relief.

In reviewing such a motion, the court will accept nonconclusory factual allegations as true. It will determine whether these facts plausibly give rise to an entitlement to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court is obligated to accept the complaint’s factual assertions as true and construe the complaint “liberally;” however, it does not have to accept as true inferences the facts do not support or “legal conclusions cast in the form of factual allegations.” *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

The court may consider exhibits properly submitted as part of the complaint. *See Skalka v. Kelly*, 246 F. Supp. 3d 147, 151 (D.D.C. 2017); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002).

The following suggests arguments that a practitioner can make in response to the claims that the government most frequently raises under FRCP 12(b)(6).

1. What arguments exist to oppose a claim that the agency has no clear duty to adjudicate a petition or application?

The government may move to dismiss a delay case under FRCP 12(b)(6) by arguing that it has no duty to adjudicate an application or petition. For example, in *Soneji*, the government argued that because USCIS has discretion to grant or deny an adjustment of status application, it also had discretion not to decide the application. 525 F. Supp. 2d at 1155. Rejecting this, the court found that “[s]uch an interpretation not only pushes the bounds of common sense but is also contradicted by a wealth of authority from this and other districts.” *Id.* (citing cases).

In rejecting this argument, courts cite to various statutory and regulatory provisions demonstrating that USCIS is required to decide applications and petitions filed with it. When viewed as a whole, the INA demonstrates congressional intent to impose a duty on USCIS to adjudicate properly filed petitions and applications. The implementing regulations similarly demonstrate such a duty. Examples of these provisions include:

a. A mandatory fee creates a duty to adjudicate

Where USCIS charges a fee to adjudicate an application or petition, a strong argument exists that it has a corresponding duty to carry out the adjudication—that is, to issue a decision. Congress intended that USCIS charge application/petition fees to cover its operating costs, giving the DHS Secretary explicit authority to set fees for immigration and naturalization services high enough to recover the cost of providing these services, including the cost of providing “similar services” without a fee to asylum applicants and other immigrants. *See* INA § 286(m).¹⁰ The implementing

¹⁰ Section 1102 of the Homeland Security Act of 2002, Pub. L. No. 107-296, amended INA § 103 to replace the Attorney General with the DHS Secretary as the official “charged with the administration and enforcement of [the INA] ...” INA § 103(a)(1). Consequently, with respect to

regulations go further, mandating payment in advance of a non-refundable adjudication fee, with limited exceptions. *See* 8 C.F.R. §§ 103.2(a)(1), (a)(7). In 2016, when USCIS proposed adjusting its fees, it explained: “USCIS calculates its fees to recover the full cost of USCIS operations, which do not include the limited appropriated funds provided by Congress.” *U.S. Citizenship and Immigration Services Fee Schedule*, 81 Fed. Reg. 26,904, 26,905 (proposed May 4, 2016). USCIS also commented that Congress’ historically small appropriations reflect its intent that the agency set its fees to ensure coverage of its direct and indirect costs of adjudication. *See* 81 Fed. Reg. at 26,906-07.

At least one court has found that USCIS’ collection of a fee to adjudicate an application imposes on it a duty to carry out that adjudication. *See Kim v. USCIS*, 551 F. Supp. 2d 1258, 1262-63 (D. Colo. 2008) (finding that the agency’s imposition of a “considerable mandatory adjudication fee” per INA § 286(m)’s requirement that full costs be recovered “implies that Congress intended that the Attorney General actually decide applications”). Other courts similarly have held that the Federal Bureau of Investigation (FBI) has a nondiscretionary duty to complete background checks necessary for certain immigration benefits based upon the fees it collects to perform such checks. *See, e.g., Kaplan v. Chertoff*, 481 F. Supp. 2d 370, 401 (E.D. Pa. 2007).

b. Other provisions demonstrating a duty to adjudicate

8 U.S.C. § 1571(b): Congress directed USCIS to adjudicate immigration benefit requests when it set deadlines by which the agency should adjudicate them. *See supra* § III.A.1.b. Another example of a statutory deadline is the 180-day deadline in which the agency must adjudicate a Form I-360 petition for special immigrant juvenile status. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. §1232(d)(2).

