AMERICAN IMMIGRATION LAW FOUNDATION

MANDAMUS JURISDICTION OVER DELAYED APPLICATIONS: RESPONDING TO THE GOVERNMENT'S MOTION TO DISMISS

By AILF Legal Action Center

Practice Advisory[1]
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In recent years, many non-citizens have filed mandamus and Administrative Procedure Act (APA) suits against USCIS in federal district court, seeking to force the agency to make decisions on long-delayed applications for immigration benefits. These suits do not ask the court to grant the immigration benefit, but instead to simply order the agency to act on an application.[2] The government frequently has challenged these suits with motions to dismiss claiming that the courts lack jurisdiction.

This practice advisory will outline in summary form arguments that can be made in response to the government's primary arguments, in district court, for dismissal of these cases on the basis of jurisdiction. It may not address all arguments advanced by the government in a particular case. For example, it does not address suits to remedy delays in naturalization cases brought under 8 U.S.C. § 1447(b). *See* AILF's practice advisory on naturalization delay suits for more on this topic, located at http://www.ailf.org/lac/lac_pa_index.shtml. Additionally, this practice advisory does not contain citations to all relevant court decisions and practitioners may want to supplement these arguments with precedent from their own court of appeals.

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[2] For more on mandamus suits, see AILF's mandamus issue page at http://www.ailf.org/lac/lit_issue_pages.shtml and AILF's mandamus practice advisory located at http://www.ailf.org/lac/lac_pa_index.shtml. For more on APA suits, see AILF's practice advisory on this topic, at http://www.ailf.org/lac/lac_pa_index.shtml.

AILF does not have the resources to participate as amicus in the district court cases in which these issues are raised. However, we are interested in appeals to the circuit courts of district court dismissals for lack of jurisdiction. Please contact us at clearinghouse@ailf.org if you are appealing a district court dismissal. Similarly, please contact us if you win the jurisdiction issue at the district court and the government appeals.

1. What has been happening with mandamus cases in the last few years?

In many of these mandamus cases addressing adjudicatory delay, the agency has argued in its motion to dismiss that the delay was due to pending security checks, often pinpointing the FBI name check process. These delays affected any application subject to the FBI name check; however a large number of mandamus cases brought in the last few years were suits to compel action on adjustment applications. Naturalization applicants who have not had an interview yet, and therefore could not bring a lawsuit under 8 U.S.C. § 1447(b),[3] also have brought mandamus and APA suits to compel adjudication of their applications.[4]

In the last year and a half, the agency has taken steps to resolve the long delays associated with the FBI name check process.[5] In a February 4, 2008 memorandum, USCIS announced that certain applications would be adjudicated even when FBI name checks were not complete - the memorandum advised the adjudicator to approve the application and proceed with the card issuance if the FBI fingerprint and IBIS check were complete and the FBI name check request had been pending for more than 180 days.[6] After the

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[3] Congress has provided a special statutory remedy under § 1447(b) for naturalization applicants whose applications have been pending for more than 120 days following the naturalization examination. *See also* AILF practice advisory on naturalization delay suits, located at http://www.ailf.org/lac/lac_pa_index.shtml and AILF's issue page on this topic located at http://www.ailf.org/lac/lit_issue_pages.shtml. Because this more specific statutory remedy exists, mandamus and APA claims are not necessary where the delay in a naturalization case occurs after the interview.

[4] Mandamus lawsuits to compel naturalization interviews became more important after USCIS adopted a policy of scheduling naturalization interviews only after the FBI name check process was complete. *See* 2006 USCIS Memo at http://www.ailf.org/lac/uscismemo060425.pdf (announcing the new USCIS policy). 8 U.S.C. § 1447(b) is a remedy for delays that occur *after* the interview has taken place, and thus is not available to address pre-interview delays. For more on naturalization delay litigation after the interview, see AILF's naturalization delay litigation issue page at http://www.ailf.org/lac/natz_delay0806.shtml.

[5] For more information about the agency guidance described in this section, see AILF's mandamus issue page at http://www.ailf.org/lac/clearinghouse_mandamus.shtml.

[6] This policy applied to Applications for Adjustment of Status (I-485); Applications for Waiver of Ground of Inadmissibility (I-601); Applications for Status as a Temporary Resident Under Section 245A of the Immigrant and Nationality Act (I-687); and Applications to Adjust Status from Temporary Permanent Resident (Under Section 245A of Public Law 99-603) (I-698).

issuance of the memorandum, many pending court cases were mooted out because the agency moved quickly to adjudicate plaintiffs' applications.

