UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALIREZA HODJAT, Plaintiff, v. EMILIO T. GONZALEZ, Director of the U.S. Citizenship and Immigration Service; ALBERTO R. GONZALES, as Attorney General Of the United States, Defendants.	Case No. CV 07-936 GPS (VBKx) Assigned for All Purposes to the Honorable George P. Schiavelli **ORDER GRANTING DEFENDANTS' EX PARTE APPLICATION; ORDER DENYING DEFENDANTS' MOTION TO DISMISS; ORDER SETTING SCHEDULING CONFERENCE**

On February 9, 2007, Plaintiff filed his Complaint for declaratory and mandatory relief pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361,[1] and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"). Plaintiff alleges that the Emilio Gonzales, as Director of the United States Citizenship and Immigration

[1] The parties incorrectly refer to Section 1361 as the Declaratory Judgment Act.

Services ("CIS"), and Alberto Gonzalez, as Attorney General (collectively "Defendants"), have unreasonably delayed the adjudication of Plaintiff's I-485 application to adjust his status to lawful permanent resident ("LPR"). Plaintiff seeks an order from the Court requiring Defendants to complete his name check clearance and adjudicate his adjustment application.

On May 10, 2007, Defendants filed the present Motion to Dismiss for lack of jurisdiction and failure to state a valid claim. The Court heard arguments on June 25, 2007 and took the matter under submission.

On July 6, 2007, Defendants filed an Ex Parte Application requesting that the Court consider additional authorities. This Ex Parte Application was not opposed. Because Defendants demonstrated good cause for ex parte relief, the Court hereby **GRANTS** Defendants' Ex Parte Application.

Despite the additional authority submitted by Defendants, the Court **DENIES** Defendants' Motion to Dismiss for the reasons set forth below.

I. DEFENDANTS' MOTION TO DISMISS

A. Legal Standards

1. Rule 12(b)(1) – Lack Of Subject Matter Jurisdiction

Rule 12(b)(1) dismissal is proper if the Court lacks subject matter jurisdiction to adjudicate a plaintiff's claims. If a Rule 12(b)(1) challenge is raised, the plaintiff bears the burden of proof to demonstrate jurisdiction exists. *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).

2. Rule 12(b)(6) – Failure To State A Claim

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* The court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).

For all these reasons, "[d]ismissal is warranted only if it appears to a certainty that [plaintiff] would be entitled to no relief under any state of facts that could be proved." *NL Indus.*, 792 F.2d at 898. It is therefore only the extraordinary case in which dismissal is proper under Rule 12(b)(6). *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

B. Discussion

Defendants' Motion raises two issues: (1) whether the Court has jurisdiction over Plaintiff's Mandamus Act and APA claims and (2) whether the Court can provide the relief Plaintiff seeks. To date, the Ninth Circuit has not provided guidance on these issues and district courts are split. For the reasons set forth below, Defendants' Motion is **DENIED**.

1. The Court Has Jurisdiction Over Both Of Plaintiff's Claims

In February 2005, Plaintiff filed an I-485 application with CIS requesting an adjustment in his status to that of a lawful permanent resident ("LPR"). Two years later, Plaintiff filed the present action alleging CIS had unreasonably delayed adjudicating his application and asking the Court to order Defendants to complete Plaintiff's name check clearance and the adjudicate his I-485 application. Plaintiff claims the Court has jurisdiction to provide this relief under the Mandamus Act and APA. Defendants disagree and allege that neither the Mandamus Act nor the APA provide the Court with jurisdiction because Defendants' duty to process I-485 applications is discretionary.

Under the Mandamus Act, district courts are vested with 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. The extraordinary remedy of mandamus is limited, however, and courts only have the power to compel government agents to perform "ministerial and non-discretionary" actions. *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997).

The APA provides the district court with authority to compel an agency to act where an individual is "suffering a legal wrong because of an agency action", where an "agency action" includes an agency's failure to act. 5 U.S.C. §§ 502; 551 (13); 706(1). Jurisdiction under these portions of the APA are limited, however, to cases where: an agency owes a non-discretionary duty to act and unreasonably delayed in acting on that duty. *See Reyes et al. v. U.S. Dept. Of Homeland Security, et al.*, CV 06-6726 MMM (MANx) (Apr. 16, 2007) at *6 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-63 (2004)).

In light of the above, the jurisdictional requirements of the Mandamus Act and APA are virtually identical where a plaintiff is seeking to compel agency action. *See id.* at *6 n. 14*; Yu v. Brown*, 36 F.Supp.2d 922, 928 (D. N.M. 1999). Specifically, both laws provide the district court with jurisdiction to order government agents to act on "non-discretionary" duties. *See id.; Patel*, 134 F.3d at 931-32. Accordingly, the question of jurisdiction in the present case turns on whether Defendants' duty to process Plaintiff's I-485 application is discretionary.

