NUTS & BOLTS OF FILING MANDAMUS ACTIONS BEFORE THE U.S. DISTRICT COURTS FOR THE EASTERN AND SOUTHERN DISTRICTS OF NEW YORK

By Jeffrey A. Feinbloom[1] and Thomas Vanasse[2]

I. Introduction

This article provides basic information and practice guidance on filing mandamus actions in federal district court to compel USCIS to complete adjudications on long-pending adjustment of status and naturalization cases. The mandamus remedy may be appropriate to address grievances other than severely delayed applications, and this advisory may be consulted for any mandamus action filed in the Eastern or Southern District of New York (EDNY/SDNY). This article does *not* cover Petitions for Hearing on Applications for Naturalization pursuant to section 336(b) of the Act, 8 U.S.C. § 1447(b).[3]

Most long-pending applications are the result of stalled FBI name checks and other purported "security" concerns. Attorneys should therefore be aware of a recent USCIS Headquarters Memorandum by Michael Aytes covering adjustment of status applications. "Where the application is otherwise approvable and the FBI name check request has been pending for more than 180 days, the adjudicator shall approve the I-485, I-601, I-687, or I-689 and proceed with card issuance." See "Revised National Security Adjudication and Reporting Requirements," Michael Aytes, Associate Director, Domestic Operations, HQ 70/23 & 70/28.1 (February 4, 2008) ("Aytes Memo") (copy attached). Thus, long-pending adjustments due to stalled name checks should soon be a distant, unhappy memory. Adjustment cases, however, are often delayed for other reasons. Moreover, the Aytes Memo expressly excludes naturalization applications from the new policy directive, and an increasing number of naturalization applicants are experiencing pre-interview delays, for which there is no distinct right of action under INA § 336(b). Mandamus thus provides a useful tool for advocates whose clients do not want, or cannot afford, to wait *ab infinito* for the agency to act on his or her case.

II. Pre-Filing Issues

Investigation: Attorneys must know all the facts, and thoroughly vet a client, before making a "federal case" out of a delayed immigration application. Ensure that your client is a good candidate for litigation and would not be "exposed" by enhanced agency scrutiny and/or a federal judge. "Clean" cases are the most appropriate for district court litigation. Practitioners must also carefully consider and review all options with a client prior to recommending litigation. It may

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[3] This provision creates a separate statutory right to compel government action on a naturalization application where there has been no decision within 120 days of the "examination" required under INA § 335. Please refer to the related article by David Kim, Esq. for a discussion of the "nuts & bolts" of filing a Petition for Hearing under INA § 336(b).

be prudent to have your client execute a Release, or an acknowledgment that you have advised the client of the potential risks associated with litigation, prior to commencing an action.

Theory of the Case: Practitioners must develop a strong legal theory of the case.[4] In addition to being aware of all the facts, you must know the law. Three elements must be established in order to succeed on a mandamus claim: (i) Plaintiff must have a "clear right" to the relief requested; (ii) the agency must have a "non-discretionary duty" to act and have failed to perform such duty within a reasonable period of time; and (iii) there must be no other adequate remedy available.[5] While the first two prongs are distinct, they are often interchangeable in the context of mandamus/"delay" litigation. As a general rule, the requisite criteria are satisfied in connection with long-delayed applications for adjustment and naturalization.[6]

Exhaustion/Due Diligence: While the doctrine of "exhaustion" does not apply *per se* in the mandamus context, mandamus requires the agency's failure to act within a "reasonable" period of time. Counsel should create a record of diligence before the agency to demonstrate the unreasonable nature of the contested action/inaction. Prior to alleging, in good faith, that judicial intervention is necessary because no other adequate remedy is available -- one of the three elements required to prevail -- counsel should be able to establish that the client has effectively exhausted his/her administrative remedies by attempting to have the case resolved at the agency level. It is thus advisable to submit at least one written status inquiry to the SDAO or Section Chief prior to instituting an action. Attorneys should follow appropriate escalation procedures in submitting inquiries to USCIS. It is also good practice to advise your client to contact his or her member of congress to request a congressional inquiry and to document these efforts. Although responses to congressional inquiries tend to yield boilerplate responses, such as your case "remains pending security clearance," congressional offices have unique access to the agency. Congressional liaison is also a component of creating a diligent record prior to seeking the Court's intervention.

