



PRACTICE ADVISORY¹

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DELAY ACTIONS IN THE ASYLUM CONTEXT: AVOIDING DISMISSAL AND PROVING THE CASE

By the American Immigration Council and the American Immigration Lawyers Association²

Asylum-seekers face ever-growing backlogs in obtaining asylum office interviews and decisions on their asylum claims. Many asylum-seekers have been waiting several years just for the government to schedule their interview, let alone decide their claims. Those who will ultimately win could have adjusted their status years earlier without the delays. The delays also deprive them of benefits that come with immigration status, such as petitioning to bring family members – often in harm’s way themselves – to the United States. Even though asylum-seekers can stay in the United States while awaiting a decision, breaking through the delays can yield significant and potentially life-saving consequences.

Attorneys may be able to challenge these delays in federal district court under the Administrative Procedure Act (APA) and/or the Mandamus Act to spur government action. This advisory provides guidance to attorneys about filing a case related to asylum delays in federal district court. It supplements the American Immigration Council and National Immigration Litigation Alliance’s 2021 Practice Advisory on mandamus actions in the general immigration context.³

This advisory discusses the required elements of both a successful APA challenge and a mandamus action, as well as various pitfalls to avoid. Many lawsuits related to asylum delays result in agencies acting more quickly; however, it is important to be aware of several adverse

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³ American Immigration Council and National Immigration Litigation Alliance, *Mandamus Actions: Avoiding Dismissal and Proving the Case* (Feb. 19, 2021), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/mandamus_actions_avoiding_dismissal.pdf.

published immigration-related decisions and to conduct further legal research for recent cases. Because many cases are settled, there are few published decisions addressing challenges to delays in the asylum context. Studying published opinions ruling against asylum-seekers helps to prepare a successful action. Sometimes, the mere filing of an APA/mandamus complaint—or even the threat to do so—prompts the government to take the action that your client is seeking, resulting in dismissal of the federal case without the need to fully litigate the claim.

I. OVERVIEW OF THE STATUTES

Two statutes that provide bases to sue are the APA and the Mandamus Act. Many courts have found that a claim under the Mandamus Act is essentially the same as one for relief under APA § 706, and generally a delay lawsuit will allege *both* APA and Mandamus Act causes of action. *See, e.g., Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir. 2010); *Han Cao v. Upchurch*, 496 F. Supp. 2d 569, 575 (E.D. Pa. 2007) (“Most of the courts that have addressed the issue agree that, for purposes of compelling agency action that has been unreasonably delayed, the mandamus statute and the APA are coextensive”). However, despite their similarity, the APA and Mandamus Act should still be recognized as two independent bases for legal action. The APA requires acting within a reasonable time, while mandamus requires the government to take action.

A. APA Actions

The APA, 5 U.S.C. §§ 555(b) and 706(1), serves as a vehicle for challenging unreasonable agency delays and inaction. *Barrios Garcia v. U.S. Dep’t of Homeland Sec.*, 25 F.4th 430, 451 (6th Cir. 2022). Section 555(b) provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” Section 706(1) provides that courts shall “compel agency action unlawfully withheld or unreasonably delayed.” To be entitled to relief under the APA, a plaintiff must establish that the defendant had a nondiscretionary duty to act. *See Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 6, n.1 (2004) (explaining that, like the mandatory action requirement in the mandamus statute, action that is “unlawfully withheld” necessarily must be action that is “legally required”). Additionally, the plaintiff must show that the challenged delay is unreasonable. *See, e.g., Kashkool v. Chertoff*, 553 F. Supp.2d 1131, 1142 (D. Ariz. 2008). Thus, under the APA, the reasonableness of the time frame in question is a key issue.

There are two exceptions to review under the APA: where a “statute[] preclude[s] judicial review” or the “agency action is committed to agency discretion by law.” 5 U.S.C. §§ 701(a)(1), (2). Those exceptions will be discussed further in Part II.C.

B. Mandamus Actions

In general, a mandamus action is used to compel administrative agencies to act. The Mandamus Act, codified at 28 U.S.C. § 1361, states: “The district courts shall have original jurisdiction . . . to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

Mandamus may be used to compel the adjudication of an asylum application or to schedule an asylum interview.

The ability of a federal district court to provide a remedy through the Mandamus Act requires that the asylum-seeker, i.e., the plaintiff, affirmatively demonstrate that: (1) they have 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).

Importantly, in either a successful mandamus or APA action—which are typically brought together—the court will only be able to compel the government to schedule an interview or adjudicate an application. The court lacks the power to dictate how the government agency will decide a case, including how the agency will exercise its discretion, if discretion is involved. Therefore, practitioners must understand that a “successful” mandamus or APA action will result in the agency scheduling an interview or issuing a decision, but that decision could be a denial or referral to immigration court. If a court grants relief based on the APA, it might then rule that the mandamus count is moot. Practitioners are encouraged to explain these consequences of a mandamus or APA action to their clients at the outset of the engagement.

II. JURISDICTION AND CAUSE OF ACTION

The mandamus statute provides both the jurisdiction and the cause of action for a claim under that statute, § 1361. In contrast, the APA serves only as a cause of action for a claim of delay; the APA does not provide subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977). Instead, for an APA claim, subject matter jurisdiction is available under the federal question statute, 28 U.S.C. § 1331. *See Valerio v. Limon*, 533 F. Supp. 3d 439, 452 (S.D. Tex. 2021); *see also Ahmed v. Holder*, 12 F. Supp. 3d 747, 753 (E.D. Penn. 2014).

Generally, it is better to assert claims in the alternative, under both the Mandamus Act and the APA and to allege jurisdiction under both § 1361 and § 1331, in part because some courts have confused the issue of subject matter jurisdiction under § 1361, and in part because the same complaint may seek mandamus relief and other forms of relief too. Moreover, courts will often accept jurisdiction under § 1331 and grant relief under the APA instead of the Mandamus Act. *See, e.g., Ahmed*, 12 F. Supp. 3d at 752, n.3 (choosing to address only the APA claim after noting that it was the same as the mandamus claim).

The court’s subject matter jurisdiction is a separate issue from the court’s authority to grant relief, either through § 1361 or the APA. *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 evaluate the cause of action. *Id.* at 387. Once a court determines that it has jurisdiction through either § 1331 or § 1361, it will then determine whether it may provide relief through § 1361 or the APA. *Id.*; *see also Rios v. Ziglar*, 398 F.3d 1201, 1207 (10th Cir. 2005) (district court had jurisdiction where plaintiff alleged that the immigration agency failed to carry out a ministerial duty, but affirming dismissal because the prerequisites for mandamus were not met).

