

LITIGATION TO CHALLENGE AGENCY DELAYS

Frequently Asked Questions

By H. Ronald Klasko*

1. Why is the adjudication of some applications delayed for long periods of time after normal processing time?

Although on occasion the reason for government adjudication delay may be an investigation of a particular factual or legal issue or even the government's mishandling or losing of a file, the very large percentage of delayed application are delayed because of pending security, name check or criminal clearances. Since these clearances are considered a matter of national security, the government will not provide any details regarding the type of clearances that are pending or any likely date for resolution of the clearances.

2. What is the chance that repetitive inquiries will expedite the adjudication of the application?

None.

3. What other alternatives exist to expedite the adjudication of the application?

When the problem is a delayed clearance, the only other alternative is filing a mandamus case in federal court. Even congressional or senatorial intervention will do nothing to expedite the clearance process.

* H. Ronald Klasko (rkasko@klaskolaw.com) is the Managing Partner of **Klasko, Rulon, Stock & Seltzer, LLP**, the only immigration law firm global partner advocate of NAFSA. With offices in New York and Philadelphia, Ron and his firm were chosen by clients and peers as one of the top six immigration firms in the country and "the strongest in the country in representing clients in the university research and medical sectors." He is a former National President of the *American Immigration Lawyers Association* and served for 3 years as the bar association's General Counsel. He has been Adjunct Professor of Immigration Law at Villanova University Law School and is a frequent lecturer on immigration law subjects. Mr. Klasko is selected annually for inclusion in Best Lawyers in America. Mr. Klasko is the recipient of the AILA Founders Award, bestowed upon the individual who has had the most positive impact on immigration law. He is a member of NAFSA and a frequent speaker at NAFSA conferences. His practice emphasizes representation of universities, hospitals and research institutions and their students, scholars, staff and employees.

4. What is a mandamus lawsuit?

A mandamus lawsuit requests a federal court judge to order the government to take action in a case. It does not and cannot request the judge to actually approve the case. If the judge believes that the delay is unreasonable, the judge may order the FBI to complete clearances and/or the USCIS to adjudicate the application within a specified period of time. Although the time specified by the judge may vary, it is often 30 to 90 days.

5. When do you recommend filing a mandamus case?

There is no correct or incorrect time. Certainly, it would be inadvisable to file before the expiration of normal processing times. Generally, we recommend waiting at least 1 ½ years after filing an adjustment of status application. Since many adjustment of status applications with pending security or name check clearances are approved within eighteen to thirty months after filing, the expense of a mandamus case may be saved by waiting longer than eighteen months. Our experience is that applications that are pending more than 2 ½ years often never get adjudicated or at least may be delayed for several more years. Another factor to be considered is that the longer the application has been pending, the greater the chance that a judge may consider the delay to be unreasonable.

6. How long does it take to get action after filing a mandamus case in federal court?

The answer varies greatly depending upon the Assistant U.S. Attorney (“AUSA”) assigned to the case and the judge assigned to the case. Some AUSAs will work with us to try to get the case resolved quickly. Some judges will get involved with the case quickly and force action. Although we have had some cases resolved in less than a month after filing of the complaint in federal court, three to six months after filing is more normal.

7. Under what circumstances will the government expedite the clearances and the adjudication after the filing of the mandamus case?

If the government is convinced that there are “compelling circumstances” that require expediting, the AUSA will make efforts to try to get the case expedited. Examples of this could be medical issues, issues of the person losing eligibility for the benefit if there is a further delay, issues regarding the national interest, etc. In addition, even when there are no “compelling circumstances,” our experience is that many applications get expedited after the filing of the complaint and before the judge has to get involved without any formal notification that the case is being expedited.

8. Will the government retaliate and deny the case as punishment for the filing of the mandamus case?

This is highly unlikely, especially since there are so many mandamus cases being filed. In addition, the government cannot just deny a case for no reason. Before we file a mandamus case, we review carefully the applicant's eligibility for the benefit sought (permanent residence or naturalization) to make certain that there is no basis for a denial.

