Mandamus Magic: Litigating Immigration Delays in Federal Court

By Nicole M. Whitaker and Tyler Sciara

Have you ever had an immigration case that seemed to go on forever? Cases pending with the U.S. Citizenship and Immigration Services (USCIS) can go long past the posted processing times with no decision. There are many reasons a case might get sucked into the black hole of the immigration service. Maybe the case was lost in transit between different USCIS offices. Maybe the case is sitting at the bottom of a pile of files on a supervisor's desk. Maybe the case is pending notorious "background checks," an explanation often used as a pretext to excuse endless delays in immigration cases. Regardless of the reason for the delay, your client is looking to you to solve the issue and get them a final decision on their case.

Typically, an immigration lawyer has a few avenues available to inquire about the status of a case filed with the immigration service. You can call USCIS or use the USCIS.gov website to make a "Case Inquiry." You can schedule an InfoPass appointment for you or your client at the local USCIS field office to address the issue. You can file a request for case assistance with the Office of the Citizenship and Immigration Services Ombudsman.

But rarely are these options effective in getting immigration cases "unstuck." The number for the USCIS customer service hotline should be 1-800-USELESS. Usually, the only result of an online case inquiry is one more email to spam your inbox. Although InfoPass appointments give you the advantage of speaking in person to a human being, your physical case file could be on someone's desk at a totally different USCIS service center or field office, making it impossible for the individual you speak with to directly solve your problem. And requesting case assistance with the Ombudsman has become more of a formality than an effective strategy to get a case back on track. It might sound like a powerful and official office, but the waitlist for case assistance has become so long that any assistance rendered comes too late to be of any help. In fact, I keep getting automated follow up emails from the Ombudsman office regarding cases that were closed months ago.

So what can you do to actually make headway on an immigration case that seems to be lost or frozen?

When All Else Fails

Pursuing the options above might seem like an effort in futility, but in reality, you are merely exhausting your remedies before filing a petition for a writ of mandamus. Mandamus actions are used to compel the government to adjudicate a case where a government agency has failed to take any action.

I have had incredible success filing mandamus actions on behalf of my clients. It is a shame that it takes suing the federal government to get results for our clients these days, but the results are undeniable.

I once helped a client get their adjustment of status case approved through the use of a mandamus action after their case had been pending five and a half years with no interview. They had filed the adjustment application on their own without a lawyer and spent years filing case inquiries, attending InfoPass appointments and anxiously waiting until they consulted with me and I recommended mandamus. After we filed the mandamus, USCIS scheduled the couple for an interview and the I-130 was approved less than two months later.

Recently, a mandamus action resulted in an I-130 approval just 33 days after filing. Despite us filing the mandamus amidst the COVID19 pandemic, my clients were interviewed immediately for the I-130 and the quick approval was critical for the I-130 petitioner's spouse who faced several looming deadlines in her removal case in immigration court.

In one case, a client's naturalization was in limbo when he was charged with, but not convicted of, a crime after his naturalization interview but before his oath ceremony to be sworn in as a U.S. citizen. His case was outside normal processing times with no end in sight, but it was approved, and he was issued a notice to attend his oath ceremony three months after we filed the complaint for mandamus.

In another naturalization case, we were issued an oath ceremony notice only three weeks after filing

our complaint for mandamus, even before we served the government defendants. Although the case was still well within normal processing times, USCIS's statutory deadline to adjudicate N-400 applications within 120 days of the naturalization interview had passed.

Nuts and Bolts

A writ of mandamus is a court order issued by a judge at a plaintiff's request compelling someone to execute a duty that they are legally obligated to fulfill. It 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. In the context of immigration, this can be helpful because USCIS officers often have a legal duty to make some form of decision. As a result, a writ of mandamus can be a useful tool if there is an unreasonable delay in a case or if there has been an unlawful withholding of action.

