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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Changzheng Wang Plaintiff, vs. **Michael Chertoff**, Secretary of the Department of Homeland Security; **Emilio T. Gonzalez**, Director of United States Citizenship and Immigration Services; **Christina Poulos**, Acting Director of the California Service Center, United States Citizenship and Immigration Services **David Still**, San Francisco District Director, United States Citizenship and Immigration Services; **Robert S. Mueller**, Director of the Federal Bureau of Investigation Defendants	Case No. C 06-7636 JF (HRL) **PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO THE COURT'S JANUARY 22, 2007 ORDER TO SHOW CAUSE** **Immigration Case**

I. INTRODUCTION

Plaintiff is an applicant who seeks to adjust his status to Legal Permanent Resident ("LPR") in the United States. This action arises out of Defendants' unreasonable delay in the adjudication of Plaintiff's *I-485 Application to Register Permanent Residence or Adjust Status*, in violation of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* and 5 U.S.C. § 701 *et*

seq.

Plaintiff filed his Complaint for Writ in the Nature of Mandamus & Declaratory Judgment on December 13, 2006. Subsequently, this Court issued an Order to Show Cause on January 22, 2007. Defendants filed their response to the Court's order on February 13, 2007, and asks this Court to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and (6), claiming that under 28 U.S.C. § 1361, Plaintiff cannot show that he has a clear right to immediate adjudication of his adjustment of status application nor can he show that the defendants have a clear ministerial duty to act within a particular time frame. Defendants also claim that the Administrative Procedures Act ("APA") exempts from judicial review, actions that are "committed to agency discretion by law." *See* Defendants' Response to the Court's January 22, 2007 Order to Show Cause at 2 ("Response").

As will be shown below, the Immigration and Nationality Act ("INA"), the Mandamus Act, codified at 28 U.S.C. § 1361, the relevant regulations, as well as the relevant case law, all support the fact that this Court may compel the government to take action on Plaintiff's delayed adjustment of status application. Furthermore, the duty to adjudicate Plaintiff's adjustment of status application is not exempt from judicial review and Defendants are ultimately responsible for ensuring that Plaintiff's application is completed within a reasonable time under APA, 5 U.S.C. § 551 *et seq*. and 5 U.S.C. § 701 *et seq*. Defendants' request for dismissal in their Response should be denied.

II. STATUTORY AND REGULATORY FRAMEWORK

The adjudication process for adjustment of status applications is codified at 8 C.F.R. § 245 *et seq.* and these regulations create a mandatory, non-discretionary duty to adjudicate such applications. Specifically, Section 245.2 of the Code of Federal Regulations provides that "[t]he applicant *shall* be notified of the decision of the director and, if the application is denied, the reasons for the denial" (emphasis added). Thus while the decision to approve or deny the application is left to the director's discretion, the duty to actually make a decision is not.

Moreover, this decision cannot be held off indefinitely. The Administrative Procedures Act at 5 U.S.C. §555(b) provides that, "[w]ith due regard for the convenience and necessity of

the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it" (emphasis added). The scope of this Court's review under the APA is provided at 5 U.S.C. § 706:

> 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 shall-
>
> (1) compel agency action unlawfully withheld or unreasonably delayed…

Thus the pertinent statutes and regulations not only provide a mandatory, non-discretionary duty for an agency to complete a matter before it, but an agency must also complete these matters within a reasonable time.

III. BRIEF STATEMENT OF FACTS

Plaintiff, a native of the People's Republic of China, filed his *I-485 Application to Register Permanent Residence or Adjust Status* ("Application") with the United States Citizenship and Immigration Services ("USCIS") on April 8, 2003. *See* Complaint, Exhibit 1 and *Declaration of Gerald McMahon* from Defendants' Response at ¶ 14. This Application, which included the *I-485* form, required supporting documentation, and the $305 filing fee, were filed with USCIS's California Service Center ("CSC"). *See* Complaint, Exhibit 1.

Plaintiff inquired about his Application numerous times and each time was told that his Application was pending due to the FBI name check. *See* Complaint, Exhibits 3, 4, 5 and 7.

It has now been nearly four years since Plaintiff first filed his Application with USCIS.

