



PRACTICE ADVISORY¹
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**MANDAMUS ACTIONS:
AVOIDING DISMISSAL AND PROVING THE CASE**

By The American Immigration Council²

This advisory provides basic information about filing an immigration-related mandamus action in federal district court. It discusses the required elements of a successful mandamus action as well as the jurisdictional concerns that sometimes arise.

Mandamus can be a relatively simple and quick remedy in situations where the government has failed to act when it has a duty to do so. However, there are a number of adverse published decisions, some of which are discussed in this advisory. Although it is helpful to understand these cases—and to identify the weaknesses in the courts' analyses—potential plaintiffs should not be discouraged. Most successful mandamus actions are unreported and/or do not result in written decisions. Often, the filing of a mandamus action prompts the government to take whatever action is requested and the case ultimately is dismissed.

I. INTRODUCTION

Mandamus can be used to compel administrative agencies to act. The Mandamus Act, codified at 28 U.S.C. § 1361 says, in its entirety:

1361. Action to compel an officer of the United States to perform his duty.

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.

The Mandamus Act authorizes the court to order a remedy. It does not provide independent, substantive grounds for a suit. A mandamus plaintiff must demonstrate that: (1) he or she has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available. *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir.

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² The American Immigration Council thanks Theresa A. Queen and Sarah Mathews of Greenberg Traurig, LLP for their assistance in updating this practice advisory.

2002). Under the Mandamus Act, the court may compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular manner or grant the relief the plaintiff seeks from the agency.

II. JURISDICTION AND CAUSE OF ACTION

Plaintiffs in a mandamus action may allege subject matter jurisdiction under both the mandamus statute, 28 U.S.C. § 1361, and the federal question statute, 28 U.S.C. § 1331. Generally, it is better to allege both grounds, in part because some courts have confused the issue of subject matter jurisdiction under § 1361, and in part because the same complaint may seek mandamus relief and other forms of relief as well.

The Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, does not provide an independent basis for subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977). However, the APA provides a basis for the suit when the government unreasonably delays action or fails to act. *See* 5 U.S.C. §§ 555(b) and 706(1). Thus, the plaintiff may allege the APA as a cause of action. *Id.* In many cases involving agency delay, the court will accept jurisdiction under 28 U.S.C. § 1331 and grant relief under the APA instead of the Mandamus Act. Therefore, it is important to allege jurisdiction under 28 U.S.C. § 1331 and a cause of action under the APA.³

The court’s subject matter jurisdiction is a separate issue from the court’s authority to grant mandamus relief. *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003). Subject matter jurisdiction is a threshold question that determines whether the court has the power to decide the case in the first place. *Id.* at 387. The failure to state a valid cause of action calls for a judgment on the merits and not for dismissal for lack of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Consequently, after a court has determined that the petitioner’s “claim is plausible enough to engage the court’s jurisdiction,” the court turns to the question of whether it has authority to grant the particular relief. *Id.*; *see also Rios v. Ziglar*, 398 F.3d 1201, 1207 (10th Cir. 2005) (holding that district court had jurisdiction where plaintiff alleged immigration agency failed to carry out a ministerial duty, but affirming dismissal because plaintiff did not prove prerequisites for mandamus); *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008) (reasoning that the plaintiff’s claim that pre-interview naturalization application was unreasonably delayed may ultimately fail on the merits, but was not so insubstantial and frivolous as to defeat subject-matter jurisdiction).

III. ELEMENTS OF A SUCCESSFUL MANDAMUS ACTION

A mandamus plaintiff must establish that

- (1) he or she has a clear right to the relief requested;
- (2) the defendant has a clear duty to perform the act in question; and

³ *See also* American Immigration Council Practice Advisory, [*Immigration Lawsuits and the APA: The Basics of a District Court Action*](#).

(3) no other adequate remedy is available.

Not all courts analyze these issues the same way, or even consistently. Often, the courts mesh these issues or frame them differently. However, for clarity and completeness, this advisory addresses these issues individually.

