UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RAZAQ, et al.,

Petitioners,

v.

CHRISTINA POULOS, et al.

Respondents.

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No. C 06-2461 WDB

ORDER AND MEMORANDUM OPINION RE MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

For reasons we will explain in the pages that follow, we DENY, for now, Petitioners' Motion for Summary Judgment, filed November 8, 2006, seeking Writ of Mandamus. As explained, *infra*, we also DENY Respondents' "Cross Motion" for Summary Judgment, filed November 22, 2006. The Court retains jurisdiction over this action, however, and invites petitioners to file an amended motion for summary judgment after February 5, 2007, if the government has failed to keep its promise to resolve petitioner Holly Razaq's outstanding I-130 application by that date.

These proceedings began on April 7, 2006, when petitioners Holly Ann Weber Razaq and Assad Razaq filed a Petition for Writ of Mandamus asking the Court to compel the United States Citizen and Immigration Services ("USCIS") to *process* Holly Razaq's I-130 petition to obtain "immediate relative" status for her husband, Assad Razaq.[1]

[1]Petitioners filed an Amended Petition for Writ of Mandamus on April 18, 2006. That document is the operative pleading.

Petitioner Assad Razaq is a native of Kenya and is a citizen of the United Kingdom. Declaration of Stacey L. Gartland in Support of Petition for Writ of Mandamus, filed April 18, 2006, ("Gartland Decl."), at Ex. A. He entered the United States on a 90-day tourist visa in March of 1997. Declaration of Ronald E. Johnson, filed November 22, 2006, ("Johnson Decl.") at ¶7. He married a woman (not Ms. Weber) who was a citizen of the United States and who, sometime near the end of the decade, submitted an application on Form I-130 seeking a determination of "immediate relative" status for Mr. Razaq that would enable him to apply for an "immigrant" (permanent) visa. Gartland Decl., at Ex. F.[2] She withdrew that application in 2001, after she and Mr. Razaq were divorced. *Id.*

In 2001 Mr. Razaq met Ms. Weber. Gartland Decl., at Ex. F. In 2002 the immigration authorities determined that Mr. Razaq was in this country illegally -- having overstayed his 90-day tourist visa by some five years. *Id.*; Johnson Decl., at ¶7. He was taken into custody -- then elected to leave the country rather than litigate his status. Gartland Decl., at Ex. F. In July of 2004 he and Ms. Weber were married in Antigua. Gartland Decl., at Ex. A. In September of that year she submitted an application on Form I-130, asking that her marriage to Mr. Razaq be deemed valid so that he could apply for a permanent visa and re-enter the United States. Gartland Decl., at Ex. A. Even though more than two years has elapsed since the current Ms. Razaq filed this second I-130 application, the USCIS has not completed adjudicating Ms. Razaq's application. It is petitioners' position that the USCIS has unreasonably (and, therefore, unlawfully) delayed the processing of Ms. Razaq's application.

The USCIS filed its answer to petitioners' complaint in these proceedings on June 7, 2006. Thereafter, the parties entered two successive stipulations to continue the initial case management conference in the hope that the administrative

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[2]Some of the background factual information herein is derived from a report written by Lisa Bonta Sumii, the social worker who conducted a mental health assessment of Holly Razaq. Declaration of Stacey L. Gartland in Support of Petition for Writ of Mandamus, filed April 18, 2006 ("Gartland Decl."), at Ex. F. We presume the information in the report was told to the social worked by Ms. Razaq. As neither party has disputed the accuracy of the social worker's statements, for our purposes here, we accept these representations as accurate.

proceedings were about to be concluded. Stipulations, filed June 28, 2006, and August 16, 2006. When that hope proved illusory, petitioners filed a motion for summary judgment, to which the government responded by filing an opposition and a cross motion for summary judgment. On November 8, 2006, the Court scheduled a hearing on these cross motions for December 13, 2006.

On December 7, 2006, after both motions for summary judgment had been fully briefed, the government notified the court and petitioners that it had decided that it would adjudicate Ms. Razaq's I-130 application within sixty days. Respondents' Sur-Reply, filed December 7, 2006. Having been so notified, the Court vacated the December 13th hearing on the cross motions for summary judgment. Rather than dismiss the action, however, the Court scheduled a case management conference for February 21, 2007 -- so the Court could re-set the hearing on the motions if the government failed to honor its promise. Petitioners were unhappy with this proposed course of action. They filed an Objection to the Court's Order and asked the Court to issue a formal ruling on their Motion. We agreed to do so. See, Order, filed December 12, 2006.

The parties' motions present two issues. First, we must decide whether the Court has jurisdiction over the Razaqs' Petition for Writ of Mandamus. If the Court has jurisdiction over this matter, we must consider the merits of the parties' motions.

DISCUSSION

I. Jurisdiction over the Petition for Writ of Mandate

The government contends that the Court lacks jurisdiction over the Razaqs' Petition for Writ of Mandamus.

Petitioners filed their Petition for Writ of Mandamus pursuant to the Mandamus and Venue Act, 28 U.S.C. §1361 ("Mandamus Act"), and the Administrative Procedures Act, 5 U.S.C. §§555, 702 and 706 ("APA").

