UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

XIAOHUI HE, an individual,

Plaintiff,

vs.

MICHAEL CHERTOFF, Secretary of the Department of Homeland Security; EMILIO T. GONZALEZ, Director, United States Citizen and Immigration Services; ROBERT S. MULLER, III, Director, the Federal Bureau of Investigation,

Defendants.

CASE NO. 06-CV-2608 – IEG (NLS)

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

[Doc. No. 5]

Presently before the court is Michael Chertoff, Emilio T. Gonzalez, and Robert S. Muller's (collectively "defendants") Motion to Dismiss. (Doc. No. 5.) For the following reasons, the court denies defendants' motion.

BACKGROUND

Factual Background

This case involves Xiaohui He's ("plaintiff") I-485 Application for Adjustment of Status Under Section 245 ("I-485 application") of the Immigration and Nationality Act, which she filed with the United States Citizenship and Immigration Service ("CIS") on July 8, 2003. (Complaint ("Compl.") at ¶ 9.) In September 2004, plaintiff submitted her fingerprints to the CIS because the agency requested fingerprint exemplars in August 2004. (Id. at ¶ 10.) Over the course of the next

several months, plaintiff contacted the CIS by email to receive a status report on her case and the CIS informed her that it was continuing to process her application. (Id. at ¶ 12.) In October 2005, plaintiff again provided fingerprint exemplars in response to a September 2005 request by the CIS.

Over the course of the next 14 months, from September 2005 to November 2006, plaintiff made attempts to follow up on her application by email communication and even requesting help from her United States Senator. (Id. at ¶¶ 14-17.) In the course of her correspondence with the CIS, plaintiff learned her Federal Bureau of Investigation ("FBI") name check result, which is one of the necessary investigative steps in processing plaintiff's application, was still pending. (Compl., Exhibit 5, 6.) The CIS has yet to schedule an application interview with plaintiff. (Compl. at ¶ 19.) Plaintiff, who is a research scientist, alleges that she has been unable to travel and obtain financial support for her research because of defendants' delay in processing her adjustment application. (Id. at ¶ 18.)

Procedural Background

On November 27, 2006, plaintiff filed a complaint for writ of mandamus seeking a court order to compel defendants to issue a decision on her I-485 application.[1] (Doc. No. 1.) On January 30, 2007, defendants filed a motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (Doc. No. 5.) On February 16, 2007, plaintiff filed her opposition. (Doc. No. 6.) Defendants filed a reply on February 23, 2007. (Doc. No. 7.) The matter is now fully briefed, and the court finds it appropriate for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1).

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[1] In the prayer for relief section of the complaint, plaintiff requested the court order defendants to approve her application. (Compl. at ¶ 25, Prayer.) The plaintiff has since withdrawn that request for relief. (Opposition ("Opp.") at ¶ 6.) And as explained below, the court does not have the authority to require defendants to approve an I-485 application.

DISCUSSION

Legal Standard

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court over the subject matter of the complaint. Fed. R. Civ. P. 12(b)(1). Because federal courts are courts of limited jurisdiction, the party seeking to invoke the court's jurisdiction bears the burden of proving that subject matter jurisdiction exists. See Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); Savage v. Glendale Union High School, 343 F.3d 1036, 1039-40 (9th Cir. 2003). A Rule 12(b)(1) motion may be "facial" or "factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

If the defendant brings a facial attack, arguing that the allegations in the complaint are insufficient to demonstrate the existence of jurisdiction, the Court's inquiry is much the same as when ruling on a motion to dismiss brought under Rule 12(b)(6). Federation of African American Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir.1996); 2 Moore's Federal Practice § 12.30 (2004). Specifically, the Court must assume that the factual allegations in the complaint are true and construe them in the light most favorable to the plaintiff. Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2000), cert. denied, 534 U.S. 1018 (2001); Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). A Rule 12(b)(1) motion will be granted if the complaint, when considered in its entirety, fails on its face to allege facts sufficient to establish subject matter jurisdiction. Thornhill Publishing Co. v. General Tel. & Electric Corp., 594 F.2d 730, 733 (9th Cir. 1979).

A motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. Proc. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). A court may dismiss a complaint for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Navarro, 250 F.3d at 732 (citing Conley); see also Haddock v. Board of Dental Examiners, 777 F.2d 462, 464 (9th Cir.1985) (stating that a court should not dismiss a complaint if it states a claim under any legal theory, even if plaintiff

erroneously relies on a different theory). Generally, dismissal is proper only when the plaintiff has failed to assert a cognizable legal theory or failed to allege sufficient facts under a cognizable legal theory. See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 782 (9th Cir. 1996); Balisteri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

In deciding a motion to dismiss for failure to state a claim, the court's review is limited to the contents of the complaint. Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996); Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). The court must accept all factual allegations pled in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party.[2] Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996); Mier v. Owens, 57 F.3d 747, 750 (9th Cir.1995) (citing Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir.1987). In spite of the deference the court is bound to pay to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, (1983). Furthermore, a court is not required to credit conclusory legal allegations cast in the form of factual allegations, "unwarranted deductions of fact, or unreasonable inferences." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

The court recognizes the mandate to construe a pro se plaintiff's pleadings liberally in determining whether a claim has been stated. Ortez v. Washington County, State of Oregon, 88 F.3d 804, 807 (9th Cir. 1996).

Analysis

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[2] Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. Wheeldin v. Wheeler, 373 U.S. 647, 648, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (inferring fact from allegations of complaint).

In her complaint, plaintiff asserts three statutory bases for the court's jurisdiction: 1) mandamus jurisdiction pursuant to 28 U.S.C. §1361; 2) the Administrative Procedure Act ("APA"), 5 U.S.C. §551 et seq.; and 3) the declaratory judgment statute, 28 U.S.C. § 2201. (Compl. at ¶ 6.) Defendants argue that none of these statutes vest the court with authority to hear plaintiff's claim. Specifically, defendants argue mandamus jurisdiction, 28 U.S.C. § 1361, is inapplicable to discretionary decisions by government officials. (Memorandum In Support of Motion ("Memo. ISO Motion") at 6-7.) Defendants also argue the Declaratory Judgment Act does not independently grant the court with jurisdiction. (Id. at 7-8.) Lastly, defendants argue the APA limits "judicial review to agency actions that are made reviewable by statute" and there is no statutory mandate requiring defendants to process plaintiff's application by a specific deadline. (Id.) If the court finds it has jurisdiction, defendants request the court remand the matter to the CIS. (Id. at 8.) Plaintiff responds that the CIS has a duty to adjudicate her application and to adjudicate it within a reasonable time. (Opposition ("Opp.") at 3-7.)

As an initial matter, the court agrees with defendants that 28 U.S.C. §2201, the declaratory judgment statute, is not a basis for the court's jurisdiction over this case. It is merely a procedural statute allowing certain plaintiffs to be proactive in litigation and does not independently provide the federal courts with subject matter jurisdiction.[3] Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); Opera Plaza Residential Parcel Homeowners Association v. Hoang, 376 F.3d 831, 837-38 (9th Cir. 2004).

The court now turns to defendants' argument that the court does not have mandamus jurisdiction over claims that the CIS has improperly delayed the adjudication of adjustment applications. 28 U.S.C. §1361 states "[t]he district courts 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." A writ of mandamus is an extraordinary remedy and is only available where: 1) plaintiff's claim is clear and certain; 2) the official's duty to

[3] See also Hadari v. Frazier, 2006 WL 3544922, at *3 (D. Minn. Dec. 8, 2006) (stating declaratory judgment statute did not provide court with jurisdiction to hear plaintiff's claim the CIS unreasonably delayed adjudicating adjustment application).

act is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and 3) other adequate remedy is unavailable. See Allied Chemical v. Daiflon, Inc., 449 U.S. 33, 34 (1980); Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997). The district court has discretion to issue a writ of mandamus even where the prerequisites have been satisfied. Kerr v. United States District Court, 426 U.S. 394, 403 (1976); San Jose Mercury News, Inc. v. United States District Court, 187 F.3d 1096, 1099 (9th Cir. 1999).

Plaintiff filed her I-485 application pursuant to §245 of the Immigration and Nationality Act, 8 U.S.C. § 1255 (2006). The statute states in relevant part:

> The status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. 8 U.S.C. §1255(a).

8 C.F.R. §245.2, the administrative regulation regarding I-485 applications, states in relevant part, "[t]he applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial." 8 C.F.R. §245.2(a)(5).

The crux of defendants' argument is that plaintiff fails to meet the second prong of the mandamus test – the official's duty to act is clearly nondiscretionary – because the Attorney General is granted discretion under statute to grant or deny a I-485 application. See 8 U.S.C. § 1255. Defendants argue plaintiff can point to no statute that grants her the right to demand speedier processing of her application or that requires the CIS to grant her application. (Memo. ISO Motion at 5.) The fact that plaintiff filed an I-485 application does not automatically require an adjustment to plaintiff's status as a permanent resident. (Id.) Citing Safadi v. Howard, – F. Supp. 2d –, 2006 WL 3780417, at *11 (E.D. Va. Dec. 20, 2006), defendants argue that because the CIS has discretion over the outcome of the adjustment process, the CIS must necessarily have discretion over the pace of the application process.[4] (Opp. at 6; Reply at 3.)

