IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ABDELHAMID LAZLI and ELIZABETH RIBBECK,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, WILLIAM MCNAMEE, EVELYN UPCHURCH, ROBERT DIVINE, MICHAEL CHERTOFF, ALBERTO GONZALES

Defendants.

CV-05-1680-ST

FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate Judge:

INTRODUCTION

Abdelhamid Lazli ("Lazli"), a native and citizen of Algeria, and his wife, Elizabeth Ribbeck ("Ribbeck"), request the court to order the Citizenship and Immigration Services

("CIS") to adjudicate their Petition to Remove Conditions on Residence, Form I-751, and Lazli's Application for Naturalization, Form N-400. They allege claims against the CIS and the following defendants sued in their official capacity (hereinafter "Defendants"): William McNamee ("McNamee"), District Director of the Portland District Office of the CIS; Evelyn Upchurch ("Upchurch"), Acting Director of the Nebraska Service Center of the CIS; Robert Divine ("Divine"), Acting Director of the CIS within the Department of Homeland Security ("DHS"); Michael Chertoff ("Chertoff"), the Secretary of Homeland Security; and Alberto Gonzales ("Gonzales"), Attorney General of the United States.

The Supplemental Pleadings (Second) ("Complaint") allege that the CIS and Defendants have: (1) willfully and unreasonably delayed the adjudication of or refused to adjudicate the plaintiffs' Petition to Remove Conditions on Residence (First Cause of Action); (2) have willfully and unreasonably delayed in, and have refused to, adjudicate Lazli's Application for Naturalization (Second Cause of Action); and (3) by refusing to issue evidence of Lazli's lawful permanent residence, have made it impossible for Lazli to comply with the requirements of 8 USC § 1304(e) (Third Cause of Action).

This court has jurisdiction pursuant to 28 USC § 1331 (federal question) and 28 USC § 1361 (Mandamus and Venue Act of 1962).

Plaintiffs have filed Motions for Partial Summary Judgment on their First Cause of Action (docket # 26) and Second Cause of Action (docket # 29). Defendants have filed a Motion to Dismiss for failure to state a claim upon which relief may be granted, or, in the alternative, a

partial Cross Motion for Summary Judgment (docket # 38).[1] For the reasons that follow, plaintiffs' motions should be granted and defendants' motion should be denied.

LEGAL STANDARDS

I. Motion to Dismiss

"A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Sprewell v. Golden State Warriors*, 266 F3d 979, 988 (9th Cir), *opinion amended on denial of rehearing*, 275 F3d 1187 (2001) (citation omitted). The court must accept as true, in the light most favorable to the non-moving party, all material, well-pled allegations in a complaint, as well as all reasonable inferences from those allegations. *Id.*

II. Motion for Summary Judgment

FRCP 56(c) authorizes summary judgment if "no genuine issue" exists regarding any material fact and "the moving party is entitled to judgment as a matter of law." The moving party must show an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 US 317, 323 (1986). Once the moving party does so, the nonmoving party must "go beyond the pleadings" and designate specific facts showing a "genuine issue for trial." *Id* at 324, citing FRCP 56(e). The court "does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City*, 180 F3d 1047, 1054 (9th Cir 1999) (citation omitted). A "'*scintilla* of evidence,' or evidence that is 'merely colorable' or 'not significantly probative,'" does not present a genuine issue of material fact.

[1] Although defendants' motion appears to seek dismissal of all claims, the briefing in support responds only to plaintiffs' motions concerning the First and Second Causes of Action. Because the parties did not address the Third Cause of Action, this court also does not address it.

United Steelworkers of Am. v. Phelps Dodge Corp., 865 F2d 1539, 1542 (9th Cir), *cert denied*, 493 US 809 (1989) (emphasis in original) (citation omitted).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F2d 626, 630 (9th Cir 1987). The court must view the inferences drawn from the facts "in the light most favorable to the nonmoving party." *Id* (citation omitted).

FACTS

I. Conditional Permanent Residence

On March 29, 2000, Lazli, a citizen of Algeria, was lawfully admitted to the United States on a K-1 fiancé visa to marry Ribbeck, a United States citizen. Plaintiffs' Facts I, Exhibits 1 & 2.[2] On April 8, 2000, Lazli and Ribbeck were lawfully married in Beaverton, Oregon. Plaintiffs' Facts I, Exhibit 3. They are the parents of two children born in the United States, a five-year old son and a two-year old daughter. Plaintiffs' Facts I, Exhibits 4 & 5.

On May 10, 2000, Lazli applied for adjustment of status to conditional permanent residence. Plaintiffs' Facts I, Exhibit 6. On October 23, 2000, Lazli's application for adjustment of status was approved by the Portland District Office of the Immigration and Naturalization Service (now The CIS),[3] and he was granted conditional permanent residence for two years. Plaintiffs' Facts I, Exhibit 7.

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[2] Plaintiffs have submitted exhibits 1 through 11 in support of their Motion for Partial Summary Judgment on the First Cause of Action, and exhibits 1 through 10 in support of their Motion for Partial Summary Judgment on the Second Cause of Action. In order to avoid confusion, the former are referred to as "Plaintiffs' Facts I" exhibits, while the latter are referred to "Plaintiffs' Facts II" exhibits.

[3] As of March 1, 2003, the Immigration and Naturalization Office ceased to exist as an agency within the Department of Justice, and its functions regarding adjudicating applications for immigration benefits were transferred to the newly created CIS, an agency within the Department of Homeland Security. Homeland Security Act of 2002, Pub L 107-296, § 471(a), 116 Stat 2135, 2205 (Nov 25, 2002).