A. STANDING

The government may move to dismiss a mandamus or APA delay lawsuit on the ground that a plaintiff has no standing. Standing requires that (1) the plaintiff suffered injury-in-fact that is concrete, particularized, and actual or imminent, (2) the injury is traceable to the defendant's actions, and (3) the injury can be redressed by the court." See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The government most commonly challenges the first prong of standing in asylum delay cases—injury-in-fact.

Many plaintiffs are injured by USCIS's policy of prioritizing the most recently filed asylum applications for asylum interview scheduling. See USCIS, *USCIS to Take Action to Address Asylum Backlog*, <https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog> (Jan. 31, 2018). USCIS refers to this policy as "last in, first out" (LIFO). Because USCIS also fails to timely schedule new applications, applicants with older-filed applications are in multi-year limbo. In many cases, this results in separations from their spouses and children and a delayed opportunity to adjust status.

The government may challenge standing by arguing that plaintiffs cannot demonstrate injury-in-fact because the fear that they may never obtain adjudication is merely speculative. The government has even argued that new increased hiring policies and their LIFO policy promote efficiency and reduce backlog. See *Lajin v. Radel*, No. 19-CV-52, 2019 WL 3388363, at *4 (S.D. Cal. July, 26, 2019); *Ghali v. Radel*, No. 18-CV0508, 2019 WL 1429583, at *3 (S.D. Cal. Mar. 29, 2019). A response is to argue that it is not merely speculative based on the statistics around interview scheduling.⁴ Plaintiffs should also argue that is a matter for discovery. For further discussion on arguments addressing the LIFO policy and interview scheduling, see Part IV.A below.

Practitioners should also argue that there is a "low threshold" for establishing an injury in fact." *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 157 (E.D.N.Y. 2018) (quoting *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008)). An injury-in-fact "may simply be the fear or anxiety of future harm." *Id.* at 158 (internal quotations omitted). An injury-in-fact already exists because asylum-seekers face uncertainty about how long they have to wait and whether they will ever get an interview. The years that asylum-seekers have already been waiting demonstrates that their fears of a long wait are real.

B. Jurisdiction-Stripping Provisions of the INA

Some courts have found that the INA contains a provision that strips applicants of jurisdiction over asylum-based delay actions. The INA contains a provision that a few courts—but not the majority—have relied on to dismiss immigration-related mandamus actions. This section reads:

⁴ USCIS adjudication statistics can be found on USCIS's website. See Immigration and Citizenship Data, https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?topic_id%5B%5D=33597&ddt_mon=&ddt_yr=2022&query=interview&items_per_page=10 (last visited Oct. 17, 2022) (filter for "asylum" and by appropriate month and year). A summary of USCIS statistics is at Addendum A.

(B) Denials of discretionary relief: Notwithstanding any other provision of law (statutory or nonstatutory) . . . no court shall have jurisdiction to review—

. . . .

(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.

8 U.S.C. § 1252(a)(2)(B)(ii). The government has argued, and a minority of courts have held, that this provision strips courts of jurisdiction to review all aspects of discretionary decisions taken by governmental agencies, including the timing of these discretionary decisions and the pace of adjudication. *See Karam v. Garland*, No. CV 21-0915, 2022 WL 4598626, at *6 (D.D.C. Sept. 30, 2022) (collecting cases and ultimately concluding that the pace of adjudication is discretionary); *see also See Daniel v. Mayorkas*, No. 1:20-cv-1099, 2021 WL 4355355, at *3 (E.D. Va. Sept. 23, 2021) (“Even if the asylum application’s statutory regime does not expressly dictate that the pace of adjudications is ‘discretionary,’ 8 U.S.C. § 1158, *et seq.*, it is apparent that USCIS enjoys broad discretion regarding how swiftly such decisions are made.”).

Nonetheless, most courts have held that this provision does not prevent judicial review of APA or mandamus cases brought about by the agency’s unreasonable delay in adjudicating a case; these decisions reason that, while the decision itself may be discretionary, the agency has a non-discretionary duty to act and 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar review of its failure to act. *See Hassane v. Holder*, No. C10-314Z, 2010 WL 2425993, at *3 (W.D. Wash. June 11, 2010) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar judicial review of unreasonable delay claims involving adjustment of status and stating that this is consistent with the “overwhelming majority of district courts” and collecting cases finding jurisdiction despite § 1252(a)(2)(B) defense claims). Accordingly, plaintiffs should add a jurisdictional statement in their complaint that the agency has a non-discretionary to act, pointing to 8 U.S.C. § 1158(a), and that the INA’s jurisdiction-stripping provisions do not bar review of a delay claim.

C. APA Prerequisites: Final Agency Action and Non-Discretionary Action

The government may argue that the court lacks jurisdiction and the plaintiff failed to state a claim under the APA because there is no final agency action or that their actions fall within the agency’s discretion. Arguments regarding final agency action and agency discretion are a matter of framing, and plaintiffs typically have the better of the argument for two reasons: The APA specifically defines “final agency action” as a failure to act, and second, even where an agency’s ultimate decision is discretionary, in most instances, agencies do not have discretion over *whether* to adjudicate an application. *See* 5 U.S.C. § 551(13); *Tailawal v. Mayorkas*, No. 22-1515, 2022 WL 4493725, at *3 (C.D. Cal. Aug. 18, 2022) (finding that the INA requires USCIS to adjudicate asylum applications and denying government’s motion to dismiss APA claim); *Singh v. Still*, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007) (noting in the context of asylee adjustment the distinction between the agency’s discretion over *how* to adjudicate an application and its discretion over *whether* it adjudicates an application, which this court found to be nondiscretionary).

Under the APA, only “final agency action” is subject to judicial review. 5 U.S.C. § 704. “[A]gency action,” in turn, is defined as an “agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.” 5 U.S.C. § 551(13) (emphasis added). Final agency action must (1) “mark the ‘consummation’ of the agency’s decision-making process” and (2) “be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted).

In response to “final agency action” arguments, plaintiffs should emphasize that the court should consider the direct impact on the parties involved when analyzing whether USCIS’s action is one by which rights have been determined or from which legal consequences will flow. *See Gill v. U.S. DOJ*, 913 F.3d 1179, 1185 (9th Cir. 2019); *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031-32 (N.D. Cal. 2018). Plaintiffs who have been hurt by asylum backlogs can argue that because lengthy asylum interview wait times have effectively denied them a right to adjudication, and USCIS’s action is one by which their rights have been determined and from which legal consequences flow.