A. Does the Plaintiff Have a Clear Right?

A mandamus plaintiff must show that he or she has a clear right to the relief requested. Sometimes, the courts say that a person has a clear right when he or she falls within the “zone of interests” of a particular statute. This means that the interests the plaintiff seeks “to be protected are within those ‘zone of interests’ to be protected or regulated by the statute... in question.” *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 150 (1970).⁴

In immigration-related mandamus actions, plaintiffs may identify a specific provision of the Immigration and Nationality Act (INA) that creates a clear right to relief. The courts will look to the purpose of the statute—both the specific statutory provision in question, as well as the general purpose of the INA—to determine whether the mandamus plaintiff is an intended beneficiary of the statute. Said another way, the statute should indicate that the government owes a duty *to the plaintiff*.

Courts have found that the INA establishes a clear right to have an adjustment application adjudicated. *See, e.g., Razik v. Perryman*, No. 02-5189, 2003 U.S. Dist. LEXIS 13818, *6-7 (N.D. Ill. Aug. 6, 2003) (courts have consistently held that INA § 245 provides a right to have an application for adjustment of status adjudicated); *see also Iddir*, 301 F.3d at 500.⁵ And, in *Yu v. Brown*, 36 F. Supp. 2d 922, 930 (D.N.M. 1999), the court said that applicants for special immigrant juvenile (SIJ) status and for adjustment of status “fell within the zone of interest of [these] INA provisions.” *See also Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 281 (D.D.C. 2016) (plaintiffs had a clear right under the Iraqi and Afghan Special Immigrant Visa Program statutes to have their visa applications adjudicated).

Courts also have found that the INA establishes a clear right to relief in the context of delayed naturalization applications where the interview has not yet been conducted. *See Hadad v. Scharfen*, 08-22608, 2009 U.S. Dist. LEXIS 26147, *6-7 (S.D. Fla. Mar. 12, 2009) (finding INA § 335(d) creates a right to have the application for naturalization processed and a decision rendered); *Olayan v. Holder*, No. 08-715, 2009 U.S. Dist. LEXIS 12825, *11-12 (S.D. Ind. Feb.

⁴ The zone of interests test was first articulated by the Supreme Court in *Data Processing*. Although this case addressed the issue of standing, the zone of interests test has subsequently been used by some courts as a way to determine if the plaintiff has a clear right to relief for purposes of mandamus. *See Hernandez-Avalos v. INS*, 50 F.3d 842, 846-47 (10th Cir. 1995); *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992).

⁵ *See also Ahmed*, 328 F.3d at 388, in which the Seventh Circuit concluded that subject matter jurisdiction existed over a claim to compel adjudication of a diversity lottery visa application, applying its reasoning in *Iddir*. However, in both *Iddir* and *Ahmed*, the court denied mandamus relief on other grounds, i.e., that the government did not have a duty to the plaintiffs.

17, 2009) (INA §§ 334(c), 335(b), (d) create right to have naturalization application adjudicated).⁶

In contrast, several courts have said that the INA does not create a clear right to relief in the context of application adjudication delays. *See L.M. v. Johnson*, 150 F. Supp. 3d 202, 210-11 (E.D.N.Y. 2015) (INA § 208(d)(7) precludes a private right of action to enforce statutory deadlines for considering asylum applications, so no clear right to relief under Mandamus Act); *Bayolo v. Swacina*, No. 09-21202, 2009 U.S. Dist. LEXIS 42604, *5-6 (S.D. Fla. May 11, 2009) (plaintiff did not demonstrate a clear right to relief because there is no provision in INA § 245(a) which sets a time limit for the Attorney General or USCIS to decide whether to adjust an applicant's status); *Castillo v. Rice*, 581 F. Supp. 2d 468 (S.D.N.Y. 2008) (no clear right under INA §§ 101(a)(15)(K)(i)-(ii), 214(d), or 214(r) to expedite scheduling of K-1 or K-3 visa interviews by United States consulates).

Courts have similarly held that the INA does not create a right to have removal proceedings initiated. *See Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos*, 50 F.3d at 847-48; *Giddings*, 979 F.2d at 1109-10; *Gonzalez v. INS*, 867 F.2d 1108, 1109-10 (8th Cir. 1989). In these cases, the plaintiffs—noncitizens who were serving criminal sentences—argued that former INA § 242(i) created a clear right to an immediate deportation hearing. Former § 242(i) said that the Attorney General shall initiate deportation proceedings “as expeditiously as possible after the date of conviction.” The courts concluded that this provision was enacted not to benefit the noncitizens, but instead to address prison overcrowding and avoid the costs of detaining noncitizens; thus, the detainees themselves were deemed to be outside the “zone of interest” of the statute.⁷