A February 9, 2009 USCIS memorandum superseded the February 4, 2008 memorandum, changing USCIS' policy of automatic approval. The February 2009 memorandum stated that adjudicators would have to seek authorization from USCIS Headquarters before automatically approving applications in which the FBI name check had not been completed in 180 days. According to the memorandum, the change in policy was due to improved FBI processing and response times – at the time, the FBI allegedly was returning name check results in 90 days and few, if any, name checks remained pending at the FBI for 180 days.

Most recently, in a June 22, 2009 press release, USCIS stated that, in partnership with the FBI, it had eliminated the FBI name check delays – officially described as the FBI National Name Check Program (NNCP) backlog. USCIS stated that it had met the goals set forth in a joint business plan between USCIS and the FBI announced on April 2, 2008: to achieve a sustainable performance level by the NNCP of completing 98 percent of name check requests submitted by USCIS within 30 days, and the remaining two percent within 90 days. USCIS stated in its press release that this performance level will become the new agency standard

Despite USCIS' resolution of most of the FBI name check delays, USCIS has invoked other reasons for delaying adjudication of applications. For example, in some cases USCIS has stated that "additional investigation" or "detailed review" is needed before it can complete the application. In other cases, the cause of the delay is simply unknown. These delays have also resulted in litigation.

No matter the cause of the delay, however, the government has not changed its arguments regarding jurisdiction in any of these cases and continues to move to dismiss mandamus/APA cases for alleged lack of jurisdiction. Some courts have granted government motions to dismiss for lack of jurisdiction, although the majority of courts have not.[7] No court of appeals has yet ruled on the jurisdictional issues. Generally, when plaintiffs have appealed a district court decision dismissing a mandamus case for lack of jurisdiction, USCIS adjudicates the application and the case is mooted out.

2. What are the general arguments that the government makes to dismiss a mandamus/APA case for lack of jurisdiction?

The government's motions to dismiss for lack of jurisdiction are filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (FRCP). The government generally makes some combination of the following four arguments, all of which center on alleged agency discretion with respect to adjudication of applications:

[7] For a listing of some recent cases, both favorable and unfavorable, *see* AILF's issue page on mandamus suits at http://www.ailf.org/lac/lit_issue_pages.shtml.

- That USCIS does not have a duty to adjudicate an application and therefore an essential element of the mandamus claim is missing;
- That the pace of adjudication of an application is discretionary and therefore not subject to mandamus relief;
- That adjudication of applications is committed to agency discretion by law and not subject to APA relief; and
- That 8 U.S.C. § 1252(a)(2)(B)(ii), which limits judicial review over certain discretionary issues in immigration cases, bars review of these mandamus and APA cases.

3. In responding to a motion to dismiss, can I argue that at least some of the issues raised by the government are not jurisdictional?

Yes. An initial response to a government motion to dismiss for lack of jurisdiction is to question whether, in fact, the government has raised a *jurisdictional* challenge. The Supreme Court has distinguished between jurisdiction – which is the court's power to hear the case – and the sufficiency of a valid cause of action. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1988); *see also Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003) (distinguishing between the court's power to adjudicate the case, which is jurisdictional, and the court's power to grant relief, which is not jurisdictional).

The failure to state a valid cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). The Supreme Court has made clear that:

> 'jurisdiction … is not defeated … by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the [ ] laws of the United States are given one construction and will be defeated if they are given another …'

Steel Co. v. Citizens for a Better Environment, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682, 685).

To win a mandamus claim on the merits, a plaintiff must show 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. 2002). Applying the principles discussed above, the Seventh Circuit has explained that in resolving whether mandamus jurisdiction is present in an immigration case, the allegations of the complaint are taken as true (unless patently frivolous) to avoid "tackling the merits under the ruse of assessing jurisdiction." *Ahmed*, 328 F.3d at 386-387. The court also held in *Ahmed* that the question of whether a statute imposed a "duty" on the government for purposes of mandamus relief was not a jurisdictional question. As the court explained:

> [T]he district court has jurisdiction under *§ 1361* [the mandamus statute] to determine whether the prerequisites for mandamus relief have been satisfied: does the plaintiff have a clear right to the relief sought; does the defendant have a duty to perform the act in question; and is there no other adequate remedy available. … A conclusion that any one of those prerequisites is missing should lead the district court to deny the petition, not [for lack of jurisdiction], but because the plaintiff has not demonstrated an entitlement to this form of extraordinary relief.

