

# **To Sue or Not to Sue: Pursuing Litigation to Overcome Denials and Delays**

*Patricia Castillo Flanagan, Esq.*

# **Mandamus and Unreasonable Delay Litigation**

# Authority

- JURISDICTION
- Jurisdiction under 28 U.S.C §1331 federal question
- Mandamus Statute, 28 U.S.C. 1361
- CAUSE OF ACTION
- 28 U.S.C. §1361 action to compel officer of U.S. to perform duty
- APA, 5 U.S.C. §555(b), within a reasonable time, agency shall conclude matter

# Mandamus vs. APA Delay

- Mandamus is to compel an agency to perform an act that it has a duty to perform. Generally, for extraordinary delays.
  - Clear right of plaintiff to the requested relief
    - Plaintiff within “zone of interests” of statute
  - Duty of government to adjudicate

# Mandamus vs. APA Delay *cont'd.*

- No other adequate remedy available
  - - e.g., adjustment of status can be renewed in removal proceedings
- APA is to seek redress for unreasonable delays. Courts use TRAC factors (Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984))

# Recommended Steps

- Congressional inquiry
- 1-800 number and resulting indignities (spell these out)
- Emails to the agency
- Ombudsman

# When is Mandamus/APA Complaint Recommended

- Case is pending well beyond published processing times, especially if coupled with humanitarian factors
- Exceptions:
  - Retention of priority date requires approval
  - Adjustment portability requires approval
  - Processing time unreasonable or vastly increased (e.g. EB-5)
  - DHS OIG: Processing times not realistic

# When is Mandamus/APA Complaint Recommended *cont'd.*

- When the statute or regulation requires processing in a specific time period (L 30 days; 751 and 829 90 days), and adjudication has well exceeded this
- Conditional residence
  - Couple delays with the fact that conditional residence was meant to be a 2 year period, not a 5 year period
  - Delays can abrogate the statutory 3 year period of residence required for naturalization if married to a U.S.C. and defeat the intent of the naturalization statute. Delays in processing conditional residence removal result in delayed naturalization because USCIS won't naturalize a conditional resident.



# When is Mandamus/APA Complaint Recommended *cont'd.*

- Where the statutory or regulatory scheme is completely abrogated because of the delay. A good example of this is F-1 Change of Status to H-1B where the F loses cap gap employment on September 30. Clearly the intent of the regulation was to provide continuity of employment, which is defeated by the delay of the adjudication of the H petition.

# When is Mandamus/APA Complaint Recommended

*cont'd.*

- Where the law requires a person to have proof of residence and USCIS will not provide it (I-90 filed, 829 or 751 receipt expired, Court grants residence)
- Permanent residents are legally required to carry their green card with them if age 18 or older. Section 264(e) of the Immigration and Nationality Act states that all permanent residents must have “at all times” official evidence of permanent resident status. A photocopy is not acceptable. If found guilty of this misdemeanor, the penalty set by law is a fine of up to \$100 and up to 30 days in jail.

# Allegations in Complaint

- Fees doubled to provide service
- We are Customers
- Defeats statutory or regulatory intent
- Explain harm to the beneficiary
- 8 U.S.C. §1571(b) sense of Congress that nonimmigrant benefit will be processed within 30 days and immigrant benefit within 180 days

# Facts Matter

- If there are compelling factors which necessitate an adjudication, or elevate the need for an adjudication, include these factors

# Where to File

- 28 U.S.C. § 1391(e)
- Where Defendant resides (USCIS offices almost everywhere)
- Where a substantial part of the events of omissions giving rise to the claim occurred
- Where the Plaintiff resides
- For a business, residence is the principal place of business
- D.C. is always safe

# Cite Processing Time Delays and Fee Increases in December 2016

- Consider citing to or documenting the following in the Complaint:
- Remind Court that USCIS is a fee-funded agency and Plaintiff is a fee-paying customer (USCIS has stripped “customer” and “service” from its mission statement).
- Cite from the Federal Register for the most recent fee increase. The F.R. includes estimated time to adjudicate each type of case. <https://www.federalregister.gov/documents/2016/10/24/2016-25328/us-citizenship-and-immigration-services-fee-schedule>
- The overall average case processing time surged by 46 percent over the past two fiscal years and 91 percent since FY 2014.
- Case processing times increased substantially in FY 2018 and FY 2019 even as case receipt volume appeared to markedly decrease

# Cite Processing Time Delays and Fee Increases in December 2016 *cont'd.*

- USCIS “net backlog” exceeding 2.3 million delayed cases at the end of FY 2017. This total amounts to more than a 100 percent increase over the span of one year despite only a four percent rise in case receipts during that period.
- AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under The Trump Administration
- <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-uscis-processing-delays>; AILA Doc. No. 19012834 (January 30, 2019) <https://egov.uscis.gov/processing-times/historic-pt> (published 3/31/19 and shows average processing times since 2015)
- <https://www.oig.dhs.gov/sites/default/files/assets/2018-03/OIG-18-58-Mar18.pdf> (OIG says USCIS processing times are wrong).