9. What are the chances of success if a mandamus case is filed?

We have been successful on a very high percentage of these cases, but not 100%. Most judges agree that the grant of the relief in mandamus is appropriate with a long delayed application, but some judges do not. Also, the length of time in which the application is delayed may be a relevant issue affecting the chances of success.

10. Where does the mandamus case get filed?

The application is filed in federal district court in one of two places: either the federal district court with jurisdiction over the place where the foreign national lives or the federal district court in Washington, D.C. The only exception is on a naturalization case where the permanent resident alien has already been interviewed (called a "336(b) case"), which must be filed in the federal district court with jurisdiction over the place where the permanent resident lives.

11. Who should be named as a defendant in the mandamus complaint?

All government agencies involved in the adjudication of the application could be named. Normally, this includes USCIS (and often the local district director, the regional center director and the commissioner of USICS in Washington), the Department of Homeland Security and the Attorney General of the United States. It is also often a good idea to include as a defendant the FBI, which has the mandate to process the clearances.

12. Who represents the government?

The Assistant U.S. Attorney.

13. What is the government's likely response to the complaint?

The official response is usually a Motion to Dismiss in which the government attempts to convince the judge that a mandamus case is not appropriate for an adjustment of status or

a naturalization application. In some cases, the application is adjudicated before the government files its Motion to Dismiss.

14. What is the likelihood that the government’s Motion to Dismiss will be granted?

Although some judges agree with the reasons given to dismiss the application, our experience is that most judges agree with the legal argument that we provide in our Reply to the Motion to Dismiss and refuse to dismiss the mandamus case.

15. What happens if the Motion to Dismiss is granted?

In that event, the case is dismissed; and the mandamus possibility is gone. The foreign national remains in the exact same position he was in before the filing of the mandamus case.

16. What happens if the Motion to Dismiss is denied?

In most cases, the government voluntarily adjudicates the application before receiving a judge’s order requiring it to do so. If that does not happen, we request the judge to issue such an order requiring the adjudication of the application within a specified period of time.

17. Can the judge approve the application?

No. The judge can only order the FBI to complete the clearances and order USCIS to adjudicate the application within a specified period of time.

18. What are the reasons given by the government why the mandamus case should be dismissed?

The government usually raises some combination of the following defenses:

- cases involving national security are not appropriate for action by the federal court;
- the court should not allow the mandamus applicant to “jump ahead” of others standing in line;
- the government has complete discretion regarding how long to take in adjudicating an application, and its discretion is not subject to court review;
- the government has no duty to adjudicate the application;
- the amount of delay in a particular case is not “unreasonable.”

19. Can the judge order the government to pay attorneys fees?

If the judge issues an order in favor of the plaintiff (the foreign national) the judge can order the government to pay the foreign national's attorneys fees under the Equal Access to Justice Act.

20. Can an employer, including a university, be a party to the mandamus case?

When the mandamus case seeks action on a petition in which the employer (including a university) is the petitioner, the employer can and must be a plaintiff in the litigation.

21. Can a mandamus case be filed on behalf of someone outside of the United States?

There are more complicated issues involved when the mandamus case is filed on behalf of someone outside of the United States. It may be possible to file such an action if there is a U.S. petitioning employer and if the defendant is the Department of State in Washington rather than the U.S. Consulate overseas. The court would have to be convinced that it has jurisdiction over the case because of the action or inaction of the Department of State or other government entity in Washington, as opposed to the action or inaction of a U.S. Consulate overseas, since the court would likely hold that it has no jurisdiction over the U.S. Consulate overseas.

22. Are naturalization cases the same as adjustment of status cases?

Although the issues are a little bit different, a mandamus case can be filed for a long-pending naturalization applicant just as for a long-pending adjustment of status applicant. There are special provisions available if the naturalization applicant was interviewed and if no decision was made on the application for more than 120 days following the interview. In that event, the federal court judge can be requested to not only order USCIS to adjudicate the application but actually to have the federal court judge hold a hearing and decide the naturalization application.