IV. ARGUMENT

A. This Court Has Subject Mater Jurisdiction to Grant Plaintiff's Request for Mandamus Under 28 U.S.C. § 1361

A mandamus action can be used to compel administrative agencies to act. 28 U.S.C. § 1361 provides:

> The 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 mandamus plaintiff must demonstrate that: 1) the plaintiff's claim is clear and certain; 2) the defendant has a clear duty to perform the act in question; and 3) no other remedy is available. *See Barron v. Reich*, 13 F.3d 1370, 1374 (9th. Cir.1994).

It is well established that mandamus can be used to compel action on adjustment of status applications. Numerous Courts, including the Northern District of California, have held that there is a non-discretionary duty to adjudicate adjustment of status applications. *See Aboushan v. Mueller*, 2006 WL 30410886 at *2 (N.D. Cal.) (Judge Bernard Zimmerman reading the statutory text of 8 C.F.R. § 209.2, (which he deemed similar to 8 C.F.R. § 245.2) as "creating a non-discretionary duty to adjudicate the plaintiff's [adjustment of status] application); *Iddr v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (INA and relevant regulations "confirm that the INS did have the duty to adjudicate the appellants' [adjustment of status] applications in a reasonable period of time); *Yu v. Brown*, 36 F. Supp.2d 922, 931 (D.N.M.1999) (Commenting on 8 U.S.C. § 1103 and relevant regulations, "The language of the statue and these regulations is mandatory not discretionary. Thus regardless of the ultimate decision, INS has a non-discretionary, mandatory duty to act on Plaintiffs' [adjustment of status] applications.")

Defendants argue that Plaintiff's right to adjudication of his Application is not "clear and certain." Defendants categorize their actions as discretionary rather than ministerial and argue that adjustment of status applications are "plainly committed to the discretion of the Attorney General by Statute" and thus Defendants have discretion over how long they may take to adjudicate Plaintiff's Application. *See* Defendants' Response at 4 and 5. In the words of the *Yu* Court, "[t]his argument has been flatly rejected numerous times by other courts." *See Yu*, 36 F.Supp.2d at 931. [*Citing Forest Guardians v. Dombeck*, 131 F.3d 1309 (9th Cir. 1997); *Mt. Emmons Mining v. Babbitt*, 117 F.3d at 1172 (10th Cir.1997); *Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794, 798 (5th Cir. 1960); *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir.1950); and *Dabone v. Thornburgh*, 734 F.Supp. 195, 200 (E.D.Pa.1990).] Defendants are confusing their discretion over *how* they resolve adjustment of status applications with their non-discretionary duty to adjudicate. *See Dabone*, 734 F.Supp. at 200. In other words, while

Defendants have discretion to approve or deny an application to adjust status, they still have a mandatory, non-discretionary duty to process Plaintiff's Application. *See Yu*, 36 F.Supp.2d at 931. ("*All* other courts addressing this question have held that INS has a non-discretionary duty to process application for LPR status as well as all other immigration applications") (emphasis added).

Defendants further argue that USCIS has no clear, mandatory duty to adjudicate Plaintiff's Application at any particular time since "neither the statute [INA] nor its corresponding regulations provides a mandatory time frame for the adjudication of I-485 applications." *See* Response at 4. Although Defendants are correct in stating that neither statute nor regulation provides a timeliness requirement, previous Courts have held that APA § 555(b) still imposes a duty to complete action on adjustment of status applications within a reasonable time. *See Aboushaban*, 2006 WL 30410886 at *2 (Defendants must adjudicate within reasonable time); *Yu*, 36 F. Supp.2d 922, 932 ("Defendants owe Plaintiffs a non-discretionary duty to complete processing of Plaintiffs' applications in a reasonable time.") *See also Kim v. Ashcroft*, 340 F. Supp 2d 384, 393 (S.D.N.Y.2004) ("…although there is no statutory or regulatory deadline by which the CIS *must* adjudicate an application, at some point, defendants' failure to take any action runs afoul of section 555(b).")

Defendants also attempt to purge themselves of the "reasonable time" requirement by demonstrating that Defendants have taken *some* action in processing Plaintiff's Application. Pointing to the *Gerald McMahon Declaration* provided in their Response, Defendants claim that Plaintiff's Application is being processed according to established procedures and the failure to complete adjudication on the Application is therefore not unreasonable. *See* Response at 5. The APA at Section 6 explicitly states, "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to *conclude* a matter presented to it." 5 U.S.C. § 555(b) (emphasis added). Defendants, "fail to comprehend that the APA grants Plaintiffs a right to have the agency *complete* work on their application within a reasonable time." *Yu*, 36 F. Supp.2d 922 at 933.