INA § 245(b): Congress requires the DHS Secretary to record the foreign national’s lawful admission to permanent resident “[u]pon the approval of an application for adjustment [under INA § 245].” INA § 245(b); *see also* 8 C.F.R. § 245.2(a)(5) (implementing the mandatory statutory recording requirement). This recordation duty implicitly requires adjudication of adjustment applications to determine which will be approved.

8 C.F.R. § 103.2(b)(14): When the petitioner or applicant requests, USCIS must decide the application or petition on evidence already submitted, rather than require additional evidence. This requirement supports an argument that a duty to adjudicate *all* applications exists. *See Kim*, 551 F. Supp. 2d at 1263. Similar arguments can be made with respect to other regulations that dictate how USCIS must decide a benefit request. *See, e.g.,* 8 C.F.R. §§ 103.2(b)(8)(i) (USCIS will approve benefit request if evidence submitted establishes eligibility; if approval is “entrusted to USCIS discretion,” then petitioner or applicant also must warrant favorable exercise of discretion; if evidence establishes ineligibility, then USCIS will deny), 103.2(b)(12) (USCIS shall deny if evidence submitted in response to USCIS request does not establish benefit eligibility at time of filing).

transferred functions, all statutory references to the Attorney General should be read as referencing the DHS Secretary.

8 C.F.R. § 103.2(b)(18): USCIS may “withhold” adjudication for investigations if specific procedures are followed that include specified time periods for review of whether withholding of adjudication can continue. 8 C.F.R. § 103.2(b)(18). By imposing conditions for withholding adjudication in a case, this regulation establishes such withholding as an exception. This, in turn, indicates the general rule is that adjudication must take place. *See Kim*, 551 F. Supp. 2d at 1263 (“If the Defendants had completely unfettered discretion to withhold processing or fail to adjudicate an application, such a detailed scheme governing who may make the decision to do so and how and when it will be reviewed would be unnecessary”).

8 C.F.R. § 103.2(b)(19): USCIS is required to send notice when it approves a petition or application. *See* 8 C.F.R. § 103.2(b)(19). Various forms’ instructions also inform the petitioner or applicant that they will be notified in writing of USCIS’ decision. *See, e.g.*, USCIS, Instructions for Form I-765 at 26 (May 31, 2018), <https://www.uscis.gov/i-765>; USCIS, Instructions for Form I-140 at 10 (May 10, 2018), <https://www.uscis.gov/i-140>. The form instructions are incorporated into the regulations that require the form’s submission. *See* 8 C.F.R. § 103.2(a)(1). Some courts have cited the regulatory notice requirement in support of their conclusion that USCIS has a non-discretionary duty to decide an adjustment application. *See Lindems v. Mukasey*, 530 F. Supp. 2d 1044, 1046 (E.D. Wis. 2008); *Shah v. Hansen*, No. 1:07 CV 1576, 2007 WL 3232353, at *3 (N.D. Ohio Oct. 31, 2007).

8 C.F.R. § 214.2(f)(5)(vi): This regulation provides an extension of F-1 status and work authorization until October 1, if the student is the beneficiary of an H-1B petition with change of status and a start date of October 1. The agency’s selection of October 1 for this “cap gap” protection demonstrates that USCIS expected to adjudicate the H-1B petitions by that date.

8 C.F.R. §§ 103.2(b)(6), 103.2(b)(8)(ii)-(iv), 103.2(b)(16), 103.3(a)(1), 245.2(a)(5), 245.6: These regulations all impose a sequence on the adjudicatory process, further supporting USCIS’ duty to adjudicate. For example, 8 C.F.R. § 103.3(a)(1) mandates that USCIS issue a written decision specifying any reason for a denial of an application or petition. Similarly, 8 C.F.R. § 103.2(b)(6) specifies that an applicant may withdraw a request for a benefit up until the time USCIS issues a decision.

2. How can a practitioner oppose a motion to dismiss which contends there is no duty to adjudicate under the APA?

With respect to APA claims, the government may argue that it has no duty to adjudicate an application or petition by contending the APA only requires that an agency take “discrete” agency actions that are “legally required.” *See S. Utah Wilderness Alliance*, 542 U.S. at 63. This argument rests on the premise that when the decision is committed to the agency’s discretion, there is no discrete action that the agency is legally required to take. Most, although not all, courts have rejected the argument that if the agency has discretion to approve or deny a petition or application, then a challenge to delayed adjudication of an immigration benefit request fails to meet this standard. *See Soneji*, 525 F. Supp. 2d at 1155 (citing cases); *but see Beshir*, 10 F. Supp. 3d at 171, 174.

