

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

MARIA MITOVA	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
	:	
MICHAEL CHERTOFF, Secretary of the Department of Homeland Security; EMILIO T. GONZALEZ, Director of the United States Citizenship & Immigration Services (USCIS); GERALD HEINAUER, Director of the USCIS Nebraska Service Center; ROBERT S. MUELLER, III, Director of the Federal Bureau of Investigation; and MICHAEL B. MUKASEY, Attorney General of the United States,	:	No. 07-2631
Defendants.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 13th day of December, 2007, upon consideration of Defendants' Motion to Dismiss (Document No. 4, filed August 9, 2007) and Plaintiff's Response to Defendants' Motion to Dismiss (Document No. 6, filed August 24, 2007), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendants' Motion to Dismiss is **GRANTED** as to defendant Robert S. Mueller, III, Director of the Federal Bureau of Investigation, and **DENIED** as to defendants Michael Chertoff, Secretary of the Department of Homeland Security; Emilio T. Gonzalez, Director of the United States Citizenship & Immigration Services (USCIS); Gerald Heinauer, Director of the USCIS Nebraska Service Center; and, Michael B. Mukasey, Attorney General of the United States.

MEMORANDUM

Plaintiff Maria Mitova, a resident alien, seeks an order to compel defendants to adjudicate her pending I-485 adjustment of status application. Mitova seeks to become a Legal Permanent Resident (LPR). Defendants have a filed motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). For the reasons set forth below, the Court grants in part and denies in part the defendants' motion to dismiss.

I. BACKGROUND

On July 14, 2004, pursuant to Section 245 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1255¹, plaintiff, Maria Mitova, through her employer, filed an application for adjustment of status to legal permanent resident with United States Citizenship and Immigration Services (“USCIS”). More than two years later, on December 26, 2006, USCIS notified the plaintiff that preliminary processing of her application was complete and that her application had been transferred to the Nebraska Service Center. She was further advised that the Nebraska Service Center would notify her when an interview was scheduled. In April 2007, in response to plaintiff’s inquiry, USCIS informed plaintiff that her application had “not been assigned to an officer yet” but provided no explanation for the nearly three year delay in adjudicating her application. In June 2007, after several attempts by plaintiff to determine the status of her application and after requesting the assistance of her United States Senator, plaintiff learned that the delay in adjudicating her application was due, in part, to the fact that USCIS had

¹ Section 1255 provides, in relevant part, that the Attorney General may, “in his discretion and under such regulations as he may prescribe,” adjust the status of an alien who is inspected and admitted or paroled into the United States to that of an alien lawfully admitted for permanent residence. 8 U.S.C. § 1255.

not received a Name Check Clearance for plaintiff from the Federal Bureau of Investigation (“FBI”).

Plaintiff filed this action on June 22, 2007, claiming that the defendants are “unlawfully withholding action” on her application and have failed to carry out the adjudicative functions delegated to them by law, in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* Named as defendants are Michael Chertoff, Secretary of the Department of Homeland Security; Emilio T. Gonzalez, Director of USCIS; Gerald Heinauer, Director of the USCIS Nebraska Service Center; Michael B. Mukasey,² Attorney General of the United States (“USCIS defendants”); and, Robert S. Mueller, III, Director of the Federal Bureau of Investigation (“FBI defendant”). Plaintiff avers that USCIS has a non-discretionary duty to process and adjudicate her application “within a reasonable time” and that the delay has caused her injury. Plaintiff seeks an order to compel adjudication of her application pursuant to the APA, the Mandamus Act (28 U.S.C. § 1361), and other federal statutes. Notably, plaintiff “challenges only the Respondents’ timeliness in adjudication of [her] petition, not the granting or denial of [the] petition” Pl.’s Compl. ¶ 10. Plaintiff invokes the Court’s jurisdiction under 28 U.S.C. § 1331.³

On August 9, 2007, defendants filed a motion to dismiss plaintiff’s Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

² This action originally named then-Attorney General Alberto Gonzales as a defendant. Attorney General Gonzales resigned effective September 17, 2007. Under Fed. R. Civ. P. 25(d), Attorney General Michael B. Mukasey is automatically substituted as a defendant in this action.

³ 28 U.S.C. § 1331 provides: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

II. LEGAL STANDARD—FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint for “lack of jurisdiction over the subject matter” of a case. The plaintiff has the burden of establishing subject matter jurisdiction. Carpet Group Int'l v. Oriental Rug Imp. Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). “Without jurisdiction the court cannot proceed at all in any case.” Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

“A challenge to a complaint for failure to allege subject matter jurisdiction is known as a ‘facial’ challenge, and must not be confused with a ‘factual’ challenge contending that the court in fact lacks subject matter jurisdiction, no matter what the complaint alleges” N.E. Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 n.7 (3d Cir. 2001) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); see also 5A Wright & Miller, Federal Practice & Procedure § 1350, at 212-18 (West 1990)). Plaintiff’s complaint in this case presents a factual challenge.