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The Mandamus Act provides:

> The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. §1361.

In circumstances such as those presented here, a district court has jurisdiction to consider whether to issue a writ of mandamus under this statute if the action that the petitioners ask the Court to compel the agency to take is the kind of action that Congress and the courts have recognized as appropriate for mandamus relief. *E.g., Rios v. Ziglar*, 398 F.3d 1201 (10th Cir. 2005). To be so recognized, the action that the petitioner seeks to compel must be deemed ministerial and non-discretionary. *Id. Accord, Patel v. Reno*, 134 F.3d 929, 931-2 (9th Cir. 1998).

The government contends that the duty petitioners seek to compel is not "ministerial" because <u>neither Congress nor the regulations have specified a time limit in which the agency must act</u>. Opposition at 3. For the reasons set forth in this section, we FIND that the act that petitioners seek to compel is ministerial and, therefore, that the Court has jurisdiction to consider whether to issue the writ that petitioners seek.

Petitioners are not asking the Court to dictate the outcome of the administrative proceedings. Instead, they are simply asking the Court to order the executive branch to complete -- in an appropriate period -- the processing of their application. The Court is not being asked to dictate the substance of the decision -- just to force the defendant to decide.

The Immigration and Nationality Act ("INA") provides that,

> <u>After an investigation</u> of the facts in each case, . . . the Attorney General <u>shall</u>, if he determines that the facts stated in the petition are true and that the alien in [sic] behalf of whom the petition is made is an immediate relative, . . . approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

8 U.S.C. §1154(b) (emphasis added). The statute uses the term "shall," expressly requiring the agency to approve an I-130 application where the predicate for

obtaining I-130 status has been satisfied.[3] Congress clearly contemplates that an investigation will be conducted and a decision rendered.

This obvious Congressional intent is implicitly acknowledged in the language of pertinent regulations. See, e.g., 8 C.F.R. §204.2(a)(3) ("the approved petition will be . . .." and "[i]f the petition is denied . . ." emphasis added).

Thus, the INA and the regulations issued pursuant to it impose on the executive branch a clear duty to either grant or deny petitioner's I-130 petition. The agency is not authorized to hold onto the petition and make no decision. *But compare*, *Luo v. Coultice*, 178 F.Supp.2d 1135 (C.D.Cal 2001) ("court does not find any statutory language obligating the INS to approve or reject petitions returned by consulate"). We find that the USCIS has a mandatory duty to decide whether to grant or deny I-130 petitions. *Accord, Patel*, 134 F.3d 929 (consul cannot suspend visa application); *Aboushaban v. Mueller*, 2006 WL 3041086 (N.D. Cal) (agency has duty to adjudicate I-485 application); *Yu v. Brown*, 36 F.Supp.2d 922 (D.N.M. 1999).

The fact that neither the statute nor the regulations establish a specific deadline does *not* change the character of the duty itself. While the substance of the decision whether to grant or deny a petition obviously is discretionary, the duty to process the application is just as obviously ministerial. Congress expected the executive branch to receive applications of this kind and then to 'adjudicate' them to a decision.

It is equally clear that Congress had to have intended the executive branch to complete these 'adjudications' within a reasonable time -- because imposing no time constraint at all on the executive branch would be tantamount to giving the

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[3]At this juncture, we make no findings with respect to petitioners' argument that, pursuant to *Matter of O*, 8 I & N Dec. 295 (BIA), "law enforcement and national security concerns are entirely irrelevant to adjudication of the [I-130] petition." Reply, at 7 (emphasis added). In our view, it seems unlikely that the ability of the USCIS to consider national security concerns is entirely cut off. First, if the agency's investigation were to uncover evidence of unlawful activity, that evidence might call into question the credibility of statements made in the I-130 petition and thus affect the agency's assessment of their "truth." Moreover, under petitioners' view, the agency would be required to grant an I-130 application on behalf of a known terrorist if his or her marriage to a U.S. citizen were "legitimate." Because it appears that "immediate relative" status might entitle an alien to a temporary visa and thus entry into this country, we question petitioners' view that national security concerns are "entirely irrelevant" to the USCIS's assessment of the validity of an applicant's I-130 petition.

government the power to decide whether it would decide. If Congress had wanted to give the executive branch that power, the power to decide whether to decide, it would have been obvious to Congress how to articulate that intention. But Congress followed no such course. Instead, by using the phrase of legal art "shall," Congress ordered the executive branch to make decisions on these applications. Congress would have eviscerated that mandate (ordering the executive branch to make a decision) if it had given the executive branch full discretion to determine the time frame for concluding the processing of the applications. A 'duty to decide' becomes no duty at all if it is accompanied by unchecked power to decide when to decide.

Congress imposes many duties on executive agencies without prescribing specific time frames for their completion. This is a wise course -- as Congress recognizes that in many instances it will not have sufficient information to impose deadlines that adequately take into account a host of potentially relevant variables. Recognizing that there will be instances in which it would be unwise to impose rigid deadlines on agencies dealing with a wide variety of circumstances, many not fully predictable, Congress enacted a generally applicable prescription that would offer agencies the time they legitimately needed to complete their assigned tasks but that would not permit those agencies to evade their duties altogether by retreating indefinitely into inaction. This prescription applies, through the Administrative Procedure Act, when Congress imposes a duty but does not articulate a specific time frame within which that duty must be honored.