Courts have come to differing conclusions when confronted with the issues of the character

[4] In Safadi, a case from the Eastern District of Virginia, the court found that the pace at which the application review process proceeds is an "action" within the meaning of 8 U.S.C. §1252(a)(2)(B)(ii), which excludes discretionary "actions" by the CIS from judicial review.

of the CIS's duty to adjudicate and the federal courts' ability to hear these types of mandamus cases. In cases like Safadi and Zheng v. Reno, 166 F. Supp. 875, 880 (S.D.N.Y. 2001), courts have held there is no jurisdiction, reasoning that because the outcome of the review process is discretionary, the CIS's judgment regarding how applications are reviewed is also discretionary. See also, Badier v. Gonzalez, – F. Supp. 2d –, 2006 WL 4079085, at *4 (N.D. Ga Dec. 1, 2006). Thus, the plaintiffs failed to establish the existence of a nondiscretionary duty. See Zheng, 166 F. Supp. 2d at 880-81 (declining to find jurisdiction because the duty to schedule interviews for adjustment applications is discretionary according to statute). In contrast, a larger number of courts, including those in the Ninth Circuit, have held that while the final decision on the application itself may be discretionary, the duty to reach a decision is not discretionary. See, e.g., Lazli v. United States Citizenship and Immigration Services, 2007 WL 496351, at *2-*4 (D. Or. Feb. 12, 2007); Yu v. Brown, 36 F. Supp. 2d 922, 925 (D. N.M. 1999) (finding jurisdiction where the plaintiff sought writ of mandamus to compel the CIS to render a decision on adjustment application); Paunescu v. INS, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999) (finding mandamus jurisdiction because three mandamus requirements were satisfied); cf. Singh v. Still, - F. Supp. -, 2006 WL 3898174, at *2 n.5 (N.D. Cal. 2006). In other words, when an individual files an adjustment application, the CIS has a nondiscretionary and ministerial duty to consider and process the application, even if it ultimately denies it. See Yu, 36 F. Supp. 2d at 931.

Having considered the current case law and the statutory language, the court agrees with plaintiff and courts of this circuit that there is mandamus jurisdiction over plaintiff's claim. Defendants argue and the court agrees that the statutory language clearly grants the CIS discretion to adjust an alien's status and the statute is silent as to a time limit by which the CIS must adjudicate.[5] (Memo. ISO Motion at 5; Reply at 3.) However, it stretches the statutory mandate for defendants to argue that there is unlimited and unfettered discretion in the time by which the CIS must adjudicate an application. This would allow defendants to delay considering an application indefinitely, which

[5] It is important to note that plaintiff is not requesting the court force defendants to approve her application but simply to reach a decision about her application.

in this context is equivalent to declining to consider and process an application. Razaq v. Poulos, 2007 WL 61884, at *4 (N.D. Cal. Jan. 8, 2007) ("[I]mposing no time constraint at all on the [CIS] would be tantamount to giving the government the power to decide whether it would decide. . . . A 'duty to decide' becomes no duty at all if it is accompanied by unchecked power to decide when to decide."). It is unlikely Congress intended a situation where an alien would submit an application and the CIS would effectively decline to complete processing the application. See Kim v, Ashcroft, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004). The underlying presupposition of the statute and the accompanying regulation is that the CIS will consider all applications and reach a decision on them. See 8 C.F.R. §245.2(a)(5) ("The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial. . . . If the application is approved, the applicant's permanent residence shall be recorded.") (emphasis added); Yu, 36 F. Supp. 2d at 931-32; accord Razaq, 2007 WL 61884, at *3 ("Congress clearly contemplates that an investigation will be conducted and a decision rendered."); Aboushaban v. Mueller, 2006 WL 3041086, at * 2 (N.D. Cal. Oct. 24, 2006) ("[Defendants] have a clear duty to adjudicate the plaintiff's change of status application."). While the statutory language grants defendants discretion to adjust an alien's status, there is an implied duty to consider and process an application once it and the necessary supporting documentation have been filed. The duty to adjudicate an application is ministerial and non-discretionary.

