CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# MANDAMUS ACTIONS: AN EYEWITNESS ACCOUNT

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**by**
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Recently, the American Immigration Lawyer's Association announced that during a meeting with Secretary of Homeland Security Michael Chertoff, he indicated U.S. Citizenship & Immigration Services (USCIS) and the Federal Bureau of Investigation (FBI) have re-examined their existing name check system and developed strategies to process security clearances more quickly.[1] Secretary Chertoff confirmed this in a subsequent email, and expressed a joint commitment between these two agencies to allocate additional funding and resources to clear the better part of the current backlog of name checks within six months. If effective, this could also check the proliferation of mandamus actions filed in the federal district courts in recent years.

Earlier in the year, on June 11, 2007, Citizenship & Immigration Services Ombudsman, Prakash Khatri, released his Annual 2007 Report to the Judiciary Committees of the House and Senate. In this report, he specifically named security clearance checks as "a pervasive and serious problem faced by USCIS and its customers."[2] As noted by Ombudsman Khatri, security clearance delays have a considerable impact upon those applying for immigration benefits, including, "loss of employment and employment opportunities where the position requires green card status or U.S. citizenship ; difficulties obtaining drivers' licenses; inability to qualify for certain federal grants and funds; difficulties obtaining credit and student loans; and disqualification from in-state tuition."

It is for these and other reasons, that this firm has held more and more consultations with prospective clients to discuss their options with regard to compelling the government to complete the long-delayed adjudication of their

pending applications – primarily, Form I-485 Application to Register Permanent Residence or Adjust Status.[3] The Immigration and Nationality Act (INA) does not provide any definite timeframe within which USCIS must finally adjudicate an I-485 application – as opposed to a naturalization application, for example, where USCIS is required to make a final decision within 120 days of the date of the examination of the applicant under Section 336(b). As an agency of the United States, however, USCIS is subject to the Administrative Procedures Act (APA), which requires that "ith due regard for convenience and necessity of the parties . . . within a reasonable time, each agency shall proceed to conclude a matter presented to it. . ."[4] More important, the APA empowers the federal district courts to "compel agency action unlawfully withheld or *unreasonably delayed*."[5] In conjunction with 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1361 (mandamus jurisdiction), the federal courts possess the necessary jurisdiction to entertain actions brought by private individuals against the U.S. Government to compel the government to adjudicate the application before it within a more reasonable timeframe. This suit is called an action for Writ of Mandamus.[6]

Immigration attorneys across the country have made innovative use of the mandamus action in recent years. In July 2007, the American Immigration Law Foundation hosted a litigation institute, attended by this CDMA associate, where one faculty member explained he had successfully sued the government on a matter related to a stalled petition for temporary work authorization. Basically, where the government provides a fee-based service, the payment of such fees by a private individual imposes a duty upon the government to provide the service(s) promised within a reasonable period of time. Of course, whether the delay is reasonable or not depends on the context of the benefit requested. Also, compelling factors related to an individual applicant's circumstances may sway a judge in favor of entering an order against the government.

Generally, this firm has found that anything less than two years' delay on an adjustment of status application is not delay enough to bring a mandamus action on such applications. Nevertheless, if we are retained, we begin the process by attending an Infopass appointment with USCIS to inquire into the nature of the delay in adjudicating our client's application. Despite the experiences of some, these appointments have proven very useful, and we

have avoided filing several lawsuits by keeping things at the local application support center. If the USCIS officer is unhelpful or outright hostile, one should request to speak with his or her supervisor. One supervisor at 26 Federal Plaza went above and beyond the call of duty to dedicate the better part of his afternoon to sorting out an identity theft issue that led to a six-year delay in the adjudication of one of our client's adjustment application. She was just recently scheduled for her interview early next year.

