UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
Southern Division

Mohamed Kamel Ibrahim

Case No. 02:06cv13219

Plaintiff,

v.

Hon. Arthur J. Tarnow

Michael Chertoff, Secretary, Department
of Homeland Security; Emilio Gonzalez,
U.S. Citizenship and Immigration Services.
Defendants.
_____/

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Plaintiff, Mohamed Kamel Ibrahim, submits this brief in opposition to Defendants' Motion to Dismiss because jurisdiction is proper in this Court. Plaintiff seeks a Writ of Mandamus to order Defendants to perform a duty they owe to him, namely to adjudicate the Application for Adjustment of Status (Application). Plaintiff seeks this Writ because Defendants have unreasonably delayed in processing the Application. Defendants assert in their Motion to Dismiss that this court does not have jurisdiction. Defendants misunderstand the applicable law. Defendant's Motion to Dismiss is without merit, and therefore, should be denied.

TABLE OF AUTHORITIES

Cases

Califano v. Sanders,
430 U.S. 99, 107 (1977)

Heckler v. Ringer,
466 U.S. 602 (1984)

District Lodge No. 166, Intern Ass'n of Machinists and Aerospace Workers and AFL-CIO v. TWA Services, Inc,
731 F. 2d 711, 717 (11th Cir. 1984)

Agbemaple v. INS,
No 97 C 8547, 1998 WL 292 441 (N.D. I11 5/11/1998)

Home Visiting Nurse Svcs Inc v. HHS,
132 F3d 1135, 1141 (6th Cir. 1997)

Iddir v. Immigration and Natrualization,
166 F. Supp. 2D 1250 (N.D. I11 2001)

JianJun Fu v. Reno,
2000 U.S. Dist. LEXIS 16110 (N.D. Tx. 2000)

Nyaga v. Ashcroft,
186 F. Supp. 2D 1244, 1252 (2002) rev'd on other grounds,
323 F. 3d 906 (11th Cir. 2003)

Yu v. Brown,
36 F. Supp. 922 (D.N.M 1999)

Zemin Hu v. Reno,
2000 U.S. Dist. Lexis 5030 (N.D. Tx. 2000)

List of Exhibits

Exhibit A: Agbemaple v. INS
No 97 C 8547, 1998 WL 292 441 (N.D. I11 5/11/1998)

Exhibit B: JianJun Fu v. Reno
2000 U.S. Dist. LEXIS 16110 (N.D. Tx. 2000)

Exhibit C: Zemin Hu v. Reno
2000 U.S. Dist. Lexis 5030 (N.D. Tx. 2000)

INTRODUCTION

I. Facts.

The Plaintiff, Mohamed Kamel Ibrahim was born in Lebanon and arrived in the United States as a student in 1997. He changed his status to H-1B Immigrant Professional Worker. He has attended Schoolcraft College and the University of Michigan where he received a B.S in Electrical Engineering and is currently working on his Masters Degree at the same university. The Plaintiff has always maintained lawful immigration status. He was hired at Lear Corporation where he still works to this date.

The Plaintiff married Marlene Gharib on February 24, 2005. On April 18, 2005, the Plaintiff applied for adjustment of status, based on his marriage to Marlene Gharib, a United States citizen. He was interviewed by Immigration Officer Coleman on October 21, 2005

II. Plaintiffs have a Right to a Writ of Mandamus Under 28 U.S.C. 1361.

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. 28 U.S.C. Sec. 1361.

This Court has the authority to issue a Writ of Mandamus when the Plaintiff shows that he has a clear right to relief, the Defendants have a clear non-discretionary duty to act, and no other adequate remedy is available. Home Visiting Nurse Svcs v. HHS, 132 F3d 1135, 1141 (6th Cir. 1997) citing Heckler v. Ringer, 466 U.S. 602, 616 (1984). Nyaga v. Aschroft, 186 F. Supp. 2D 1244,

1252 (2002) rev'd on other grounds, 323 F. 3d 906 (11th Cir. 2003), citing Heckler v. Ringer, 466 U.S. 602 (1984); District Lodge No. 166, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. TWA Services, Inc., 731 F. 2d 711, 717 (11th Cir. 1984).

