LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

**PRACTICE ADVISORY** [1]
**August 6, 2009**

# MANDAMUS ACTIONS: AVOIDING DISMISSAL AND PROVING THE CASE

This advisory provides basic information about filing an immigration-related mandamus action in federal district court. It discusses the required elements of a successful mandamus action as well as the jurisdictional concerns that sometimes arise. The information in this document is accurate and authoritative as of the date of this advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

Mandamus can be a relatively simple and quick remedy in situations where the government has failed to act when it has a duty to do so. However, there are a number of adverse published decisions, some of which are discussed in this advisory. Although it is helpful to understand these cases – and to identify the weaknesses in the courts' analyses – potential plaintiffs should not be discouraged. Most successful mandamus actions are unreported and/or do not result in written decisions. In fact, often, the filing of a mandamus action prompts the government to take whatever action is requested and the case ultimately is dismissed.

## I. INTRODUCTION

Mandamus can be used to compel administrative agencies to act. The Mandamus Act, codified at 28 U.S.C. § 1361 says, in its entirety:

> 1361. Action to compel an officer of the United States to perform his duty.
>
> 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 Mandamus Act authorizes the court to order a remedy. It does not provide independent, substantive grounds for a suit. A mandamus plaintiff must demonstrate 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). Under the Mandamus Act, the court may compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular manner, nor can it grant the relief the plaintiff seeks from the agency.

## II. JURISDICTION AND CAUSE OF ACTION

Plaintiffs in a mandamus action may allege subject matter jurisdiction under both the mandamus statute, 28 U.S.C. § 1361, and the federal question statute, 28 U.S.C. § 1331.[2] Generally, it is better to allege both grounds, in part because some courts have confused the issue of subject matter jurisdiction under § 1361, *see, e.g.*, footnote 2, and in part because the same complaint may seek mandamus relief and other forms of relief as well.

The Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.* does not provide an independent basis for subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977). However, the APA provides a basis for the suit when the government unreasonably delays action or fails to act. *See* 5 U.S.C. §§ 555(b) and 706(1). Thus, the plaintiff may allege the APA as a cause of action. *Id*. In many cases involving agency delay, the court will accept jurisdiction under 28 U.S.C. § 1331 and grant relief under the APA instead of the Mandamus Act. Therefore, it is additionally important to allege jurisdiction under 28 U.S.C. § 1331 and a cause of action under the APA.

## III. ELEMENTS OF A SUCCESSFUL MANDAMUS ACTION

A mandamus plaintiff must establish 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.

Not all courts analyze these issues the same way, or even consistently. Often, the courts mesh these issues or frame them differently. However, for clarity and completeness, this advisory addresses these issues individually.

[2] The court's subject matter jurisdiction is a separate issue from the court's authority to grant mandamus relief. *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003). Subject matter jurisdiction is a threshold question that determines whether the court has the power to think about the case in the first place. *Id*. at 387. After the court has determined that the petitioner's "claim is plausible enough to engage the court's jurisdiction," the court turns to the question of whether it has authority to grant the particular relief. *Id.*

The Seventh Circuit decision *Ahmed v. DHS* provides a good discussion of these two issues. Furthermore, *Ahmed* cites several cases where the courts have tended to collapse the question of subject matter jurisdiction into the analysis of the merits of the case. *See Ahmed*, 328 F.3d at 386; *see also Davis Associates v. Sec. of Dept. of Housing and Urban Dev.*, 498 F.2d 385, 388-89 (1st Cir. 1974).

## A. Does the Plaintiff Have a Clear Right?

A mandamus plaintiff must show that he or she has a clear right to the relief requested. Sometimes, the courts say that a person has a clear right when they fall within the "zone of interests" of a particular statute. This means that the interests the plaintiff seeks "to be protected are within those 'zone of interests' to be protected or regulated by the statute … in question."[3]

In immigration related mandamus actions, plaintiffs may identify a specific provision of the INA that creates a clear right to relief. The courts will look to the purpose of the statute – both the specific statutory provision in question, as well as the general purpose of the INA – to determine whether the mandamus plaintiff is an intended beneficiary of the statute. Said another way, the statute should indicate that the government owes a duty *to the plaintiff*.