II. Form I-751

On October 23, 2002, plaintiffs timely filed Form I-751 with the CIS Nebraska Service Center in order to remove the condition on Lazli's residence. Plaintiffs' Facts I, Exhibit 8. The CIS acknowledged receipt of the Form I-751 and extended Lazli's alien card for one year, authorizing employment and travel during that time. *Id*. The CIS further informed plaintiffs that processing of the form would require a minimum of six months and that they could contact the Nebraska Service Center if they did not hear from the CIS within eight months. *Id*.

Forms I-751 are generally adjudicated by the four CIS Service Centers. Plaintiffs' Facts I, Exhibit 10. As of April 18, 2006, the CIS Nebraska Service Center was adjudicating Forms I-751 filed on or before December 22, 2005. *Id*. Nationwide, as of April 14, 2006, the average processing time for I-751 petitions was 7.25 months. *Id*.

To date, the director of the CIS Nebraska Service Center has neither waived the requirement to interview plaintiffs and adjudicate the Form I-751 Petition nor forwarded plaintiffs' Form I-751 Petition to the Portland District Office of the CIS for an interview. Plaintiffs' I-751 Petition has not been adjudicated because the Interagency Border Inspection System ("IBIS") security check is not complete. Plaintiffs' Facts I, Exhibit 11. IBIS is a system managed by the DHS that combines information from more than 20 federal law enforcement and intelligence agencies, such as the Central Intelligence Agency ("CIA"), Federal Bureau of Investigation ("FBI"), other divisions of the United States Department of Justice, Department of State, DHS/United States Customs and Border Protection ("CBP"), and other DHS agencies.[4]

[4] According to defendants, IBIS has existed since 1989 and is under the control of the CIS within the Treasury Enforcement Communications Systems ("TECS"), which is a law enforcement database managed by Immigration and Customs Enforcement ("ICE"), part of DHS. *See* System of Records Notices, 70 Fed Reg 17857 (April 7, 2005); 66 Fed Reg 52984 (Oct 18, 2001); 63 Fed Reg 60809 (Dec 7, 1998).

Plaintiffs' Facts II, Exhibit 8. IBIS is the only security check required by the CIS for adjudication of the plaintiffs' Form I-751. Plaintiffs' Facts I, Exhibit 9.

III. Form N-400

On April 29, 2004, Lazli filed Form N-400, Application for Naturalization, with the CIS Nebraska Service Center. Plaintiffs' Facts II, Exhibit 7. On May 24, 2004, the Nebraska Service Center sent Lazli a receipt, informing him that when scheduled by the local office, he would be notified of the date and place of his interview and that he should expect to receive that notice within 210 days. *Id.*

Forms N-400 are received and processed at the four CIS Service Centers, but are always adjudicated at the district offices. Plaintiffs' Facts II, Exhibit 9. As of April 18, 2006, the CIS Portland District Office was adjudicating Forms N-400 filed on or before August 8, 2005. *Id.* Nationwide, as of April 14, 2006, the average processing time for adjudication of Forms N-400 was 9.86 months. *Id.*

To date, Lazli's N-400 application remains pending and he has not had a naturalization interview. Plaintiffs' Facts II, Exhibit 10. On June 5, 2006, Lazli received a naturalization interview notice from the CIS. Plaintiffs' Reply to Motion II, Exhibit 2. The interview was scheduled for on July 17, 2006 at 8:00 a.m. *Id.* However, on July 3, 2006, Lazli received a notice from the CIS stating that the interview was cancelled "due to unforeseen circumstances." Plaintiffs' Reply to Motion II, Exhibit 1.

Lazli's N-400 application has not been adjudicated because the IBIS check, the FBI name check,[5] and the FBI fingerprint check [6] are not complete. Plaintiffs' Facts II, Exhibits 8 & 9. Immigration officers performed IBIS checks at the CIS Nebraska Service Center on January 9, 2004, March 30, 2004, April 2, 2004, May 25, 2004, July 8, 2004, and November 14, 2005, which are "pending resolution." Plaintiffs' Facts II, Exhibit 8. The FBI name check was requested May 25, 2004 and is "pending." *Id*. The fingerprint check was completed on July 8, 2004, but was valid for only 15 months and has now expired, requiring it to be completed again. *Id.* On May 8, 2006, Lazli received a notification that his fingerprints had expired and that his fingerprints would be retaken on May 23, 2006 at 9:00 a.m. Plaintiffs' Reply to Motion II, Exhibit 3.

DISCUSSION

I. Statutory Basis for Jurisdiction and Relief

Plaintiffs seek relief under 28 USC § 2201 (Declaratory Judgment Act), 5 USC §§ 701-06 (Administrative Procedures Act) ("APA"), and 28 USC § 1361 (Mandamus and Venue Act of 1962). Although plaintiffs' motions for partial summary judgment request only the issuance of a writ of mandamus under 28 USC § 1361 requiring defendants to adjudicate their I-751 petition and N-400 application, the APA also provides a possible basis for the same relief.

The Mandamus and Venue Act grants federal district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any

[5] Records maintained in the FBI name check process "consist of administrative, applicant, criminal, personnel and other files compiled by law enforcement." Defendants' Answer to Court's Inquiry, Exhibit B, p. 2.

[6] The FBI fingerprint check "provides information relating to criminal background within the United States." Defendants' Answer to Court''s Inquiry, Exhibit B, p. 2.

agency thereof to perform a duty owed to the plaintiff." 28 USC § 1361. Similarly the APA allows district courts to compel "agency action unlawfully withheld or unreasonably delayed." 5 USC § 706(1). The provisions of the APA do "not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 US 99, 107 (1977). However, an independent ground for jurisdiction exists under 28 USC § 1331 which grants federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Although the relationship between the APA and the Mandamus and Venue Act "has not been thoroughly examined by the courts, the Supreme Court has construed a claim seeking mandamus . . . as one for relief under § 706 of the APA." *Indep. Mining Co., Inc. v. Babbitt*, 105 F3d 502, 507 (9th Cir 1997), citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 US 221, 230 n4 (1986).