Ahmed, 328 F.3d at 386-87.

Thus, where the government claims that jurisdiction is lacking because a prerequisite to mandamus is missing, the plaintiff can respond by arguing that this is not a jurisdictional question and cannot lead to dismissal under Rule 12(b)(1). However, you also will want to address the substance of the challenge as an alternative way to dispute the government's motion. *See, e.g.,* § 3, below.

4. What response is there to the government argument that USCIS does not have a duty to adjudicate an application?

For a mandamus application to succeed, the plaintiff must show that the defendant has failed to carry out a statutory or regulatory duty owed to the plaintiff. *See, e.g., Work v. U.S.,* 267 U.S. 175, 177 (1925); *see also* AILF's mandamus practice advisory, located at http://www.ailf.org/lac/lac_pa_index.shtml. In some motions to dismiss, the government has argued that USCIS does not owe a legal duty to an adjustment applicant to adjudicate his or her application. *See, e.g., Villa v. DHS,* 607 F. Supp. 2d 359 (N.D.N.Y. 2009).

The first response to this will be to argue that this is not a jurisdictional question, and therefore does not subject the case to dismissal under Rule 12(b)(1) (see § 2, above). Additionally, however, you will want to argue that USCIS does owe a legal duty to an applicant to adjudicate the application. [8] The Immigration and Nationality Act (INA) and its implementing regulations impose this duty on USCIS. The APA also imposes an independent duty to adjudicate the application on USCIS. The following discussion uses

[8] Where the government's motion is only for dismissal for lack of jurisdiction under Rule 12(b)(1), you may succeed in convincing the court to deny the motion outright because the issues raised by the government are not jurisdictional. However, the government often argues in the alternative that a case should be dismissed under Rule 12(b)(6) for failure to state a claim. This will require a showing in response that the complaint does, in fact, include all of the substantive requirements necessary for mandamus and APA actions. Thus, when the government makes an alternative 12(b)(6) claim, you will need to address the substance of the cause of action. Moreover, it is a good idea to address the substantive issues challenged by the government – such as the existence of a governmental duty – even where the government's motion is based solely on Rule 12(b)(1), since the court could rule against you on the question of whether the government has stated a jurisdictional challenge.

adjustment applications as an example, but similar arguments may be available for other types of applications.

a. How do the INA and regulations impose a duty to adjudicate an adjustment application on USCIS?

When viewed as a whole, the INA and implementing regulations demonstrate that Congress intended to impose a duty on USCIS to adjudicate all properly filed applications and that the agency, through its regulations, carried out this intent. While the adjustment statute gives USCIS discretion about the actual decision, Congress did not intend that USCIS have the discretion to not decide an application.

i. The imposition of a mandatory adjudication fee creates a duty to actually decide the application.

Congress intended that USCIS would charge a fee to cover the cost of adjudicating benefit applications such as those for adjustment. *See* 8 U.S.C. § 1356(m). The regulations mandate that a non-refundable adjudication fee be paid in advance. *See* 8 C.F.R. §§ 103.2(a)(1) and (a)(7). In 2007, the fee for an adjustment application was increased to $905 from $305 for each applicant. *See* 72 Fed. Reg. 29851 (May 30, 2007). USCIS made clear that the reason for the increase was to insure that the adjudication fee covered the full cost of adjudicating an application. *Id.* It is untenable for the government to charge a $905 fee for adjudication costs of each adjustment application and then to argue it has no duty to adjudicate a properly filed application.

ii. Because the INA and regulations impose a duty to issue a decision, these provisions also impose a duty to adjudicate the application.

The INA mandates that USCIS record a non-citizen's lawful admission to permanent residence "upon approval" of an adjustment application. 8 U.S.C. § 1255(b). This duty implicitly requires the adjudication of all applications to determine those that are to be approved. Moreover, the duty to make a decision on all applications is explicit in the regulations. *See, e.g.*, 8 C.F.R. § 103.2(b)(19); 8 C.F.R. § 245.2(a)(5). Additionally, the instructions to the adjustment application inform an applicant that he or she will be notified in writing of a decision on the application. The instructions are incorporated into the regulations, with the same effect. *See, e.g.*, 8 C.F.R. § 103.2(a)(1).