Rules: All federal court cases, including mandamus actions, are governed by the Federal Rules of Civil Procedure. Practitioners should also obtain, and consult, the Local Rules of the district court where you intend to file your action. The Southern and Eastern Districts of New York follow the same local rules, which can be accessed online. The website for the Eastern District is: http://www.nyed.uscourts.gov. The website for the Southern District is: http://www.nysd.uscourts.gov.

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[4] The American Immigration Law Foundation has a Practice Advisory entitled, "MANDAMUS ACTIONS: AVOIDING DISMISSAL AND PROVING THE CASE," which is available on http://www.ailf.org/lac/lac_pa_081505.pdf and "MANDAMUS JURISDICTION OVER DELAYED APPLICATIONS: RESPONDING TO THE GOVERNMENT'S MOTION TO DISMISS," found at http://www.ailf.org/lac/mandamus-jurisdiction9-24-07%20PA.pdf. Another solid resource is Robert Paw's book entitled "LITIGATING CASES IN FEDERAL COURT," published by AILA in 2007.

[5] Iddir v. INS, 301 F.3d 492, 499 (7th Cir. 2002).

[6] Please refer to the accompanying article by H. Raymond Fasano, Esq. for a survey of district court cases involving mandamus claims.

Admission: Local Rule 1.3/"Admission to the Bar" governs admission to both EDNY and SDNY. Attorneys must be admitted to practice before the district court where the action will be filed. If you are not admitted to practice before the court, then you will need to apply for admission *pro hac vice* and adhere carefully to the Local Rules. Many out of state district courts require that you have designated local counsel in their districts for the purpose of accepting service of documents. In most cases, you will be able to file your district court action concurrently with an application for *pro hac vice* admission. You must consult the Local Rules or call the court clerk.

Location of Courts: The Southern District of New York is located at 500 Pearl Street, New York, NY 10007. This is near Foley Square, behind 26 Federal Plaza. The clerk's office is on the first floor in Room 120. The Eastern District of New York is located at 225 Cadman Plaza East, Brooklyn, NY 11201. It is located near the Brooklyn Bridge and the court's website provides directions.

III. Special Issues Relating to Naturalization Cases

"Lawfully" Admitted for Permanent Residence: A threshold requirement for naturalization is the lawful nature of your client's LPR status.[7] It is impossible to over-emphasize the importance of ensuring the lawfulness of your client's resident status prior to commencing and/or pursuing a mandamus action in the naturalization context. The enhanced agency scrutiny of a federal court action could result in tragic consequences for your client(s), including removal, if his/her LPR status may be deemed unlawful (for any number of reasons). It is thus critical to conduct a thorough investigation of the facts and law surrounding your client's naturalization application prior to instituting litigation (see Section II herein).

Distinct Statutory Provisions: Although causes of action under the mandamus statute may be materially identical whether you have an adjustment or naturalization case, the underlying statutory and regulatory provisions giving rise to the agency's non-discretionary duty to act are distinct. Adjustment of status is governed under Title II of the INA, whereas naturalization is governed by Title III. Accordingly, you want to be sure to cite the correct statutory provisions in your Complaint as well as any Brief of Memorandum of Law filed with the Court.

The Aytes Memo: As set forth in the Introduction to this article, the Aytes Memo (attached) expressly excludes applications for naturalization from the revised national security policy with regard to the adjudication of applications pending FBI name checks. The agency, therefore, will almost certainly argue that national security concerns override any mandatory duty to adjudicate N–400 applications within a reasonable period of time, or that any delays attributable to national security are reasonable as a matter of law. You should therefore be prepared to effectively counter these arguments.[8]

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[7] INA § 316(a)(1).