The government may also contend that cases fall within the APA’s agency discretion exception to judicial review in 8 U.S.C. § 701(a), by arguing that there are no “meaningful standards” for courts to analyze challenged policies. *See Lunney v. United States*, 319 F.3d 550, 558 (2d Cir. 2003) (citation omitted). For example, the government may argue that there are no standards by which courts can assess how it sequences applications and therefore courts should leave such decisions up to agencies.

To change the framework, plaintiffs could respond that policies such as LIFO are not simply about discretionary sequencing decisions. Rather, the issue is that such policies create such an unreasonable delay that they prevent asylum applicants from ever receiving an interview in practice. Convincing the court that application of the LIFO policy to a client’s asylum application will result in the client never getting an interview can overcome many of the government’s arguments. This framework avoids the perception that plaintiffs are splitting hairs about how quickly USCIS will give them an asylum interview. Courts have applied standards for determining what constitutes an “unreasonable delay” many times, and Plaintiffs can point to USCIS’s own backlog statistics showing that USCIS will never schedule these cases under a LIFO policy. *See, e.g., Kamal v. Gonzales*, 547 F. Supp. 2d 869, 878 (N.D. Ill. 2008) (finding that plaintiff was “challenging USCIS’s failure altogether to decide” adjustment application pending for over five years and denying government motion to dismiss); *He v. Chertoff*, 528 F. Supp. 2d 879, 882-83 (N.D. Ill. 2008) (collecting cases holding that USCIS cannot have “absolute discretion over the pace of adjudication because this could in theory lead to indefinite delay for which mandamus relief would be unavailable”); *see* Part IV.A for further discussion on LIFO processing arguments. Reframing the argument this way recenters plaintiffs’ right to adjudication and the government’s duty to adjudicate under 8 U.S.C. § 1158.

SUMMARY OF COMMON SUBJECT MATTER JURISDICTION ARGUMENTS

1. The government has argued that plaintiffs have no standing to challenge policies such as LIFO because there is no injury-in-fact, traceability, or redressability, which are all required elements of standing. Plaintiffs could respond with any or all of the following:

1. They have suffered an injury-in-fact because LIFO creates a real fear that they will never obtain adjudication.
2. Their injury is *most directly* caused by LIFO, notwithstanding other potential contributing factors.
3. Their injury is redressable because there are possible alternatives to LIFO that will not keep applicants waiting in line for an indefinite amount of time. Note that plaintiffs do not need to recommend any specific alternative.

2. The government has argued that asylum delay claims are not cognizable under the APA because policies such as LIFO are not “final agency actions” and/or are committed to agency discretion. Plaintiffs could argue:

6. LIFO is a “final agency action” because it threatens to deny many asylum applicants the right to adjudication entirely, which clearly affects rights and produces legal consequences.
7. LIFO is not simply a matter of discretionary sequencing, but in practice creates such unreasonable delays that it prevents some asylum applicants from ever receiving an interview.

III. ELEMENTS OF A SUCCESSFUL MANDAMUS ACTION

A mandamus plaintiff must affirmatively demonstrate that:

- (1) They have 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.

28 U.S.C. § 1361; *see also Iddir*, 301 F.3d at 499. While the following discussion focuses on these requirements for mandamus, the discussion below may also be relevant to APA claims because mandamus and APA claims are evaluated under similar standards. *See, e.g., Hernandez-Avalos v. I.N.S.*, 50 F.3d 842, 844-45 (10th Cir. 1995) (“The two statutes are, after all, merely different means of ‘compelling an agency to take action which by law it is required to take.’”) (quoting *Soler v. Scott*, 942 F.2d 597, 605 (9th Cir. 1991), *vacated sub nom. Sivley v. Soler*, 506 U.S. 969 (1992)); *Giddings v. Chandler*, 979 F.2d 1104, 1110 (5th Cir. 1992). However, practitioners should keep in mind that not all courts treat the claims identically.

A. Does the Plaintiff Have a Clear Right?

A mandamus plaintiff must demonstrate that they have a clear right to the relief requested. In the immigration context, this means that the plaintiff must prove that the Immigration and Nationality Act (“INA”) provides a clear right and that the plaintiff is the intended beneficiary.

When dealing with asylum applications, the mandamus plaintiff must demonstrate that the INA provides a right to have an asylum application adjudicated.

It is well-established that the INA provides asylum-seekers with the right to apply for asylum. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990) (citing, inter alia, 8 U.S.C. § 1158(a)).⁵ Courts have denied the government’s motions to dismiss on the grounds that asylum seekers have the right to have asylum applications adjudicated, even if the ultimate decision is discretionary. *See Tailawal*, 2022 WL 4493725, at *3 (“The language of Section 1158(d)(5)(A)(ii) is mandatory.”); *Hui Dong v. Cuccinelli*, No. CV 20-10030, 2021 WL 1214512, at *2 (C.D. Cal. Mar. 2, 2021) (“[U]se of the word ‘shall’ with respect to adjudication of an asylum application and the time frame for conducting an interview for an asylum application in the statute and regulations demonstrates that the adjudication of asylum applications is not a discretionary act.”); *see also Ou v. Johnson*, No. 15-cv-03936, 2016 WL 7238850, at *3 (N.D. Cal. Feb. 16, 2016) (finding that “processing Ou’s asylum application was a ‘discrete agency action that [USCIS was] required to take’” but that the 11-month delay was not unreasonable) (quoting *SUWA*, 542 U.S. at 64).

Courts have also held in other contexts that where there is a right to apply for a benefit, there is a right to receive a decision on the application. *See, e.g., Iddir*, 301 F.3d at 500 (finding the right to have a diversity visa application adjudicated); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (right to visa application adjudication); *Yu v. Brown*, 36 F. Supp. 2d 922, 930-31 (D.N.M. 1999) (finding a right to have Special Immigrant Juvenile (SIJ) applications adjudicated because SIJ applicants fell “within the zone of interest of the INA provisions for SIJ and LPR status.”); *Razik v. Perryman*, No. 02 C 5189, 2003 WL 21878726, at *2 (N.D. Ill. Aug. 7, 2003) (noting that courts have consistently held that INA § 245 provides a right to have an application for adjustment of status adjudicated).