The non-discretionary, ministerial duty of notifying an applicant of a decision cannot be carried out unless the application is decided. Thus, the duty to make a decision and notify the applicant carries with it a duty to adjudicate the application.

iii. The remaining regulatory structure demonstrates that USCIS has a duty to adjudicate the application.

Other regulations presume that a decision must be made on all applications, thus underscoring the intent discussed above. For example, several regulations dictate how certain applications must be decided. *See* 8 C.F.R. §§ 103.2(b)(12); 103.2(b)(14); 103.2(b)(8)(i). Other regulations dictate the sequence of the adjudicatory process. *See, e.g.,* 8 C.F.R. § 103.2(b)(6); 103.2(b)(8)(ii)-(iv); 103.3(a)(1); 103.2(b)(16); 245.2(a)(5). Finally, one regulation specifically imposes a duty on USCIS to make a decision upon the request of the applicant, even in the absence of all requested evidence. 8 C.F.R. § 103.2(b)(14). It would make no sense for the government to have imposed on itself a duty to make a decision where not all evidence is submitted if no such duty existed in cases in which all requested evidence is submitted.

iv. The limited flexibility in the regulations for processing an application does not absolve USCIS of the duty to adjudicate it.

The government frequently argues that the adjudication process is entirely discretionary and cites to several regulations that provide limited flexibility. In fact, these regulations do not say anything about the agency's ultimate duty to adjudicate an adjustment application. To the contrary, one of the regulations – which allows USCIS to waive an adjustment interview – actually works to speed up the adjudication process. 8 C.F.R. § 245.6.

In some cases, the government has relied on the regulation that allows USCIS to temporarily withhold adjudication in certain limited circumstances. *See* 8 C.F.R. § 103.2(b)(18). Contrary to the government's argument, this regulation only provides an *exception* to the normal adjudicatory process. The normal adjudicatory process – as evidenced by the statutory and regulatory scheme in full – does not allow for even a temporary withholding of adjudication. As an exception to the normal adjudicatory process, § 103.2(b)(18) can only be implemented in accordance with its strict requirements.

Even under this regulation, the agency does not have discretion to not ever decide an application. Moreover, in many cases, USCIS will not have applied the regulation to your client, but only will have mentioned it in their briefing to the district court. If this is the case, be sure to argue that the regulation is irrelevant to the case because it was not applied in the case. *See, e.g.*, *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1166 (N.D. Cal. 2007) (§ 103.2(b)(18) inapplicable where defendants provide no evidence it was used in the case); *Toor v. Still*, 2007 U.S. Dist. LEXIS 53173, *11 (N.D. Cal. July 10, 2007) (same); *Elmalky v. Upchurch*, 2007 U.S. Dist. LEXIS 22353, *13 (N.D. Tex. Mar. 28, 2007) (same).

b. Does the recently issued USCIS FBI Name Check Memoranda reflect the existence of a duty on USCIS to adjudicate an application?

The February 4, 2008 USCIS memorandum, "Revised National Security Adjudication and Reporting Requirements," stated that, for certain applicants, after a FBI fingerprint and IBIS check have been completed and the FBI name check request has been pending for more than 180 days, *the adjudicator shall approve the application and proceed with the card issuance*. The language used in the memorandum – that the USCIS adjudicator "shall approve" the pending application and "shall . . . proceed" to issue the appropriate card 180 days after the request is received - acknowledged USCIS' understanding of its duty to adjudicate certain applications, even in instances where the name check was not complete.

Although, in February 2009, the agency changed its position regarding automatic approval of applications prior to complete FBI name checks; it altered its policy because the FBI had drastically improved name check processing times. Therefore, both the February 4, 2008 memorandum and the February 9, 2009 memorandum provide evidence of USCIS' intention to adjudicate applications within 180 days or less after the date that a name check request is received by the FBI.

While the agency has an independent duty to adjudicate applications under the INA, its implementing regulations and the APA, the February 4, 2008 and February 9, 2009 memoranda provides additional evidence of USCIS' recognition of this duty.

c. How does the APA impose an independent duty on USCIS to adjudicate an application?

Section 555(b) of the APA, 5 U.S.C. § 555(b), requires 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." A number of courts of appeals have held that § 555(b) creates a non-discretionary duty to conclude agency matters. *See, e.g., Friends of the Bow v. Thompson*, 124 F.3d 1210, 1220-21 (10th Cir. 1997); *Litton Microwave Cooking Prods. v. NLRB*, 949 F.2d 249, 253 (8th Cir. 1991); *Estate of French v. FERC*, 603 F.2d 1158 (5th Cir. 1979); and *Silverman v. NLRB*, 543 F.2d 428, 430 (2d Cir. 1976).