Section 555(b) of the APA states, " . . . With due regard for the convenience and necessity of the parties or their representatives, and <u>within a reasonable time</u>, each agency <u>shall</u> proceed to <u>conclude a matter presented to it</u>." Emphasis added. Similarly, section 706 of the APA states,

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court <u>shall</u> – (1) <u>compel agency action</u> unlawfully withheld or <u>unreasonably delayed</u>, . . .

5 U.S.C. §706 (emphasis added).

Thus, where a statute does not specify a deadline for a particular kind of government action, the APA compels the executive agency to act "within a reasonable time." *Accord, Patel*, 134 F.3d 929 (no time frame specified; court finds eight year delay unreasonable); *Fallini v. Hodel*, 783 F.2d 1343 (9th Cir. 1986) (BLM must remove wild horses from private land within a reasonable time where Wild Horses Act specifies no time frame).

Consistent with these authorities, we reject respondents' argument that the absence of a statutorily specified deadline, by itself, changes the character of the government's duty from ministerial to discretionary. The duty that the petitioners want this Court to compel the government to honor is the duty to make a decision -- a duty that can be real only if it must be honored sometime. Here, Congress has made the duty it has imposed real by ordering the executive branch to make its decision on petitioners' application "within a reasonable time."

For all the reasons set forth above, we conclude that this Court may exercise jurisdiction over petitioners' request for a writ of mandamus.

II. <u>Parties' Motions for Summary Judgment</u>

To succeed on a motion for summary judgment, the moving party must establish that, under facts that are not subject to genuine dispute, that party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c). In reviewing a motion for summary judgment, the Court considers the evidence in the light most favorable to the party against whom the judgment is sought.

We must grant the motion for summary judgment if, when we consider the evidence in the best possible light for the party against whom the judgment is sought, the evidence is sufficient (as a matter of law) to support a finding that the moving party has proved all required elements of the party's claims.

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A. Petitioners' Motion

To be entitled to issuance of a writ of mandamus, petitioners must demonstrate that: (1) their claim is clear and certain, (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. *Fallini*, 783 F.2d 1343; *Patel,* 134 F.3d 929.

In section I, *supra*, we explained the basis for our finding that respondents have a nondiscretionary, ministerial duty to adjudicate petitioner's Form I-130 application. Thus, the second requirement for issuance of a writ of mandamus is satisfied.

Respondents have not suggested that a remedy other than mandamus would be available and adequate to enforce the rights asserted here by petitioners.

It follows that the only requirement for issuance of a writ of mandamus that remains for petitioners to satisfy is the requirement that they establish that their claim is clear and certain. As we understand it, this means that petitioners must clearly demonstrate their entitlement to the requested relief. We now turn to this issue.

Immigration-based complaints such as the Razaqs', which seek to compel the government to decide a petition pending before it (but not to compel any particular decision), will satisfy the requirements for obtaining mandamus where the petitioner demonstrates that the agency has unreasonably delayed. *Patel*, 134 F.3d 929 (consul cannot suspend visa application; eight year delay unreasonable); *Aboushaban*, 2006 WL 3041086 (agency has duty to adjudicate I-485 application within reasonable period; ten year delay unreasonable). Accordingly, we may grant petitioners' Motion to obtain mandamus only if facts that are not subject to genuine dispute, when considered in the light most favorable to the government, demonstrate, <u>as a matter of law</u>, that the government has "unreasonably delayed" processing of Ms. Razaq's I-130 application.

By their Motion for Summary Judgment, petitioners assert that they have demonstrated, as a matter of law, that the government has unreasonably delayed processing Ms. Razaq's I-130 application. They ask the Court to issue a writ of mandamus compelling the USCIS to adjudicate the I-130 application within sixty

days.[4] In response, the government asserts not only that petitioners have failed to show that the USCIS has acted unreasonably, but also that the Court should make the opposite finding -- *i.e.*, respondents ask us to find, as a matter of law, that the government has acted *reasonably*.

Mandamus is an extraordinary remedy. *Patel*, 134 F.3d at 931. The mandamus remedy implicates fundamental constitutional principles that dictate the separation of governmental powers and that strive to preserve in substantial measure the independence of each of the three great branches of our government. These fundamental constitutional directives require courts to proceed with considerable care and caution when asked to use the power of mandamus to impose a course of conduct on an executive agency. Given the magnitude and sensitivity of these constitutional principles, courts must resolve close questions about whether to issue a writ in favor of the government. Thus, the delay that petitioners must establish to justify issuance of the writ must be clearly unreasonable. Moreover, courts may not rely on facts that are subject to genuine dispute to justify issuing a writ of this kind -- and must consider the facts that are not subject to genuine dispute in the light most favorable to the government. Among other things, this means that if multiple inferences could rationally be drawn from a given set of undisputed facts, the court (in deciding whether to issue a writ of this kind) must draw the inference that is most favorable to the government. Stated differently, in this procedural setting, if an inference that would be favorable to the government could rationally be drawn from the evidence, the court must draw that inference.