When we find that a case is ripe for litigation, we ask that our client gather a complete copy of the application giving rise to the action, including all attachments or evidence, either initially or subsequently submitted, and all notices or correspondences received from the government related to that application. We also request the client to assemble copies of all official documentation related to his or her immigration status in the U.S., from first entry to present status, as well as all tax returns and exhaustive lists of their education and employment histories and any affiliations.[7] Not only is this information important to drafting the complaint, as the attorney needs to include factual allegations stating why the delay is unreasonable, but it is crucial to assessing whether mandamus is an appropriate remedy for the client. The government could moot out a mandamus action based upon a pending adjustment application, as jurisdiction over the application remains with USCIS which may find a discretionary basis to deny the benefit. This leads us to an important caveat for filing any complaint for a writ of mandamus: the decision of whether to grant or deny the adjustment application rests ultimately with USCIS and not the court.[8]

Unlike actions related to naturalization applications, pursuant to INA § 336(b), a mandamus complaint only vests the federal courts with the jurisdiction required to compel the defendant agency to act.[9] If successful, an order from a federal judge will require only that the FBI complete its name check, if the pendency of the security check is noted as the reason for delay, and that USCIS enter a final decision on the application within a specified schedule. Typically, district court judges have given government parties 30 and/or 60 days to complete processing. Because the delay could be attributed to the FBI name check, it is crucial that the attorney name all necessary parties when drafting the complaint, including the client as plaintiff and, as defendants, Emilio T. Gonzalez, in his official capacity as Director of U.S. Citizenship and Immigration

Services; Michael Chertoff, in his official capacity as Secretary of the U.S. Department of Homeland Security; Peter D. Keisler, in his official capacity as Acting Attorney General of the United States; and Robert S. Mueller III, in his official capacity as Director of the Federal Bureau of Investigation. In the cases with which I have been involved, where the applications remain pending at the New York City District Office, we have also named Andrea Quarantillo, in her official capacity as Director of the New York City District of U.S. Citizenship and Immigration Services, as a defendant. This last defendant, however, will vary depending upon the location of the client's immigration file.

The suit itself must be filed either where the Plaintiff resides or where the government conducts its business, such as Washington, D.C. Some attorneys have also suggested filing in the federal district where the application was originally filed as a strategy of forum selection, where the attorney is hoping to avoid a district with unfavorable case law or uncooperative U.S. Attorneys.[10] With regard to the practicalities of initiating the action, the complaint should begin with a brief introduction stating the nature of the action, then provide a comprehensive explanation of the basis for jurisdiction that cites not only the above-cited statutes, but also the INA and implementing regulations, the basis for proper venue under 28 U.S.C. §1391 and a list of names of all parties with brief descriptions of why they are properly included in the lawsuit. Next, the complaint should state all factual allegations, showing that the applicant has complied with all requirements necessary to adjust his or her status, including providing biometrics and appearing for interviews when called in to do so by USCIS. The factual allegations should also include a timeline of whatever steps the applicant or his or her representative have taken to instigate USCIS to take action, as proof of exhaustion of administrative remedies.[11] Finally, the factual allegations should include whatever other compelling circumstances warrant granting an order to compel USCIS and FBI to conclude their adjudication of the application. The complaint then makes its "Prayer for Relief," which more succinctly restates the duty owed to the applicant by the defendants and how this duty has been breached by the agency's unreasonable delay. And do not forget to include a request for costs and fees under the Equal Access to Justice Act.

The original complaint, with a filing fee of $350, must be filed with the civil cover sheet of the specific court where the action is to be filed. When filing the

complaint, the attorney should contact the clerk of the court beforehand to learn how many copies must be filed with the court, and bring completed summonses for each defendant, which must bear the court's stamp when service of the complaint is made upon the government parties. Each defendant must be named on a separate summons.[12] Also, I prefer to immediately hand deliver service to the U.S. Attorney's Office, as this will begin the clock against the government, giving the U.S. Attorney 60 days within which to reply.

When the complaint is filed, the clerk will assign two judges two the matter and provide copies of the rules of each. Of course, the complaint must comport with the Federal Rules of Civil Procedure, as well as the Local Rules of the court, however, **READ** the individual judges' rules immediately, as there is considerable variance between the procedures each judge prefers to impose upon those who pursue matters before him or her. Also, it is essential that the parties familiarize themselves with the specific court's rules governing its Electronic Case Filing system (ECF) procedures. The courts have gone paperless, and the ECF systems are quite daunting when first faced with them. Luckily, the ECF helpdesks are typically manned by extremely friendly staff, whose numbers are available on the court's web sites. Basically, all papers submitted to the courts after the initiating complaint, including the attorney's Notice of Appearance, must be filed electronically. Therefore, it is a good idea to register for the courts ECF system before filing, and pay heed to the warnings and suggestions made in the internet trainings that the courts make available.