Finally, Defendants argue that a writ of mandamus to "compel the processing of routine

immigrant applications out of order" would have negative repercussions and would allow Plaintiff to "cut in line". *See* Response 5 and 6. Plaintiff respectfully disagrees with Defendants categorization of his Application processing as "routine." Plaintiff has been waiting for *nearly four years* for adjudication of his Application. Normal processing time for an *I-485 Application to Register Permanent Residence or Adjust Status* at CSC is approximately 6 months. *See* Complaint at Exhibit 8 (CSC's posted processing times). In fact, the opposite of Defendants' argument is true – Defendants' unreasonable delay of Plaintiff's Application has allowed numerous applicants to "cut in line" in front of him. Rather than giving Plaintiff "preferential treatment" by granting his Writ of Mandamus, this Court would be granting relief from the unfairness caused by Defendants' unreasonable delay in adjudicating his Application.

For the foregoing reasons, this Court has subject matter jurisdiction over Plaintiff's Writ of Mandamus and should deny Defendants' request to dismiss based on lack of jurisdiction and/or failure to state claim and grant Plaintiff the requested relief.

B. The APA and 28 U.S.C. § 1331 Allows This Court Subject Matter Jurisdiction to Review Plaintiff's Claim and Defendants' Delay is Unreasonable Under the APA

Defendants claim that judicial review of Plaintiff's action is precluded because the APA's judicial review provisions do not provide an independent basis for subject matter jurisdiction. *See* Response at 6. While Defendants are correct in that the APA does not, in and of itself, provide an independent basis for review, it has been well established that "where a plaintiff alleges that the defendant violated the APA, the court may exercise subject matter jurisdiction pursuant to section 1331." *See Kim,* 340 F. Supp 2d 896 at 388; *Carpet Linoleum and Resilient Tile Layers Local 419 v. Brown,* 656 F.2d at 567 (10th Cir.1981). *See also Yu,* 36 F. Supp.2d 922 at 930 ("…courts have specifically recognized jurisdiction under §1331 and the APA to hear challenges to INS delays in processing visa, LPR, and citizen applications.")

Defendants' final argument is that because there are no statutory or regulatory timeliness provisions, there is no "meaningful standard" against which to measure the time it takes for USCIS to adjudicate Plaintiff's Application. Defendants fear that "this Court would have to create a temporal standard from thin air." *See* Response at 7. On the contrary, rather than

needing to conjure its own timeliness standard, this Court need only look to previous decisions which have already dealt with the question of what constitutes an unreasonable delay in adjudicating an adjustment of status to LPR. *See Galvez v. Howerton,* 503 F.Supp. 35 at 39 (C.D.Cal.1980) (delay of six months unreasonable); *Paunescu v. INS,* 76 F.Supp.2d 896 at 901 and 902 (N.D.Ill.1999) (delay of 10 months unreasonable); *Jefrey v. INS,* 710 F.Supp. 486 (S.D.N.Y.1989) (delay of 16 months unreasonable); *Dabone,* 734 F.Supp. at 202 (delay of 20 months unreasonable); *Yu,* 36 F.Supp.2d at 932 (delay of two and a half years a prima facie case unreasonableness). Defendants' delay of nearly four years in this case is longer than all of the unreasonable delay standards established by the Courts above. Plaintiff also notes that the CSC's posted processing time for an *I-485* is approximately six months. *See* Complaint, Exhibit 8.

Because this Court can find subject matter jurisdiction through 28 U.S.C. § 1331 and also because what constitutes an "unreasonable delay" in adjustment of status to LPR is well established by case law, this Court should deny Defendants' request to dismiss based on lack of jurisdiction and/or failure to state claim and grant Plaintiff the requested relief.

IV. CONCLUSION

For the foregoing reasons Plaintiff respectfully requests that this Court deny Defendants' request to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) and grant the relief asked for in the Complaint. The Defendants' unreasonable delay of over three years in processing Plaintiff's Application is precisely the type of government behavior that Congress sought to protect applicants from when it passed the Mandamus Act and the Administrative Procedures Act.

Dated: March 5, 2007

Respectfully Submitted,

/s/

Justin G. Fok
Attorney for Plaintiff