In assessing a Rule 12(b)(1) motion that presents a factual challenge to a court’s jurisdiction, the court is “free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. . . . [N]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” Carpet Group Int'l v. Oriental Rug Imp. Ass'n, 227 F.3d 62,

69 (3d Cir. 2000) (*quoting* Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).⁴

III. DISCUSSION

The government argues that this Court lacks jurisdiction over the plaintiff's claim for two reasons. First, the government asserts that the INA removes adjustment of status decisions from the ambit of judicial review. The government cites two subsections of 8 U.S.C. § 1252 which it contends strip the Court of jurisdiction over plaintiff's claim. See 8 U.S.C. §§ 1252(a)(2)(B) and 1252(g). Second, the government argues that the discretionary nature of the adjustment of status process renders mandamus and APA review "completely inappropriate." See Memo. In Supp. of Defs.' Mot. To Dismiss 3. In advancing this argument, the government notes that neither the INA nor the relevant regulations specify a time frame within which the Secretary must act on an application. In the government's view, the adjustment of status *process*, not only the decision whether to adjust an alien's status, is "quintessentially discretionary." *Id.* The Court disagrees. The government's arguments are addressed, in turn, below.

A. The Jurisdictional Limitations of 8 U.S.C. § 1252

1. Section 1252(a)(2)(B)

The government asserts that § 1252(a)(2)(B) strips the Court of jurisdiction over

⁴ A different rule is applicable to a motion under Rule 12(b)(1) which presents a facial challenge to a complaint. A court evaluating a facial challenge under that rule must accept the allegations in the complaint as true. Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). In reviewing a facial attack, a court may rely on documents referenced in the complaint and attached thereto, but must view them in the light most favorable to the nonmoving party. See *id.* at 176; Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993).

plaintiff's claims. Section 1252(a)(2)(B) states, in relevant part, that notwithstanding any other provision of law, including the mandamus statutes, "no court shall have jurisdiction to review, (i) any judgment regarding the granting of relief under section . . . 1255 of this title, or (ii) any other decision or action of the . . . Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the . . . Secretary"

Section 1252(a)(2)(B)(i), by its terms, does not apply to this case. That section applies only to judgments regarding the granting of relief. A delay in addressing a plaintiff's petition cannot be fairly characterized as a judgment regarding the granting of relief. See Han Cao v. Upchurch, 496 F. Supp. 2d 569, 572 (E.D. Pa. 2007). Although the INA does not define the term "judgment," it is commonly understood to mean "[t]he pronouncing of a deliberate opinion upon a person or thing" or "[t]he formation of an opinion or notion concerning something by exercising the mind upon it." Id. (citing VIII The Oxford English Dictionary 294, defs. 6 and 7.a. (2d ed.1989)); cf. Iddir v. INS, 301 F.3d 492, 497 (7th Cir. 2002) (noting that the term "judgment" is used more than twelve times throughout the INA, and eight of those references denote "judgments" as court orders). In this case, the defendants have not issued a judgment in relation to plaintiff's adjustment of status application. Therefore, 1252(a)(2)(B)(i) does not divest the Court of jurisdiction over plaintiff's claim.

Similarly, § 1252(a)(2)(B)(ii) is inapplicable to this case. It applies only to decisions or actions of the Secretary of Homeland Security, the authority for which is specified to be in his discretion. While some courts have concluded that the pace at which USCIS processes an application is a discretionary action within the meaning of 1252(a)(2)(B)(ii), see Safadi v. Howard, 466 F. Supp. 2d 696 (E.D. Va. 2006), that is not the law of the Third Circuit. The Third Circuit has held that "the jurisdiction stripping language of § 1252(a)(2)(B)(ii) applies not to all decisions the Attorney General is entitled to make, but to a narrower category of decisions where

Congress has taken the additional step to specify that the sole authority for the action is in the Attorney General's discretion.” Alaka v. Attorney Gen., 456 F.3d 88, 95 (3d Cir. 2006); see also Khan v. Attorney Gen., 448 F.3d 226, 232 (3d Cir. 2006) (“[T]he language of the statute must provide the discretionary authority before the bar can have any effect.”). “The subchapter at issue . . . does not address, much less specify any discretion associated with, the pace of application processing. Given the absence of an explicit provision to that effect, the principles enunciated in Khan and Alaka render Section 1252(a)(2)(B)(ii) inapplicable to a claim of adjudicatory delay.” Li Duan v. Zamberry, 2007 WL 626116, at *2 (W.D. Pa. Feb. 23, 2007). Accordingly, § 1252(a)(2)(B)(ii) does not bar judicial review of plaintiff’s claim.

2. Section 1252(g)

Contrary to the government’s assertion, § 1252(g) does not bar review of plaintiff’s claim. Section 1252(g) states, in relevant part, that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.” 8 U.S.C. § 1252(g). While, on its face, the statute appears to be “on point,” the statute must be read in proper context.