The parties have given us little guidance about how to determine whether the "delay" between September 13, 2004, (the date Ms. Razaq filed her I-130 application) and the present is "clearly unreasonable." Petitioners' papers suggest that the period

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[4]Petitioners originally requested an order compelling adjudication within thirty days. Motion at 7. The government has since agreed to adjudicate the application by February 5, 2007, and petitioners do not object to use of this deadline. Declaration of Anna K. Chau, filed December 7, 2006; Petitioners' Objection to Court's December 8, 2006 Order, filed December 11, 2006.

of delay by itself -- more than two years -- should be deemed sufficient to establish a violation of the duty to process the application within a reasonable period. The only significant point petitioners make to bolster this argument is that, as of April 18, 2006, information on the government's public website indicated that the USCIS was then processing I-130 applications filed one year after Ms. Razaq's. Gartland Decl., at Ex. B.

On the other hand, the only acts by the agency that respondents cite in support of their position were taken after the petitioners' application had been pending for some twenty two months. The government also alludes at the most general of levels to some unspecified national security concerns. Opposition at 4.

Where the governing statute specifies no deadline for a governmental act, the Ninth Circuit has considered the following factors -- known as the "TRAC factors"[5] -- to assist in assessing whether a government agency has unreasonably delayed concluding a matter before it in violation of the APA:

> (1) the time agencies take to make the decision 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 the delay, and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Indep. Mining Co., Inc. v. Babbitt, 105 F.3d 502, n. 7 (9th Cir. 1997) (agency processing of application for mineral patents). See also, *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001) (balancing TRAC factors to determine whether agency unreasonably delayed); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, n.

[5]So named for *T.R.A.C. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984).

11 (9th Cir. 2002) (courts use TRAC factors where there is no deadline from Congress in order to evaluate reasonableness of delay).[6]

This non-exhaustive list of considerations must be applied in specific factual settings; courts must decide whether a petitioner has shown that a delay was "clearly unreasonable" on a case-by-case basis -- taking fully into account all the variables and considerations at play in each specific factual/historical scenario. *Fallini*, 783 F.2d at 1347; *Selah v. Ridge*, 367 F.Supp.2d 508, 512 (S.D.N.Y. 2005). There are no formulaic bases for resolving these kinds of issues; there is no particular time frame that is presumptively unreasonable across the agency board. Instead, in each case the court must determine what kind of decision the applicant was asking the government to make, what kind of information the government would reasonably need to acquire in order make that decision responsibly, how much time it might take to gather that information, whether the applicant could have provided needed information faster or more reliably, what competing demands were being made on the agency during the relevant period, and whether there were forces at work or barriers involved that were beyond the agency's control that disabled it from getting a sufficient information base to make the kind of decision it was being asked to make.

At the outset, we note that the third "TRAC" factor provides that delays involving human welfare are less tolerable than those that implicate only economic interests, and that the fifth factor directs the court to take into account the nature and extent of the interests prejudiced by the delay. The processing of Holly Razaq's I-130 petition affects human health and welfare, the well-being of the Razaqs' marriage and Ms. Razaq's mental health. Gartland Decl., at Ex. F. Thus, the nature of the interests implicated by the delay are potentially quite significant. It is less clear, however, how much harm to those interests the government's delay has caused. Apparently the

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[6]While none of these cases involves a petition for a writ of mandamus with respect to immigration applications, we see no principled basis for presuming that the Ninth Circuit would reject those factors in this context. *See, Independence Mining Co., Inc., v. Babbitt*, 105 F.3d 502 (9th Cir. 1997) (claim seeking mandamus under MVA is "in essence" one for relief under §706 of the APA). Additionally, we find that, substantively, the TRAC factors provide a sensible place to start our analysis.

petitioners have been able to spend time together outside the United States. The agency's delay has prevented the petitioners from spending time together in the United States -- but it has not prevented them from spending time together elsewhere. So the interest that has been harmed by the delay is not the interest in being married or being together per se, but the interest in being together sooner in this country. Moreover, the Court may not presume that the government's action on Mrs. Razaq's application would be positive. If that decision turns out be to negative, the interest that would have been harmed is the interest in knowing sooner that petitioners would have to spend their time together outside the United States. We do not mean to suggest that these are insignificant interests, especially for a citizen of this country (as Ms. Razaq is). We do mean to suggest, however, that we need to be careful when we try to identify the interests that really are implicated by an agency's action and when we try to gauge the extent to which the agency action appears to have harmed those interests.

Another of the TRAC factors that we are instructed to consider focuses on the effect that ordering an agency of the executive branch to expedite applications like petitioners would have on the ability of the agency to complete tasks of comparable or higher priority. The government has given us virtually no information by which we could assess the weight of this factor. The government has not described the backlog of similar applications or the volume of work the agency has faced. Nor has the government identified any higher priority matters whose timely completion might be jeopardized if the agency were required to make a decision on petitioners' application within the near future. Without explanation and without citing any evidence, the government makes only a generalized assertion that expediting the processing of applications like petitioners could compromise national security. Opposition at 4; Johnson Decl., at ¶10. Compare, *Luo*, 178 F.Supp.2d 1135 (no writ where government presented evidence of significant backlog and of other types of applications having higher 'priorities'); *Saleh*, 367 F.Supp.2d 508 (summary judgment for government where Congress limited number of that type of petition that

could be granted and processing time was consistent with published time – in light of annual limit and volume of applications delay was not unreasonable). In light of the fact that the government has recently promised, without compulsion from the court, to complete its processing of petitioners' application within 60 days, we infer that neither the volume of competing demands nor concerns about national security remain as obstacles to timely action on this application. Declaration of Anna K. Chau, filed December 7, 2006.