Courts have held that when an INA provision specifically disclaims a private right of action, there will be no clear right to relief under the Mandamus Act, but there may be relief under the APA. Specifically, courts have found that the APA’s mandate that agencies must conclude matters presented to them “within a reasonable time” may afford relief for claimants whose

⁶ Note that Congress has provided a statutory remedy by authorizing judicial intervention when USCIS has not issued a decision within 120 days of the naturalization “examination,” which you can utilize instead of mandamus when applicable. INA § 336(b). *See Smith v. Johnson*, No. 3:16-CV-00066-GNS, 2016 WL 4030969, at *2 (W.D. Ky. July 26, 2016) (“[I]f an interview is conducted with an applicant, the Court may have jurisdiction if the process is not completed within 120 days of the date of the interview.”) *See also* American Immigration Council Practice Advisory, [How to Get Judicial Relief Under 8 USC § 1447\(b\) for a Stalled Naturalization Application](#).

⁷ The Ninth Circuit initially found that detained immigrants were within the zone of interests protected by former INA § 242(i). *Garcia v. Taylor*, 40 F.3d 299 (9th Cir. 1994); *Silveyra v. Mozhorak*, 989 F.2d 1012 (9th Cir. 1993). In *Campos*, however, the court held that a subsequent amendment to the INA, which provided that § 242(i) “shall not be construed to create any substantive or procedural right or benefit,” overruled its prior rulings in *Garcia* and *Silveyra*. *Campos*, 62 F.3d at 314 (citing § 225 of the Immigration and Nationality Technical Corrections Act of 1994). *See also Hernandez-Avalos*, 50 F.3d at 848 (citing § 225 as barring detainees’ standing).

applications have been unreasonably delayed 5 U.S.C. § 555(b). *See Villa v. DHS*, 607 F. Supp. 2d 359, 365 (N.D.N.Y. 2009) (finding that 5 U.S.C. §555(b) (APA) requires USCIS to adjudicate applications within a reasonable time). For example, although INA § 208(d)(7) precludes a private right of action to enforce the statutory timeframes for consideration of asylum applications, those timeframes may serve as evidence that an adjudication delay is unreasonable for purposes of an APA action. *Ibrahim Almandil v. Radel*, No. 15cv2166 BTM (BGS), 2016 WL 3878248, at *2 (S.D. Cal. July 18, 2016) (holding that although relief under the Mandamus Act was unavailable to adjudicate asylum application within a statutory time period, claimant may bring an action under the APA, but seven months delay not unreasonable); *Ou v. Johnson*, No. 15-cv-03936-BLF, 2016 WL 7238850, at *3 (N.D. Cal. Feb. 16, 2016) (denying relief when asylum applicant had been waiting only eleven months); *L.M.*, 150 F. Supp. 3d at 210-11, 213 (Mandamus Act unavailable, APA claim considered, but two year delay adjudicating asylum applications not unreasonable). These decisions took into account the District of Columbia Circuit Court of Appeals’ admonition that a court should not compel agency action when “putting [the plaintiff] at the head of the queue would simply move all others back one space and produce no net gain.” *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (quoting *In re Barr Labs, Inc.*, 930 F.2d 72 (D.C. Cir. 1991)).

B. Is there a Mandatory Duty?

In addition to having a clear right to relief, the plaintiff must show that *the defendant owes* him or her a duty.⁸ The courts have said that this duty must be mandatory or ministerial, but mandamus actions can be used to compel the government to exercise its discretion in a case where the government has failed to take any action. For example, the court may order the defendant to adjudicate an application or petition. *See, e.g., Iddir*, 301 F.3d at 500 (duty to adjudicate adjustment of status applications under the diversity lottery program); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (duty of consular officer to adjudicate visa application, but no duty owed by the Attorney General or INS officials); *Villa*, 607 F. Supp. 2d at 363 (duty to adjudicate adjustment application in a reasonable amount of time); *Yu*, 36 F. Supp. 2d at 932 (duty to process SIJ and adjustment of status applications in a reasonable amount of time). *But see Orlov v. Howard*, 523 F. Supp. 2d 30, 38 (D.D.C. 2007) (defendants have no duty to increase the pace at which they are adjudicating an adjustment application).