In conclusion, Secretary Chertoff has expressed his hopes that the new USCIS/FBI initiative will help clear the backlog and allow for quicker adjudications of the species of applications that have until now fallen victim to name check delays. We have all learned to take such announcements with an entire lick of salt. Regardless, the mandamus has proven an extremely useful tool in instigating the government to act and concluding the unreasonable delays it too frequently imposes upon its customers.

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[1] See AILA InfoNet Doc. Nos. 07113061 & 07120361.

[2] Ombudsman Khatri reported:

> As of May 2007, USCIS reported a staggering 329,160 FBI name check cases pending, with approximately 64 percent (211,341) of those cases pending more than 90 days and approximately 32 percent (106,738) pending more than one year. While the percentages of long-pending cases compared to last year are similar, the absolute numbers have increased. There are now 93,358 more cases pending the name check than last year. Perhaps most disturbing, there are 31,144 FBI name check cases pending more than 33 months as compared to 21,570 last year – over a 44 percent increase in the number of cases pending more than 33 months.

CIS Annual Report 2007, p. 37 (*citing* USCIS FBI Pending Name Check Aging Report (May 4, 2007). For a full copy of the report, go to http://www.dhs.gov/xlibrary/assets/CISOMB_Annual%20Report_2007.pdf.

[3] While this article discusses mandamus actions in the context of adjustment applications, the firm has also used INA § 336(b) to compel the USCIS to adjudicate naturalization applications. These actions are somewhat different than mandamus actions, and some of the distinctions will be highlighted in this article.

[4] 5 U.S.C. §555(b).

[5] 5 U.S.C. § 706(1) (emphasis added).

[6] Such actions are to be distinguished from actions brought to compel USCIS to make a decision on a pending Form N-400 Application for Naturalization. These suits are brought pursuant to section 336(b) of the INA, which requires that USCIS render its decision on the application within 120 days of the

"examination" of the applicant. Although there is some case law going the other way, the district courts have almost universally found that the date of the examination is the same as the date of the interview.

[7] As many potential mandamus clients come to us after having filed their applications themselves or through another law firm and do not always have copies of their complete copies of their immigration filings, we frequently file a Freedom of Information Act Request with USCIS on Form G-639. If the client has filed any immigration documents through an attorney, we request a copy of the individual's file from their prior attorney. If we learn that the reason for the delay in adjudication is a name check, which it often is, we often recommend that our clients submit an FBI Identification Record Request (information available at http://www.fbi.gov/hq/cjisd/fprequest.htm), which is, ironically, answered relatively quickly.

[8] During a recent conference call, concerning mandamus litigation strategies employed by immigration attorneys across the country, the attorneys seemed to agree that USCIS seldom takes retaliatory action for filing suit to compel it to adjudicate an application. On my first mandamus action, however, USCIS issued a request for additional evidence that was six pages long and asked us to document that applicant's tax and immigration histories going back 20 years. Although the application was eventually approved, it appeared as though USCIS was searching the applicant's record of proceedings for a discretionary basis upon which to issue a denial.

[9] Proceedings under INA § 336(b) vest exclusive jurisdiction over a naturalization application with the district courts; thus, USCIS can take no action on an application once suit has been filed until it receives the application back on remand.

[10] In my experience, the U.S. Attorney's Office has been extraordinarily cooperative and helpful in bringing its clients, USCIS and the FBI, to adjudicate the matter during the initial stages of judicial conferences.

[11] Many prospective clients come to us after having already contacted their Congressional representatives and learning that congressperson is equally powerless in prompting USCIS or FBI into action. When the reason for delay is a name check, the congressperson receives a response to his or her status

inquiry that is more or less identical to the one USCIS sends to applicants and their representatives. All that contacting a congressperson accomplishes in these instances is initiating the transfer of the file to the Congressional Unit at the local Application Support Center, which makes it more difficult to learn anything during personal status inquiries ay Infopass appointments.

[12] As government agencies are named as defendants, the pertinent regulations require that the plaintiff serve not only the U.S. Attorney's Office, but also the Office of the General Counsel for that agency and the Attorney General's office.