In rejecting this argument, courts have relied on the relevant statutes and regulations which impose a nondiscretionary duty for USCIS to decide an application, *see supra* § III.B.1.a.-b., finding that these supply the discrete action the agency is required to take under the APA. *See, e.g., Soneji*, 525 F. Supp. 2d at 1155.

Additionally, a practitioner could argue that 5 U.S.C. § 555(b) supplies the discrete action required for a cause of action under the APA. *See, e.g., Pedrozo v. Clinton*, 610 F. Supp. 2d 730, 738 (S.D. Tex. 2009) (finding that, while there is a nondiscretionary duty to adjudicate nonimmigrant status petitions within “reasonable time,” eleven months is not unreasonable after consular return); *He*, 528 F. Supp. 2d at 884; *Soneji*, 525 F. Supp. 2d at 1156. Section 555(b) states that “with due regard for the convenience or necessity of the parties . . . and within a reasonable time, each agency shall proceed to conclude a matter presented to it.”

3. What arguments exist to oppose a claim that there is no clear right to relief in mandamus because there is no statutory or regulatory deadline?

The government may argue that statutory language giving it discretion to approve a particular immigration benefit also gives it discretion when to decide so the plaintiff cannot show a clear right to relief, as required for mandamus relief. Immigration benefits which USCIS may approve or deny in its ultimate discretion include adjustment of status to lawful permanent residence, asylum, and certain waivers of inadmissibility. *See, e.g., INA* §§ 208(b) (asylum); 209(b) (adjustment of status to permanent resident for refugees); 212(d)(3)(B)(i) (exemptions for terrorism-related admissibility); 245(a) (adjustment of status to permanent resident). Practitioners may counter that the absence of a clear right to relief in an INA provision does not preclude relief for “unreasonable delay.” *See infra* § III.B.4.

The government also may cite its authority to “withhold” adjudications in 8 C.F.R. § 103.2(b)(18) as evidence that the adjudication process is entirely within its discretion. As discussed *supra* at § III.B.1.b. this regulation is an exception which allows USCIS to withhold adjudicating an application or petition only pursuant to limited regulatory requirements. The regulation, by its terms, does not give USCIS discretion never to adjudicate the benefit request. Practitioners also may argue that the regulation is irrelevant if USCIS did not apply it to the petition or application at issue but only cited to it in support of the motion to dismiss. *See, e.g., Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1167-68 (N.D. Cal. 2007) (Section 103.2(b)(18) inapplicable where defendants provided no evidence it was used); *Han Cao v. Upchurch*, 496 F. Supp. 2d 569, 576 (E.D. Pa. 2007) (same).

4. How can a practitioner respond to a claim that there can be no showing of unreasonable delay in the absence of a statutory or regulatory deadline?

USCIS may argue that, without a statutory or regulatory deadline, the plaintiff cannot demonstrate that delayed adjudication is unreasonable. However, the absence of a deadline does not give USCIS the right to postpone a decision indefinitely. *See Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001). Under both the Mandamus Act and the APA, courts measure delay in circumstances in which there is no deadline under a “reasonableness” standard. *See Kim*, 551 F. Supp. 2d at 1264-65 (under Mandamus Act and APA where there is no deadline to adjudicate, agency has a non-discretionary duty to adjudicate within a reasonable time); *Kamal v.*

Gonzalez, 547 F. Supp. 2d 869, 876-78 (N.D. Ill. 2008) (assessing mandamus and APA claims under reasonableness standard); *He*, 528 F. Supp. 2d at 883 (agreeing with “the significant majority of district courts that have considered the issue” and concluded that applicants for adjustment of status have a clear right to a decision “within a reasonable time”) (citing cases); *see also Han Cao*, 496 F. Supp. 2d at 575 (“Most of the courts that have addressed the issue agree that, for purposes of compelling agency action that has been unreasonably delayed, the mandamus statute and the APA are co-extensive.”) (Citing cases.)