# Discussions with Client

- EAJA fees and separate agreement who gets them
- The risk of denial
- Who should/can pay in H-1B Mandamus



# **Declaratory Judgments - - Review of USCIS Denials**

# The Administrative Record

- Plan ahead and build a strong record to set the stage for litigation should it become necessary
- With very limited exceptions, you CANNOT supplement the record during litigation
- Attach independently verifiable evidence to support the arguments made in the petitioner's letter
- Fully brief and address every substantive issue raised in the RFE
- Expert opinion very helpful

# Your Petition is Denied - - Do You Have a Good Case for Successful Litigation?

- Mistakes of fact or law in denial
- Decision based on policy vs. law
- Inconsistencies with prior decisions
- Did someone already win/lose your case - - Pacer
- Good record
  - Expert opinion(s)
  - Every issue addressed
  - Independent verifiable evidence
  - Decision disregarded credible facts

# Motion to Reopen, Appeal or Federal Court

- 4 options:
  - When best to refile?
  - When best to file MTR?
  - When best to appeal to AAO?
  - When best to litigate in federal court?

# Exhaustion of Administrative Remedies

- Law – Darby vs. Cisneros
  - Administrative appeal not required for USCIS denials
- Likelihood of defense being raised?
- Issue if appeal pending

# Jurisdiction

- APA: Subject matter jurisdiction is based on “federal question”
  - 28 U.S.C. 1331: District courts have original jurisdiction of civil actions “arising under the Constitution, laws, or treaties of the United States
- But See: INA 242(a)(2)(B): Stripping courts of jurisdiction over any other decision or action “which is specified under this title to be in the discretion” of the AG or DHS Secretary other than asylum

# The Administrative Procedure Act (5 U.S.C. 702 et.seq.)

- The APA directs reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions” that are:
  - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law
  - Not supported by substantial evidence
  - In excess of statutory jurisdiction, authority, or limitations, or short of statutory right
  - Without observance of procedure required by law
- Will court remand or decide?
- General six-year statute of limitations [28 U.S.C. 2401(a)]

# Venue

- Federal District Court
- 28 U.S.C. 1391(e) for suit against the federal government or a federal official acting in an official capacity
  - Where company headquarters are located
  - Where beneficiary resides
  - Where worksite is located
  - Where USCIS Service Center is located
  - Washington, DC



# Venue

*cont'd.*

- Look for favorable case law on the issues - -  
district court and circuit court
  - - Procedural
  - - Substantive
  - Other factors
    - - Home court?
    - - District court judges
    - - Need for local counsel

# Standing of Plaintiff

- Usual Plaintiff: Petitioning employer
- Does beneficiary have standing?
  - “Zone of interests” test
  - Ethical issues

# The Complaint

- What makes a good complaint?
  - Clear statement of relevant facts and procedures
  - Statement of jurisdiction
  - Background facts and law needed to understand the issue
    - Bearing in mind the judge is not an immigration expert
  - Compelling narrative
  - Evocative language but not melodrama
  - Properly framed counts

# What Else Do You File?

- File Electronically (PACER/ECF)
  - Complaint
  - Exhibits (e.g. documents from the administrative record)
  - Civil cover sheet
  - Summons
  - Filing Fee
- Serve all necessary parties

# Local Issues

- Need local counsel?
  - Pro hac vice motion
  - Co-counsel
  - Check local rules

# What Happens Next?

- Settlement
- Answer
- Motion to Dismiss
  - Exhaustion (unlikely)
  - Standing
  - Venue
  - Discovery unlikely
  - Government motion to reopen
  - Issue new RFE or NOID
  - How to respond

# Client Management Issues: Allaying Litigation Fears

- Fear of Retaliation: Most litigators report no evidence whatsoever that USCIS...
  - Has retaliated against employers or individuals who file suit
  - Has the desire, will, or resources to retaliate
- Costs: Consider creative ways to keep costs down
  - Fee arrangements/success fees
  - EAJA
  - Multiple plaintiffs with the same issue can drive the price down
  - Engagement letters
- Publicity: Client information in court filings can be kept confidential

# AILA Resources

- The AILA Administrative Litigation Task Force (ALTF) Website: <https://www.aila.org/infonet/administrative-litigation-task-force>
  - Sample Pleadings
  - Contact a Mentor
  - Litigation Briefings
  - Litigation Spotlight
- The Federal Court Litigation Section
- Litigating Immigration Cases in Federal Court, by Robert Pauw (4th Ed)
- AILA's Immigration Litigation Toolbox (5th Ed.)



# American Immigration Council

## Practice Advisories

- Litigation for Business Immigration Practitioners (June 3, 2016)
- Immigration Lawsuits and the APA: The Basics of a District Court Action (June 20, 2013)
- Failure to Appeal to the AAO: Does it Bar All Federal Court Review of the Case? (Sept. 26, 2016)
- Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation (May 13, 2010)
- Mandamus Litigation Against DOL to Address Delays in Prevailing Wage Determinations and Labor Certifications (Nov. 6, 2015)
- Mandamus Actions: Avoiding Dismissal and Proving the Case (Mar. 8, 2017)
- Requesting Attorneys' Fees Under the Equal Access to Justice Act (June 17, 2014)
- Agency Delay Litigation: Opposing a Government Motion to Dismiss (October 4, 2019)

# INTRODUCTION TO AILA'S ADMINISTRATIVE LITIGATION TASK FORCE

- Reaction to unprecedented denials and delays
  - Litigation often best or only option
- Empowering AILA members to litigate
  - Education
  - Website
  - Mentors
  - Samples
  - Practice pointers
  - #BreaktheBacklog campaign
    - Focus on mandamus/unreasonable delay litigation
    - Separate listserv, website, webinars, media campaign