There is no consensus on whether the APA provides a means for challenging delays by agencies subject to the Immigration and Nationality Act of 1952 ("INA"), 8 USC §§ 1101 *et seq*. In *Ardestani v. INS*, 502 US 129 (1991), the Supreme Court considered whether a prevailing party in a deportation proceeding could recover attorneys fees pursuant to the Equal Access to Justice Act ("EAJA"). The EAJA provides for fees in an adversary adjudication as defined by section 554 of the APA, 5 USC § 504. The Court held that a deportation adjudication conducted pursuant to the INA was not governed by the definitions and provisions of APA because Congress intended the provisions of the INA to supplant rather than supplement the APA in immigration proceedings. *Id*, citing *Marcello v. Bonds*, 349 US 302 (1955). Actions involving I-751 petitions and N-400 applications take place under the INA. Nevertheless, after *Ardestani* a number of district court have ruled that the APA allows judicial review of unlawfully withheld

or unreasonably delayed actions by the CIS. *See Hu v. Reno*, 2000 WL 425174 *1 (ND Texas April 18, 2000); *Yu v. Brown*, 36 F Supp 2d 922, 929 (DNM 1999); *Sze v. INS*, 1997 WL 446236 **4-5, 7 (ND Cal July 24, 1997), *appeal dismissed by* 153 F3d 1005 (9th Cir 1998); *cf Singh v. Chert*, 784 F Supp 759, 763 (ND Ca 1992) (recognizing, but not resolving, that *Ardestani* may call into question the applicability of the APA "reasonable time" requirement to the INS).

Because the relief sought by plaintiffs is basically the same under both acts and because *Ardestani* raises a question concerning the applicability of the APA to agency action under the INA, this court will analyze the plaintiffs' entitlement to relief solely under the Mandamus and Venue Act. *See also Yu*, 36 F Supp 2d at 933.

II. Relief Under the Writ of Mandamus

A. Legal Standard

A writ of mandamus under 28 USC § 1361 is an extraordinary remedy which is available to compel a federal officer, employee or agency to perform a duty only if: (1) the plaintiff's claim is "clear and certain;" (2) "the official's duty to act is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt;" and (3) "no other adequate remedy is available." *Patel v. Reno*, 134 F3d 929, 931 (9th Cir 1998) (citation omitted). Whether each element of the three-part mandamus test is satisfied is a question of law. *Fallini v. Hodel*, 783 F2d 1343, 1345 (9th Cir 1986). Granting a writ of mandamus lies within the discretion of the court even if the three elements are satisfied. *Id* (citation omitted).

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B. I-751 Petition (First Cause of Action)

In their First Cause of Action, plaintiffs request the court to issue a writ of mandamus compelling defendants to adjudicate their I-751 petition. Defendants seek dismissal of that claim for failure to meet the second and third prongs of the writ of mandamus test.

1. Clear and Certain Claim

Conditional permanent residence is the immigration status of an alien spouse[7] lawfully admitted for permanent residence as an immediate relative of a United States citizen, by virtue of a marriage entered into less than 24 months before the alien obtains such status. 8 USC §§ 1186a(a) & (g). Within three months before the two-year anniversary of obtaining conditional permanent residence, the alien spouse and his or her United States citizen spouse are required to file Form I-751, Petition to Remove Conditions on Residence. 8 USC § 1186a(c)(1). If the

I-751 petition is approved, the conditional basis for permanent residence will be removed effective as of the second anniversary of obtaining conditional permanent residence, and the alien spouse will become a lawful permanent resident. 8 USC § 1186a(c)(3)(B).

The parties agree that within the three months before the second anniversary of becoming a conditional permanent resident, Lazli and his wife filed an I-751 petition and complied with the requirements of the statute. Thus, plaintiffs' claim for adjudication of the Form I-751 is clear and certain.

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[7] Conditional permanent residence can also be obtained by certain alien sons and daughters, a topic which need not be addressed here.

2. Nondiscretionary Duty to Adjudicate I-751 Petitions

a. Nature of Duty to Adjudicate

Under 8 USC § 1186a(d)(3), an interview "shall be conducted within 90 days" after the date of submitting the I-751 petition. However, the Attorney General,[8] in his or her discretion, "may waive the deadline for such an interview or the requirement for such an interview in such cases as may be appropriate." *Id*. The regulations clarify this statutory language:

> The director of the regional service center shall review the Form I-751 filed by the alien and the alien's spouse to determine whether to waive the interview required by the Act. If satisfied that the marriage was not for the purpose of evading the immigration laws, the regional service center director may waive the interview and approve the petition. If not so satisfied, then the regional service center director shall forward the petition to the district director having jurisdiction over the place of the alien's residence so that an interview of both the alien and the alien's spouse may be conducted. *The director must either waive the requirement for an interview and adjudicate the petition* or *arrange for an interview within 90 days* of the date on which the petition was properly filed.

8 CFR § 216.4(b)(1) (emphasis added).

Plaintiffs argue that the director has a mandatory duty to act within 90 days after the filing by either waiving the interview and adjudicating the I-751 petition *or* arranging for an interview with the Portland District Office. Relying on *Robertson v. Attorney General*, 957 F Supp 1035, 1037 (ND Ill 1997), defendants contend that 8 CFR § 216.4(b)(1) only provides guidance and does not impose a mandatory duty.