The clear majority of courts have held that, although the Government is vested with full discretion in determining whether to adjust the status of an individual like Plaintiff to that of a LPR, the agency has a *non-discretionary duty* to make the determination. *See e.g., Reyes*, No. CIV 06-6726 MMM (MANx) (C.D. Cal. April 16, 2007); *Gelfer*, 2007 WL 902382 at *2; *Tjin-A-Tam v. U.S. Dep't of Homeland Sec.*, No. 05-2339-CIV, 2007 WL 781339, *3 (S.D. Fla. March 12, 2007); *Saleh v. Hansen*, No. CV 05-521, 2006 WL 2320232, *3 (S.D. Ohio Aug. 9, 2006); *Singh*, 470 F. Supp. 2d at 1067; *Bartolini v. Ashcroft*, 226 F. Supp. 2d 350, 353-54 (D. Conn. 2000); *Hu v. Reno*, No. CV 99-1136 BD, 2000 WL 425174, *3 (N.D. Tex. April 18, 2000);

Paunescu v. INS, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999); *Yu*, 36 F. Supp. 2d at 931 ("The fact that INS discretion in the ultimate decision whether to grant LPR status is simply irrelevant to the question of whether it has discretion to refuse to act on [p]laintiffs' application"); *Agbemaple v. INS*, No. 97 C 8547, 1998 WL 292441, *2 (N.D. Ill. May 18, 1998). In other words, nearly every court that has faced this issue held that the Government has a ministerial, non-discretionary duty to adjudicate Plaintiff's I-485 application.

Given this established line of cases, the Court rejects Defendants' argument that the Government has complete discretion in adjudicating I-485 applications, including discretion on how and when to adjudicate applications.

In rejecting Defendants' argument that the decision is discretionary, the Court additionally rejects Defendants' claim that 8 U.S.C. § 1252 (a)(2)(B) divests this Court of jurisdiction. *See Reyes*, CV 06-6726 MMM (MANx) (April 16, 2007) at *7-8 (holding that § 1252 (a)(2)(B) does not divest district courts of jurisdiction). Although courts are split on the effect of § 1252 in the immigration context,[2] this Court is inclined to follow Reyes and the only circuit court to address this issue, *Iddir v. INS*, 301 F.3d 492, 497-98 (7th Cir. 2002) (holding that § 1252 "only bars review of actual discretionary decisions to grant or deny relief" such as merit determinations on immigration applications).

Accordingly, the Court has jurisdiction over Plaintiff's claims under both the Mandamus Act and the APA.

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[2] *See e.g. Benik Israyelyan, et al. v. Alberto Gonzales, et al.*, CV 06-8114 SVW (VBKx) at **8-11, 18 (June 25, 2007) (listing cases on each side of the split over § 1252, but ultimately finding that this section barred district court review of I-485 applications).

2. Plaintiff Does Not Fail To State A Claim (Rule 12(b)(6))

While most judges in this district agree that there is jurisdiction to hear claims like Plaintiff's, they are sharply divided on whether or not an I-485 applicant's claim can survive a motion to dismiss under Rule 12(b)(6). *Compare Kawaguichi v. Poulos*, 07-324 RGK (SSx) (C.D. Cal. June 5, 2007) (holding I-485 applicant's claims fail) *with Reyes*, CV 06-6726 MMM (MANx) (C.D. Cal. April 16, 2007) (holding an I-485 applicant's claims survive). After reviewing these cases and others from around the nation, the Court concludes that Plaintiff's claim survives the present motion because the record does not demonstrate that the delay in processing Plaintiff's I-485 application was "reasonable" as a matter of law. Accordingly, Defendants' Motion is **DENIED**.

a. The Two Views In The Central District

As noted above, the judges in this district are sharply divided on whether or not an I-485 applicant can state a claim for relief under the Mandamus Act and APA. The two views taken in this district are represented in *Reyes* and Kawaguichi. As demonstrated below, this Court is persuaded by the position expressed in *Reyes*.

In *Reyes*, the court denied a Government motion to dismiss an I-485 applicant's action pursuant to the Mandamus Act and APA. *Reyes*, CV 06-6726 MMM (MANx) (April 16, 2007) at *8. In so holding, the *Reyes* court rejected the Government's claim that the court lacked jurisdiction because the statutory and regulatory provisions provided no "meaningful standard" against which to measure the time it takes the CIS to process I-485 applications. *Id.* at *6-7. The *Reyes* court rejected this position and found CIS had a duty to process I-485 applications "within a reasonable time," and that this was a manageable standard. *Id.* (*citing e.g., Singh*, 470 F.Supp.2d at 1067-70; *Kim*, 340 F.Supp.2d at 393-94; *Yu*, 36 F.Supp.2d at 934-35; *Razaq v. Poulos*, CV 06-2461 WDB, 2007 WL 61884 (N.D. Cal. Jan. 8, 2007) * 6 & nn. (stating that the "TRAC"

factors[3] the Ninth Circuit uses to determine whether a government agency has unreasonably delayed in APA cases should also be applied to mandamus requests in immigration cases)). Because neither party provided evidence explaining the cause of the delay in processing the I-485 application, the *Reyes* court denied the Government's motion to dismiss and determined an assessment of whether the delay was unreasonable would need to await a later stage of the proceedings.

