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Mandamus Litigation in Federal Court By James P. McCollom, Jr.

A. Yu v. Brown, 36 F.Supp.2d 922 (D. N.M. 1999)

I. Jurisdiction

28 U.S.C. § 1331 (Federal question jurisdiction)

“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

1331 and APA 706(1) combine to provide federal subject matter jurisdiction

“The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate.”

Califano at 105

706(1) (providing that courts shall "compel agency action unlawfully withheld or unreasonably delayed").

II. Duty to Act

Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794, 798 (5th Cir. 1960)

Non-discretionary duty to process adjustment of status applications as well as all other applications.

There is a difference between the INS's discretion over *how* to resolve an application and the INS's discretion over *whether* it resolves an application

III. Within a reasonable time APA 555(b)

"...With 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."

"What constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." *Yu* at 935

B. *Mustafa v. Pasquarell*, 2006 WL 488399 (WD Tex 2006)

1. The Mandamus Act 28 U.S.C. § 1361

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Fifth Circuit Court of Appeals recognizes that mandamus is an "extraordinary remedy" and requires mandamus plaintiffs to satisfy three jurisdictional prerequisites: (1) the plaintiff has a clear right to the relief sought; (2) the defendant holds a plainly defined and mandatory, nondiscretionary duty to do the act in question; and (3) no other adequate remedy is available. *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir.1992); *United States v. O'Neil*, 767 F.2d 1111, 1112 (5th Cir.1985)

2. The Federal Regulations

8 CFR § 103.2 made CIS actions discretionary

(7) Testimony. The Service may require the taking of testimony, and may direct any necessary investigation. When a statement is taken from and signed by a person, he or she shall, upon request, be given a copy without fee. Any allegations made subsequent to filing an application or petition which are in addition to, or in substitution for, those originally made, shall be filed in the same manner as the original application, petition, or document, and acknowledged under oath thereon.

(18) Withholding adjudication. A district director may authorize withholding adjudication of a visa petition or other application if the district director determines that an investigation has been undertaken involving a matter relating to eligibility or the exercise of discretion, where applicable, in connection with the application or petition, and that the disclosure of information to the applicant or petitioner in connection with the adjudication of the application or petition would prejudice the ongoing investigation. If an investigation has been undertaken and has not been completed within one year of its inception, the district director shall review the matter and determine whether adjudication of the petition or application should be held in abeyance for six months or until the investigation is completed, whichever comes sooner. If, after six months of the district director's determination, the investigation has not been completed, the matter shall be reviewed again by the district director and, if he/she concludes that more time is needed to complete the investigation, adjudication may be held in abeyance for up to another six months. If

the investigation is not completed at the end of that time, the matter shall be referred to the regional commissioner, who may authorize that adjudication be held in abeyance for another six months. Thereafter, if the Associate Commissioner, Examinations, with the concurrence of the Associate Commissioner, Enforcement, determines it is necessary to continue to withhold adjudication pending completion of the investigation, he/she shall review that determination every six months.

3. Under 5 U.S.C. § 701(a)(2), cannot compel action committed to agency discretion

See also: *Zahani v. Neufeld*, 2006 WL 2246211 (MD Fla 2006)

Gemini Realty, Inc. v. Gonzalez, 2006 WL 2927562 (MD Fla 2006)

3. *Safadi v. Howard*, 2006 WL 3780417 (ED Va 2006) (J.Ellis)

1. 8 U.S.C. § 1252(a)(2)(B)(ii) Jurisdiction Stripping Provision

8 U.S.C.A. § 1252

1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have 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 or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

2. 8 U.S.C.A. § 1255

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

3. No Jurisdiction

“In sum, § 1255(a) vests USCIS with discretion over the *entire process* of adjustment application adjudication. As such, § 1252(a)(2)(B)(ii) precludes judicial review of any "action," meaning any act or series of acts, included within the ongoing adjudication process and the pace at which that action proceeds.” (emphasis added)

4. *Alkenani v. Barrows*, 356 F.Supp.2d 652 (N.D. Tex 2005)

1. Administrative Procedures Act

“Although immigration officials are vested with broad discretion in making the ultimate decision whether to grant or deny an application for naturalization, they have a non-discretionary duty to process the application within a reasonable time.” at 656.

“ ... subject matter jurisdiction is proper under the APA and 28 U.S.C. § 1331.” at 656.

2. Mandamus Act

“In the instant case, petitioner must establish: (1) that he has a clear right to have his naturalization application adjudicated; (2) that respondents have a nondiscretionary duty to rule on his application; and (3) that he has no other adequate remedy.” at 657.

“The court has already determined that respondents have a clear duty to process petitioner's application for naturalization within a reasonable time. *See also* 5 U.S.C. § 555(b) (agency required to conclude a matter presented to it "within a reasonable time").” at 657

“However, the court is not convinced that the 15-month delay in deciding petitioner's appeal is unreasonable under the unique circumstances of this case. The evidence shows that the immigration service is still awaiting the results of a fingerprint comparison, or "name check," on petitioner.” at 657.

“Unfortunately, delays of this nature are inevitable and becoming more frequent in light of heightened security concerns in the post-911 world.” at 657 (emphasis added).

See Singh v. Still, 2006 WL 3898174 (ND Ca 2006) (District Judge ordered I-485 to be adjudicated that had been pending for 7 years) (Asylee) (Name checks pending)

5. Naturalization 1447(b)

8 U.S.C. § 1447(b) states:

If there is a failure to make a determination under section 335 before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

Danilov v. Aguirre, 370 F.Supp. 2d 441 (E.D. Va., May 26, 2005) (J. Ellis) **“process”**

El-Daour v. Chertoff, 417 F.Supp2d 679, 681 (W.D. Pa., Aug. 26, 2005)

6. Consular processing

American Academy of Religion v. Chertoff, 463 F.Supp.2d 400 (S.D. NY 2006)

Patel v. Reno, 134 F.3d 929, 932 (9th Cir.1998)

Raduga USA Corp. v. Dep't of State, 440 F.Supp.2d 1140, 1149 (S.D.Cal.2005)

Doctrine of Consular nonreviewability