IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AHMAD J. KAHLIFA ALSALEH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:06-CV-2162-N
	§	
EMILIO T. GONZALEZ, Director,	§	
U.S. Citizenship and Immigration Services,	§	
	§	
Defendant.	§	

ORDER

Before the Court is the motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) of Defendant Emilio T. Gonzalez, Director of U.S. Citizenship and Immigration Services ("the Government") [8]. The Government contends that because the adjustment of status is a discretionary procedure under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, ("INA"), the Court lacks jurisdiction to adjudicate Plaintiff Ahmad J. Khalifa Alsaleh's ("Alsaleh") claim for mandamus. For the reasons discussed below, the Court denies the Government's motion.

I. ALSALEH'S APPLICATIONS

On September 13, 2005, Alsaleh's wife, a United States citizen, filed an I-130 visa petition on behalf of Alsaleh. At the same time, Alsaleh submitted an I-485 application for adjustment of status, an I-131 application for travel authorization, and an I-765 application for work authorization. The Government interviewed Alsaleh and his wife regarding the visa petition and adjustment application on April 27, 2006. At that time, the Government

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informed Alsaleh that it had nearly completed his case and needed only to conduct an FBI name check. However, Alsaleh's applications remain pending.

On November 22, 2006, Alsaleh filed this claim for mandamus against the Government, seeking to compel the Government to adjudicate his applications. The Government moves to dismiss Alsaleh's claims pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the Courts lacks jurisdiction over this matter. Alternatively, the Government contends that even if the Court has jurisdiction to compel action under 28 U.S.C. § 1361 (the "Mandamus Act"), Alsaleh has failed to state a claim upon which relief may be granted and thus moves to dismiss his claims pursuant to Rule 12(b)(6).

II. MOTION TO DISMISS STANDARD

A party that believes jurisdiction to be improper may challenge the court's authority by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Once jurisdiction is challenged, the burden rests upon the party seeking to invoke the court's jurisdiction to prove that jurisdiction is proper. *Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995). In deciding a jurisdictional challenge, the court may look beyond the complaint's jurisdictional allegations to determine if jurisdiction is present. That is, the court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts, plus the court's resolution of disputed facts. *Raming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996)).

A party may challenge the merits of a case by filing a motion to dismiss pursuant to Rule 12(b)(6). *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Courts may

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dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts consistent with the allegations of the complaint that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In reviewing a Rule 12(b)(6) motion, the court must liberally construe the complaint in favor of the plaintiff and accept as true all well-pleaded facts. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

III. THE COURT HAS JURISDICTION

In our federal system, courts may exercise authority over a case only if and to the extent that federal law allows. If federal law expressly prohibits a court's adjudicatory authority, the court must dismiss the case. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Here, Alsaleh argues that jurisdiction arises under 28 U.S.C. § 1361 (the "Mandamus Act"), 28 U.S.C. § 1331, and the Administrative Procedures Act ("APA"), 8 U.S.C. § 706(1).

The Mandamus Act vests courts with original jurisdiction "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. Mandamus relief is generally viewed as "a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Mandamus relief is appropriate "only when the plaintiff's claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992) (internal quotation and citation omitted).

The APA requires an administrative agency to act upon matters presented to it "within a reasonable time," 5 U.S.C. § 555(b), and provides that federal courts "shall . . . compel

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agency action unlawfully withheld or unreasonably delayed . . . ." *Id.* § 706(1).[1] Federal courts' jurisdiction is limited only when agency action is committed to agency discretion by law or specifically precluded; "[w]hen an agency's recalcitrance, inertia, laggard pace or inefficiency sorely disadvantages the class of beneficiaries Congress intended to protect, judicial review . . . is in order." *In re Amer. Feder. of Gov. Employees, AFL-CIO*, 790 F.2d 116, 117 (D.C. Cir. 1986). Much like mandamus relief, such relief under the APA is considered an extraordinary measure. *See, e.g.*, *Chromcraft Corp. v. E.E.O.C.*, 465 F.2d 745, 747 (5th Cir.1972).

Because compelling agency action is an extraordinary remedy regardless of the statute from which the remedy derives, relief is appropriate, and jurisdiction lies, only when the plaintiff can establish "a clear right to the relief sought, a clear duty by the defendant to do the particular act, and that no other adequate remedy is available." *Newsome v. E.E.O.C.*, 301 F.3d 227, 231 (5th Cir. 2002). The duty owed must be plainly defined, nondiscretionary, and free from doubt, and the act must be purely ministerial. *See Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1288 (5th Cir. 1997). Therefore, to demonstrate that jurisdiction is proper, Alsaleh must show that: (1) he has a clear right to have his applications adjudicated; (2) the Government has a nondiscretionary duty to act; and (3) no other adequate remedy exists.

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[1] *See Yu v. Brown*, 36 F. Supp. 2d 922, 929 (D.N.M. 1999) ("Because, in cases such as this, the APA provides an enforceable legal right to agency action within a reasonable time, and the duty of the agency is prescribed by federal statute requiring interpretation of federal law, [28 U.S.C.] § 1331 and APA § 706(1) combine to provide federal subject matter jurisdiction over the controversy.").