Many—though not all—courts correctly distinguish between the government’s duty to take *some* discretionary action and the actual discretionary decision that the government makes. A court generally will not order the defendant to exercise its discretion in any particular manner. *See Silveyra v. Moschorak*, 989 F.2d 1012, 1015 (9th Cir. 1993) (“[m]andamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated ‘statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised.’”); *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (the Attorney General has discretion to grant or deny an application, but does not have discretion to simply never adjudicate an adjustment application); *see also Soneji v. DHS*, 525 F. Supp. 2d

⁸ *See, e.g., Naporano Metal & Iron Co. v. Sec’y of Labor*, 529 F.2d 537 (3d Cir. 1976) (duty to issue labor certification); *Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D. Pa. 2003) (ministerial duty to issue derivative citizenship); *Rios v. Aguirre*, 276 F. Supp. 2d 1195, 1199-1200 (D. Kan. 2003) (no duty to entertain motion to reconsider).

1151, 1155 (N.D. Cal. 2007) (with respect to an APA claim, finding USCIS' argument that it does not have to adjudicate an adjustment application "not only pushes the bounds of common sense but is also contradicted by a wealth of authority from this and other districts" and citing cases). Rather, the court will order the government to take *some* action. As a result, be aware that filing a mandamus action may result in a prompt denial of the application by the agency.

The question of the defendant's mandatory duty is closely related to the question of the plaintiff's clear right to relief, and in many cases, the answer to these questions will be the same. However, just because there is a clear right to relief does not mean that the government has an affirmative duty and vice versa. For example, in *Iddir*, a mandamus case involving the diversity visa program, the court found that the plaintiffs had a clear right to have their adjustment applications adjudicated, but because defendants had no statutory authority to issue a diversity visa after the fiscal year statutory deadline had passed, the defendants no longer had a duty to adjudicate the applications. 301 F.3d at 500-01.⁹ Alternatively, in *Giddings*, the court held that although the INA imposes "a duty on the Attorney General to deport criminal aliens, we stop short of concluding that this created a duty *owed to the alien*." 979 F.2d at 1110. In doing so, the court noted the distinction between "imposing a duty on a government official and vesting a right in a particular individual." *Id.* (citing *Gonzalez*, 867 F.2d at 1109).

Even if the government has a nondiscretionary duty to adjudicate an application, mandamus is appropriate only if the government fails to act within a reasonable amount of time. *See, e.g., Nine Iraqi Allies*, 168 F. Supp. 3d at 293-94 (finding unreasonable delay when statutes provided a clear nine-month timeline for adjudicating Special Immigrant Visas for certain Iraqi and Afghan nationals); *Karim v. Holder*, No. 08-671, 2010 U.S. Dist. LEXIS 30030 (D. Colo. Mar. 29, 2010) (finding plaintiff's adjustment application was unreasonably delayed pursuant to USCIS' policy of withholding from adjudication certain applications subject to terrorism-related bars); *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1147 (D. Ariz. 2008) (finding, after applying 5 U.S.C. § 555(b) (APA), that the nearly six-year delay in adjudicating Plaintiff's adjustment application was unreasonable). Where there is no statutory deadline for adjudicating an application, what is "reasonable" will depend on the circumstances of the case. Courts have found delays in adjudicating immigration applications to be unreasonable when the delays are lengthy. *Compare Aslam v. Mukasey*, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (finding a nearly three-year delay in the adjudication of an adjustment application unreasonable) *with Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657 & n.6 (N.D. Tex. 2005) (finding 15-month delay was not unreasonable, but noting that decisions from other jurisdictions suggest that delays approximating two years may be unreasonable); *see also Dehrizi v. Johnson*, No. CV-15-00008-PHX-ESW, 2016 WL 270212, at *5 (D. Ariz. Jan. 21, 2016) (finding that the timeframe in which government grants or denies refugee's application is not discretionary and holding that material facts existed to suggest the

⁹ Note, however, that in a similar mandamus action involving the diversity visa program, the Eleventh Circuit did not reach the issue of whether the government had a duty to adjudicate the plaintiff's adjustment of status application. *Nyaga v. Ashcroft*, 323 F.3d 906, 915-16 (11th Cir. 2003) (per curiam). Rather, in *Nyaga*, the court dismissed the case as moot because the fiscal year had ended. In two district court cases where the plaintiffs filed mandamus complaints prior to the end of the fiscal year, relief was granted even though the diversity visa was not issued prior to the end of the fiscal year. *See Przhobelskaya v. USCIS*, 338 F Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999).