Against this backdrop, we turn to a more detailed examination of the evidence about how the government has processed Ms. Razaq's I-130 application. Given the importance of the national security concerns that the government contends were implicated by an application like Ms. Razaq's, the government's Opposition to the petition for a writ of mandamus in this case was remarkably spare and superficial. The evidence submitted by the government (as opposed to evidence submitted by petitioners) establishes the following facts about the government's response to Ms. Razaq's I-130 application: (1) the USCIS ran "IBIS name checks" on August 11, 2006 and November 18, 2006,[7] (2) at some unspecified juncture the USCIS ran a "CIS database check" on Assad Razaq, and (3) the USCIS interviewed Ms. Razaq on August 14, 2006, then asked her for additional information (information that she has since provided). Johnson Decl., at ¶¶7 and 9.

As one can readily see, the evidence to which the government has directed our attention would *not* support an inference that it took *any* action on Ms. Razaq's petition before August 11, 2006[8] – almost two years after she initially submitted her I-130 application and four months after petitioners filed the Complaint in this action. Respondents' Opposition contains no explanation about what, if anything, was being

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[7]Respondents' opposition notes that the agency conducted "IBIS name check inquiries" on March 28, 2003, and May 2, 2003. Opposition at 2; Johnson Decl., at ¶7. Because Ms. Razaq's I-130 was not filed until September 2004, these name check inquiries could not have been responses to the I-130 application at issue here.

[8]Evidence submitted by respondents would support a finding that the USCIS ran an "IBIS name check inquiry" on August 11, 2006. Johnson Decl., at ¶7.

done in response to the I-130 application between September 13, 2004, and August 11, 2006.

Ironically, it is evidence that petitioners have submitted that indicates that the government took a series of actions in response to petitioner's I-130 application between September 13, 2004, and August 11, 2006. Not long after filing her I-130 application, Ms. Razaq initiated a series of e-mail exchanges with the USCIS -- checking on the status of her application and offering to provide additional information the government might need. Gartland Decl., at Ex. C. Petitioners' evidence includes copies of e-mail responses from the agency.[9] The parties' e-mail exchanges support the following conclusions. (1) As of January 26, 2005 (about four months after the application was filed), Ms. Razaq's I-130 was "in transit to the responsible division for review and processing." (2) As of March 18, 2005, the case was "currently undergoing additional systems check." The agency directed petitioners to allow an additional 180 days for processing.[10] (3) As of April 12, 2005, the case was sent "to an Adjudicating officer in line for adjudication." (4) As of June 9, 2005, the agency had "selected this case for detailed review and inquiry." The agency indicated at this juncture that because of the referral of the application for more detailed analysis, "this will take longer than the normal processing time." (Emphasis added). (5) On July 11, 2005, the agency repeated the response it had given on June 9th. (6) As of November 9, 2005, petitioners had complied with a request for information from the FBI.[11] (7) As of November 14, 2005, the agency contact was waiting for review to be completed (presumably by the FBI) and for "the file ... [to be] released back to our office for adjudication."

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[9]The authenticity of these responses is undisputed.

[10]The record does not include an explanation of the subject matter of a "systems check." The additional 180 days would have expired about September 18, 2005.

[11]This statement was made in an e-mail from petitioners' counsel. It, and counsel's March 9, 2006, statement that, "[t]he couple [has] complied with all security investigations requested of them" (Gartland Decl., at Ex. D), clearly vitiate the credibility of petitioners' later statement that "[i]t appears that Respondents had taken absolutely no action on the I-130 visa petition prior to Petitioners filing their mandamus petition." Reply at 6.

This record, when viewed in the light most favorable to the government, could support a series of inferences under which the Court could not find, as a matter of law, that the time the government took to complete its processing of Ms. Razaq's I-130 application -- through the end of 2006 -- was "clearly unreasonable."

The first such inference supported by the record is that between September 13, 2004, and March 18, 2005, the USCIS had begun its review of Ms. Razaq's application and had learned enough to warn Ms. Razaq that processing her form I-130 would take an additional 180 days. The evidence also could support a finding that by June 9, 2005, the USCIS had completed one level of screening and analysis of petitioner's I-130 application, a process that included more than one systems check and an examination by an adjudicating officer, and, based on the information that had been developed, the agency had determined that it was appropriate to subject Ms. Razaq's application to a more exacting "detailed review." Gartland Decl., at Ex. C (e-mail from respondents to Jessica Gonzalez, dated June 9, 2005).