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A. The Government Has a Nondiscretionary Duty to Adjudicate Applications

Focusing on the second prong, the Government argues that the Court does not have jurisdiction over this matter because adjustment of status is not a nondiscretionary, ministerial duty; rather, it is a discretionary act committed by the INA to the authority of the Attorney General. In making this argument, however, the Government mischaracterizes the nature of Alsaleh's request. Alsaleh does not ask the Court to compel the Government to make a particular determination with respect to his applications. On the contrary, Alsaleh asks the Court merely to compel the Government to adjudicate his application. As this Court has previously determined, the Government has a nondiscretionary duty to act on applications for adjustment of status. *Alsharqawi v. Gonzalez*, 3:06-CV-1165-N, 2007 WL 1346667, at *3 (N.D. Tex. Mar. 14, 2007). Furthermore, under section 555(b) of the APA, the Government must do so within a reasonable time. *Id.* at *4. Therefore, if Alsaleh can present a clear right to relief, both the Mandamus Act and the APA authorize the Court to compel adjudication of the outstanding applications.

B. Alsaleh May Present a Right to Relief

To present a clear and certain right to relief, Alsaleh must establish a prima facie case that the Government has failed to adjudicate his applications within a reasonable time, as well as show that no other remedy exists. *Yu*, 36 F. Supp. 2d at 932.

Alsaleh contends that the eighteen months from the time his applications were filed (September 13, 2005) to now constitutes an unreasonable delay for purposes of APA section 706(1). The Government, on the other hand, contends that "the Supreme Court has held that

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the passage of time cannot, standing alone, support" a claim of unreasonable delay. Def. Br. at 5 (citing *INS v. Miranda*, 459 U.S. 14, 19 (1982)). In other words, the Government argues that a court must consider the delay in its entire factual context before the court can deem the delay unreasonable. The Court agrees that a delay should be considered in context. The ultimate right to mandamus depends on the factual scenario surrounding the eighteen months the Government has had Alsaleh's applications. However, the record is insufficient for the Court to make a determination as to the reasonableness of the Government's delay.[2] Thus, the Court cannot say, on the basis of the record before it, that Alsaleh is unable to prove any set of facts consistent with his allegations that would entitle him to relief. Therefore, assuming Alsaleh has exhausted his administrative remedies, dismissal is inappropriate.

Next, Alsaleh has established that no other adequate remedy exists. While the INA provides the channels an applicant must navigate for an adjustment of status or for travel or work authorization, it provides no recourse to an applicant stuck in limbo due to the Government's failure to promptly adjudicate applications. *Yu*, 36 F. Supp. 2d at 932. Under the APA, the only recourse is in the courts. *See* 5 U.S.C. § 706(1). Therefore, as the *Yu* court explained, neither the INA nor the APA afford applicants any means "other than resort

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[2]That is to say, on the limited record before the Court, the Court is unable to say as a matter of law that the Government's delay is reasonable. The reasonableness of the delay may turn on a variety of factual issues, such as the volume of applications, the resources available to process them, typical time for processing, and any issues specific to Alsaleh that may affect processing. It is at least possible that Alsaleh could prove a set of facts consistent with his allegations that would show the delay was unreasonable and entitle him to relief. Conversely, the Court is also unable to say on this record that the Government's delay is *un*reasonable as a matter of law. Whether further development of the paper record through a motion for summary judgment would suffice to resolve that question, or whether an evidentiary hearing is needed, is a matter for another day.

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to this Court[] to challenge this alleged agency malfeasance." *Id.* Accordingly, Alsaleh has established that no other adequate remedy exists.

C. INA Section 1252 Does Not Strip the Court of Jurisdiction

Finally, the Government argues that 8 U.S.C. §§ 1252(a)(2)(B) & (g) explicitly preclude judicial review in this case. Section 1252(a)(2)(B) eliminates judicial review of certain judgments and decisions relating to adjustment of status. § 1252(a)(2)(B) ("Notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall has jurisdiction to review – (i) any judgment regarding the granting of relief under section 1182(h), 1182(I), 1229b, 1229c, or 1255 of this title, or (ii) any other *decision* or *action* of the Attorney General . . . the authority for which is specified . . . to be in the discretion of the Attorney General . . . ."). Similarly, Section 1252(g) deprives courts of jurisdiction "to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." According to the Government, these sections express Congress's intent to protect the agency from actions that interfere with prioritizing and adjudicating immigration cases. The Government, however, misreads both sections.

By its terms, section 1252(g)'s proscription is confined to review of removal orders. *See* 8 U.S.C. § 1252 (titled, "Judicial Review of Orders of Removal"). Here, Alsaleh seeks to compel the adjudication of his applications; this case has nothing to do with removal orders. "If Congress intended to limit all judicial review of any INS action or in action, on any matter before the agency, it could have done so. However, by limiting judicial review of 'removal orders' it specifically left intact judicial review of all other matters properly

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before the Court." *Yu*, 36 F. Supp. 2d at 934. Moreover, Alsaleh does not complain of any "decision or action by the Attorney General," 8 U.S.C. §§ 1252(a)(2)(B) & (g). Rather, his complaint centers on the Attorney General's *failure* to decide or act. Accordingly, section 1252(a)(2)(B) & (g) do not strip the Court of authority to entertain Alsaleh's claim for mandamus.

CONCLUSION

The Court concludes, contrary to the Government's assertion otherwise, that it may properly exercise jurisdiction over this matter pursuant to the Mandamus Act and the APA. The Court therefore denies the Government's motion to dismiss.

Signed June 6, 2007.

David C. Godbey
United States District Judge

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