nine-year delay in adjudicating refugee's application to adjust status was unreasonable). The courts also have found government delays unreasonable when the passage of time causes a plaintiff to become ineligible for the relief sought. *See, e.g., Harriott v. Ashcroft*, 277 F. Supp. 2d 538 (E.D. Pa. 2003) (granting mandamus where INS unreasonably delayed issuing derivative citizenship); *Yu*, 36 F. Supp. 2d at 932-333 (granting mandamus where INS unreasonably delayed adjudicating SIJ and adjustment of status applications); *but cf. Ahmed*, 328 F.3d at 287 (finding no right to relief because delay resulted in plaintiff's ineligibility, but noting that the result may have differed had plaintiff filed the case while government still had authority to act).

A mandamus plaintiff may look to regulations or internal operating procedures to find out if the agency itself has set guidelines.¹⁰ Plaintiffs also may look to what the agency's average adjudication period is;¹¹ however, just because a delay is "not unusual" does not make it reasonable. *See Jeffrey v. INS*, 710 F. Supp. 486 (S.D.N.Y. 1989).

The following factors provide guidance on what is reasonable:

- (1) the time agencies take to make decisions 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 delay;
- (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) ("TRAC") (quoted in *Kashkool*, 553 F. Supp. 2d at 1143); *see also Tufail v. Neufeld*, No. 2:14-cv-02545-TLN-CMK, 2016 WL 1587218, at *9 (E.D. Cal. Apr. 20, 2016) (finding "presumptively unreasonable" a delay of over 14 years in adjudicating an adjustment of status application); *Latfi*

¹⁰ However, the agency's delay may be unreasonable even if it adjudicates an application within the agency-specified timeframe. *See Singh v. Ilchert*, 784 F. Supp. 759, 764 (N.D. Cal. 1992) (finding that "the mere fact that the INS promulgates a regulation establishing a time period in which applications must be adjudicated does not, in and of itself, mean that an adjudication within the time period cannot constitute unreasonable delay").

¹¹ For example, USCIS provides processing time reports by office and type of filing at its [USCIS Processing Time Information](#) web page.

v. Neufeld, No. 13-CV-05337-BLF, 2015 U.S. Dist. LEXIS 77264, *14-25 (N.D. Cal. June 12, 2015) (applying TRAC factors and finding that USCIS' six-year delay in adjudicating adjustment application was unreasonable). *But see Alaei v. Holder*, No. 2:15-cv-08906-ODW (JPRx), 2016 WL 3024103, at *3 (C.D. Cal. May 26, 2016) ("courts have found delays of several years to be acceptable" in adjudicating asylum applications).

C. Is There Another Remedy Available?

The courts will not grant mandamus relief if the plaintiff has an alternative, fully adequate remedy available. This means that plaintiffs must exhaust their administrative remedies. *See, e.g., Cheknan v. McElroy*, 313 F. Supp. 2d 270, 274 (S.D.N.Y. 2004); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106, 108 (E.D.N.Y. 2003); *see also Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1233 (D. Ariz. 2016) (when there was adequate remedy under INA § 360, plaintiff could not use mandamus). Failure to exhaust may be excused, however, when one of the exceptions to exhaustion is established.¹²

Furthermore, courts generally will not grant relief if the plaintiff has a judicial alternative available. For example, in *Bhatt v. Board of Immigration Appeals*, the plaintiff asked the court to compel the BIA to adjudicate his motion to reconsider. 328 F.3d 912 (7th Cir. 2003). The court held that to the extent that the plaintiff can challenge the BIA's inaction, it must do so as part of a petition for review in the court of appeals. *Id.* at 915 n.3 (citing INA § 242(b)(9)). Similarly, in *Kulle v. Springer*, the court dismissed a mandamus action that sought to compel discovery in an immigration court proceeding. 566 F. Supp. 279 (N.D. Ill. 1983). The court said that the determinations involving discovery fall within the scope of the judicial review provisions of the INA (former section 106(a)). *Id.* at 280.