It should be noted, however, that some courts—particularly in the Second Circuit—have rejected arguments that statutory timeframes for adjudicating asylum applications create an enforceable right for asylum applicants. *See* 8 U.S.C. § 1158(d)(5)(A) (stating that “in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed” and that “final administrative adjudication of an asylum application” should be completed within 180 days after the application is filed). Citing the statutory bar on interpreting anything in § 1158(d) as creating any enforceable procedural or substantive rights, courts have declined to find a legally enforceable right to challenge delays under this section.⁶ *See* 8 U.S.C. 1158(d)(7); *see, e.g.,*

⁵ The majority of circuit courts recognize the right to apply for asylum. *See, e.g., Rivas-Quilizapa v. Lynch*, 653 F. App’x 487, 490 (8th Cir. 2016); *Maldonado-Reyes v. Holder*, 531 F. App’x 692, 695 (6th Cir. 2013); *Huang v. Ashcroft*, 124 F. App’x 129, 131 (3d Cir. 2005); *Gonzales v. Reno*, 212 F.3d 1338, 1348 (11th Cir. 2000); *Amanullah v. Nelson*, 811 F.2d 1, 14 (1st Cir. 1987); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982).

⁶ While Section 1158(d) may not create a statutory duty or clear right to time under the Mandamus Act, the timeframe is useful in arguing unreasonable delay under the APA, which will be discussed further in Part IV below.

Fangfang Xu v. Cissna, 434 F. Supp. 3d 43, 52 (S.D.N.Y. 2020); *L.M. v. Johnson*, 150 F. Supp. 3d 202, 209 (E.D.N.Y. 2015) (“Here, Section 1158(d)(7) precludes mandamus relief by providing that “nothing in [Section 1158(d)],” including the 45- and 180-day timeframes contained in Section 1158(d)(5)(A)(ii) and (iii), creates any legally enforceable right or benefit against any officer of the United States or any agency.”); *Pesantez v. Johnson*, No. 15 Civ. 1155, 2015 WL 5475655, at *5 (E.D.N.Y. Sept. 17, 2015) (“[I]t seems to me that the precatory or hortatory deadlines set forth in § 1158(d) cannot be more important than the impetus to prevent the instant lawsuit from elevating plaintiff’s claims above those of others similarly situated...”).

However, this limitation on a private right of action applies only to subsection (d) of § 1158. The right to apply for asylum is not based on § 1158(d) but is instead based on subsection (a). Thus, notwithstanding the decisions that reject reliance on § 1158(d), a plaintiff has a viable argument that they have the right to a decision on her asylum application under § 1158(a), and separately, to get a decision within a reasonable time under the APA. In fact, several courts found that a plaintiff had a right to a decision within a reasonable time based on the APA, even though they refused to enforce the timeframes in § 1158(d)(5) because there was no right of action under § 1158(d)(7). See *Fangfang Xu*, 434 F. Supp. at 52 (“Plaintiff’s right to adjudication within a reasonable time [under the APA] exists independently of § 1158(d), and the Court concludes that § 1158(d)(7) is not so broad as to strip Plaintiff of her right to challenge all delays in the adjudication of her asylum application, no matter how egregious.”); *Alkassab v. Rodriguez*, No. 2:16-cv-1267-RMG, 2017 WL 1232428, at *4-5 (D.S.C. Apr. 3, 2017). Moreover, other courts have noted that the time frames in § 1158(d)(7)—although not creating an enforceable right—were instructive for determining whether a delay was reasonable. See *Tailawal*, 2022 WL 4493725, at *3 (noting plaintiff’s reference to 45-day limit as an indication of the unreasonableness of two-and-a-half-year delay); *Pesantez*, 2015 WL 5475655, at *5-6 (ultimately finding that other factors outweighed the statutory time frames). See Part III.C & IV below for a discussion on how courts determine reasonableness.

B. Is there a mandatory duty?

In addition to having a clear right to relief, a plaintiff must show that the defendant owes them a duty. The existence of a right and a duty are closely intertwined, and courts often blur the distinction between a right and a duty. See, e.g., *Pesantez*, 2015 U.S. Dist. LEXIS 124508, at *15-16 (holding that the power of mandamus to compel an agency “to perform a duty” is inappropriate in asylum cases because INA § 208(d) prevents the creation of a “legally enforceable right.”).

Courts have said that this duty must be mandatory or ministerial. Courts have found that USCIS has a mandatory duty to adjudicate an application. See, e.g., *Iddir*, 301 F.3d at 500 (duty to adjudicate applications under the diversity lottery program); *Patel*, 134 F.3d at 933 (duty to adjudicate visa application); *Paunescu v. I.N.S.*, 76 F. Supp. 2d 896, 903 (N.D. Ill. 1999) (duty to adjudicate a diversity visa); *Yu*, 36 F. Supp. 2d at 932 (duty to process SIJ application in a reasonable amount of time); *Hoo Loo*, 2007 WL 813000, at *3 (“Indeed, numerous courts have found that immigration authorities have a non-discretionary duty to adjudicate applications.”).

Moreover, courts have determined that the duty to render a decision on an application is mandatory even where the underlying decision to be made by the agency is a discretionary one; thus, 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. *See, e.g., Villa*, 607 F. Supp. 2d at 363 (duty to adjudicate adjustment application in a reasonable amount of time). In the immigration context, including asylum, USCIS often has a general duty to take *some* action, but does not have a duty to exercise its discretion in any specific manner. *See Ruiz v. Wolf*, No. 20 C 4276, 2020 WL 6701100, at *3 (N.D. Ill. Nov. 13, 2020) (holding in a U visa case that “a discretionary decision to grant or deny an application is separate and distinct from the nondiscretionary duty to adjudicate those applications.”); *Nigmatzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (the Attorney General has discretion to grant or deny an application, but does not have discretion to simply never adjudicate an adjustment application).

Plaintiffs can also point to regulatory language at 8 C.F.R. § 208.9(a) that mandates adjudication. Agencies are bound by regulations, which can provide the “duty” necessary for either a mandamus or APA delay action. Language in an agency’s regulations may “create[] a commitment binding on the agency.” *SUWA*, 542 U.S. at 71; *see also Gonzalez Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018) (“[T]he court discerns no reason to differentiate the mandatory regulatory deadlines at issue here from the mandatory statutory deadlines.”); *Ren v. Mueller*, No. 6:07-cv-790-Pr1-19DAB, 2008 WL 191010, at *7 (M.D. Fla. Jan. 22, 2008) (citing *SUWA*, 542 U.S. at 65) (“Thus, when an agency uses mandatory language like ‘shall,’ a court should find there is a legal duty to act.”).