In the adjustment context, courts have found that the INA establishes a clear right to relief. *See, e.g. Razik v. Perryman*, No. 02-5189, 2003 U.S. Dist. LEXIS 13818, *6-7 (N.D. Ill. Aug. 6, 2003) (courts have consistently held that 8 U.S.C. § 1255 provides a right to have an application for an adjustment of status adjudicated). For example, diversity lottery applicants have established that the INA confers a right to have their applications adjudicated. *See Iddir*, 301 F.3d at 500 (affirmed in *Ahmed v. DHS*, 328 F.3d 383 (7th Cir. 2003));[4] *Basova v. Ashcroft*, 373 F. Supp. 2d 192, 199 (E.D.N.Y. 2005); *Paunescu v. INS*, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999). Likewise, in *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999), the court said that applicants under the special immigrant juvenile program "fell within the zone of interest of the INA provisions for SIJ and LPR status."

Courts have also found that the INA establishes a clear right to relief in the context of delayed naturalization applications where the interview has not yet been conducted. *See Hadad v. Scharfen*, 08-22608, 2009 U.S. Dist. LEXIS 26147, *6-7 (S.D. Fla. Mar. 12, 2009) (finding 8 U.S.C. § 1446(d) creates a right to have the application for naturalization processed and a decision rendered); *Olayan v. Holder*, No. 08-715, 2009 U.S. Dist. LEXIS 12825, *11-12 (S.D. Ind. Feb. 17, 2009) (8 U.S.C. § 1445(c), § 1446(b) and § 1446(d) create right to have naturalization application adjudicated).[5]

In contrast, several courts have said that the INA does not create a clear right to relief in the context of application adjudication delays. *See Bayolo v. Swacina*, No. 09-21202, 2009 U.S. Dist. LEXIS 42604, *5-6 (S.D. Fla. May 11, 2009) (plaintiff did not demonstrate a clear right to relief because there is no provision in INA § 245(a) which sets a time limit for the Attorney General or USCIS to decide whether to adjust an applicant's status); *Castillo v. Rice*, 581 F. Supp. 2d 468 (S.D.N.Y. 2008) (no clear right under 8 U.S.C. §§ 1101(a)(15)(K)(i)-(ii), 1184(d),

[3] *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 150 (1970). The zone of interests test was first articulated by the Supreme Court in *Data Processing*. Although this case addressed the issue of standing, the zone of interests test was later used by some courts as a way to determine if the plaintiff has a clear right to relief for purposes of mandamus.

[4] In both *Iddir* and *Ahmed*, the court denied the mandamus relief on other grounds, i.e., that the government did not have a duty to the plaintiffs.

[5] To remedy delays following a naturalization interview, an applicant can seek relief under INA § 336(b), 8 U.S.C. § 1446(b). *See* the American Immigration Council's practice advisory "How to Get Judicial Relief Under 8 USC § 1447(b) for a Stalled Naturalization Application."

and 1184(r) to expedite scheduling of K-1 or K-3 visa interviews by United States consulates).

Courts have similarly held that the INA does not create a right to have deportation proceedings initiated. *See Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847-48 (10th Cir. 1995); *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992); *Gonzalez v. INS*, 867 F.2d 1108, 1109-10 (8th Cir. 1989). In these cases, the plaintiffs – immigrants who were serving criminal sentences – argued that former INA § 242(i) created a clear right to an immediate deportation hearing. Former section 242(i) said that the Attorney General shall initiate deportation proceedings "as expeditiously as possible after the date of conviction." The courts concluded that this provision was enacted not to benefit the noncitizens, but instead, to address prison overcrowding and avoid the costs of detaining noncitizens; thus the detainees themselves are outside of the "zone of interest" of the statute.[6]

Apart from the INA, in the context of agency delay, courts have also found the right to relief in the APA. *See Villa v. DHS*, 607 F. Supp. 2d 359, 365 (N.D.N.Y. 2009) (§555(b) of the APA requires USCIS to adjudicate applications within a reasonable time).