In several cases, the government has argued that applicants for adjustment of status are precluded from mandamus when the government has not initiated removal proceedings against them. The government has reasoned that (1) adjustment applicants have not exhausted remedies because they have not re-adjudicated their applications before the immigration court and the Board of Immigration Appeals in removal proceedings, and/or (2) there is (or will be) an alternative judicial forum available after removal proceedings conclude (i.e., petition for review under INA § 242).¹³ Although some courts have agreed with the government, *see, e.g., Sadowski v. INS*, 107

¹² Failure to exhaust may be excused if: (1) requiring exhaustion of administrative remedies causes prejudice due to unreasonable delay or an "indefinite time frame for administrative action"; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) substantial constitutional questions are raised. *See Iddir*, 301 F.3d at 498 (citations omitted).

¹³ Note that an immigration judge has no jurisdiction over the adjustment application of an "arriving alien" in removal proceedings, so no administrative review would be possible, with one exception. The immigration judge would have jurisdiction if, while in the U.S., the foreign national had properly filed an adjustment application with USCIS, had departed from and then returned to the U.S. under advance parole to pursue the previously-filed adjustment application, USCIS denied the adjustment application, and DHS placed the individual into proceedings, either upon his or her return to the U.S. under the advance parole or after

F. Supp. 2d 451 (S.D.N.Y. 2000), most courts have implicitly rejected this reasoning, and a few courts have rejected it explicitly. In *Iddir*, the court said that even though INS may initiate removal proceedings in the future, administrative exhaustion is excused because, *inter alia*, this situation constitutes an “indefinite timeframe for administrative action.” 301 F.3d at 498-99 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992)).

Finally, courts sometimes find that the availability of APA relief precludes granting mandamus relief. See *Valona v. U.S. Parole Comm’n*, 165 F.3d 508, 510 (7th Cir. 1998) (finding “APA . . . authorizes district courts to ‘compel agency action unlawfully withheld or unreasonably delayed’ without the need of a separate action seeking mandamus”); *Ali v. Frazier*, 575 F. Supp. 2d 1084, 1091 (D. Minn. 2008) (dismissing plaintiff’s mandamus claims because the APA provides a remedy for unlawfully delayed agency action); *Sawan v. Chertoff*, 589 F. Supp. 2d 817 (S.D. Tex. 2008) (same).

III. OTHER THRESHOLD ISSUES

The following are some jurisdictional and other threshold issues that often arise in immigration mandamus actions.

A. Mootness

The courts will dismiss a civil action where the plaintiff’s claim is moot. Some courts have found that when an agency fails to adjudicate an application, and, as a result of the passage of time, the applicant becomes ineligible for the benefit requested, the issue is moot.

For example, in *Nyaga*, the plaintiff asked the court to compel the government to adjudicate his adjustment application under the diversity visa program. The court found that the plaintiff was no longer eligible to receive a diversity visa because the fiscal year during which the visa was available had ended. 323 F.3d at 915-16.¹⁴ As a result, his claim was moot.¹⁵ *Id.* at 916. Likewise, in *Sadowski*, the court found that the plaintiff’s claim was moot because he no longer was eligible for derivative beneficiary status, having turned twenty-one. 107 F. Supp. 2d at 454. *But see Harriott*, 277 F. Supp. 2d at 545 (court ordered government to issue derivative

USCIS denied the adjustment application. 8 C.F.R. § 1245.2(a)(1)(ii). See the American Immigration Council’s Practice Advisory, *“Arriving Aliens” and Adjustment of Status*.

¹⁴ The plaintiff filed the complaint after the expiration of the fiscal year for which he had won the diversity visa lottery. The court may have reached a different result if the complaint had been filed before year’s end. See *Nyaga*, 323 F.3d at 915 n.7 (plaintiff’s case arguably distinguishable from a case where complaint filed before end of year); *Paunescu*, 76 F. Supp. 2d at 898 (mandamus issued where complaint filed before end of year); see also *Przhebelskaya*, 338 F Supp. 2d at 405 (motion to compel granted where mandamus issued prior to end of year). *But see Keli v. Rice*, 571 F. Supp. 2d 127, 135-36 (D.D.C. 2008) (when petitioner filed complaint only ten days before the end of the fiscal year, court held there was not adequate time to intervene before the fiscal year expired).

¹⁵ In *Iddir*, the Seventh Circuit reached the same result, but did not rely on mootness. Rather, the court found that the government did not have a duty to adjudicate the application because the plaintiff was no longer eligible for a diversity visa. 301 F.3d at 501.

citizenship nunc pro tunc where plaintiff alleged very compelling factors and government acted unreasonably).