[8] Although the Homeland Security Act of 2002, Pub L 107-296, § 471(a), 116 Stat 2135, 2205 (Nov 25, 2002) transferred the responsibility to adjudicate petitions from the now defunct INS (an agency within the Department of Justice and under the Attorney General's supervision) to the CIS (an agency within DHS), many statutes and regulations pertaining to immigration law have yet to be amended to reflect this transfer of authority from the Attorney General to the Secretary of Homeland Security.

In *Robertson*, the plaintiffs filed their mandamus action five months after the interview on their I-751 petition. Based on the interview, the agency had referred the case for a marriage fraud investigation which was still pending at the time the couple filed their action in federal district court. The court held that the deadlines contained in 8 USC § 1186a(c)(3)(A) and its implementing regulation, 8 CFR § 216.4, are "merely directory" based on several considerations. *Id* at 1037.

First, citing *Brock v. Pierce Co.*, 476 US 253, 260-62 (1986), *Robertson* noted that a deadline is not mandatory if Congress fails to specify any penalty or sanction for an agency's failure to comply with the deadline and if nothing in the legislative history indicates that Congress believed compliance with the deadline was essential to the effective operation of the statute. It found that neither the statute nor the regulation concerning adjudication of Form I-751 make any mention of any sanction for noncompliance with the 90 day deadline, and nothing in the legislative history indicates a significant concern with restricting the time in which the CIS may act. It also concluded that a court's interference with the investigation "would thwart the main purpose of the legislation," which is to prevent the use of fraudulent marriages to obtain permanent resident status. *Id*.

This court concurs with *Robertson* that nothing in 8 USC § 1186a(c)(3)(A) or 8 CFR § 216.4 specifies any sanction for the CIS' failure to act within the 90-day deadline. Nevertheless, *Robertson* failed to recognize an important distinguishing factor in *Brock*. *Brock* involved a statute requiring the Department of Labor to investigate complaints alleging the misuse of grant funds by a grant recipient and issue a final determination within 120 days of receiving the complaint. By failing to meet the deadline, the grant recipient contended that the

agency was divested of the power to issue *any* determination on the recipient's alleged misuse of funds. Examining the language and legislative history of the statute, the Supreme Court determined that Congress did not intend to create a jurisdictional requirement by setting a 120-day deadline. *Id* at 262-63. The Court also noted that important public rights involving the recovery of misused public funds would be prejudiced if the statute were construed as imposing a mandatory requirement. *Id* at 260. It concluded that the agency did not lose the power to make a final determination on a complaint after the 120-day period expired. *Id* at 266.

Unlike the scenario in *Brock*, 8 USC § 1186a(c)(3)(A) does not involve a jurisdictional requirement. Finding that the director's duty is mandatory would not cause the CIS to lose any power to make a determination on Forms I-751. Plaintiffs simply ask the court to compel the CIS to act, either by adjudicating the I-751 petition or by setting up an interview. Such an order would not thwart the main purpose of the legislation which is to prevent the use of fraudulent marriages to obtain permanent resident status.

However, this court need not decide whether the 90-day deadline dictated by the statute and implementing regulation is mandatory or permissive. In either event, defendants have a nondiscretionary duty to make a decision on the I-751 petition at some point. This court is persuaded that an implied duty exists to adjudicate immigration applications, including the I-751 petition, within a reasonable time. *See Fraga By and Through Fraga v. Smith*, 607 F Supp 517, 521 (D Or 1985); *Alkelani v. Barrows*, 356 F Supp 2d 652, 656 (ND Tex 2005); *Elkhatib v. Bulter*, No. 04-22407 at * 4 (SD Fla June 6, 2005); *Lavelle v. United States Dept. of Homeland Security*, 2004 WL 1975935 at * 6 n5 (ND Cal Sept 7, 2004); *Hu v. Reno*, 2000 WL 425174 ** 3-4 (ND Texas April 18, 2000); *Paunescu v. INS*, 76 F Supp 2d 896, 900 (ND Ill 1999);

Agbemaple v. INS, 1998 WL 292441 at * 2 (ND Ill May 18, 1998); *Yu*, 36 F Supp 2d at 932. Administrative agencies have no discretion to avoid discharging the duties that Congress intended them to perform. *Yu*, 36 F Supp 2d at 931. Any discretion the agency may have in *how* to decide such immigration applications should not be confused with *whether* it has discretion to make a decision in the first place. "A contrary position would permit the [CIS] to delay indefinitely." *Agmaple*, 1998 WL 292441 at * 2.

b. Unreasonable Delay in Adjudication

What constitutes a reasonable time for adjudicating an immigration application depends on the facts of each case. *Yu*, 36 F Supp 2d at 935, citing *Fraga*, 607 F Supp at 522. Among the various tests used by courts to assess unreasonable delay are the six factors cited by *Telecommunications Research and Action Center v. F.C.C.*, 750 F2d 70, 80 (DC Cir 1984) ("*TRAC*"):

> (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.

(internal citations and quotation marks omitted).

While *TRAC* was decided in the context of the APA, 5 USC § 706(1), it serves as a helpful tool for deciding what constitutes unreasonable delay. "The reasonableness of administrative delays also must be judged in light of the resources that Congress has supplied to

the agency" and the "impact of the delays on the applicants' interests." *Fraga*, 607 F Supp at 521. While "[t]he passage of time alone is rarely enough to justify a court's intervention in the administrative process" (*id* (citation omitted)), significant delays "may not be justified merely by assertions of overwork," especially where "the interests involved are personal, not economic." *Dabone v. Thornburgh*, 734 F Supp 195, 203 (ED Penn 1990).

