

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YEHYA ELZERW, et al., : CIVIL ACTION  
: :  
Plaintiffs, : NO. 07-00166  
: :  
v. : :  
: :  
ROBERT MUELLER, III, et al., : :  
: :  
Defendants. : :

**ORDER AND MEMORANDUM**

AND NOW, this 23rd day of April, 2007, upon consideration of Defendants’ Motion to Dismiss, as well as, Plaintiffs’ Motion for Hearing on their Complaint for Writ of Mandamus and Defendants’ Response in opposition thereto, it is hereby ORDERED that Defendants’ Motion to Dismiss is GRANTED and Plaintiffs’ Motion for Hearing on their Complaint for Writ of Mandamus is DENIED for the reasons that follow.

Plaintiffs did not file a response to Defendants’ Motion to Dismiss, which, therefore, is unopposed. Plaintiffs’ Motion for Hearing did include some relevant arguments regarding jurisdiction, which the court will consider below.

Plaintiffs ask the court to compel the Federal Bureau of Investigation (“FBI”) to complete necessary, pending background checks and security clearances and to compel United States Customs and Immigration Services (“USCIS”) to adjudicate their applications for adjustment of status to legal permanent residents. Plaintiffs do not allege that Defendants have not taken any action at all in adjudicating their applications. Instead, they seek an order from this court directing a more speedy adjudication of their applications and completion of ongoing FBI

background checks. (Pl. Mot. for Hearing ¶ 9; Compl. Intro., ¶¶ 12, 16.) They argue that this court has jurisdiction, pursuant to 28 U.S.C. §§ 1331, federal question, and 1361, the mandamus statute, and pursuant to 5 U.S.C. §§ 555(b), 704, and 706(1) of the Administrative Procedures Act (“APA”).

This court concludes that it does not have subject matter jurisdiction under either the mandamus statute or the APA because a plaintiff may not compel performance under either statutory framework. Under law, such act is committed to the discretion of the USCIS.

For mandamus relief to issue, a plaintiff must establish that the defendant has a clear, non-discretionary duty to act. Heckler v. Ringer, 466 U.S. 602, 616-17 (1984). The APA similarly requires a non-discretionary duty. The APA authorizes suit by “[a] person suffering legal wrong because of agency action.” 5 U.S.C. § 702. Section 555(b) provides that “[w]ith due regard for the convenience and necessity of the parties . . . and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Section 706(1) permits a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

The U.S. Supreme Court has stressed that “the only agency action that can be compelled under the APA is action legally *required*.” Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). “Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” Id. at 64. Even where the agency is required to act within a certain period of time, “but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.” Id. at 65.

An examination of the Immigration and Nationality Act (“INA”) demonstrates that the process of adjustment of status is wholly discretionary. Section 245(a) of the INA provides that the status of an alien who has been admitted or paroled into the United States “*may be adjusted* by the [Secretary of Homeland Security], *in his discretion* and under such regulations as he *may prescribe*, to that of an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1255(a) (emphasis added). Neither the statute nor enabling regulations establish a time frame for the Secretary to adjudicate such an application. *Id.*; 8 C.F.R. Pt. 245. Furthermore, Section 242(a)(2)(B)(i) of the INA provides that, notwithstanding any other provision of law, including the mandamus statute, “no court shall have jurisdiction to review any judgment regarding the granting of relief” under Section 245. 8 U.S.C. § 1252(a)(2)(B)(i). Section 242(a)(2)(B)(ii) further precludes judicial review of “any other *decision or action* of the . . . Secretary of Homeland Security the authority of which is specified under this subchapter to be in the *discretion* of the . . . Secretary of Homeland Security.” 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

As was stated in the prior order denying Plaintiffs’ Petition for Extraordinary Expedited Relief, this court does not have jurisdiction pursuant to 28 U.S.C. § 1361 because the process of immigration adjustment of status, including with respect to timeliness, is committed wholly to the discretion of the Secretary, is not mandatory, and thus is not subject to mandamus relief. *See, e.g., Safadi v. Howard*, 466 F. Supp. 2d 696, 700 (E.D. Va. 2006) (denying mandamus relief because “the defendant does not owe plaintiff a ‘clear nondiscretionary duty’ to process his adjustment of status application at any particular pace or speed”); *Keane v. Chertoff*, 419 F. Supp. 2d 597, 599-601 (S.D.N.Y. 2006); *Dridi v. Chertoff*, 412 F. Supp. 2d 465, 468 (E.D. Pa.