The government also may argue that any delay cannot be considered unreasonable when attributable to security checks. Practitioners may respond that when the plaintiff has demonstrated the delay is unreasonable, not attributable to the plaintiff, and the government’s only reason for not adjudicating is “security checks,” the plaintiff “need not provide more factual allegations to demonstrate unreasonable delay.” *Ceken v. Chertoff*, 536 F. Supp. 2d 211, 218 (D. Conn. 2008) (citing *Salehian v. Novak*, No. 3:06cv459 (PCD), 2006 WL 3041109, at *4 (D. Conn. Oct. 23, 2006)); *Lindems*, 530 F. Supp. 2d at 1047 (finding that agency delay to wait for FBI response not reasonable without more).

In the absence of a deadline, practitioners may refer to guidelines such as the sense of Congress in 8 U.S.C. § 1571(b), the “cap gap” regulation at 8 C.F.R. § 214.2(f)(5)(vi), *see supra* § III.B.1.b, or USCIS’ processing time reports¹¹ to demonstrate what a reasonable time for adjudication would be.

Additionally, courts usually consider the following factors developed by the D.C. Circuit in *Telecomm. Research & Action Ctr. v. Fed. Commc’ns Comm’n*, 750 F.2d 70, 80 (D.C. Cir. 1984) (known as the “TRAC factors”):

- (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

¹¹ Processing time reports are available by office and type of petition or application at USCIS’ website: <https://egov.uscis.gov/processing-times/>.

(6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”

750 F.2d 70, 80 (D.C. Cir. 1984) (citations and quotations omitted). Practitioners must be prepared to overcome the tendency of some courts to elevate the fourth factor and conclude that the problem is one of limited agency resources, such that the injury is faced by all and that moving the plaintiff to the “front of the line” would come, impermissibly, at the expense of others. *See, e.g., Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003); *see also Calderon-Ramirez v. McCament*, 877 F.3d 272, 275-76 (7th Cir. 2017) (not referring to TRAC factors, but finding no right to “skip ahead” for U visa waiting list adjudication when nothing in record differentiated plaintiff’s wait from others).

The counterargument, which some courts have accepted, is that the plaintiff should not be penalized for a lack of agency resources; thus, they focus on the impact of the delay on the plaintiff before them. *Zhou v. FBI Director*, No. 07-cv-238-PB, 2008 WL 2413896, at *7 (D.N.H. June 12, 2008) (finding it inappropriate to shift the burden of lack of agency resources onto plaintiff who did not create the problem); *Aslam v. Mukasey*, 531 F. Supp. 2d 736, 744 (E.D. Va. 2008) (finding that agency lack of resources was not relevant because “[b]ureaucratic inadequacy is not a justification, especially because the costs of noncompliance are imposed on the applicant”); *Alkeylani v. DHS*, 514 F. Supp. 2d 258, 266 (D. Conn. 2007) (“While [lack of resources] may be a legitimate policy crisis, the Court will not excuse Defendants from their statutory duty and let the cost fall on immigrant plaintiffs”); *Tang v. Chertoff*, 493 F. Supp. 2d 148, 158 (D. Mass. 2007) (finding that lack of agency resources is a “policy crisis,” and not excusing agency from its statutory duty to adjudicate applications, which would place the cost on the plaintiffs). *See also Wang v. Gonzales*, No. C07-02348 HRL, 2007 WL 2972917, at *5 (N.D. Cal. Oct. 10, 2007) (marked “Not for Citation,” but helpful for constructing an argument (rejecting line-jumping argument where record showed that later-filed applications were processed before plaintiffs’). In a case considering a roughly seven-year delay in adjudicating an application to adjust status to permanent residence, the court found the fourth TRAC factor neutral. *See Khan*, 65 F. Supp. 3d at 932 (holding that delay was unreasonable and that expediting a decision would not intrude on agency’s discretion).

One court rejected the government’s claim that delay in adjudicating special immigrant visa applications for Afghans and Iraqis who provided services to the United States was reasonable because of complex background checks and screening. *Afghan & Iraq Allies v. Pompeo*, No. 18-cv-01388 (TSC), 2019 WL 4575565, at *7 (D.D.C. Sept. 20, 2019). In deciding that the first through third and fifth TRAC factors favored the plaintiffs, the court relied heavily on congressional intent that, except for certain high-risk cases, these visa applications should be completed, including specifically background checks and screenings, within 9 months after the applicant submits all required documentation. *Id.* at *7-9. The court concluded that given this 9-month “statutory benchmark,” Congress “did not intend to give Defendants an unbounded, open-ended timeframe in which to adjudicate SIV applications.” *Id.* at *8.