While there is evidence that suggests that during this first nine month period (before the referral of the application for the more exacting review) the USCIS was not processing Ms. Razaq's application as quickly as it was processing some others,[12] we certainly cannot assume that all applications are completed in the same detail, give rise to identical needs for information or analysis (needs that could be met in identical time frames and with identical ease), and trigger only an identical set of concerns or questions. Thus, even if it were clear that the agency processed some applications faster than others during this period, that fact, standing alone, could not support a finding that it was clearly unreasonable for the agency not to have made its decision about Ms. Razaq's application by the end of June, 2005.

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[12]Each of petitioners' e-mails to the agency sets forth the filing date identified on the government's website of those I-130 petitions that the California Service Center branch was purportedly processing at that time. Each of petitioners' e-mails sent through June 8, 2005, indicate that, according to the government's website, the agency was processing I-130 applications that had been filed *after* petitioner's by a margin of one to five months.

On this record, we simply can not find, as a matter of law, that it was clearly unreasonable for the agency to take nine months to reach petitioner's application in the queue of applications, to transfer that application to the appropriate investigatory personnel, to conduct some level of investigation, to transfer the file to an "adjudicating officer," to have the adjudicating officer reach this particular application in his or her queue of cases and review the information resulting from the investigation, and to have the adjudicating officer determine that this application should be subjected to a more detailed review.

While we are neither positioned nor called upon to pass judgment on the merits of the agency's determination that petitioner's I-130 application met the criteria for detailed review, we note that the record the parties have developed to date would not support a finding that this determination by the agency was unreasonable. Mr. Razaq had been deported two years earlier for overstaying a ninety day tourist visa by five years. Johnson Decl., at ¶7. The fact that he overstayed his visa by such a significant period would make it reasonable for the agency to inquire into whether he had knowingly and intentionally violated the immigration laws. Moreover, Holly Razaq's I-130 was the second such application filed on behalf of Assad Razaq. Given the fact the agency was processing a second marriage-based I-130 application for the same man, it would not be unreasonable for the agency to try to determine whether Mr. Razaq's marriages were legitimate or were shams that were arranged in order for him to re-gain admittance into this country.[13]

We shift our attention at this juncture to the second major time period in issue here, the period that began in the latter part of June of 2005 and extends through most of 2006. It would be reasonable to infer from the record thus far developed that sometime in the summer of 2005 the USCIS sent Ms. Razaq's file to the FBI for investigation. It also would be reasonable to infer that, between receipt of the file and November 9, 2005, the FBI had conducted some investigation, identified additional

[13]We have no basis for concluding that Assad Razaq is doing so. We simply note that the suspicion would not be inaccessible to the agency.

information needed from petitioner, requested that information from Ms. Razaq, and received the requested information from her. See Gartland Decl., at Ex. C. (e-mail from Stacey Gartland to Christiana Knasiak, dated November 9, 2005). Assuming that the USCIS did not forward the file to the FBI until after June 9, 2005, the FBI conducted an initial investigation and then requested and received information from Ms. Razaq within approximately five months. Without more, we cannot find that the delay between June 9, 2005 and November 9, 2005, was clearly unreasonable.

On November 14, 2005, the USCIS informed petitioner that it could not take further action on the I-130 application "until review is complete and the file is released back to our office for adjudication." Gartland Decl., at Ex. C. One could rationally infer that, as of November 14, 2005, the FBI's review was not "complete" and that the FBI still possessed petitioner's file. An inference that the USCIS had possession of petitioner's file or had received input from the FBI that would permit the USCIS to move forward on petitioner's I-130 before November 14, 2005, is inaccessible on this record.

On December 29, 2005, petitioners' counsel sent an e-mail to the USCIS inquiring whether the file had been released back to the agency's office. Gartland Decl., at Ex. C. The record does not include a response by the USCIS to this e-mail. The fact that petitioners had not received notification that the FBI had concluded its investigation and released the file back to the USCIS before the end of 2005 provides at least some circumstantial evidence that those acts had not yet occurred. Accordingly, the evidence, viewed in the light most favorable to respondents, could permit an inference that petitioner's I-130 had not been returned to the USCIS, and, therefore, that that agency was not positioned to move forward on it, through the end of calendar year 2005.

What remains is the period between January and early August of 2006. This is the least transparent period we must assess. Petitioners have not identified for us the kind of information the FBI sought from them in the latter part of 2005 -- or at any other juncture. We do not know whether that information, perhaps assessed in the

context of other information the FBI deemed relevant, would reasonably have triggered a need for some follow-up investigation by the Bureau. We do not know when the FBI completed any such follow-up investigation -- or when the FBI returned the I-130 file to the USCIS.

What we do know about this period is that petitioners filed the complaint that initiated these judicial proceedings on April 7, 2006, and that respondents filed their answer on June 7, 2006. In that answer, respondents asserted no fewer than three times that "any delay in adjudication in this case is due in part to pending security background checks." While this statement does not identify the agency that was conducting the security checks, one rationally accessible inference is that Ms. Razaq's Form I-130 file remained with the FBI. Thus, we cannot preclude the possibility that, as of early June of 2006, the FBI had not completed its investigations and was not satisfied that it could responsibly give the USCIS a green light to complete the processing of Ms. Razaq's application.