[8] The Center for Human Rights and Global Justice at the NYU School of Law (CHRGJ) recently published a report entitled, "Americans on Hold: Profiling, Citizenship, and the 'War on Terror'" (2007), which contains some outstanding research and policy considerations countering the government's purported justification for delayed

IV. Commencement of the Action

Venue: Venue for a mandamus action may be in any judicial district in which the plaintiff resides.[9] Venue could also be in any judicial district in which the defendant "resides" in which a substantial part of the events or omissions giving rise to the claim occurred.[10] This would be the judicial district of the local USCIS office.

Fees: The filing fee to commence a District Court action is $350.00. Complaints may be accompanied by an application *in forma pauperis* if the plaintiff is unable to pay the filing fee. The attorney admission fee is $185.00.

Parties: The named defendants should include the local District Director if it is a local district case. In New York, this would be Andrea Quarantillo, as Director, New York District, United States Citizenship and Immigration Services. You could also include Emilio T. Gonzales, as Director, United States Citizenship and Immigration Services; Michael Chertoff, Secretary, Department of Homeland Security. Naming either of these individuals in their official capacity should suffice. In appropriate cases -- i.e. where you have been notified by USCIS, or you have good reason to believe, that the basis for the delay is a stalled FBI name check -- you should also name Robert S. Mueller, III, as Director, Federal Bureau of Investigations.[11]

Forms to be Filed: Civil Cover Sheet; Summons ("original" plus 3 copies); and Complaint (original plus 3 copies). The Civil Cover Sheet and Summons may be downloaded from the court's website. Hard copies with filing fee (currently $350) may be mailed to the Court Clerk or personally delivered. If you file by mail you should include a return envelope for a file-stamped and dated copy of the Summons & Complaint with docket number.

Contents of the Complaint [samples attached]:

- Introduction: You should have a brief Introduction describing the case and the relief you are seeking.
- Jurisdiction: You must set forth the jurisdictional basis for the action. You may allege subject matter jurisdiction under the mandamus statute, 28 U.S.C. § 1361. You may also allege subject matter jurisdiction under the Federal Question Statute, 28 U.S.C. § 1331.

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naturalization adjudications. A copy of the report is attached to this article. Practitioners could, and should, incorporate this material, particularly Chapter VII.C, into any Brief or oral argument before the court. A documentary film based on the manuscript is currently in production. To contribute, support and/or get involved with this project, please visit www.chrgj.org or send an email to aohihrc@nyu.edu.

[9] 8 U.S.C. §1447(b).

[10] 28 U.S.C. § 1391(e).

[11] The American Immigration Law Foundation has a Practice Advisory entitled, "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" found at http://www.ailf.org/lac/lac_pa_040706.pdf.

The court has jurisdiction over the mandamus action under 28 U.S.C. §1331 because it arises under the Administrative Procedure Act ("APA")(5U.S.C.§§702 and 704), and under the INA and regulations implementing it (title 8 of the C.F.R.). In a mandamus only suit it is best to include all these jurisdictional grounds.

- Venue: Venue of the action is proper under 28 U.S.C.§ 1391(e)(3) because Plaintiff resides in the judicial district, and no real property is involved in the action.
- Parties: You should describe the parties involved in the action including your client, the plaintiff and all of the named defendants above.
- Facts: Detailed factual allegations include biographical facts of the plaintiff. You should detail the date of filing of the immigration petition as well as the date and outcome of any USCIS interview. A detailed rendition of all the post-interview inquiries with immigration should also be included. Include the initial filing receipt, interview notice, USCIS responses to inquires and inquiries as exhibits.
- Cause(s) of Action: You will need to state that your client is fully eligible for the relief sought. You will have to make clear that the Immigration Service had a duty to act on your client's application and that the Agency has failed to act within a reasonable time period. You must indicate that the client has exhausted any administrative remedies that may have existed.
- Prayer for Relief: Ask the court to assume jurisdiction and to compel the immigration service to perform their duty to adjudicate the long-delayed application. Ask the court to grant attorney's fees and costs under the Equal Access to Justice Act.