Additionally, some courts have found that the government failed to provide sufficient evidence to support its claim that a lack of resources and increasing caseloads rendered the delay reasonable. *See, e.g., Rodriguez v. Nielsen*, No. 16-CV-7092 (MKB), 2018 WL 4783977, at *21 (E.D.N.Y. Sept. 30, 2018) (finding that “[n]either increasing petitions nor limited resources can

account for what appears to be a complete hiatus in adjudicating petitions,” and indicating a need for discovery on these issues).¹²

Furthermore, where there are compelling reasons that outweigh any alleged effect on the agency, courts may find delay unreasonable as to the plaintiff even if the agency argues it is within a regulatory timeline or posted processing times. *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”). Examples of compelling reasons are the loss of work authorization or family separation (either because the spouse and children are abroad or because the children are at risk of aging-out of eligibility for an immigration benefit). A court must weigh such reasons under the third TRAC factor (consideration of human health and welfare).

5. What arguments exist to oppose a motion to dismiss which argues that there is no relief that can be granted?

In some cases, the government may argue that the court has no authority to grant the relief requested. Practitioners are most likely to encounter this argument when challenging USCIS’ unreasonable delay in adjudicating an application to adjust status to permanent residence based on the diversity visa category. The government often claims that a court will not be able to provide relief because diversity visa numbers are not available after midnight on September 30 of the fiscal year in which the applicant was selected in the diversity visa lottery. Once the September 30 deadline has passed, courts generally will dismiss these cases. *Iddir*, 301 F.3d at 501 (dismissing diversity visa- based adjustment applicants’ mandamus actions because USCIS had no duty to adjudicate after September 30).

Some courts have carved out a limited exception in cases in which, prior to September 30, the court ordered USCIS to take certain steps before the fiscal year ended and USCIS failed to do so. *See Przhobelskaya v. USCIS*, 338 F. Supp. 2d 399, 405-06 (E.D.N.Y. 2004) (ordering adjustment of status after September 30 where USCIS failed to perform ministerial acts to complete adjudication contrary to court’s pre-September 30 order); *Paunescu v. Immigration & Naturalization Serv.*, 76 F. Supp. 2d 896, 902-03 (N.D. Ill. 1999) (ordering adjustment of status after September 30 where USCIS failed to perform non-discretionary duty to adjudicate within a reasonable time contrary to court’s pre-September 30 order); *see also Iddir*, 301 F.3d at 501 & n.2 (finding that USCIS had no duty to adjudicate after September 30, but noting that “[i]t would be a different case” if district court had ordered adjudication before fiscal year ended).

¹² AILA has gathered materials practitioners may find useful in demonstrating that administrative resources have increased while the number of petitions filed has remained “flat” or decreased, depending on the category. *See Featured Issue: Changes in USCIS Policy Under the Trump Administration*, AILA Doc. No. 19022633.

6. What arguments exist to oppose dismissal of a mandamus claim because there is an adequate remedy at law?

A writ of mandamus is extraordinary relief that can be granted only if there is no other adequate remedy at law. *See, e.g., Am. Hosp. Ass'n*, 812 F.3d at 189. A number of courts have held that the availability of APA relief precludes granting mandamus relief. *See Valona v. U.S. Parole Comm'n*, 165 F.3d 508, 510 (7th Cir. 1998) (finding “the APA . . . authorizes district courts to ‘compel agency action unlawfully withheld or unreasonably delayed’ without the need of a separate action seeking mandamus”) (quoting 5 U.S.C. § 706(1)); *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825-26 (S.D. Tex. 2008) (dismissing plaintiff’s mandamus claims because the APA provides a remedy for unlawfully delayed agency action); *Ali v. Frazier*, 575 F. Supp. 2d 1084, 1090-91 (D. Minn. 2008) (same).

For this reason, it generally is wise to include both mandamus and APA claims in a delay lawsuit. Where the government moves to dismiss both claims, practitioners can argue that, should the court find that dismissal of the APA claim is warranted for any reason, the court should refuse to dismiss the mandamus claim as there would be no adequate alternative remedy at law.