Various courts have found unreasonable delays in the CIS' failure to act on immigration applications. In *Al-Kudsi v. Gonzales*, 2006 WL 752556 * 3 (D Or March 22, 2006), Magistrate Judge Papak found that a delay of over three years after the interview in the adjudication of a naturalization application due to pending security checks was unreasonable where there was no explanation or justification for the delay by the CIS or the FBI.[9] In *Elkhatib*, No. 04-22407, **4-5, the court found that as a matter of law, four years is an unreasonable length of time for the plaintiff's adjustment of status application to remain pending. In *Agbemaple*, 1998 WL 292441 at * 2,[10] the court denied the CIS' motion to dismiss, concluding that it was possible that plaintiff could demonstrate that a delay of over a year from the adjustment of status interview was unreasonable. In *Yu*, 36 F Supp at 932, the court denied the CIS' motion to dismiss, deciding that a two and a half year delay in adjudicating an application for special immigrant status and adjustment of status was "on its face an unreasonable amount of time to process a routine application" and was sufficient to establish a *prima facie* case of unreasonable delay. In

[9] *Al-Kudsi* was decided under 8 USC § 1447(b), which provides that "[i]f there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the [naturalization] examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter."

[10] Unfortunately, neither opinion reveals the CIS' stated reason for the delay in adjudications.

Paunescu, 76 F Supp 2d at 902,[11] the court ordered the CIS to process the adjustment of status applications of diversity visa holders whose applications had been pending for over two years since they were first filed, for 19 months since the principal applicant refiled his fingerprint card, and for over a year since that applicant's fingerprints cleared.

By contrast, in *Sze*, 1997 WL 446236 at *7, a seven-month failure to adjudicate several plaintiffs' naturalization applications was held not to be unreasonable where the delays were "largely attributable to short-term factors such as increased applicants, recent changes to INS' processing rules, and the fallout from the FBI's recent relocation of its facilities," and where a court order would "at best, reorder the queue of applications, thereby leading to little net benefit." In *Singh v. Ilchert*, 784 F Supp 759, 765 (ND Cal 1992), a delay of up to 90 days in adjudicating temporary employment authorization applications for aliens awaiting decisions on their asylum applications was found not to be unreasonable. In *Alkelani*, 356 F Supp 2d at 657, a 15-month delay in deciding a naturalization appeal was not unreasonable under "the unique circumstances" of that case, namely the results of a fingerprint comparison or name check by the FBI, one of 600 name checks being processed by the FBI at that time. The court further noted that the CIS had no authority to expedite the FBI investigation or to give the petitioner priority over background checks requested by other agencies and that "delays of this nature are inevitable and becoming more frequent in light of heightened security concerns in the post-911 world." *Id*. Therefore, the court declined to grant mandamus relief. However, "[w]ithout deciding how long

[11] One factor present in *Paunescu* is not at issue here: the applicants' diversity visas were only valid for one year, a valid diversity visa was required for adjustment of status eligibility, and the diversity visas expired while the adjustment of status applications were pending. The court found that the CIS' delay was unreasonable and ordered the CIS to adjudicate the adjustment of status applications despite the expiration of the diversity visas.

of a delay may be too long," *Alkelani* acknowledged that decisions from other jurisdictions (*Paunescu, Yu* and *Agbemaple*) suggested that delays approximating two years may be unreasonable. *Id* (citations omitted). In *Hu*, 2000 WL 425174 at * 4, the court was unable to decide whether a two and a half year delay was unreasonable as a matter of law since neither party submitted any evidence on that issue.

Here defendants have not adjudicated plaintiffs' I-751 petition or scheduled an interview within 90 days after the petition was filed or even within the past three and a half years. Defendants attribute the delay to the IBIS security check not being completed and deny that the delay is unreasonable.

If an IBIS security check is not a prerequisite for adjudication, then that excuse for the delay cannot be justified. The Secretary of the DHS is charged by 8 USC § 1103 with the administration and enforcement of the INA and all other laws relating to the immigration and naturalization of aliens. Its implementing regulation, 8 CFR § 216.4(c), dictates that a district director adjudicating an I-751 must determine whether: (1) the marriage was in accordance with the laws of the place of marriage; (2) the marriage was annulled or terminated other than through the death of a spouse; (3) the marriage was entered into for the purpose of procuring permanent residence status for the alien; or (4) a fee was paid to someone in connection with filing the petition. If "derogatory information is determined regarding any of these issues, the director shall offer the petitioners the opportunity to rebut such information." 8 CFR § 216.4(c)(4). On the other hand, if "derogatory information not relating to any of these issues is determined during the course of the interview, such information shall be forwarded to the investigations unit

for appropriate action." *Id*.[12] The regulation concludes that if "no unresolved derogatory information is determined relating to these issues [*i.e.* the *bona fides* of the marriage], the petition shall be approved and the conditional basis of the alien's permanent residence status removed, regardless of any action taken or contemplated regarding other possible grounds for removal." *Id*.

Although the relevant statute and regulation say nothing about the need for a security check prior to adjudication of a I-751 petition, a CIS memorandum mandates its employees to conduct IBIS checks for *all* applications and petitions. *See* Memorandum, William R. Yates, Deputy Exec Assoc Commissioner (May 10, 2002), *reprinted in* 79 *Interpreter Releases* 823, 843 (May 24, 2002) ("2002 CIS Memorandum"). The Adjudicator's Field Manual 10.3(1) likewise states that "[a]n application or petition shall not be approved or revalidated until the name of the applicant or principal beneficiary . . . [has] been checked against [IBIS]." At 10.3(2), the Manual further provides that "[a]dverse information relating to criminal activity or threats to national security may be fully addressed by the officer before any final decision may be made on such cases."