## B. Is there a Mandatory Duty?

In addition to having a clear right to relief, the plaintiff must show that *the defendant owes* him or her a duty.[7] The courts have said that this duty must be mandatory or ministerial, but mandamus actions can be used to compel the government to exercise its discretion in a case where the government has failed to take any action. For example, the court may order the defendant to adjudicate an application or petition. *See, e.g., Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (duty to adjudicate applications under the diversity lottery program); *Patel v. Ren*o, 134 F.3d 929, 933 (9th Cir. 1997) (duty to adjudicate visa application); *Villa v. DHS*, 607 F. Supp. 2d 359, 363 (N.D.N.Y 2009) (duty to adjudicate adjustment application in a reasonable amount of time); *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999) (duty to process SIJ application in a reasonable amount of time). *But see Orlov v. Howard*, 523 F. Supp. 2d 30, 38 (D.D.C. 2007) (defendants have no duty to increase the pace at which they are adjudicating an adjustment application).

Many – though not all – courts correctly distinguish between the government's duty to take *some* discretionary action and the actual discretionary decision that the government makes. A court generally will not order the defendant to exercise its discretion in any particular manner. *See*

[6] The Ninth Circuit initially found that detained immigrants were within the zone of interests protected by former INA § 242(i). *Garcia v. Taylor*, 40 F.3d 299 (9th Cir. 1994); *Silveyra v. Mozhcorak*, 989 F.2d 1012 (9th Cir. 1993). In *Campos*, however, the court held that a subsequent amendment to the INA, which provided that section 242(i) "shall not be construed to create any substantive or procedural right or benefit," overrules its prior rulings in *Garcia* and *Silveyra*. *Campos*, 62 F.3d at 314 (citing § 225 of the Immigration and Nationality Technical Corrections Act of 1994). *See also Hernandez-Avalos*, 50 F.3d at 848 (citing § 225 as barring detainees' standing).

[7] *See, e.g., Naporano Metal & Iron Co. v. Sec'y of Labor*, 529 F.2d 537 (3d Cir. 1976) (duty to issue labor certification); *Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D.P.A. 2003) (ministerial duty to issue derivative citizenship); *Rios v. Aguirre*, 276 F. Supp. 2d 1195, 199-1200 (D. Kan. 2003) (no duty to entertain motion to reconsider).

*Silveyra v. Moschorak*, 989 F.2d 1012, 1015 (9th Cir. 1993). ("[m]andamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised.'"); *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (the Attorney General's has discretion to grant or deny an application, but does not have discretion to simply never adjudicate an adjustment application).

Rather, the court will order the government to take *some* action. As a result, be aware that filing a mandamus action may result in a prompt denial of the application by the agency.

The question of the defendant's mandatory duty is closely related to the question of the plaintiff's clear right to relief, and in many cases, the answer to these questions will be same. However, just because there is a clear right to relief does not mean that the government has an affirmative duty and vice versa. For example, in *Iddir v. INS*, the plaintiffs had a clear right to have their adjustment applications adjudicated, but because defendants had no statutory authority to issue the visa after the fiscal year statutory deadline had passed, the defendants no longer had a duty to adjudicate the applications. 301 F.3d 492, 500-01 (7th Cir. 2002).[8] Alternatively, in *Giddings v. INS*, the court held that although the INA imposes "a duty on the Attorney General to deport criminal aliens, we stop short of concluding that this created a duty *owed to the alien*." 979 F.2d 1104, 1110 (5th Cir. 1992). In doing so, the court noted the distinction between "imposing a duty on a government official and vesting a right in a particular individual." *Id.* (citing *Gonzalez v. INS*, 867 F.2d 1108, 1109 (8th Cir. 1989)).

Even if the government has a nondiscretionary duty to adjudicate an application, mandamus is appropriate only if the government fails to act within a reasonable amount of time. *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1147 (D. Ariz. 2008) (finding, after applying 5 U.S.C. § 555(b), that the nearly six-year delay in adjudicating Plaintiff's application was unreasonable). Where there is no statutory deadline for adjudicating an application, what is "reasonable" will depend on the circumstances of the case. Courts have found delays in adjudicating immigration applications to be unreasonable when the delays are lengthy. *Compare Aslam v. Mukasey*, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (finding a nearly three-year delay in the adjudication of an adjustment application unreasonable) *with Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657, n.6 (N.D. Tex. 2005) (finding 15-month delay was not unreasonable, but noting that decisions from other jurisdictions suggest that delays approximating two years may be unreasonable).