We also know that on June 28, 2006, petitioners and respondents jointly requested that the scheduled initial case management conference be postponed until late August on the grounds that the "USCIS intends to interview the applicant for the I-130 visa petition in early August, 2006," and that there was a "possibility that this case may be administratively resolved in the next two months." Stipulation to Extend the Date of the Case Management Conference, filed June 28, 2006, at 2. These circumstances suggest that by late June, 2006, either the FBI had returned Ms. Razaq's file to the USCIS or that that agency expected to receive the file soon -- thus positioning the USCIS to re-institute its processing of the application.

Further, we know that the USCIS conducted its interview of Ms. Razaq on August 14, 2006, that as a result of that interview the agency asked Ms. Razaq to provide additional information, and that on August 15, 2006, the petitioners and the respondents again jointly sought to have the initial case management conference delayed, this time until September 29, 2006, as they perceived a "reasonable probability that this case will be administratively resolved within the next 30 days."

Second Stipulation to Extend Date of Case Management Conference, filed August 16, 2006, at 2. While that hope was not realized, it is clear that over the past few months the USCIS has committed real resources to this matter and has promised both petitioners and the Court that it will complete its adjudication by early February of this year.

While the evidentiary record the parties have provided enables us to sketch an outline of major events that occurred in this case between the late fall of 2005 and the summer of 2006, that record leaves a good many potentially relevant questions unanswered. When did the petitioners' file reach the FBI and when did the FBI return it to USCIS? What matters was the FBI investigating, what resources did it commit to this matter and when did it do so, and what were the contemporaneous competing demands on the FBI's time?

What are we to do, analytically, with these unknowns? To answer that question, me must step back and remind ourselves about the context in which we are working. Petitioners have moved for summary judgment. It is their burden, under generally applicable principles, to establish that, under the undisputed facts, a rational trier of fact could reach only the conclusion that favors them. That burden, which the law imposes on parties seeking summary judgment in any setting, is magnified in a case like ours, where fundamental constitutional principles permit the judiciary to invade a province of responsibility assigned to an equal branch of the federal government only when that branch has failed quite clearly to honor a duty that Congress has imposed on it.

The effect of these elemental and animating principles is to place a substantial burden on petitioners who seek a writ of mandamus directed at an agency of the executive branch. Because of the location and size of that burden, a court may not base issuance of a writ on speculation, or on facts that are merely assumed or that are subject to genuine dispute. Nor may a court base issuance of such a writ on one of two or more rationally accessible inferences -- even if the one seems appreciably more likely to be correct than the others.

With these directives in mind, we look again at the period between January and August of 2006. As noted above, we do not know what information the FBI had developed or what its security concerns were. Nor can we determine the role that other pressing demands on the FBI's time might have played in extending the period during which the FBI declined to return the file to the USCIS so that it could complete the processing of the Razaq's Form I-130 application.

Given these circumstances, can we conclude that a rational trier of fact could make only one finding about the length of the period over which the FBI apparently retained the file and completed its investigations -- and that that finding is that that period was clearly unreasonable? We cannot so conclude.

It is well-known that since September of 2001, the FBI's resources have been sorely taxed by the demands that have been made on it by the Administration. Legitimate national security concerns, intensified by the sophistication of some of the threats to the lives of people in this country, have forced federal agencies to be considerably more careful and thorough in their investigations than they were in the past. In short, there was a lot more work for the FBI to do and it had to be done a lot more carefully.

Moreover, we cannot say that it was unreasonable for the FBI (and the USCIS) to infer from the circumstances that were most visible about this application that it warranted an especially thorough work up. Mr. Razad is a native of Kenya who had become a citizen of the United Kingdom and who had entered the United States on a 90-day tourist visa in 1997 -- but he had remained in this country, illegally, for five years -- until he was arrested and removed against his will. He claimed, in a relatively compact period, to have formed two separate relationships (with women who were citizens of the United States) that would give him access to a permanent visa. After he was divorced and the first I-130 application on his behalf was withdrawn, he had another woman submit a second application seeking the same relief. He claimed to have met that second woman (the current Mrs. Razaq) about the time his first marriage was being dissolved -- but, somehow, to have been able to

advance that relationship from afar to the point where it led to a second marriage in July of 2004. That marriage was entered outside the United States. Two months later, his second U.S. citizen-wife submitted the second I-130 application on his behalf.

The circumstances just described are sufficient to permit a rational trier of fact to conclude that it was reasonable for the FBI and the USCIS to conclude that this second Form I-130 application warranted an especially careful review and thorough investigation. The accessability to a rational mind of that conclusion clears a pathway to a second finding that might rationally be made on the record before us: that petitioner has failed to prove that the amount of time it has taken the executive agencies to process this second application was clearly unreasonable. The periods involved, given the circumstances and what we know about the historical context, simply are not long enough, standing alone, to compel the conclusion that the way the federal agencies processed this second application was clearly unreasonable.