The record does not reveal, and this court cannot ascertain, how an IBIS check would reveal any derogatory information relating to the issues to be determined by the director when adjudicating an I-751 petition. Instead, an IBIS check presumably would only reveal derogatory information unrelated to those issues, such as a criminal record or suspicion of criminal or terrorism-related activity. Such derogatory information revealed by the IBIS check is "forwarded to the investigations unit for appropriate action," and the director must approve the

[12] Because the district director has authority to waive the interview under 8 CFR § 216.4(b)(1), the requirements of 8 CFR § 216.4(c) also apply to the adjudication process without an interview.

petition and remove the conditional basis of the alien's permanent residence status "regardless of any action taken or contemplated regarding other possible grounds for removal." 8 CFR § 216.4(c)(4). In that event, an IBIS check has nothing to do with determining the *bona fides* of a qualifying marriage and can have no bearing on the adjudication of an I-715 petition by the director. As a result, delaying adjudication of an I-751 petition in order to perform an IBIS check cannot be justified by the CIS' own regulations.

However, even if an IBIS check is an appropriate prerequisite to adjudication of I-751 petitions, the CIS is still required to complete both the IBIS check and the adjudication within a reasonable time. The current processing time for the CIS Nebraska Service Center to adjudicate an I-751 petition is about five months. Nationwide, the average processing time for I-751 petitions is just over seven months. Moreover, whether mandatory or not, the CIS' own regulation requires that adjudication or the scheduling of an interview occur within 90 days of the filing date, thus offering an insight into the CIS' expectations.

In comparison to the three, five, or seven-month processing times referenced by defendants, plaintiffs' I-751 petition has been pending for 46 months, over six times the national average processing time. Yet defendants offer absolutely no explanation why the IBIS check is not complete more than three and a half years after plaintiffs filed their petition. They appear to take the position that they have the right to sit on the petition indefinitely.

Defendants maintain that Lazli is not prejudiced by the delay because a conditional resident enjoys all the rights, privileges, responsibilities and duties which apply to lawful permanent residents. However, some differences do exist. Unlike a lawful permanent resident, Lazli misses a half-day from work every two months in order to go to the Portland District

Office to request an extension of his Form I-551, which constitutes proof of his status as a conditional permanent resident. Complaint ¶ 41, admitted at Answer ¶ 41. The process of obtaining extensions is unreliable at best. For example, between December 22, 2005, and January 10, 2006, the Portland District Office repeatedly denied Lazli an extension of his Form I-551 extension due to a new CIS memorandum which apparently affected such issuing. Complaint

¶¶ 34-38, admitted at Answer ¶¶ 34-38. The denial occurred despite the CIS' knowledge that Lazli's I-551 Form was expiring on December 24, 2005. Complaint ¶ 34, admitted at Answer ¶ 34. On January 10, 2006, defendants' counsel informed plaintiffs' counsel that the CIS memorandum had been temporarily withdrawn, but that it would be issued again in the near future. Complaint ¶ 38, admitted at Answer ¶ 38. The strong possibility that the CIS memorandum will be reinstated and Lazli will once again be denied extensions of his Form I-551 further illustrates the difference between his status as a conditional resident and that of a lawful permanent resident.

Having considered the 46 month delay in adjudication, defendants' unstated but likely interest in defending national security and preventing marriage fraud, and the harm suffered by plaintiffs suspended in a bureaucratic limbo, this court finds that defendants have violated their nondiscretionary duty to adjudicate the plaintiffs' I-751 petition within a reasonable time.

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3. <u>Other Remedies</u>

Mandamus is only appropriate where "no other *adequate* remedy is available" to the plaintiffs. *Patel*, 134 F3d at 931 (emphasis added). Defendants argue that plaintiffs have an

adequate remedy because they have the option of waiting until an adjudication is made. As discussed above, defendants have unreasonably delayed adjudication of the plaintiffs' I-751 petition. Continuing to wait indefinitely after more than three and a half years have passed since filing the petition is not an adequate remedy. Defendants also reference the remedies available in case the plaintiffs' I-751 petition is denied. Since their petition has not yet been denied, those remedies are inapplicable.

4. Recommendation

Since the record reveals that the three-part mandamus test is satisfied as a matter of law, mandamus relief should be granted on plaintiffs' First Cause of Action to adjudicate plaintiffs' I-751 petition. The court is mindful of the interests of other applicants who are currently waiting for their I-751 petitions to be adjudicated. Given that the national average processing time for I-751 petitions is just over seven months, an order to compel CIS to adjudicate the plaintiffs' petition would not unfairly place the plaintiffs in front of other applicants who have dutifully waited their turn. Therefore, defendants should be ordered to adjudicate the plaintiffs' I-751 petition within 90 days, with or without an interview, and to file a copy of the adjudication with the court within five business days of the adjudication.

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C. N–400 Naturalization Petition (Second Cause of Action)

Plaintiffs' Second Cause of Action requests that the court issue a writ of mandamus compelling defendants to complete the security checks within 90 days and to adjudicate Lazli's application for naturalization within 120 days of the date of the court's order.

1. Clear and Certain Claim

A lawful permanent resident spouse of a United States citizen may be naturalized if he or she meets certain requirements listed in 8 USC § 1430(a), including three years of continuous residence in the United States in marital union with his or her spouse immediately preceding the application for naturalization. For purposes of a naturalization application, a conditional permanent resident, such as Lazli, is considered to have been admitted as an alien lawfully admitted for permanent residence. 8 USC § 1186a(e). Conditional residents may file for naturalization, if they qualify, while their I-751 is pending. *See* Letter, Novak, Director, Vermont Service Center (Dec 18, 2001), *reprinted in* 79 *Interpreter Releases* 66, 89-90 (Jan 14, 2002).[13]

Lazli became a conditional permanent resident on October 23, 2000. He filed his application for naturalization on April 29, 2004. Therefore, for purposes of the naturalization application, he was a lawful permanent resident for three years immediately preceding the application.

