



# LITIGATING SIJS DELAY CASES: MANDAMUS and APA



National Immigration Litigation Alliance  
in collaboration with Children's Immigration Law Academy  
January 2020

# CILA-NILA Partnership



Provide trainings, resources and technical assistance (Texas) related to appellate and litigation practice



Some emphasis on matters originating within Fifth Circuit



Topics to include:

- *Briefing Strategies for Winning at the BIA*
- *Introduction to Federal Court Practice*
- *Administrative Procedures Act (APA) Actions after SIJS Denials*
- *Texas Habeas Petitions and Texas Mandamus Actions 101*
- *Petitions for Review and Judicial Stays of Removal (5<sup>th</sup> Circuit)*
- *Attorneys Fees Under the Equal Access to Justice Act*

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**Texas –  
Technical Assistance,  
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Technical Assistance**

# Reasons to file a delay case

- 8 U.S.C. § 1232(d)(2)
  - Requires that all applications for special immigrant status (I-360 petitions) be adjudicated “not later than 180 days after the application is filed”
- USCIS routinely takes much longer to adjudicate these petitions
- Filing the action may result in quick decision without need to fully litigate the case
- Priority date for adjustment may be current

# Reasons why litigation may not be warranted

- Both mandamus and APA provide a remedy for the delay but not a guarantee that the I-360 will be approved
  - Court has no authority to rule on the merits
  - It can only order agency to make a decision more quickly
- Special considerations if minor in removal proceedings
  - Cannot file for adjustment until a visa number becomes available
  - As long as I-360 pending, better chance of a continuance
  - Once I-360 approved, IJ may refuse continuance if minor has extended period before visa number becomes available
  - Often a problem for those from Guatemala, Honduras, El Salvador and Mexico

# Mandamus vs APA

- Similarities:
  - Largely the same standards
  - Same relief: court order compelling agency to act more quickly
- Differences:
  - Mandamus not available if there is an adequate remedy at law
  - Some courts have found APA claim is such a remedy, precluding mandamus relief
- Plead both:
  - Gives you two possible avenues for relief
  - Do not know how court will rule

# Mandamus

- 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.
- Required elements:
  - The plaintiff has a clear right to relief;
  - The defendant has a clear duty to act; and
  - There is no other adequate remedy at law.

# Administrative Procedure Act

- 5 U.S.C. § 706(1)
  - The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed
- Elements of an APA delay claim:
  - The agency failed to take discrete action it was required to take; and
  - It unlawfully withheld that action; or
  - It unreasonably delayed that action



# Mandamus

- **Plaintiff has a clear right to the relief requested**
  - Zone of interest test
    - Determine the interests the statute was designed to protect
    - Determine if plaintiff's interest falls within interest statute designed to protect
- For SIJS, test is easily met

# Mandamus

- **Defendant owes a mandatory duty to plaintiff**
- Duty must be non-discretionary
  - Where there is a right to apply for a benefit, the agency has a nondiscretionary duty to adjudicate the application.
    - *See, e.g., M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 598 (W.D. Tex. 2019)
- Duty must be owed to the plaintiff
- How to determine whether the agency has a duty to act within a certain time period

# Mandamus

- **No adequate remedy at law**
- This includes both administrative and judicial remedies
  - *Wolcott v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011)
- A remedy is adequate if it can afford full relief
  - *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969)
- Government may argue that the APA is an adequate remedy

# APA

- **Agency failed to take discrete action it was required to take**
  - Courts have found this element identical to requirement in mandamus claim that the plaintiff have a clear right to a mandatory agency duty
  - *See, e.g., Sawan v. Chertoff*, 589 F. Supp. 2d 817, 829 (S.D. Tex. 2008)

# APA

- **Agency unlawfully withheld action**
- Some, but not all courts, have held that this standard is met where an agency has failed to meet a concrete statutory deadline, such as the 180-day adjudication deadline for I-360 petitions
  - *See, e.g., South Carolina v. United States*, 907 F.3d 742, 759 (4th Cir. 2018)
  - *Rosario v. USCIS*, 365 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018) (holding that USCIS was required to issue work authorization to certain asylum-seekers within 30-day regulatory deadline)
  - *Contra, e.g., Org. for Competitive Mkts. v. U.S. Dep't of Agric.*, 912 F.3d 455, 462 n.5 (8th Cir. 2018)

# APA

- **Agency action unreasonably delayed**
- Alternative to unlawfully withheld action
- Courts evaluate reasonableness based on six factors outlined in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984)
- These factors applied to both APA and mandamus claims

# APA

- **Unreasonable delay (cont'd)**
- TRAC factors:
  - (1) time to act governed by a “rule of reason;”
  - (2) statutory timeframe may supply content for this rule of reason;
  - (3) delays less tolerable when human health and welfare are at stake;
  - (4) effect of expediting delayed action on agency activities of a higher or competing priority;
  - (5) nature and extent of the interests prejudiced by delay; and
  - (6) court need not find any impropriety behind agency delay.

# Pleading basics

- Jurisdiction:
  - Mandamus: 28 U.S.C. § 1361
  - APA: 28 U.S.C. § 1331
- Venue:
  - 28 U.S.C. § 1391(e)
- Defendants to Sue:
  - The official responsible for making the decision



# Other delay situations

- Compelling least-restrictive-setting assessments by ICE
  - Issue in *Ramirez v. ICE*, Civil Action No.: 18-508 (RC) (D.D.C. July 2, 2020)
- Asylum adjudication delay
  - See [Mandamus Actions in the Asylum Context: Avoiding Dismissal and Proving the Case](#)
- U visa delays
  - *M.J.L. v. McAleenan*, 420 F. Supp. 3d 588 (W.D. Tex. 2019)
  - *Calderon-Ramirez v. McCament*, 877 F.3d 272 (7th Cir. 2017)
  - *Garcia v. DHS*, 2019 U.S. Dist. LEXIS 222683 (N.D. Ill. Dec. 30, 2019)

# THANK YOU FOR WATCHING!

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A project of the American Bar Association, funded by the Vera Institute of Justice

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CILA's

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