By contrast, the *Kawaguichi* court granted the Government's motion to dismiss an I-485 applicant's action seeking relief under the Mandamus Act and APA. *Kawaguichi v. Poulos*, 07-324 RGK (SSx) (C.D. Cal. June 5, 2007) at *3. In so holding, the court found (1) I-485 applicants have no right to mandamus relief because there is no "clear" nondiscretionary duty for CIS to adjudicate applications in a particular time frame and (2) I-485 applicants have no claim under the APA because there is no manageable standard by which to determine whether CIS "unreasonably delayed" in exercising its discretion while processing applications. *Id.*

After reviewing these cases and cases from other districts, the Court concludes that the analysis in *Reyes* is appropriate.

As discussed in the previous section, the Government has a non-discretionary duty to adjudicate I-485 applications. This conclusion, based on a line of district cases dating back to 1998, undermines the position in *Kawaguichi* because that decision suggested the discretion afforded to CIS and the Attorney General (1) precludes the existence of a "clear" duty, which is a prerequisite for mandamus relief and (2) precludes the existence of a manageable standard upon which to judge whether CIS "unreasonably delayed" in processing I-485 applications. *Id.* The clear majority of cases finding that the Government lacks complete discretion when processing I-485 applications undermines the *Kawaguichi* court's determination.

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[3] The "TRAC" factors originated in the case *Telecommunications Research & Action v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

Because the Government does not have complete discretion, the question of whether CIS "unreasonably delayed" is manageable. As noted in *Reyes*, courts have routinely found that the "reasonable time" requirement in 5 U.S.C. § 555(b) coupled with precedent as to what constitutes an "unreasonable delay" is sufficiently definite for courts to determine whether the Government's processing of I-485 applications was completed in a "reasonable time." *Reyes*, CV 06-6726 MMM (MANx) (April 16, 2007) at *6-7. This line of cases is persuasive because the Ninth Circuit regularly uses a six-factor test to evaluate whether an agency has "unreasonably delayed" in performing its duties, thus demonstrating the propriety of such evaluations. *See Brower v. Evans*, 257 F.3d 1058, 1068-69 (9th Cir. 2001) (applying the "TRAC" factors to determine if an agency unreasonably delayed in performing studies under the APA.) Further, at least one district court in this circuit found that the six-factor test applies to both APA and Mandamus Act claims brought on behalf of an immigration plaintiff. *Razaq v. Poulos*, CV 06-2461 WDB, 2007 WL 61884 (N.D. Cal. Jan. 8, 2007) * 6 & nn.

Thus, based on the above, there are manageable standards by which to evaluate Mandamus Act and APA claims regarding the processing of I-485 applications.

b. It Is Unclear Whether Plaintiff's Application Was "Unreasonably Delayed"

In the present case, as in *Reyes*, the record is too undeveloped to determine whether CIS acted reasonably in processing Plaintiff's I-485 application. Although Defendants contend the delay in this case is not due to a lack of diligence by CIS, but instead by the FBI's delay in completing the security check, this is simply not enough to find that CIS acted reasonably as a matter of law.

Thus, in light of the high standard for dismissal under Rule 12(b)(6) and the flexibility of the six TRAC factors that the Court must use to evaluate the

reasonableness of the delay,[4] Defendants' Motion is **DENIED**.

II. SCHEDULING CONFERENCE

A scheduling conference in this matter will be held on **August 27, 2007 at 11:00 a.m.** The parties are to meet and prepare a joint report pursuant to Federal Rule of Civil Procedure 26 and the related Local Rules.

IT IS SO ORDERED.

Dated this 30th day of July, 2007

GEORGE P. SCHIAVELLI

Hon. George P. Schiavelli
United States District Judge

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[4] These six factors are:

> (1) the time agencies take to make decisions must be governed by a 'rule of reason'; (2) where Congress provided a time-table or other indication of the speed with which it expects the agency to proceed in the enabling statute, that scheme provides context for the 'rule of reason'; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare is at stake; (4) the court should consider the effect of expediting delayed action on agency activities of higher or competing nature; (5) the court should also take into account the nature and extent of the interests prejudiced or delayed; and (6) the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecommunications Research & Action, 750 F.2d at 80 (internal citations omitted).