Defendants agree that Lazli "appears to meet the statutory residence and physical presence requirements of naturalization found at 8 USC §§ 1427 and 1430." Plaintiffs' Facts II

[13] While Lazli's naturalization application was sent to the Nebraska Service Center, there is no evidence that the Nebraska Service Center has taken a different position than the Vermont Service Center.

Exhibit 10. As a result, the plaintiffs' claim for adjudication of the N-400 application is clear and certain.[14]

2. Nondiscretionary Duty to Adjudicate Naturalization Petitions

Defendants admit that they owe a nondiscretionary duty to adjudicate Lazli's application for naturalization. Complaint, ¶ 53, admitted in Answer, ¶ 53. As discussed above, they have a duty to adjudicate immigration applications, including the naturalization application, within a reasonable time.

3. Unreasonable Delay in Adjudication

Lazli filed Form N–400, Application for Naturalization, with the Nebraska Service Center on April 29, 2004. The May 24, 2004 receipt notice stated that he should expect to be notified of the date and place for his interview within 210 days of the notice. However, Lazli has yet to be interviewed. While he received a naturalization interview notice from CIS on June 5, 2006, setting the interview for July 17, 2006, the interview was later cancelled "due to unforeseen circumstances." Defendants have offered no evidence concerning the nature of the "unforeseen circumstances" that caused cancellation of the interview.

Lazli's naturalization application has been pending for over 27 months. Defendants maintain that the delay in adjudicating his application is due to pending IBIS and FBI name checks over which they have no control. Additionally, the July 8, 2004 fingerprint check has expired because of the substantial delay caused by the other security checks and needs to be

[14] It is unclear whether adjudications of naturalization applications can be *finalized* while an I-751 petition is still pending. That scenario will not occur here, as the pending IBIS check is delaying both the I-751 and N-400 applications. In any event, defendants have not raised the issue of ripeness.

reinitiated. Lazli was scheduled to have his fingerprints retaken on May 23, 2006, which plaintiffs claim was done. Plaintiffs' Reply to Motion II, Exhibit 3.

a. FBI Name Check and Fingerprint Check

The FBI name check and fingerprint check are statutory prerequisites to the adjudication of a naturalization application. Congress has directed the CIS to conduct a thorough background investigation of each applicant for naturalization to confirm eligibility for naturalization. *See* 8 USC § 1446(a); 8 CFR § 335.2(b). Beginning in 1997, the INS (now the CIS) cannot complete adjudication of N-400 applications until an FBI criminal background check is completed:

> That, during fiscal year 1998 and each fiscal year thereafter, none of the funds appropriated or otherwise made available to the Immigration and Naturalization Service shall be used to complete adjudication of an application for naturalization unless the Immigration and Naturalization Service has received confirmation from the Federal Bureau of Investigation that a full criminal background check has been completed, except for those exempted by regulation as of January 1, 1997 . . .

The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub L 105-119, Title I, 111 Stat. 2440, 2448-49 (Nov 26, 1997); *also see* 8 USC § 1446 note, referencing this language.

The implementing regulations require the CIS to "notify applicants for naturalization to appear before a Service officer for initial examination on the naturalization application only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed." 8 CFR § 335.2(b).

The FBI forwards fingerprint check responses within 24-48 hours. Defendants' Answer to Court's Inquiry, Exhibit B, p. 2. If there is a match, then the FBI forwards an electronic copy of the criminal history to the CIS. *Id*. The CIS adjudicator reviews the information to determine

what effect, if any, it may have on the applicant's eligibility to naturalize. *Id.* Where the match is an arrest or charge without disposition, the CIS "requires the applicant to provide court certified evidence of the disposition." *Id.* That presupposes, of course, that an applicant has first been advised of an arrest or charge without disposition.

Here Lazli's FBI fingerprint check was completed in July 2004. Had the FBI found a match, then the CIS adjudicator was required to take action. Yet nothing happened for over 15 months, causing the FBI fingerprint check to expire and be reinitiated. Given the quick response by the FBI for fingerprint checks, the delay leading to the expiration can only be attributable to two reasons: either the CIS: (1) failed to review the information promptly to determine what effect, if any, it may have on Lazli's eligibility to naturalize, or (2) is waiting for the FBI name check and IBIS check to be completed. Three months have passed since Lazli's fingerprints were retaken on May 23, 2006, and there is no evidence that the CIS has asked Lazli to provide any further documentation. Therefore, no further delay in adjudication can be reasonably justified solely due to a pending FBI fingerprint check, but must be blamed either on the CIS adjudicator, the FBI name check or the IBIS check.

The FBI name check on Lazli was requested on May 25, 2004, and remains pending. The delay for more than two years in completing Lazli's name check is substantially longer than the average time. According to defendants, initial responses to the FBI name check take about two weeks. Defendants' Answer to the Court's Inquiry, Exhibit B, p. 2. While a match is found in 20% of the cases, most are resolved within six months, and less than 1% of the cases remain pending after six months. *Id.* "[A] name check is not complete until full information is obtained and eligibility issues arising from it are resolved." *Id.* Defendants have submitted no evidence

to explain the reason for the delay in completing the FBI name check on Lazli, other than to blame the FBI.

b. IBIS Check

No statute or regulation requires an IBIS check prior to adjudication of a naturalization application. However, the 2002 CIS Memorandum mandates employees to conduct IBIS checks for all applications and petitions, including naturalization applications. It expressly states that "no [naturalization] ceremony will proceed after May 28, 2002, *without IBIS checks having been accomplished*, and starting today, no new ceremony should be scheduled unless arrangements can be made to conduct IBIS checks prior to the ceremony." *Id* (emphasis added).