In order to get a mandamus issued, a plaintiff must demonstrate to the court that 1) he or she has a clear right to the relief requested, 2) the defendant has a clear duty to perform the act in question, and 3) no other adequate remedy is available. The court may compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular manner or grant the relief the plaintiff seeks from the agency.

Immigration-Specific Mandamus Actions

In immigration-based mandamus actions, a plaintiff may utilize provisions of the Immigration and Nationality Act (INA) as well as the Administrative Procedure Act (APA) that create a clear right to relief.

In naturalization proceedings, the USCIS officer conducting the examination interview is required to determine whether the application should be granted or denied within 120 days of the initial examination. INA § 335-336; 8 C.F.R. § 335.3. *See also Smith v. Johnson*, No. 3:16-CV-00066-GNS, 2016 WL 4030969, at *2 (W.D. Ky. July 26, 2016). If the applicant has complied with all requirements for naturalization, USCIS "shall grant the application." 8 C.F.R. § 335.3.

While there is no specific timeline for USCIS to adjudicate other immigration proceedings, the APA requires USCIS to carry out its duties within a reasonable time. 5 U.S.C.§555(b) provides that "[w]ith 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." (Emphasis added). USCIS is subject to 5 U.S.C. §555(b). *See Trudea v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006) (finding that district court has jurisdiction under the APA, in conjunction with 28 U.S.C. §1331, to review the plaintiff's complaint for declaratory and injunctive relief against a federal agency); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 114 (D.D.C. 2005) ("The Administrative Procedure Act requires an agency to act 'within a reasonable time,' 5 U.S.C. §555(b), and authorizes a reviewing court to 'compel agency action… unreasonably delayed,' 5 U.S.C. §706(1).").

In addition, various courts have held that the immigration service has a duty to adjudicate different kinds of immigration cases. *See, e.g., Iddir v. I.N.S.*, 301 F.3d 492, 500 (duty to adjudicate adjustment of status applications under the diversity lottery program); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (duty of consular officer to adjudicate visa application, but no duty owed by the Attorney General or INS officials); *Villa v. U.S. Dep't of Homeland Sec.*, 607 F. Supp. 2d 359, 363 (N.D.N.Y. 2009) (duty to adjudicate adjustment application in a reasonable amount of time); *Yu v. Brown*, 36 F. Supp. 2d 922, 930-32 (D.N.M. 1999) (duty to process Special Immigrant Juvenile Status and adjustment of status applications in a reasonable amount of time).

Although applicants have a clear right to have their cases adjudicated, in cases other than naturalization proceedings the timing is less clear. Where there is no statutory deadline for adjudicating an application, what is "reasonable" will depend on the circumstances of the case. *See 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); *but see Orlov v. Howard*, 523 F. Supp. 2d 30, 38 (D.D.C. 2007) (holding defendants have no duty to increase the pace at which they are adjudicating an adjustment application). In fact, several courts have ruled that the INA does not create a clear right to relief for application adjudication delays. *See L.M. v. Johnson*, 150 F. Supp. 3d 202, 210-11 (E.D.N.Y. 2015) (holding INA § 208(d)(7) precludes a private right of action to enforce statutory deadlines for considering asylum applications, so no clear right to relief under Mandamus Act).

Regardless of any uncertainty concerning the case law on immigration-related mandamus actions, filing a complaint for a writ of mandamus is certain to get your client's case pulled out of the dark abyss of USCIS's bureaucracy. Make the best argument you can to show

that USCIS has a duty to act on your client's case and that any delay is wholly unreasonable. Most district court judges do not see immigration cases often, so they're not as jaded immigration practitioners when it comes to the chronically sluggish immigration system; they are often shocked at how long applicants have been waiting for USCIS to adjudicate their cases.

In practice, counsel representing the government rarely desire to litigate mere delays in cases, and they will work with the appropriate USCIS service center or field office to help get a decision in your case. Most immigration-related mandamus actions never see the courtroom and are resolved with stipulations of dismissal once USCIS finally makes a decision on the case in question.