Here, by regulation, DHS has imposed on itself such a duty, mandating that “[t]he Service *shall adjudicate* the claim of each asylum applicant” who has filed a complete application. *See* 8 C.F.R. § 208.9(a); *see also Ou*, 2016 WL 7238850, at *3 (“[P]rocessing Ou’s asylum application was a ‘discrete agency action that [USCIS was] required to take.’”) (quoting *SUWA*, 542 U.S. at 64).⁶

C. Is the delay reasonable?

Where a clear right and a nondiscretionary duty are established—such as through 8 C.F.R. § 208.9(a)—mandamus is appropriate only if the government fails to act within a reasonable amount of time. *See, e.g., Castaneda v. Garland*, No. 5:21CV01418, 2021 WL 5002419, at *10 (C.D. Cal. Oct. 19, 2021) (granting preliminary mandamus relief where the immigration court had a nondiscretionary duty to adjudicate detained person’s bond motion); *Nine Iraqi Allies*, 168 F. Supp. 3d 268, 293-94 (D.D.C. 2016) (finding unreasonable delay when statutes provided a clear nine-month timeline for adjudicating Special Immigrant Visas for certain Iraqi and Afghan nationals); *Kashkool*, 553 F. Supp. 2d at 1147 (finding, after applying 5 U.S.C. § 555(b) (APA), that the nearly six-year delay in adjudicating plaintiff’s adjustment application was unreasonable). Where many courts have found that there is no enforceable statutory deadline for adjudicating an application (notwithstanding the deadlines in 8 U.S.C. § 1158(d)(5)(A)), 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 Barrios Garcia v. U.S. Dep’t of Homeland Sec.*, 25 F.4th 430, 452 (6th Cir. 2022) (finding a five-year delay for an initial U visa determination unreasonable), *with Alkenani v. Barrows*, 356

F. Supp. 2d 652, 657 & n.6 (N.D. Tex. 2005) (finding a 15-month delay was not unreasonable, but noting that decisions from other jurisdictions suggest that delays approximating two years may be unreasonable); *see also Dehrizi v. Johnson*, No. CV-15-00008, 2016 WL 270212, at *5-7 (D. Ariz. Jan. 21, 2016) (holding that material facts existed to suggest the nine-year delay in adjudicating refugee’s application to adjust status was unreasonable).

A mandamus plaintiff may look to regulations or internal operating procedures to find out if the agency itself has set guidelines that could be used to demonstrate the delay is unreasonable. While USCIS does not post case processing times for asylum applications, Plaintiffs could compare their case processing time to those of other applications and petitions, particularly other humanitarian claims such as VAWA, T visas, U visas, and/or Special Immigrant Juvenile Status applications.

Plaintiffs also may look to the agency’s average adjudication period, although courts commonly weigh this factor in the government’s favor in asylum mandamus claims. However, just because a delay is “not unusual” does not make it reasonable. *See Barrios Garcia*, 25 F.4th at 454 (“We find it unhelpful to fixate on the average snail’s pace when comparing snails against snails in a snails’ race.”). Asylum-based mandamus plaintiffs also may argue that the statutory language of 8 U.S.C. § 1158(d)(5)(A)(ii-iii) is relevant when evaluating the reasonableness of delay. Although these timelines are not enforceable (*see supra*), the “statutory guidelines created by Congress...are instructive....” *Pesantez*, 2015 WL 5475655, at *5 (citation omitted). Accordingly, Plaintiffs should allege how long they have waited beyond the 45-day timeframe for an interview or 180-day timeframe for a final decision. *See* §§ 1158(d)(5)(A)(ii-iii).

Finally, a plaintiff may reference the factors that courts review to determine whether a delay is unreasonable under § 706 of the APA. *See, e.g., Desai v. U.S. Citizenship & Immigr. Servs.*, No. CV 20-1005, 2021 WL 1110737, at *4-5 (D.D.C. Mar. 22, 2021) (evaluating reasonableness in deciding a motion to dismiss both mandamus and APA claims); *Kashkool*, 553 F. Supp. 2d at 1141 (referencing § 706 of the APA while discussing whether delay is unreasonable for mandamus purposes). For more on evaluating whether a delay is reasonable under the APA, see Part IV below.

D. Is there another remedy available?

The courts will not grant mandamus relief if the plaintiff has an alternative, fully adequate remedy available. *See, e.g., Bhatt v. BIA*, 328 F.3d 912 (7th Cir. 2003) (dismissed due to the availability of judicial alternatives). Plaintiffs waiting for an asylum interview have no other forms of relief other than waiting on the adjudication of their applications. *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 191 (D.C. Cir. 2016) (finding that an administrative “escalation” process was not “an adequate or exclusive remedy where, as here, a systemic failure causes virtually all appeals to be decided well after the statutory deadlines.”). No other avenues are available to expedite adjudication, although as a practical matter, plaintiffs first should pursue all avenues to seek an interview or administrative adjudication before filing suit. The mandamus and APA claims will be stronger—and the Court may be more persuaded to grant relief—if the Plaintiff alleges the steps they have taken to raise the delay to the agency’s attention.

Be aware that the government may argue that a viable APA claim provides an alternative remedy that requires the court to dismiss the mandamus action. The government nevertheless may argue that while the plaintiff had the *opportunity* to pursue a viable APA claim, courts should still dismiss the APA action because the plaintiff failed to bring that colorable APA claim in the lawsuit. In response to such arguments, plaintiffs can counter that the government cannot simultaneously assert that there is an alternative remedy in the form of an APA claim while also arguing that plaintiffs are not entitled to APA relief.

SUMMARY OF COMMON MOTION TO DISMISS ARGUMENTS

1. The government has argued against clear right and mandatory duty because 8 U.S.C. § 1158(d) precludes any kind of statutory right that would give rise to a duty. As a response, plaintiffs can emphasize any of the following:

- They do not seek to enforce specific statutory deadlines and that their statutory right to adjudication is based on 8 U.S.C. 1158(a).
- Agency regulations provide a basis for finding of mandatory duty.

2. The government argues that the APA provides an alternative remedy and thus mandamus claims should be barred. However, the government typically also seeks to dismiss APA claims. In such instances, plaintiffs should keep in mind:

- The government cannot simultaneously claim APA as an alternative remedy and deny it to plaintiffs.
- Even if a mandamus claim may be dismissed, bringing both mandamus and APA claims can be helpful in compelling agencies to settle and schedule interviews.