It is not clear from the record whether the statutorily required "full criminal background check" by the FBI for naturalization applications requires not only a FBI name check and fingerprint check, but also an IBIS check. An IBIS check includes information in the DHS managed database, which gathers information not only from the FBI, but also from more than 20 other federal agencies. By checking information from other federal agencies, an IBIS check seems to go far beyond the statutory directive of an FBI criminal background check. If so, then it cannot rise to the level of justifying delay in adjudication of naturalization applications based solely on a single CIS memorandum requiring IBIS checks.

Even if an IBIS check can serve as justification for delay in adjudication, the results of an IBIS check "are usually available immediately." Defendants' Answer to the Court's Inquiry, Exhibit B, p. 2. However, in some cases, "information found during an IBIS check will require further investigation. The IBIS check is not deemed completed until all eligibility issues arising from the initial system response are resolved." *Id*. According to an unidentified CIS official,

IBIS checks regarding Lazli were "performed" by immigration officers at the Nebraska Service Center in January, March, April, May and July, 2004 and again in November, 2005.[15] No evidence has been provided to explain why CIS officials performed six IBIS checks or why they waited for a year and four months (from July 2004 to November 2005) before following up with the last IBIS check or why they have performed no further IBIS checks since November 2005.

c. Conclusion

Lazli's naturalization application has been pending for over 27 months, which is almost three times the national average of 9.86 months. The CIS certainly should be given substantial latitude for organizing its work, especially when it is dependent in part on other agencies. However, defendants have submitted no evidence to support a finding that the delay in this case by the CIS to complete relatively uncomplicated tasks is outside the bounds of reasonable agency control. It does not appear that all of the delay can be attributed to the FBI, as defendants contend, but can be attributed in part to delay by the CIS not completing the IBIS check, for which this court has received absolutely no explanation. Even if the delay is attributable to other agencies, defendants have had more than sufficient time to gather the information necessary from those other agencies to offer persuasive evidence justifying the delay, but have failed to do so. Nothing in the record substantiates any effort by the CIS to try its best to have any of the security checks promptly completed by others, such as by requesting expedited consideration.

Unlike the delay in adjudicating the I-751, Lazli does not miss work in order to obtain periodic extensions of his I-551. However, the delay is preventing Lazli from naturalizing and enjoying the rights and responsibilities of a United States citizen. Moreover, as discussed above,

[15] The first two IBIS checks were performed prior to receipt of Lazli's N-400 application and likely were performed in connection with plaintiffs' I-751 petition.

other courts have found that a two-year delay in adjudicating an immigration application is an unreasonable delay. *See Agbemaple* (delay of over a year could be unreasonable), *Yu* (delay of two and a half years is unreasonable), *Paunescu* (delay of over two years was unreasonable), *supra*. Accordingly, this court finds that by failing to complete security checks, conduct a naturalization interview and adjudicate the N-400 application for over 27 months, defendants have violated their nondiscretionary duty to adjudicate Lazli's N-400 application within a reasonable time.

4. Other Remedies

Defendants allege that plaintiffs have failed to establish that no other administrative or judicial remedies are available, but reference only the remedies available to Lazli in case his N-400 is denied. Such remedies do not apply here. Continuing to wait indefinitely after waiting for over two years is not an adequate remedy to prevent the application of mandamus in this case. Lastly, defendants contend that because the FBI has not been named as a party to this lawsuit and has not had a chance to explain the reasons for the delay, the Attorney General cannot instruct the FBI to complete the name check and the fingerprint check within 120 days. They base this argument on their understanding that the Attorney General was sued in his capacity as it relates to the delegation of statutory immigration powers tcourt refuses to read the Complaint so narrowly. Paragraph 10 of the Complaint alleges that Gonzales is being sued in his official capacity, that he, along with Chertoff, is responsible for the implementation and enforcement of the immigration laws, and that their delegation of authority to administer the immigration laws to the CIS permits these officials to act under color of authority of the United States. The requirement to complete FBI name and fingerprint checks stems from immigration

laws but is administered by the FBI, an agency within the Department of Justice (*see* 28 USC § 531) under the supervision of the Attorney General.

Also, it appears that much of the delay is attributable to the IBIS check for which the CIS, not the FBI, is responsible by accessing a DHS managed database. If so, then plaintiffs have sued the appropriate officials to complete the IBIS check.

5. Recommendation

Because the three elements for mandamus relief have been met, a writ of mandamus should be issued on plaintiffs' Second Cause of Action to compel defendants to adjudicate Lazli's N-400 application. Accordingly, Gonzales should be ordered to instruct the FBI to complete Lazli's FBI name check and fingerprint check within 90 days; the CIS should be ordered to complete Lazli's IBIS check within 90 days; and the CIS should be ordered to adjudicate Lazli's N-400 application within 120 days and file a copy of the adjudication with the court within five business days after the adjudication.

RECOMMENDATIONS

For the reasons stated above, plaintiffs' Motions for Partial Summary Judgment on Plaintiffs' First Cause of Action (docket # 26) and Second Cause of Action (docket # 29) SHOULD BE GRANTED and defendants' Motion to Dismiss for failure to state a claim upon which relief may be granted, or, in the alternative, partial Cross Motion for Summary Judgment (docket # 38) SHOULD BE DENIED.

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SCHEDULING ORDER

Objections to these Findings and Recommendations, if any, are due **September 12, 2006.** If no objections are filed, then the Findings and Recommendation will be referred to a district judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district judge and go under advisement.

DATED this 23rd day of August, 2006.

/s/ Janice M. Stewart_____
Janice M. Stewart
United States Magistrate Judge