V. Post-Filing Requirements

Summons & Complaint: Within 24 hours of commencing an action, plaintiffs are required to convert the Summons and Complaint into PDF documents and email them as attachments to: case_openings@nysd.uscourts.gov.[12] The Eastern District does this on your behalf, so the rule applies only in the Southern District. When sending the email to SDNY, the subject line of the email and the file name of the PDF document should list only the case number followed by the document description (e.g. "Re: 01cv1234-complaint). Note that you do not need access to ECF to comply with this procedure. Once the case is docketed and assigned to a judge, the Court will typically provide a copy of the individual judge's rules; if not, you should endeavor to obtain a copy yourself.

ECF: Electronic case filing (ECF) is required in both EDNY and SDNY. Counsel must register with the court's ECF system as soon as time permits following commencement of the action, if not already registered. Recognize that the ECF system is not the PACER system. Even if you already have a PACER password, you must obtain a new password for each district court's ECF system in order to electronically file documents in that court. Following commencement of the action in the traditional manner, everything is filed and docketed through ECF.

[12] 3rd Amended Instructions for Filing an Electronic Case or Appeal, www.nysd.uscourts.gov.

Service of Process: Service is governed by Rule 4(i) of the Federal Rules of Civil Procedure. You must serve all of the named defendants, along with the U.S. Attorney's office with jurisdiction over the district where suit is filed, as well as the U.S. Attorney General.[13] If you serve the local U.S. attorney's office by mail, the package should be addressed to "Civil Process Clerk at the Office of the United States Attorney". You also need to serve the Office of General Counsel, U.S. Department of Homeland Security, Washington DC 20528, although the failure to do so does not appear to render service defective.[14]

File the affidavit of service for the initiating document on the ECF system (do not send by email), then file the Affidavit (or Acknowledgment) of Service with the Summons attached in the traditional manner, on paper with the court clerk. All subsequent documents, including the Defendant's Answer, *must be filed electronically* on the ECF system at ecf.nysd.uscourts.gov for SDNY or ecf.nyed.uscourts.gov for EDNY.

Upon commencement of the action, the Court will send confirmation of filing via email as well as notification through the ECF system. You are responsible for monitoring the docket on your case through ECF. The court may call or send you emails regarding any filing requirements or scheduled judicial conferences, but not always. All announcements, including court Orders, are docketed through the ECF system.

Agency Reply: Defendant(s) will be represented either by an Assistant United States Attorney (AUSA) from the Southern or Eastern District, which is part of the Department of Justice, or by a "Special" AUSA that is actually housed with DHS/ICE. The agency has sixty (60) days to file an Answer or otherwise respond to the complaint.[15]

VI. Exploring an Early Resolution/Settlement

Many cases are resolved before the agency, and thereby rendered moot, prior to the filing of responsive papers. If you have a strong case, the AUSA will generally work with agency to get case resolved without expending too much time/energy/resources. Litigation is often the most effective means of focusing the attention of USCIS supervisory personnel to act on your client's case. To this end, it may be in your client's best interest to consent to multiple extension requests, but do so strategically and keep pressure on the agency to resolve the case in your favor.

The AUSA or SAUSA will typically contact counsel and request an extension if the matter cannot be resolved or "mooted" within the 60-day period. It is generally good practice to consent to at least one extension. This maintains a good working relationship with the AUSA,

[13] FRCP Rule 4(i)(1)(A).

[14] See 6 C.F.R. §5.42(a).

[15] FRCP Rule 12(a)(3).

with whom you may litigate many future cases, and it also allows the bureaucratic octopus to feed. A good AUSA wants to clear his/her docket of as many cases as possible and will often be an ally in terms of liaising with the agency (his/her client) and moving the matter towards adjudication, which is the stated goal of mandamus litigation, and hopefully a favorable resolution. Be sure to keep your eye on the prize. Prior to consenting to any extensions, inquire regarding the status of the underlying application as well as what steps, if any, the agency is taking to resolve the matter. Try to obtain as much information as possible, including tangible representations from the AUSA (if possible) in exchange for your consent to any extension(s), akin to a *quid pro quo*.