Moreover, § 555(b) requires that agency matters be resolved within a reasonable time. A violation of this duty is a sufficient basis for mandamus relief. *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987).

Courts have reached this same result in APA cases brought in the immigration context. *See, e.g., Villa v. United States Dep't of Homeland Sec.*, 607 F. Supp. 2d

359, 366 (N.D.N.Y 2009); *Toor v. Still*, 2007 U.S. Dist. LEXIS 53173, *4-5 (N.D. Cal. July 10, 2007); *Yue Yu v. Brown*, 36 F. Supp. 2d 922, 928 (D.N.M. 1999); *Xu v. Chertoff*, 2007 U.S. Dist. LEXIS 50027, *7 (D.N.J. July 11, 2007); and *Haidari v. Frazier*, 2006 U.S. Dist. LEXIS 89177, *9-10 (D. Minn. 2006).

5. Under the mandamus statute, does the agency's duty to act depend upon a statutory or regulatory timeframe?

No. Because § 555(b) of the APA mandates that an agency act within a reasonable time, courts have held that the underlying statute and regulations do not have to include specific timeframes.

The seminal case on assessing claims of agency delay, *TRAC v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), specifically acknowledges that courts will be called on to assess delay even in the absence of a statutory timeframe. The *TRAC* court lists six factors useful in assessing delay. *See TRAC*, 750 F.2d at 80. The second factor addresses cases in which Congress provided a timetable for agency action in the enabling statute. *Id.* By setting forth a single factor applicable only in cases where the enabling statute does provide a timeframe, the *TRAC* court necessarily contemplates that courts will assess delay even in the absence of timeframes. There are numerous other examples of courts assessing the reasonableness of delay under the APA in the absence of a deadline in the underlying statute. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1998); *Sierra Club*, 828 F.2d at 796-98; *Toor v. Still*, 2007 U.S. Dist. LEXIS 53173, at *12-13 (N.D. Cal. July 10, 2007); *Singh v. Still*, 470 F. Supp. 2d 1064, 1072 (N.D. Cal. 2007); *Kim v. Ashcroft*, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004).

In addition, the presence of a timeframe within one section of the INA and its absence in another, does not indicate Congress's intent to bar courts from reviewing the latter. The government frequently argues that 8 U.S.C. § 1447(b) provides a 120-day timeframe in which a naturalization application should be adjudicated after the completion of a naturalization "examination," and that the absence of such a time frame in the adjustment context indicates Congress' intent not to impose a time limit. Despite the absence of statutory timeframe for the adjudication of applications other than post-examination naturalization applications, Congress is presumed to know that the APA requires agency action within a reasonable period. Thus, Congress does not need to include a specific timeframe in every statute. In addition, courts have held that Congress must be explicit when an agency should not be subject to the APA's reasonableness standard. *See, e.g., Sierra Club*, 828 F.2d at 796-98.

Moreover, the February 4, 2008 USCIS memorandum on FBI name check procedures and subsequent USCIS memoranda have provided timeframes in which the FBI will complete name checks and USCIS will adjudicate certain applications. This stated agency policy recognizes a duty to complete certain applications within a certain time period.

Finally, Congress outlined what should be considered a reasonable processing time in The Immigration Services and Infrastructure Improvements Act of 2000. There,

Congress stated, "[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571. Some courts have found that 8 U.S.C. § 1571 provides a meaningful standard to assess the reasonableness of agency delay. *See e.g.*, *Houle v. Riding*, No. 07-1266, 2008 U.S. Dist. LEXIS 8482, at *19-20 (E.D. Cal. Jan. 28, 2008); *Chen v. Chertoff*, No. 06-176, 2007 U.S. Dist. LEXIS 64664, at *11-12 (W.D. Wash. April 30, 2007); *Konchitsky v. Chertoff*, No. 07-00294, 2007 U.S. Dist. LEXIS 53998, at *11 (N.D. Cal. July 13, 2007).

6. What is the response to the government's argument that the case is not subject to the APA?

The federal question statute, 28 U.S.C. § 1331, provides the court with jurisdiction over an APA suit. The APA provides the court with a cause of action for unreasonable agency delay. *See* AILF practice advisory on the APA located at http://www.ailf.org/lac/lac_pa_index.shtml. An exception to this APA cause of action is when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The government frequently argues that this exception applies because adjustment of status, including the adjudication of an application, is discretionary.