IV. ELEMENTS OF A SUCCESSFUL APA DELAY ACTION

USCIS has a duty to adjudicate asylum claims within a reasonable period under the APA. 5 U.S.C. § 706(1). Courts generally will analyze a list of six factors, known as the TRAC factors, to determine whether any adjudication delay was reasonable. *Telecomm. Rsch & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“TRAC”). The Court in TRAC identified six factors that a court should consider when determining whether agency delay 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; and
6. The court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80. Courts have used these factors to determine whether agency delays in the immigration context are unreasonable in both mandamus and APA cases. *See, e.g., Desai*, 2021 WL 1110737, at *4-5 (evaluating whether the TRAC analysis is appropriate in deciding a motion to dismiss).

Unreasonable delay claims are frequently nuanced and fact-specific. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 1991) (“Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.”). Despite the existence of the 45- and 180-day periods set out in §§ 208(d)(5)(A)(ii-iii), some courts have found there is no delay that would be considered *per se* unreasonable. *Compare Saleh v. Ridge*, 367 F. Supp. 2d 508, 513 (S.D.N.Y. 2005) (declining to find a five-year immigration adjudication delay unreasonable) *with Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1074 (N.D. Cal. 2014) (finding a nearly six-year adjustment of status adjudication delay unreasonable). The unreasonableness of any adjudication delay, in other words, is found in the facts of the specific case as argued through the TRAC factors, and courts have ruled that a motion to dismiss an unreasonable delay action is premature because the TRAC test is fact-intensive so it should not be resolved at the pleading stage. *See, e.g., Dong v. Cuccinelli*, No. 20-10030-CBM, 2021 WL 1214512, at *4 (C.D. Cal. Mar. 2, 2021). Plaintiffs should argue in response to a motion to dismiss that the court should deny a motion to dismiss and allow discovery on the fact-intensive TRAC factors.

A. The time agencies take to make decisions must be governed by a “rule of reason”

Under the first TRAC factor, the “rule of reason,” courts consider “whether the time for agency action has been reasonable,” taking into account the “length of the delay” and the “reasons for delay,” *Poursohi v. Blinken*, No. 21-cv-01960, 2021 WL 5331446, at *5-6 (N.D. Cal. Nov. 16, 2021); *In re Nat. Res. Defense Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020). The “rule of reason” is “considered to be the most important factor in some circuits.” *Martin v. O’Rourke*, 891 F.3d 1338, 1345 (Fed. Cir. 2018). The “rule of reason” that governs the pace of administrative proceedings is meant to eliminate excessive delay and protect public confidence in the agency’s ability to timely discharge its duties. *Potomac Electric Power Co. v. ICC (“PEPCO”)*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) (“Quite simply, excessive delay saps the public confidence in an agency’s ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision making into future plans.”).

The current asylum backlogs have reached more than five years in certain parts of the country, and because USCIS utilizes LIFO, that backlog continues to grow such that final adjudication of the claim may take far longer. Thus, a plaintiff must argue that such a delay is unreasonable

under the “rule of reason.” USCIS publishes data on the number of interviews scheduled and completed each month and separately publishes the number of new asylum applications filed each month. For the last two years, in most asylum offices, new asylum applications have outpaced the number of applications adjudicated using LIFO processing, showing a high probability that plaintiffs stuck in asylum backlogs may never receive an interview under the LIFO process.

To make this case, plaintiffs will need to present statistics from their individual asylum offices, which can be found on USCIS’s website, and should also consider submitting declarations from other practitioners in their geographic area to corroborate the never-ending backlog. Additionally, Addendum A lists the national total number of Form I-589s pending since USCIS began the LIFO process in 2018—which has increased in all but one quarter. This chart shows that the LIFO process has not reduced the asylum application backlog; rather, it has steadily grown since USCIS introduced LIFO processing at the beginning of 2018. In addition, national statistics show that new Form I-589 filings have outpaced adjudications for each quarter in Fiscal Year 2020 and 2021, and for the first three quarters of Fiscal Year 2022. Thus, because new filings are outpacing cases adjudicated, USCIS may never get to the asylum cases at the back of the line using LIFO processing.

Additionally, the government has highlighted mechanisms for a small number of asylum-seekers to obtain expedited interviews.⁷ For example, some asylum offices will schedule interviews for those with extremely urgent needs and some offices offer a “short-notice list” to schedule interviews in the case of last-second cancellations by other asylum-seekers. However, most expedite requests are not granted, and many offices don’t have functioning systems in place for scheduling asylum applicants. Plaintiffs should plead in their complaint any efforts that they made to obtain an expedited interview and USCIS’s response—or lack thereof.

Many courts have found that LIFO processing “despite its imperfect results, has helped USCIS reduce the backlog since it was put in place,” and resolved the rule of reason in the government’s favor. *See, e.g., Yahya v. Barr*, No. 1:20-CV-01150, 2021 WL 798873, at *3 (E.D. Va. Jan. 19, 2021); *Fangfang Xu*, 434 F. Supp. 3d at 53 (“[T]he delay was the result of the LIFO rule, which was itself a reasoned response to a systemic crisis.”); *Varol v. Radel*, 420 F. Supp. 3d 1089, 1098 (S.D. Cal. 2019) (finding the LIFO “has been enacted to prevent fraud and abuse of the asylum system”). However, there are other cases suggesting that valid policy rationales are not enough to support a rule of reason. *See Ruan v. Wolf*, No. 19-CV-4063, 2020 WL 639127 (E.D.N.Y. Feb.

⁷ In addition, some asylum offices have diverted asylum officers for urgent humanitarian needs. For example, in 2022, asylum officers were detailed to be Asylum Pre-Screen Officers (APSO), to assist in Afghan Operation Allies Welcome (OAW) interviews, and to provide Asylum Merits Interviews (AMIs) under asylum processing rules. *See* USCIS, *OAW Circuit Ride Locations*, AILA Doc. No. 22070802 (posted July 8, 2022); USCIS, *Fact Sheet: Implementation of the Credible Fear & Asylum Processing Interim Final Rule* (release date May 26, 2022, last updated June 9, 2022), <https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule>. Diverting officers reduces their ability to schedule applicants from the existing backlog.