B. Statutory Bars to Review under INA § 242

Section 242 of the INA bars jurisdiction over a variety of different issues in immigration cases. The government often argues that INA § 242(a)(2)(b)(ii) applies to bar jurisdiction over mandamus actions challenging agency delay. This provision bars review of a “decision or action” of the Attorney General or the DHS Secretary when such decision or action “is specified under this subchapter to be in [his or her] discretion.” In many cases, plaintiffs have successfully overcome government motions to dismiss that raise this jurisdictional bar. *See, e.g., Labaneya v. USCIS*, 965 F. Supp. 2d 823, 827 (E.D. Mich. 2013) (collecting cases); *Geneme v. Holder*, 935 F. Supp. 2d 184, 190 (D.D.C. 2013) (collecting cases); *Sharadanant v. USCIS*, 543 F. Supp. 2d 1071, 1075 (D.N.D. 2008). However, some district courts agree that INA § 242(a)(2)(B)(ii) bars jurisdiction. *See e.g., Safadi v. Howard*, 466 F. Supp. 2d 696, 700 (E.D. Va. 2006) (INA § 242(a)(2)(B) precludes review of a mandamus action to compel adjudication of an adjustment application).

The REAL ID Act of 2005¹⁶ amended INA § 242 to include specific bars to judicial review by mandamus action. The majority of the amendments pertained to judicial review of orders of removal or removal proceedings.¹⁷ Courts generally do not review removal orders or removal proceedings by means of mandamus actions. In fact, in one case in which this was tried, the court found that INA § 242(g) barred jurisdiction. The Second Circuit found that the court lacked jurisdiction to compel the government to execute a final order of deportation. *Duamutef v. INS*, 386 F.3d 172, 180-81 (2d Cir. 2004). Likewise, courts have held that § 242(g) bars a plaintiff from seeking to have removal proceedings commenced. *Chapinski v. Ziglar*, 278 F.3d 718, 721 (7th Cir. 2002); *Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999).

Mandamus is barred when a discretionary decision is covered by INA § 242(a)(2)(B)(i).¹⁸ However, for non-discretionary decisions, most courts have found that INA § 242(a)(2)(B)(i) does not apply. Through mandamus, the plaintiff may seek an order compelling the government to take action, but the court will not compel the government to grant or deny an application. Thus, because the plaintiff is not challenging a decision to deny relief, but rather the agency’s failure to act—which is nondiscretionary—the bar does not apply. *See Iddir*, 301 F.3d at 497-98; *but see Safadi*, 466 F. Supp. 2d at 700 (in combination with other provisions of the INA, § 242(a)(2)(B)(i) demonstrates that the process of adjustment of status is wholly discretionary).

¹⁶ Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

¹⁷ *See* amended INA §§ 242(a)(2)(A), (B) and (C); added § 242(a)(4); added § 242(a)(5); amended § 242(b)(9); and amended § 242(g).

¹⁸ INA § 242(a)(2)(B)(i) precludes judicial review of “any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.” However, Congress provided an exception for “constitutional claims or questions of law” raised in a petition for review “filed with an appropriate court of appeals.” INA § 242(a)(2)(D).

C. Consular Nonreviewability

If a person is seeking to compel a consular officer to process an application or petition abroad, the government likely will argue that such a claim is barred under the doctrine of consular nonreviewability. The courts generally have held that they lack authority to review consular decisions. *See, e.g., Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999).

However, the law is not firmly settled regarding the applicability of the consular nonreviewability doctrine to mandamus cases. *See Ahmed*, 328 F.3d at 388. And, in fact, the Ninth Circuit has found that it has authority to grant mandamus relief to compel a consular officer to act on a visa application. In *Patel*, 134 F.3d at 932, the court remanded for the district court to order the U.S. Consulate in Bombay, India to act on the plaintiff's visa application. Although the court acknowledged that "[n]ormally, a consular official's discretionary decision to grant or deny a visa petition is not subject to review," the court found mandamus jurisdiction when the consul "fail[s] to take an action." *Id.* at 931-32; *see also Assad v. Holder*, No. 2:13-00117, 2013 WL 5935631, *4 (D.N.J. Nov.1, 2013) (Embassy's failure to make final decision on visa application gives court jurisdiction to grant mandamus).