A necessary implication of the fact that the CIS cannot indefinitely delay adjudication at its whim is that the CIS must adjudicate plaintiff's application within a reasonable time. See APA, 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."); Alkenani v. Barrows, 356 F. Supp. 2d 652, 656-57 (N.D. Tex. 2005) (holding that the APA imposes a nondiscretionary duty upon the CIS to process an application within a reasonable time); Yu, 36 F. Supp. 2d at 928-31; Paunescu, 76 F. Supp. 2d at 901 (concluding plaintiffs had a right to have their adjustment application adjudicated within a reasonable time in finding mandamus jurisdiction); accord Iddir v. I.N.S., 301 F.3d 492, 500 (7th Cir. 2002) (stating that under relevant

immigration statute, CIS had duty to adjudicate application within a reasonable period of time); Agbemaple v. Immigration and Naturalization Service, 1998 WL 292441 (N.D. Ill. May 18, 1998) ("We hold that as a matter of law, [plaintiff] is entitled to a decision within a reasonable time . . . ."); Razaq, 2007 WL 61884, at *4; Aboushaban, 2006 WL 3041086, at *2 (holding that the APA imposes a timeliness requirement on the CIS in adjudicating adjustment applications for purposes of mandamus). Therefore, the second prong of the mandamus test has been established; the CIS has a nondiscretionary and ministerial duty to consider and adjudicate plaintiff's adjustment application within a reasonable time.

Defendants' argument that the four years that plaintiff has waited to hear a decision on her application is relatively short is unavailing. (Memo. ISO Motion at 5.) The reasonableness or unreasonableness of the CIS delay does not speak to the court's ability to hear plaintiff's case but to whether the court should ultimately grant the relief plaintiff requests.[6] See Raduga USA Corp. v. U.S. Department of State, 440 F. Supp. 2d 1140, 1149 (S.D. Cal. 2005) (granting summary judgment where the court determined the delay in adjudicating plaintiff's immigration application was unreasonable); Saleh v. Ridge, 367 F. Supp. 2d 508, 512-13 (S.D.N.Y. 2005). Thus, the issue of the reasonableness of defendants' delay is not dispositive at this stage of the litigation where the court is only asked to determine its jurisdiction. See Singh, - F. Supp. 2d -, WL 2006 3898174, at *3-6 (discussing the reasonableness of delay in a summary judgment phase of litigation to force CIS to render a decision on plaintiff's adjustment application); Ahmed v. Department of Homeland Security, 328 F.3d 393, 386-87 (7th Cir. 2003) ("A conclusion that any one of [the three mandamus] prerequisites is missing should lead the district court to deny the petition, not because it now realizes it has no power to be thinking about the case in the first place, but because the plaintiff has not demonstrated an entitlement to this form of extraordinary relief."). Having established the

[6] In their reply, defendants also raise policy arguments that granting a writ of mandamus will have negative repercussions on the CIS's protocol for processing adjustment applications. (Reply at 4-5.) These arguments are also unpersuasive because they address whether it is prudent for the court to grant plaintiff's writ of mandamus and not the court's ability to hear plaintiff's claim.

jurisdiction of the court to hear plaintiff's case, the court need not discuss the APA as a basis for the court's jurisdiction.[7]

Defendants' argument that the complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is also without merit. (Memo. ISO Motion at 4.) The court has already determined that the court has jurisdiction to issue a writ of mandamus compelling the CIS to adjudicate plaintiff's application. Thus, plaintiff has a legally cognizable claim. Furthermore, taking as true the allegations in plaintiff's complaint and interpreting plaintiff's pro se pleadings with the requisite liberality, the court finds the plaintiff has adequately pled the factual prerequisites for a writ of mandamus. Plaintiff claims she has submitted her I-485 application to CIS with all necessary information to process her application, which places the onus for completing the adjudication upon the CIS. (Compl. at ¶¶ 8, 9, 23.) Plaintiff has also pled that the CIS has not adjudicated her application within a reasonable time and that she has exhausted her administrative remedies. (Id. at ¶ 8, 24.)

Having found jurisdiction over plaintiff's claim, the court declines to remand the matter to the CIS before hearing the merits of the case.

CONCLUSION

For the reasons set forth herein, the court **DENIES** defendants' motion to dismiss.

IT IS SO ORDERED.

Dated: March 8, 2007

IRMA E. GONZALEZ, Chief Judge
United States District Court
Southern District of California

[7] The court notes that other district courts have found jurisdiction over disputes stemming from the inactivity of the CIS through the intersection of the federal subject matter statute, 8 U.S.C. § 1331, and the APA. See, e.g., Saleh v. Ridge, 367 F. Supp. 2d 508, 511-12 (S.D.N.Y. 2005) (holding that court lacked mandamus jurisdiction but there was subject matter jurisdiction pursuant to § 1331 and the APA); Kim v, Ashcroft, 340 F. Supp. 2d 384, 388-391 (S.D.N.Y. 2004) (holding that the court had jurisdiction over plaintiff's claim that defendants had unreasonably delayed adjudicating adjustment application pursuant to Section 6 of the APA); Valenzuela v. Kehl, 2006 WL 2474088, at *6 (N.D. Tex. Aug. 28, 2006).