As discussed above, the government does not have discretion to refuse to adjudicate an adjustment application. Therefore, this exception does not apply for that reason alone. Additionally, this exception to the APA applies only in "rare" circumstances where discretion is entirely "unfettered" – that is, where a court would have no meaningful standards by which to judge the agency's action. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 190 (1993). Here, as explained above, both the INA and the regulations provide guidance by which to judge the agency's delay. *See, e.g., M.B. v. Quarantillo*, 301 F.3d 109, 112-113 (3d Cir. 2002) (finding that an agency's regulations could supply the "law to apply" in an APA case).

7. Does 8 U.S.C. § 1252(a)(2)(B)(ii) bar jurisdiction over these mandamus and APA cases?

No, there are strong arguments that this section does not bar review in these cases. By its specific terms, 8 U.S.C. § 1252(a)(2)(B)(ii) only bars review of a "decision or action" of the Attorney General or the Secretary of DHS, and *only* when such decision or action "is specified under this subchapter to be in the discretion" of the Attorney General or the Secretary of DHS.[9]

Many courts read this section narrowly and require that the grant of discretion be explicit in a relevant statutory provision. *See, e.g., Soltane v. U.S. Dept. of Justice*, 381 F.3d 143, 146 (3d Cir. 2004); *Spencer Enterprises v. United States*, 345 F.3d 683-92 (9th Cir. 2003); *Zafar v. U.S. Atty Gen.*, 461 F.3d 1360 (11th Cir. 2006); *Zhao v. Gonzales*, 404

[9] The subchapter consists of 8 U.S.C. §§ 1151 through 1363a. For more on this bar to discretionary decisions, see AILF's practice advisory on § 1252(a)(2)(B) located at http://www.ailf.org/lac/lac_pa_index.shtml.

F.3d 295, 303 (5th Cir. 2005). Here, the agency's failure to adjudicate an adjustment application is not "specified" in the adjustment statute as being within the agency's discretion. 8 U.S.C. § 1255 authorizes discretion to grant or deny an adjustment application, but does not specify any agency authority to fail to act on an adjustment application. *See, e.g., Sharadanant v. USCIS*, 543 F. Supp. 2d 1071, 1075 (D.N.D. 2008); *Duan v. Zamberry*, 2007 U.S. LEXIS 12697, *6 (W.D. Pa. Feb. 23, 2007) *quoted in Linville v. Barrows*, 498 F. Supp. 2d 1278, 1282 (W.D. Okla. 2007); *Yang Tang v. Chertoff*, 2007 U.S. Dist. LEXIS 46030, *10 (D. Mass. June 10, 2007); *but see Bugulu v. Gonzalez*, 490 F. Supp. 2d 965, 967 (W.D. Wis. 2007) (holding that § 1252(a)(2)(B)(ii) barred review of a delayed adjustment application).

Additionally, § 1252(a)(2)(B)(ii) does not apply because the failure to adjudicate an adjustment application is not a "decision or action" within the meaning of this section. *See, e.g., Iddir v. INS*, 301 F. 3d 492, 497-98 (7th Cir. 2002). The first step in interpreting Congressional intent is to examine the plain meaning of the statute. Courts must narrowly interpret bars to judicial review and may only limit review where the plain language of the statute indicates that review is precluded. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Here, the plain meaning of the word "action" does not include the pace of adjudication or agency delay. *See* Black's Law Dictionary 28 (7th ed. 1999) (defining "action" as the "process of doing something" or a "thing done"). Further, the plain meaning of "action" also does not incorporate the agency's failure to act. Any other interpretation would distort the meaning of "action," a word that implies an affirmative step in the adjudication process or an actual decision on the application, and expand this meaning to include the opposite of "action," namely, inaction. This is not a permissible construction of the plain language of § 1252(a)(2)(B)(ii).

8. Can these arguments be used in naturalization cases?

Yes, as mentioned, in some cases, an extensive delay occurs prior to the interview and § 1447(b) is not available as a remedy. In cases addressing pre-interview delay, a mandamus and APA action might be appropriate. If so, the government may move to dismiss for the reasons discussed here, and these counter-arguments would be appropriate. *See* AILF's mandamus issue page (http://www.ailf.org/lac/clearinghouse_mandamus.shtml) for examples of pre-interview naturalization mandamus and APA cases.