IV. PROCEDURES

Mandamus is a civil action and therefore, the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on the courts' websites.

Whom to Sue and Serve: Because mandamus actions seek to force an officer or employee of the government of the United States to take an action, who is named as a defendant depends on the type of action the suit seeks to compel. For example, a mandamus action to compel the USCIS to adjudicate an application may name the USCIS Service Center Director, Field Office Director, USCIS Director, and the Secretary of DHS as defendants. If security checks conducted by the FBI are cause for the delay, an action may also name the Director of the FBI and the Attorney General. It is better to be over inclusive in naming defendants, and if it is unclear which officer had the duty to act, also name the agency/department or even the United States.¹⁹

If the defendant is DHS (or a component or officer within DHS), the complaint must be served on the DHS Office of the General Counsel. For more information about identifying defendants and about service, please see the American Immigration Council's Practice Advisory, [*Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation*](#).

Venue: Venue for the mandamus action, unless otherwise specified in another statute, can be in the judicial district in which the defendant "resides"; in which a substantial part of the events or omissions giving rise to the claim occurred; or in which the plaintiff resides. 28 U.S.C. § 1391(e).²⁰

¹⁹ If the complaint turns out to be over-inclusive, the court may dismiss the improperly named defendants and continue with the proper defendants. *See Patel*, 134 F.3d at 933.

²⁰ The government has challenged venue when the action is brought where the plaintiff resides, arguing that a noncitizen plaintiff, even if a lawful permanent resident, does not "reside"

Filing Fee: Parties instituting a civil action in district court are required to pay a filing fee pursuant to 28 U.S.C. § 1914. Complaints may be accompanied by an application to proceed in *forma pauperis* if the plaintiff is unable to pay the filing fee.

Injunctive/Declaratory Relief: A mandamus suit is an action for affirmative relief, as compared to injunctive relief, which typically seeks to prohibit improper action. Although 28 U.S.C. § 1361 does not authorize injunctive relief, mandamus jurisdiction permits a flexible remedy. Furthermore, the same complaint may request declaratory, injunctive, and mandamus relief. For example, the court could declare a policy or regulation illegal, enjoin its enforcement, and order affirmative relief all at the same time.

Sample Mandamus Complaints: Links to three sample mandamus complaints prepared by AILA members Dree Collopy,²¹ Robert Pauw,²² and Thomas K. Ragland and Patrick Taurel—to compel the adjudication of a Form I-485 [adjustment application](#) (mandamus and declaratory judgment), a Form [I-130 immediate relative petition](#) (injunctive and mandamus relief) and a [Form I-526 immigrant petition for alien entrepreneur](#) (for EB-5) (mandamus and declaratory judgment)—are provided for reference.

in the United States for purposes of venue. Some courts have rejected this argument, *see, e.g., Kumar v. Mayorkas*, No. 12-06470, 2013 U.S. Dist. LEXIS 135924, *9-14 (N.D. Cal. Sept. 23, 2013); but others have agreed. *See Ou v. Chertoff*, No. C-07-3676 MMC, 2008 U.S. Dist. LEXIS 108848, *3-4 (N.D. Cal. Mar. 12, 2008) (finding, for venue purposes, an “alien is ‘assumed not to reside in the United States’” and transferring case to district court in Washington, DC) (internal citations omitted)); *Ibrahim v. Chertoff*, No. 06-2071, 2007 U.S. Dist. LEXIS 38352, *13 (S.D. Cal. May 24, 2007) (for venue purposes, nonresident aliens do not “reside” in any district, but nevertheless finding venue because events significant to the case occurred in the district). When the government challenges venue, some courts have found jurisdiction if there is some “act or omission” that can form a basis for venue pursuant to 28 U.S.C § 1391(e)(2). *See Ibrahim, id.; Taing v. Chertoff*, 526 F. Supp. 2d 177, 180 (D. Mass. 2007) (finding venue where the plaintiff resided in Lowell, Massachusetts; a substantial part of the events giving rise to the claim occurred in Eastern Massachusetts, and the office that denied the application was the USCIS Boston Region/District Office).

²¹ Reprinted with permission from AILA’s Immigration Litigation Toolbox (AILA 5th Ed. 2015).

²² Reprinted with permission from R. Pauw, *Litigating Immigration Cases in Federal Court* (AILA 3d Ed. 2013).