The courts also have found government delays unreasonable when the passage of time causes a plaintiff to become ineligible for the relief sought. *See, e.g., Harriott v. Ashcroft*, 277 F. Supp. 2d 538 (E.D. Pa. 2003) (granting mandamus where INS unreasonably delayed issuing derivative citizenship); *Yu v. Brown*, 36 F. Supp. 2d 922 (D.N.M. 1999) (granting mandamus where INS delayed adjustment under special immigration juvenile status); *but c.f. Ahmed*, 328 F.3d at 287 (finding no right to relief because delay resulted in plaintiff becoming ineligible for relief, but

[8] Note, however, that the Eleventh Circuit did not reach the issue of whether the government had a duty to adjudicate the petitioner's adjustment of status application under the diversity visa program. *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003). Rather, in *Nyaga*, the court dismissed the case as moot because the fiscal year had ended.

In two district court cases where the plaintiffs filed mandamus complaints prior to the end of the fiscal year, relief was granted even though the visa was not issued prior to the end of the fiscal year. *See Przhebelskaya v. USCIS*, 338 F Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999).

noting that the result may have been different if case filed while government still had authority to act).

A mandamus plaintiff may look to regulations or internal operating procedures to find out if the agency itself has set guidelines.[9] Plaintiffs also may look to what the agency's average adjudication period is; however, just because a delay is "not unusual" does not make it reasonable. *See Jefrey v. INS*, 710 F. Supp. 486 (S.D.N.Y. 1989).

The following issues provide guidance on what is reasonable:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay;
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

*TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (quoted in *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1143 (D. Ariz. 2008)).

## C. Is There Another Remedy Available?

The courts will not grant mandamus relief if the plaintiff has an alternative, fully adequate remedy available. This means that plaintiffs must exhaust their administrative remedies. *See, e.g., Cheknan v. McElroy*, 313 F. Supp. 2d 270, 274 (S.D.N.Y. 2004); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106, 108 (E.D.N.Y. 2003). Failure to exhaust may be excused, however, when one of the exceptions are established.[10]

---

[9] However, the agency's delay may be unreasonable even if it adjudicates an application within the agency-specified timeframe. *See Singh v. Ilchert*, 784 F. Supp. 759, 764 (N.D. Cal. 1992) (finding that "the mere fact that the INS promulgates a regulation establishing a time period in which applications must be adjudicated does not, in and of itself, mean that an adjudication within the time period cannot constitute unreasonable delay").

[10] Failure to exhaust may be excused if: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an "indefinite time frame for administrative action"; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative

Furthermore, courts generally will not grant relief if the plaintiff has a judicial alternative available. For example, in *Bhatt v. Board of Immigration Appeals*, the plaintiff asked the court to compel the BIA to adjudicate his motion to reconsider. 328 F. 3d 912 (7th Cir. 2003). The court held that to the extent that the plaintiff can challenge the BIA's inaction, it must do so as part of a petition for review in the court of appeals. *Id.* at 915 n.3 (citing INA § 242(b)(9)). Similarly, in *Kulle v. Springer*, the court dismissed a mandamus action that sought to compel discovery in an immigration court proceeding. 566 F. Supp. 279 (N.D. Ill. 1983). The court said that the determinations involving discovery fall within the scope of the judicial review provisions of the INA (former section 106(a)). *Id.* at 280.

In several cases, the government has argued that applicants for adjustment of status are precluded from mandamus when the government has not initiated removal proceedings against them. The government has reasoned that (1) adjustment applicants have not exhausted remedies because they have not re-adjudicated their applications before the immigration court and the Board of Immigration Appeals in removal proceedings, and/or (2) there is (or will be) an alternative judicial forum available after removal proceedings conclude (i.e., petition for review under INA § 242). Although some courts have agreed with the government, *see, e.g., Sadowski v. INS*, 107 F. Supp. 2d 451 (S.D.N.Y. 2000), most courts have implicitly rejected this reasoning, and a few courts have rejected it explicitly. In *Iddir*, the court said that even though INS may initiate removal proceedings in the future, administrative exhaustion is excused because this situation constitutes an "'indefinite timeframe for administrative action.'"[11] 301 F.3d at 498-99 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992)).