The Mandamus Act grants District Courts the power to compel a government agency or employee to discharge a duty. It grants jurisdiction in "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 owned to the plaintiff." 28 U.S.C. 1361. The Mandamus Act requires the Plaintiff to show that "(1) He has a clear right to have their applications adjudicated; (2) that defendants have a non-discretionary duty to rule on the applications; and (3) that they have no other adequate remedy." Zemin Hu v. Reno, 2000 U.S. Dist. Lexis 5030 (N.D. Tx. 2000) (court has mandamus authority to order INS to adjudicate a pending adjustment of status application); Nyaga v. Ashcroft, 186 F. Supp. 2D, 1244 1252 (N.D. Ga 2002) 323 F.3d 906 (11th Cir. 2003) reversed on other grounds (defendants were ordered to adjudicate pending adjustment of status application under court's mandamus authority); Iddir v. Immigration and Naturalization, 166 F. Supp. 2D 1250 (N.D. Ill 2001) (Court has mandamus jurisdiction pursuant to 28 U.S.C. 1361 to order the adjudication of an application for adjustment of status.) Ghassan Elkhatib v. Butler, Case No. 04-22407(S.D. Fla. 2005) (Court found mandamus jurisdiction to order adjudication of Adjustment of Status.)

The Court may not use mandamus to compel the government to perform a discretionary action. Heckler v. Ringer, 466 U.S. 602 (1984). It may, however, "compel the Government to exercise its discretion without actually interfering with that exercise." Agbemaple v. INS. No 97 C 8547, 1998 WL 292 441 (N.D.

Ill. 5/18/1998). Yu v. Brown, 36 F. Supp. 922 (D.N.M. 1999), Nyaga v. Ashcroft, 186 F. Supp. 2D 1244, 1253 (2002). Ghassam Elkhatib v. Butler, Case No. 04-22407, (S.D. Fla. 2005). However, they are not seeking such relief. The Plaintiff is simply asking that the Defendants do their job by adjudicating the Application. Furthermore, the Plaintiff has a clear right to have his adjustment of status adjudicated within a reasonable period of time. In Nyaga v. Ashcroft, 186 F. Supp. 2D 1244, 1253 (2002), Plaintiffs had filed a petition for adjustment of status under the visa lottery program. Because Defendants had not adjudicated their application in what Plaintiffs deemed to be a reasonable time, they filed a petition for Writ of Mandamus with the court. The Court held that it had mandamus jurisdiction over the case. It further found that the government had a non-discretionary duty to "make diligent efforts" to adjudicate the visa lottery applications. The Court recognized that it cannot compel a particular outcome, but it can compel the government to adjudicate the petition.

> Where, as here, the evidence shows that the Government failed to act to process Plaintiff Nyaga's application, the court may order Defendants to exercise their discretion by ordering them to adjudicate the application thoroughly and make a decision one way or another... What this court may not do is mandate a certain outcome in that adjudication, as the final decision is the discretionary act.

Nyaga at 1253.

This is exactly what the Plaintiff in this case is seeking – a court to order the Defendants to adjudicate the Application. Administrative agencies such as USCIS do not possess the discretion to avoid discharging the duties Congress intended them to perform. Yu v. Brown 36, F. Supp. 922, 931 (D.N.M. 1999). They must

act as intended by Congress and they must perform the duties assigned to them. In this matter, those duties are to adjudicate the Application.

III. Administrative Procedures Act Applies to Mandamus Actions

The Administrative Procedures Act in conjunction with 28 U.S.C. 1331, the Federal Question statutes provides subject matter jurisdiction for cases in which courts are asked to review agency actions. The district courts shall have original Jurisdiction of all civil actions arising under the Constitutional laws, or treaties of the United States 28 U.S.C. Sec. 1331. "The obvious effect of this modification [of section 1331], subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on Federal Courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." Califano v. Sanders, 430 U.S. 99, 107 (1977) Courts have found jurisdiction under the APA to compel Government agencies where delay is unreasonable. Zemin Hu, 2000 U.S. Dist. LEXIS 5030, 2000 WL 425174 (N.D. Tx 2000) (finding that the APA and 28 U.S.C. 1331 together vest court with authority to order agencies to act); JianJun Fu v. Reno, 2000 U.S. Dist. LEXIS 16110 (N.D. Tx. 2000) ("the APA in conjunction with section 1331 does provide [subject-matter] jurisdiction").

The Plaintiff's case is identical to other cases in which parties have brought suit to compel the government to act on a pending application. In those cases the courts have consistently ruled that they have jurisdiction to hear such claims.

Despite statements to the contrary, USCIS does not always adjudicate applications and petitions in the order they are received. The Defendants have admitted that

USCIS can request the applications security checks be conducted in different order. Canon Affidavit at Def Ex. In this case, the Plaintiff is not being asked that he be given special treatment. He is simply asking that USCIS perform a duty owed to him-Adjudication of the Application within a reasonable time.

IV. Plaintiff is Entitled to Relief Under the Declaratory Judgment Act.

Since Plaintiff has established jurisdiction under APA he is entitled to relief.

CONCLUSION

For the above-stated reasons, Plaintiffs ask that Defendants' Motion to Dismiss be denied.

Respectfully submitted: December 15, 2006

S/ Caridad Pastor Cardinale
_____/

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