2005) (“[T]he actions of immigration authorities with respect to the timeliness of decisions on immigration petitions are discretionary not mandatory, and, therefore, not subject to a mandamus petition.”); Saleh v. Ridge, 367 F. Supp. 2d 508, 511 (S.D.N.Y. 2005); Zheng v. Reno, 166 F. Supp. 2d 875, 879-81 (S.D.N.Y. 2001); see also Elkins v. Moreno, 435 U.S. 647, 667 (1978) (stating that “adjustment of status is a matter of grace, not right”). Similarly, subject matter jurisdiction under the APA is not available to Plaintiffs because the process of adjustment of status, including with respect to timeliness, is discretionary and therefore not legally required. See, e.g., Safadi, 466 F. Supp. 2d at 700; Keane, 419 F. Supp. 2d at 601-02; Zheng, 166 F. Supp. 2d at 878-81. The regulations do not specify a time for processing applications. Because “a delay cannot be unreasonable with respect to action that is not required,” Norton, 542 U.S. at 64 n.1, Plaintiffs cannot compel action under the APA.

In their Motion for Hearing, Plaintiffs cite some district court cases for the proposition that, although the Secretary of Homeland Security may have discretion over whether to grant or deny an adjustment of status applications, it does not have discretion over whether it resolves them, that is, it cannot refuse to act on an application. See Singh v. Still, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007); Kim v. Ashcroft, 340 F. Supp. 2d 384, 389-91 (S.D.N.Y. 2004); Fu v. Reno, No. 3:99-CV-0981-L, 2000 U.S. Dist. LEXIS 16110, at \*13-14, 2000 WL 1644490, at \*4 (N.D. Tex. Nov. 1, 2000) (relying on Hu v. Reno, No. 3-99-CV-1136-BD, 2000 U.S. Dist. LEXIS 5030, at \*9-10, 2000 WL 425174, at \*3 (N.D. Tex. Apr. 18, 2000) for the proposition that the Secretary has broad discretion whether to grant an adjustment of status application but has a non-discretionary duty to process the application); Yu v. Brown, 36 F. Supp. 2d 922, 931 (D.N.M. 1999). Therefore, Plaintiff submits that Defendants have a mandatory duty to process

applications within a reasonable time, which is enforceable through a writ of mandamus. See Singh, 470 F. Supp. 2d at 1067-68; Kim, 340 F. Supp. 2d at 389-91; Fu, 2000 U.S. Dist. LEXIS 16110, at \*13-16, 2000 WL 1644490, at \*4-5; Yu, 36 F. Supp. 2d at 931-32.

Without accepting the reasoning of the cases cited by Plaintiffs, the court concludes that the cases cited are inapposite because no action at all had been taken on the applications there, and the decisions reasoned consequently that the Secretary does not have discretion to refuse to resolve an application. See Kim, 340 F. Supp. 2d at 386; Fu, 2000 U.S. Dist. LEXIS 16110, at \*2, 2000 WL 1644490, at \*1; Yu, 36 F. Supp. 2d at 925; cf. Singh, 470 F. Supp. 2d at 1067 (relying on Fu and assuming without discussion that the processing time of applications falls within a mandatory duty to act on applications). On the other hand, in the present case, Plaintiffs have not alleged that Defendants have taken no action on their applications. Indeed, the uncontroverted allegation is that the USCIS has been processing Plaintiffs' adjustment of status applications, and background checks and security clearances are pending before the FBI. (Compl. Intro., ¶ 16.) There is no allegation that the FBI has taken no action on the background checks, but rather that the FBI has not completed its work early enough to avoid inconvenience to the Plaintiffs. (Id.)

Defendants have represented to the Court, through statements by the Adjudications Manager of the USCIS Vermont Service Center, during a telephone conference call that included counsel for the parties, that Plaintiffs' applications are being actively processed and that background investigations are ongoing. This is consistent with what counsel for Defendants has represented in her Response in opposition to Plaintiffs' Motion for Hearing. (Def. Mem. in Opp'n to Pls.' Mot. for Hr'g on Compl. 2 ("[T]he agency is actively working on the case."))

It is improper for the court to inquire into the nature, scope, duration, and other specifics of the investigation. The most the court can do is inquire whether an investigation is taking place. The court is satisfied that such investigations are ongoing.

While Plaintiffs may wish to take issue with the pace of processing their adjustment of status applications, USCIS has discretion over such actions. Cf. Safadi, 466 F. Supp. 2d at 700 (finding that the pace of the application process was discretionary, where an adjustment application had been pending for four years, but distinguishing the case on the facts from the “question whether jurisdiction would exist . . . where USCIS refused altogether to process an adjustment application or where the delay was so unreasonable as to be tantamount to a refusal to process the application”). In addition, as one court has found, Congress has prohibited USCIS from processing adjustment of status applications until it receives completed FBI background checks, and thus has no mandatory duty to act until then. Kaplan v. Chertoff, No. 06-cv-5304, 2007 U.S. Dist. LEXIS 22935, at \*78, 81, 2007 WL 966510, at \*23-24 (E.D. Pa. Mar. 29, 2007) (citing Pub. L. No. 105-119, 111 Stat. 2448 (Nov. 26, 1997)).

Because the processing of adjustment of status applications is discretionary, the court concludes that it does not have subject matter jurisdiction under either the mandamus statute or the APA.

Accordingly, Defendants’ Motion to Dismiss therefore is granted and the case is dismissed with respect to all Defendants.

BY THE COURT:

S/ James T. Giles  
J.