Finally, courts sometimes find that the availability of APA relief precludes granting mandamus relief. *See Valona v. U.S. Parole Comm'n*, 165 F.3d 508, 510 (7th Cir. 1998) (finding "APA . . . authorizes district courts to 'compel agency action unlawfully withheld or unreasonably delayed' without the need of a separate action seeking mandamus"); *Ali v. Frazier*, 575 F. Supp. 2d 1084, 1091 (D. Minn. 2008) (dismissing plaintiff's mandamus claims because the APA provides a remedy for unlawfully delayed agency action); *Sawan v. Chertoff*, 589 F. Supp. 2d 817 (S.D. Tex. 2008) (same).

## III. OTHER THRESHOLD ISSUES

The following are some jurisdictional and other threshold issues that often arise in immigration mandamus actions.

---

process would be futile because the agency is biased or has predetermined the issue; or (4) substantial constitutional questions are raised. *See Iddir v. INS*, 301 F.3d at 498 (citations omitted).

[11] The court also found that two other exhaustion exceptions applied: (1) the agency lacks the ability to grant the relief requested and (2) exhausting the administrative process would be futile.

## A. Mootness

The courts will dismiss a civil action where the plaintiff's claim is moot. Some courts have found that when an agency fails to adjudicate an application, and, as result of the passage of time, the applicant becomes ineligible for the benefit requested, the issue is moot.

For example, in *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003), the plaintiff asked the court to compel the government to adjudicate his adjustment application under the diversity visa program. The court found that the plaintiff was no longer eligible to receive a diversity visa because the fiscal year during which the visa was available had ended. *Nyaga*, 323 F.3d at 915-16.[12] As a result, his claim was moot.[13] *Id.* at 916. Likewise, in *Sadowski v. INS*, the court found that the plaintiff's claim was moot because he no longer was eligible for derivative beneficiary status, having turned twenty-one. 107 F. Supp. 2d 451, 454 (S.D.N.Y. 2000). *But see Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D. Pa. 2003) (court ordered government to issue derivative citizenship nunc pro tunc where plaintiff alleged very compelling factors and government acted unreasonably).

## B. Statutory Bars to Review under INA § 242, including Amendments by the REAL ID Act.

Section 242 of the INA bars jurisdiction over a variety of different issues in immigration cases. The government often argues that INA § 242(a)(2)(b)(ii) applies to bar jurisdiction over mandamus actions challenging agency delay. This provision bars review of a "decision or action" of the Attorney General or the Secretary of DHS when such decision or action "is specified under this subchapter to be in the discretion" of the Attorney General or the Secretary of DHS. In many cases, plaintiffs have successfully overcome government motions to dismiss that raise this jurisdictional bar. *See, e.g., Sharadanant v. USCIS*, 543 F. Supp. 2d 1071, 1075 (D.N.D. 2008); *see also* the American Immigration Council's practice advisory, "Mandamus Jurisdiction over Delayed Applications: Responding to the Government's Motion to Dismiss," for arguments challenging the applicability of this bar to jurisdiction at http://www.legalactioncenter.org/practice-advisory-topics. However, some district courts agree that INA § 242(a)(2)(B)(ii) bars jurisdiction. *See e.g.*, *Safadi v. Howard*, 466 F. Supp. 2d 696, 700 (E.D. Va. 2006) (§ 1252(a)(2)(B) precludes review of a mandamus action to compel adjudication of an adjustment application).