If the case cannot settle before it is time for the agency to respond, then the AUSA will file either an Answer (if it perceives the case to have merit) or a Motion to Dismiss (if it deems the case without merit).

VII. Judicial Conference

Upon the filing of an Answer, it is good practice to immediately request a pre-trial/status conference with court in order to move the case forward. This is typically accomplished informally by telephone call to chambers (scheduling with law secretary or clerk) or by written request, although you should consult the individual judge's rules regarding the scheduling of such a conference. Prior to the conference, you should contact the AUSA and attempt to work through any discovery issues.

The conference will be held either in the courtroom or in chambers. Be prepared! Many of these conferences are held on the record and some even turn into mini-hearings on the merits of the case. You may be compelled to stand at bar and argue various issues before the court. The judge may not know a great deal about immigration law, and has only your Complaint and the government's answer to review, so you should be prepared to formally address the court and advocate your position. Know beforehand what you want to get out of the conference, i.e. what interim "relief" you are seeking. More often than not, these conferences are purely procedural, where the judge will hear briefly from both sides and try to bring the parties towards a resolution. Following the initial conference, the Judge may issue a scheduling order with mandatory deadlines for each stage of the case.[16]

VIII. Motion Practice

In lieu of an Answer, the government may file a Motion to Dismiss or Motion for Summary Judgment. You will have the opportunity to defend against these motions, and you could win your case at this juncture if there are no factual issues.

In the event of factual disputes, you will be able to present evidence at a hearing. In the mandamus context, cases rarely involve factual disputes, so to the extent the agency elects to

[16] FRCP 16(b).

litigate, matters are routinely resolved through dispositive motion practice.

In the rare instance where the case presents a factual issue, judges will generally allow USCIS to depose your client, so you must be prepared for this possibility. Ensure that you obtain any and all discovery prior to exposing your client to deposition. Again, press your client to disclose all facts and any potential "skeletons" in the closet. Being surprised at a deposition is a worst-case scenario. It could make you look bad, and wind-up costing your client a lot more than his or her mandamus claim.

IX. Disposition

The vast majority of meritorious cases are favorably resolved. If the case settles or is mooted, be sure to obtain documentation from the agency confirming adjudication and/or conferral of the benefit sought prior to stipulating to dismiss.

If case is, or appears to have been, mooted by virtue of a denial, then you should explore the filing of a motion to amend the Complaint, if necessary and advisable, to include additional causes of action, including but not limited to an APA claim. Such a claim, however, could involve serious jurisdictional issues (adjustment being a discretionary remedy) as well as possible exhaustion issues (although you should argue that there is no administrative appeal of an adjustment denial, an MTR is not mandated by statute or applicable regulations, and your client cannot compel the issuance of an NTA). In the event of a denial, it may be advisable to explore other options, including re-filing of adjustment (or naturalization) *prior* to the potential issuance of a Notice to Appear.

X. EAJA Fees

If you are the "prevailing party," then you may be eligible to file a motion for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, et seq.[17] The motion must be filed within 30 days of a "final order." This means 60-90 days following the decision (assuming no appeal). Note that, in the event the case is mooted by agency action, although you may have been successful in achieving your goal, EAJA fees are generally not available. Under limited circumstances (i.e. where the case is not mooted by agency action but a favorable settlement is achieved), you should attempt to have any agreed upon Stipulation "so ordered" by the Court to preserve a claim for EAJA fees. Under this scenario, since no appeal is possible, any EAJA fee motion must be filed within 30 days of filing the so ordered Stipulation with the Court.

[17] Please refer to the related article by Paul O'Dwyer, Esq. for a detailed discussion regarding EAJA fees.