11, 2020) (expressing “serious doubts that a rule that leaves asylum seekers waiting eight years to have their applications adjudicated can be said to be governed by a rule of reason;” legitimate policy objectives do “not mean the courts necessarily must ‘excuse Defendants from their statutory duty and let the cost fall on immigrant plaintiffs.’”); *Islam*, 32 F. Supp. 3d at 1072 (“[T]here comes a point where the seemingly indefinite delay of an [immigration status] petition becomes untethered from any discernable ‘rule of reason.’”). Accordingly, practitioners should cite this recent case law, combined with the statistics on how long asylum adjudications are taking under the LIFO policy and the growing backlog of asylum applications, to make the point that the adjudication delay is “seemingly indefinite.” *Islam*, 32 F. Supp. 3d at 1072.

- B. 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

Regarding the second TRAC factor, Congress has explicitly set out a timetable with which it expects USCIS to comply. Congress mandated that asylum interviews “shall commence not later than 45 days after the date an application is filed” and that “final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.” 8 U.S.C. § 208(d)(5)(ii-iii). As noted above, these provisions do not create a cause of action, *see Pesantez*, 2015 WL 5475655, at *2, but they demonstrate clear congressional intent that asylum applications should be promptly adjudicated. In a TRAC factor analysis, Plaintiffs should use these statutory timeframes to show USCIS’s unreasonableness. The stark contrast between the actual delays in asylum adjudication and the statutory guidelines make it clear that these delays are excessive.

- C. Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake

Regarding the third TRAC factor, asylum applicants by definition are fleeing for their health and welfare rather than based on economic issues. Under the third TRAC factor, human health and welfare is at its highest risk in the asylum context, and Plaintiffs should plead these harms in detail.

Although asylum applicants are allowed to remain in the United States throughout the adjudication period, they are left in “limbo” without the ability to petition to rescue family members who may still be facing danger to their health and welfare in the country of persecution. *See, e.g., Dae Hyun Kim v. Ashcroft*, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004) (“[T]he [agency] simply does not possess unfettered discretion to relegate aliens to a state of ‘limbo,’ leaving them to languish there indefinitely. This result is explicitly foreclosed by the APA.”). Plaintiffs may cite to case law which explains the hardship faced by applicants with long-unadjudicated asylum claims. *See, e.g., A.B.T. v. USCIS*, No. 2:11-cv-02108 RAJ, 2012 WL 2995064, at *3-4 (D. Wash. July 20, 2012) (describing fear and vulnerability of asylum-seekers while applications are pending). Additionally, asylum seekers’ own health and welfare can be directly impacted by these lengthy states of “limbo” where they cannot move on with their lives, cannot feel safe, and cannot gain closure to the events they have suffered through, as they

frequently relive them in anticipation of one day, having to talk about them again. The state of limbo in many cases tends to compound the trauma that these individuals have already suffered.

Some courts have concluded that APA or mandamus relief was not appropriate in the asylum context in part because the plaintiff was “in no immediate danger of deportation or physical or economic harm.” *Pesantez*, 2015 WL 5475655, at *6. It is important to plead with specificity the economic harm. This can include the financial strain of supporting a family overseas. It could also include facts to support a delay in adjusting status, which precludes certain jobs available only to lawful permanent residents and U.S. citizens. In terms of deportation, here again is an opportunity to plead the mental and emotional anguish that comes from the threat of deportation, which can exacerbate preexisting trauma.

D. The court should consider the effect of expediting delayed action on agency activities of a higher or competing priority

Regarding the fourth TRAC factor, plaintiffs should address how expediting one asylum case further delays others. Courts may consider the impact that one case may have on the “higher or competing” priority of ensuring that others’ cases are not delayed. Plaintiffs challenging LIFO should be aware that the government may characterize their claims as seeking to ‘cut the line’ and obtain immediate adjudication ahead of newer applicants. *See Xu*, 434 F. Supp. 3d at 55. When asking the court to order USCIS to expedite a delayed case, plaintiffs must avoid a focus on the “net gain” of expedited adjudication. *See Mashpee Wampanoag*, 336 F.3d at 1100 (refusing to grant relief “putting [the petitioner] at the head of the queue” would “produce[] no net gain”) (internal citations and quotations omitted). Rather, plaintiffs should focus on their right to timely adjudication and the duty of the agency to adjudicate. Though some courts have hesitated to expedite delayed cases because of the impact on competing priorities, other courts have recognized that an extremely delayed adjudication cannot be justified by an agency’s lack of resources. *See e.g., Zhou v. FBI Director*, No. 07-cv-238-PB, 2008 WL 2413896, at *7 (D.N.H. June 12, 2008).

Plaintiffs should also emphasize that the goal is not expedited adjudication but rather to ensure that they—along with other asylum applicants—will obtain adjudication *at some point* and without unreasonable delay. *See Wang v. Gonzales*, No. 07-CV-02348-HRL, 2007 WL 2972917, at *5 (N.D. Cal. Oct. 10, 2007) (marked not for citation). Because USCIS is adjudicating asylum applications on a LIFO basis, they are not cutting the line but, rather, trying to maintain the integrity of the “line,” such that the older applications are adjudicated before earlier-filed applications. Indeed, for those in the backlog, there arguably is no “line.” Courts have mixed reactions to such arguments. *Compare Yueliang Zhang v. Wolf*, 19-cv-5370 (DLI), 2020 WL 5878255, at *5 (E.D.N.Y. Sept. 30, 2020) (finding LIFO to be effective given statistics showing rate of growth of the asylum application backlog to have slowed as of April 2020); *with Ghali*, 2019 WL 1429583, at *4-5 (granting leave to amend to raise claim alleging that LIFO violates plaintiffs’ due process rights due to possible unconstitutionality of “infinite delay” in adjudication of asylum application). Accordingly, plaintiffs should take care to plead the inefficacy of LIFO in their complaint and be sure to “front” any issues of competing priorities.

Related to the idea of net gain is the focus of some courts on the limited resources that the government has while adjudicating asylum claims. Whereas the concern over net gain deals with unfairly reshuffling the line of applicants waiting for adjudication, concern behind interference with agency resources is based on a hesitancy to determine how agencies should expend their limited resources. *Pesantez*, 2015 WL 5475655, at *6 (“Judicial intervention in this case would necessarily involve an intrusion into the defendants’ allocation of adjudicatory resources on the whole, and that is something that this Court is “institutionally ill-equipped to do.”) (quoting *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1038 (9th Cir. 2013)).