[12] The plaintiff filed the complaint after the expiration of the fiscal year for which he had won the diversity visa lottery. Thus the court may have reached a different result if the complaint had been filed before the end of the year. *See Nyaga*, 323 F.3d at 915 n.7 (plaintiff's case arguably distinguishable from a case where complaint filed before end of year); *Paunescu v. INS*, 76 F. Supp. 2d 896, 898 (N.D. Ill. 1999) (mandamus issued where complaint filed before end of fiscal year); *see also Przhebelskaya v. USCIS*, 338 F Supp. 2d 399, 405 (E.D.N.Y. 2004) (motion to compel granted where mandamus issued prior to end of fiscal year). *But see Keli v. Rice*, 571 F. Supp. 2d 127, 135-36 (D.D.C. 2008) (when petitioner filed complaint only ten days before the end of the fiscal year, the court held there was not adequate time to intervene before the fiscal year expired).

[13] Note that in *Iddir*, the Seventh Circuit reached the same result, but did not rely on mootness. Rather, the court found that the government did not have a duty to adjudicate the application because the plaintiff was no longer eligible for a diversity visa. *Iddir*, 301 F.3d at 501.

The REAL ID Act of 2005[14] amended INA § 242 to include specific bars to judicial review by mandamus action. The majority of the amendments to provisions of INA § 242 pertain to judicial review of orders of removal or removal proceedings.[15] Courts generally do not review removal orders or removal proceedings by means of mandamus actions. In fact, in one case in which this was tried in the past, the court found that INA § 242(g) barred jurisdiction in mandamus cases. The Second Circuit said that the court lacked jurisdiction to compel the government to execute a final order of deportation. *Duamutef v. INS*, 386 F.3d 172, 180-81 (2d Cir. 2004). Likewise, courts have held that § 242(g) bars a plaintiff from seeking to have removal proceedings commenced. *Chapinksi v. Ziglar*, 278 F.3d 718, 721 (7th Cir. 2002); *Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999).

The government also sometimes argues that INA § 242(a)(2)(B)(i) (bar over certain discretionary decisions) bars review in mandamus actions. The REAL ID Act amended this section to specifically bar mandamus review of discretionary decisions that are covered by INA § 242(a)(2)(B)(i). *See* REAL ID Act § 106(a)(1)(A)(ii). Additionally, the REAL ID Act amended this section so that it now applies to both removal and non-removal immigration cases. *See* REAL ID § 101(f)(2).

However, most courts have found that INA § 242(a)(2)(B)(i) does not apply in mandamus actions. Through mandamus, the plaintiff seeks an order compelling the government to take action; the court will not compel the government to grant or deny an application. Thus, because the plaintiff is not challenging a decision to deny relief, the relief sought is not discretionary and in fact, is by definition a mandatory duty. *See Iddir*, 301 F.3d at 497-98; *but see Elzerw v. Mueller*, 2007 U.S. Dist. LEXIS 30429 (E.D. Pa. Apr. 23, 2007) (in combination with other provisions of the INA, § 242(a)(2)(B)(i) demonstrates that the process of adjustment of status is wholly discretionary)

## C. Consular Nonreviewability

If a person is seeking to compel a consular officer to process an application or petition abroad, the government likely will argue that such a claim is barred under the doctrine of consular nonreviewability. The courts generally have held that they lack authority to review consular decisions. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999).

However, the law is not firmly settled regarding the applicability of the consular nonreviewability doctrine to mandamus cases. *See Ahmed v. DHS*, 328 F.3d 383, 388 (7th Cir. 2003). And, in fact, the Ninth Circuit has found that it has authority to grant mandamus relief to compel a consular officer to act on a visa petition. In *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), the court ordered the U.S. Consulate in Bombay, India to act on the plaintiff's visa petition. Although the court acknowledged that "[n]ormally, a consular official's discretionary decision to grant or deny a visa petition is not subject to review," the court found mandamus jurisdiction when the consul "fail[s] to take an action." *Id.* at 931-32; *see also Am. Acad. of*

[14] P.L. 109-13, 119 Stat. 231 (May 11, 2005).

[15] *See* amended INA §§ 242(a)(2)(A), (B) and (C); new § 242(a)(4); new § 242(a)(5); amended § 242(b)(9); and amended § 242(g).

*Religion v. Chertoff*, 463 F. Supp. 2d 400, 417 (S.D.N.Y. 2006) (finding the doctrine does not apply in cases brought by U.S. citizens raising constitutional, rather than statutory, claims).