Considerations Before Filing a Mandamus Action

Plaintiffs are not required to exhaust any administrative remedies prior to bringing an action under the Administrative Procedure Act, or in order to seek a writ of mandamus. But although it is not a requirement to exhaust all administrative remedies before filing a mandamus action, it certainly demonstrates that the delay in the case is no fault of your client. Keep a record and include in your complaint the dates of every step you and your client have taken to get a decision in your case including USCIS inquiries, InfoPass appointments, requests for ombudsman case assistance, and congressional inquiries.

The most effective step to follow before filing a writ of mandamus is to make a congressional inquiry with your client's local congressperson. Members of Congress have staff who can help reach out on behalf of their constituents to federal agencies like USCIS. USCIS is obligated to respond to inquiries from members of Congress in a timely manner and congressional staffers may be able to provide you with meaningful insight into what is happening in your client's case.

Be sure to confirm that your client is a constituent of the congressperson and reach out to their office to locate the staffer responsible for USCIS inquiries. Submit the inquiry in the manner they prefer; most offices have their own forms for congressional inquiries and privacy releases to permit their staffers to share information about the constituent with their lawyer.

It is generally advisable to send a letter or notice of intention to file a mandamus action with the USCIS service center or field office adjudicating your case to encourage them to act before they are ordered to do so by a court. But be sure your client is ready and willing to file the mandamus action before you send the letter threatening litigation. The more often you actually file mandamus actions, the more likely the field office or service center will take your notice seriously. That, in turn, benefits all your clients. On the other hand, constantly sending toothless threats will have the opposite effect.

A Word of Caution

Filing a petition for mandamus will definitely get you a decision on your client's case—whether it's a favorable one or not. Be sure that your client's case is meritorious. A court can order USCIS to make a decision in a case, but a court generally cannot order the government to exercise its discretion in a particular way. *See Silveyra v. Moschorak*, 989 F.2d 1012, 1015 (9th Cir. 1993) (holding that "[m]andamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised.'") As a result, be aware that filing a mandamus action may result in a prompt denial of the application by the agency.

Encourage your client to be honest with you about whether there are any skeletons hiding in their closet. Filing a petition for writ of mandamus can be a quick way to get a denial in a case if there is any derogatory information about your client in the record.

Conclusion

It may seem intimidating to "sue the federal government," but these cases rarely reach the courtroom, and it can be one of the most effective tools to bring a resolution to your clients' cases. Processing times for immigration petitions are only getting longer and longer. Case inquiries and Ombudsman requests for case assistance are meaningless. It is becoming harder to schedule an InfoPass appointment, and even if you get one, the single administrative employee you speak with rarely knows anything about your specific case and doesn't have the authority to do much to help. Congressional inquiries likewise seem less effective than they have been in the past. A mandamus action is a sure way to get movement on your case and a decision for your client.

Biographies

Nicole M. Whitaker is the managing attorney of Whitaker Legal, LLC. She is a graduate of the University of Baltimore School of Law where she has served as an adjunct professor of law teaching Lawyering in Spanish and Legal Analysis, Research and Writing. Her law practice focuses mainly on the affirmative filing of family-based and humanitarian-based immigration cases such as SIJS, VAWA, U visa, and T visa applications. She prides herself on finding solutions for complicated immigration issues. She learned to speak Spanish while living in Spain teaching English in the Madrid public school system.

Tyler Sciara is a law student studying at Catholic University. He brings his experience from years of work with various judges, courts and law firms, where he assisted with case law research, legal document drafting, and legislation tracking. He earned his bachelor's degree from Monmouth University where he was elected President of the Pre-Law Club. As a legal intern for Whitaker Legal, LLC, Mr. Sciara worked with removal defense cases pending in immigration court as well as other immigration matters including applications for naturalization and adjustment of status cases under the Violence Against Women Act.