Significantly, many courts have rejected this line of reasoning, and the rationale of their decisions provides a strong argument in defense of any government claim related to “net gain” or judicial interference with the use of agency resources. For example, in *Zhou*, the court rejected the government’s argument that advancing the cases of those whose applications were most seriously delayed “would seriously interfere with higher or competing priorities.” 2008 WL 2413896, at *7. The court explained:

[T]he fact that the relevant agencies lack sufficient resources to timely process all . . . applications is ultimately a problem for the political branches . . . It is not the aggrieved applicants who have created this problem, and it would not be appropriate for the courts to shift the burdens of this [] onto the shoulders of individual immigrants.

Id.; see also *Tang v. Chertoff*, 493 F. Supp. 2d 148, 158 (D. Mass. 2007) (noting that the lack of sufficient agency resources is a “policy crisis” but finding that “it is not plaintiffs who ask the Court to take on the burden of remedying this crisis. Rather, it is defendants who ask the Court to relieve the pressure by excusing them from their statutory duty and letting the cost fall on immigrant plaintiffs.”); see also *Alkeyani v. DHS*, 514 F. Supp. 2d 258, 266 (D. Conn. 2007); *Daraji v. Monica*, No. 07-1749, 2008 WL 183643, *6-7 (E.D. Pa. Jan. 18, 2008); *Jin v. Heinauer*, No. 2:07-cv-0068, 2007 WL 4287657, *4 (S.D. Oh. Dec. 4, 2007); *Liu v. Chertoff*, No. CV-06-1682-ST, 2007 WL 2435157, at *96 (D. Or. Aug. 29, 2007); *Galvez v. Howerton*, 503 F. Supp. 35, 39 (C.D. Cal. 1980); *Jianhua Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1171-72 (N.D. Cal. 2007).

Accordingly, plaintiffs should argue that a lack of agency resources does not preclude an agency from exercising its nondiscretionary duty to adjudicate their asylum application.

E. The court should also take into account the nature and extent of the interests prejudiced by delay

The fifth TRAC factor about the interests prejudiced by delay is very fact-specific to the particular plaintiff’s facts. As discussed under factor three, successful claims will persuasively highlight the facts of the specific interests involved in the individual case. For example, in some cases, Plaintiffs have suffered the psychological trauma of not knowing if they can build a new life in the United States or if they will be sent back to their country of origin where they could be killed or persecuted. Also, specific plaintiffs suffer from not being able to see or reunite with their families, to travel, to obtain legal status, to find stable housing, or to find stable work. These

details should be pled in the complaint with specificity. *See Fangfang Xu*, 434 F. Supp. 3d at 54 (dismissing Plaintiff’s TRAC factor five arguments because the “Complaint does not include any allegations that she is suffering from psychiatric disorders as a result of the delay, or that she has any family members in China whose lives may depend on her obtaining asylum in a timely manner. In the absence of such pleaded facts, Plaintiff’s arguments in her opposition brief are insufficient to state a claim for relief.”). Because different courts have used different standards for unreasonableness, understanding the weight given to factors in the relevant Circuit and detailing the facts and harms in the client’s case is critical. *See, e.g., Zhou*, 2008 WL 2413896 at *7 (noting that the First Circuit primarily is concerned with the length of delay).

F. The court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed

Regarding the sixth TRAC factor, courts have been sympathetic to the government’s duty to adjudicate an ever-expanding backlog of asylum cases with limited resources. Mandamus relief, however, is not contingent on proving some form of wrongdoing by the agency. The plaintiff could argue that the large asylum backlog creates an unreasonable adjudication delay based on the facts of the case and that the court should not focus on whether the plaintiff has identified wrongdoing by the agency.

V. EQUAL ACCESS TO JUSTICE ACT FEES MAY BE DIFFICULT

The mere filing of a complaint in federal district court may, in some cases, spur an agency decision. Typically, where filing an unreasonable delay complaint spurs agency action—or acts as a “catalyst” for agency action—the plaintiff is not entitled to fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). However, where the case results in a district court order directing the agency to take action, EAJA fees may be available. For a thorough discussion of when EAJA fees are available and in what circumstances, please see the following practice advisory: American Immigration Council, National Immigration Litigation Alliance, and the National Immigration Project of the National Lawyers Guild, *Requesting Attorneys’ Fees Under the Equal Access to Justice Act*, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/requesting_attorneys_fees_under_the_equal_access_to_justice_act_6-7-14_fin.pdf (Aug. 15, 2020).

VI. CONCLUSION

Unreasonable delays in asylum adjudications have severe and long-lasting consequences for asylum applicants. Legally sound and compelling arguments exist that courts have the power to compel agency action under the mandamus statute and/or the APA, although, as in any suit, there are challenges that a plaintiff will need to overcome.

ADDENDUM A

Total Number of Pending Form I-589 Applications by Fiscal Year & Quarter

Quarter	I-589 Applications Received	I-589 Adjudications Completed*	Total I-589 Applications Pending
FY 2018			
Quarter 1	32,420	Data unavailable	307,635
Quarter 2	28,504		318,624
Quarter 3	22,396		319,563
Quarter 4	22,721		319,202 **
FY 2019			
Quarter 1	23,538	Data unavailable	325,514
Quarter 2	22,920		327,984
Quarter 3	25,845		330,612
Quarter 4	24,558		339,836
FY 2020			
Quarter 1	20,149	12,558	353,562
Quarter 2	23,192	15,022	358,419
Quarter 3	25,905	4,855	373,957
Quarter 4	23,888	6,842	386,014
FY 2021			
Quarter 1	14,206	8,411	394,101
Quarter 2	15,306	10,628	398,928
Quarter 3	13,371	9,580	403,947
Quarter 4	18,270	11,523	412,796
FY 2022			
Quarter 1	27,121	9,727	432,341
Quarter 2	40,919	11,423	468,080
Quarter 3	42,093	10,771	509,093

* USCIS did not comprehensively track asylum applications adjudicated during FY 2018 and 2019

** Only quarter when total pending I-589s decreased

Sources: USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2022, 3rd Quarter\)](#) (Nov. 3, 2022); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2022, 2nd Quarter\)](#) (July 15, 2022); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2022, 1st Quarter\)](#) (March 9, 2022); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2021, 4th Quarter\)](#) (Dec. 15, 2021); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2021, 3rd Quarter\)](#) (Aug. 17, 2021); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2021, 2nd Quarter\)](#) (June 23, 2021); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2021\)](#) (April 22, 2021); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2020\)](#) (Jan. 25, 2021); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2019\)](#) (Jan. 14, 2020); USCIS, [All USCIS Application and Petition Form Types \(Fiscal Year 2018\)](#) (Feb. 18, 2019).