None of this is to suggest that the agencies have limitless time to investigate and 'adjudicate' Form I-130 applications. How much time it is reasonable to allot to processing such applications will vary with the circumstances.[14] As a general

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[14]Courts evaluating the question of "unreasonable delay" where Congress has not specified a time frame for processing, sometimes consider the agency's "usual processing time" for matters of the type at issue. *E.g.*, *Luo*, 178 F.Supp.2d 1135 (C.D.Cal. 2001) (case is making its way through the usual channels slowly but is within the usual processing time); *Selah*, 367 F.Supp.2d 508 (case within usual processing time for such cases); *Galvey v. Howerton,* 503 F.Supp. 35 (C.D. Cal. 1980) (operating instructions not law but provide a "yardstick" for measuring reasonableness). The USCIS publishes an 'expected' time frame for processing I-130 applications on its public website and referenced this time frame in the notice of receipt sent to petitioners acknowledging the filing of Holly Razaq's I-130. Gartland Decl., at Ex. A.

Petitioners argue that the time taken by the USCIS to process Ms. Razaq's I-130 application is unreasonable because it is not consistent with the 'expected' time frame posted on the government's website. *E.g.,* Gartland Decl., at Ex. B. We are not persuaded by this argument for several reasons.

First, as noted in the text, all Form I-130 applications are different. We cannot assume that every application will require the same level of inquiry from the government. The fact that the USCIS has completed processing a goodly number of applications filed after Ms. Razaq's would not by itself support a finding that the detailed level of investigation the government has conducted into Ms. Razaq's application was unnecessary or inappropriate.

Second, the record supports a finding that once petitioner's I-130 was slated for "detailed review" the "usual processing time" no longer applied. Gartland Decl., at Ex. C (June 9th e-mail: "We selected this case for detailed review and this will take longer than the normal processing time." Emphasis added.). Accordingly, as of the date the I-130 was designated for

proposition, that period would be appreciably shorter when the application is straightforward and persuasively documented and where there is no situational reason to question the good faith of the petitioners. But even in more complicated circumstances, like those presented by this case, at some point the length of the period taken to process an application, by itself, will generate considerable momentum in favor of a finding that the delay by the agencies is clearly unreasonable. The circumstances presented here approach that point. When reached, fairness would compel the court to shift the burden of persuasion to the government and to issue the writ unless the government could show, by competent evidence that speaks in detail to special circumstances and justifications, that a period that appears presumptively excessive is not unreasonable.

B. Respondents' Cross Motion

As previously stated, respondents ask us to find, as a matter of law, that the government has acted *reasonably*. This we cannot do.

It is respondents' burden to demonstrate that the evidence, considered in the light most favorable to petitioners, demonstrates, as a matter of law, that the two year

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detailed review (no later than June 9, 2005), the relevance of the information on the government's website about processing time became questionable at best.

The USCIS's website information about processing time also is of limited utility for a third, independent reason. Based on our review of the evidence, the date provided on the website can change radically over time. According to evidence in the record, in January 2005 the agency was processing three month old I-130's; in March 2005 the agency was processing one month old I-130's; in April 2006 the agency was processing six month old applications; as of December 5, 2006 the agency was processing applications that were twenty one months old; and as of December 27, 2006, the agency was again processing six month old applications. We point out that, inexplicably, the expected processing time posted on December 5, 2006, indicated that the time to process had regressed. (Petitioners submitted evidence that as of April 10, 2006, the USCIS was processing I-130's that had been filed on or before October 3, 2005. On December 5, 2006, nine months later, (when the Court's staff examined the public website) the website indicated that the USCIS was processing I-130's that had been filed on or before March 16, 2005 – i.e., the agency was processing petitions filed nearly seven month *before* October 3rd (the date given back in April 2006). However, it also appears that twenty one days later, on December 27, 2006, the agency's website stated that it was then processing applications filed on or before June 15, 2006. We are aware of nothing in the record that would explain these fluctuations.) Because this "processing" date appears to be so motile, it is difficult to draw any solid conclusions based on the processing date that is published on any particular day. For this reason, we find that the website processing time, even during the period prior to designation for "detailed review," is of limited reliability and, therefore, limited utility to our analysis.

delay in processing Holly Razaq's Form I-130 application is reasonable. Consideration of the evidence in the light most favorable to *petitioners* makes accessible a different set of inferences, and under those inferences the government has failed to establish that the time it has taken was justified and reasonable, as a matter of law. Among other things, we note that the government has been processing petitions filed after Holly Razaq's for almost two years now. Viewing the evidence in the light most favorable to petitioners, respondents have failed to present evidence of specific justifications for that delay (such as backlog, competing priorities, etc).

Accordingly, we DENY respondents' cross motion for summary judgment.

CONCLUSION

For the reasons stated above, we DENY petitioner's Motion for Summary Judgment and respondents' Cross Motion for Summary Judgment.

By Wednesday, February 14, 2007, the parties must file with the Court a joint statement notifying the Court whether the government has completed adjudication of Ms. Razaq's I-130 petition and, if so, committing to file papers dismissing the action within thirty (30) days thereof. If the government has not completed adjudication of the petition, the parties also must file a joint case management conference statement.

On February 21, 2007, at 1:30 p.m., the Court will conduct a case management conference *unless,* by February 14th, the parties have notified the Court that the government has completed adjudication of the I-130 petition.

IT IS SO ORDERED.

Dated: January 8, 2007

/s/ Wayne D. Brazil
WAYNE D. BRAZIL
United States Magistrate Judge

Copies to:
parties, wdb stats