## IV. PROCEDURES

Mandamus is a civil action and therefore, the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on the courts' websites.

Whom to Sue and Serve: Because mandamus actions seek to force an officer or employee of the government of the United States to take an action, the named defendant depends on the type of action the suit seeks to compel. For example, a mandamus action to compel the U.S. Citizenship and Immigration Services (USCIS) to adjudicate an application may name the USCIS District Director, USCIS Director, and the Secretary of the Department of Homeland Security (DHS) as defendants. If security checks conducted by the FBI are cause for the delay, an action may also name the Director of the Federal Bureau of Investigations and the Attorney General. It is better to be over inclusive in naming defendants, and if it is unclear which officer had the duty to act, name the agency/department or even the United States.[16]

If the defendant is DHS (or a department or officer within DHS), by regulation[17] the complaint must be served to:

> Office of the General Counsel
> United States Department of Homeland Security
> Washington, DC 20528

For more information about identifying the defendants and about service, please see the American Immigration Council's Practice Advisory, "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" (Amended Apr. 7, 2006) (http://www.legalactioncenter.org/practice-advisory-topics).

Venue: Venue for the mandamus action, unless otherwise specified in some other statute, can 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; or in which the plaintiff resides. 28 U.S.C. § 1391(e).[18]

---

[16] If the complaint turns out to be over-inclusive, the court may dismiss the complaint against the improperly named defendants and continue with the proper defendants. *See Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (granting defendant's summary judgment in part, and denying in part).

[17] Service of Summonses and Complaints, 6 C.F.R. § 5.42 (2004). The regulations list the zip code for DHS as 20258. The postal service indicates that no such zip code exists, however, and thus this appears to be a typographical error. The USCIS website lists the zip code noted above: 20528.

[18] The government has sometimes challenged venue when the action is brought where the defendant resides. The government argues that the defendant, even if a lawful permanent resident, does not "reside" in the United States for purposes of venue. *See Ou v. Chertoff*, 07-3676, 2008 U.S. Dist. LEXIS 108848, *3-4 (N.D. Cal. Mar. 12, 2008) (finding, for venue purposes, a lawful permanent resident could not bring a mandamus action where he resided because an "alien is 'assumed not to reside in the United States'") (citing *Galveston v. Gonzales*, 151 U.S. 496, 506-07 (1894)); *Ibrahim v. Chertoff*, No. 06-2071, 2007 U.S. Dist. LEXIS 38352, *13 (S.D. Cal. May 24, 2007) (for venue purposes nonresident aliens do not "reside" in any district of the United States). When the government challenges venue, courts have found jurisdiction if there is some "act or omission" that can form a basis

Fee: Parties instituting a civil action in district court are required to pay a filing fee pursuant to 28 U.S.C. § 1914. The current fee is $350. Complaints may be accompanied by an application to proceed in *forma pauperis*, if the plaintiff is unable to pay the filing fee.

Injunctive/Declaratory Relief: A mandamus suit is an action for affirmative relief, as compared to injunctive relief, which typically seeks to prohibit improper action. Although 28 U.S.C. § 1361 does not authorize injunctive relief, mandamus jurisdiction permits a flexible remedy. Furthermore, the same complaint may request declaratory, injunctive, and mandamus relief. For example, the court could declare a policy or regulation illegal, enjoin its enforcement, and order affirmative relief all at the same time.

---

for venue pursuant to 28 U.S.C § 1391(e)(2). *See e.g.*, *Taing v. Chertoff*, 526 F. Supp. 2d 177, 180 (D. Mass. 2007) (finding venue where the plaintiff resided in Lowell, Massachusetts; a substantial part of the events giving rise to the claim occurred in Eastern Massachusetts, and the office that denied the Application was the Boston Region/District Office of the United States Citizenship and Immigration Services); *Ibrahim v. Chertoff*, No. 06-2071, 2007 U.S. Dist. LEXIS 38352, *14-15 (S.D. Cal. May 24, 2007) (finding § 1391(e)(2) provides a proper basis for venue because significant events took place in the court's district, even if substantial events or omissions also took place in other districts).