Section 1252(g) applies to orders of removal. Han Cao, 496 F. Supp. 2d at 574. Unlike 1252(a)(2)(B), § 1252(g) contains no language making it applicable to all immigration decisions.

In the REAL ID Act of 2005, (“RIDA”), Congress inserted the words “and regardless of whether the judgment, decision, or action is made in removal proceedings” into Section 1252(a)(2)(B), thereby making the language of that subsection applicable to all immigration decisions. Though it could have inserted identical language into 1252(g), Congress elected not to do so. Were we to read Section 1252 as applying outside the removal context generally, the amendment to 1252(a)(2)(B) would be rendered surplusage.

Han Cao, 496 F. Supp. 2d at 574 (internal citations omitted). It is axiomatic that courts should not treat statutory provisions as surplusage and this Court declines to do so. “Thus, because [plaintiffs’] petition for adjustment of status is separate and distinct from any matter related to an order of deportation, § 1252(g) has nothing to do with the present case.”⁵ Id. (citations omitted); see also Xu v. Chertoff, 2007 WL 2033834, at *4 (D.N.J. July 11, 2007) (1252(g) applies only to exclusion, deportation, or removal proceedings); Fu v. Reno, 2000 WL 1644490, at *2 (N.D. Tex. Nov. 1, 2000) (discussing cases and concluding that it is reasonable to infer that 1252(g) “applies only to INS actions related to deportation or removal”).

B. Jurisdiction Under the Administrative Procedure Act and the Mandamus Statute⁶

The government submits that Norton v. So. Utah Wilderness Alliance, 542 U.S. 55 (2004), “disposes of both the APA and the mandamus prong of plaintiff’s jurisdictional allegation.” Memo. In Supp. of Defs.’ Mot. To Dismiss 5. In Norton, the Supreme Court held that an APA claim to compel agency action unlawfully withheld or unreasonably delayed “can

⁵ The Court further notes that none of the cases cited by the government in support of its position explicitly apply 1252(g) outside of the context of removal. See Gomez-Chavez, 308 F.3d 796, 798 (7th Cir. 2002) (involving a plaintiff already ordered removed); Li v. Agagan, 2006 WL 637903, at *3 (5th Cir. Mar. 14, 2006) (same); Kailash v. Chertoff, 2006 WL 938523, at *1 (E.D. Pa. Apr. 10, 2006) (same); cf. Zahani v. Neufeld, 2006 WL 2246211, at *1 n.4 (M.D. Fla. June 26, 2006) (holding that 1252(g) “simply [did] not apply” because the matter at hand had “nothing to do with removal orders”).

⁶ The APA provides that “[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Pursuant to the APA, a court may “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706. Similarly, under the mandamus statute, 28 U.S.C. § 1361, a court “may compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” “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 co-extensive.” Han Cao, 496 F. Supp. 2d at 574 (citing Hernandez-Avalos v. I.N.S., 50 F.3d 842, 844-45 (10th Cir.1995)). The Court, therefore, address both statutes together.

proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take.” 542 U.S. at 64 (emphasis in original). The government contends that Norton is “directly on point” because adjudication of an adjustment of status application is “a manifestly discretionary task” and no statute or regulation specifies a time frame within which adjudication should take place. Memo. In Supp. of Defs.’ Mot. To Dismiss 6. In other words, the government argues that there is “no discrete action which [the agency] is required to take” in this case. *Id.*

While the government is correct that 8 U.S.C. § 1255(a) grants the Secretary discretion to adjust the status of an alien to permanent legal resident, and that neither § 1255(a), nor the relevant regulations, 8 C.F.R. Pt. 245, specify a time frame within which the Secretary must act, this does not render the entire process discretionary. As many courts, including several in this District, have noted, “USCIS has a non-discretionary duty to make some decision on [an] application” for permanent residency. *See Han Cao*, 496 F. Supp. 2d at 575 (E.D. Pa. 2007) (citing *Kaplan v. Chertoff*, 481 F. Supp. 2d 370, 399 (E.D. Pa. 2007)); *Song v. Klapakas*, 2007 WL 1101283, at *3 (E.D. Pa. Apr. 12, 2007); *see also Liu Duan*, 2007 WL 626116, at *3. Moreover, a decision must be made within a reasonable time. To hold otherwise would “render toothless all timing restraints, including those imposed by the APA,” and amount to a “grant of permission for inaction.” *Liu Duan*, 2007 WL 626116, at *3. In this Court’s view, “USCIS simply does not possess unfettered discretion to relegate aliens to a state of ‘limbo,’ leaving them to languish there indefinitely.” *Han Cao*, 496 F. Supp. 2d at 575-76 (quoting *Kaplan*, 481 F. Supp. 2d at 399).

The Court finds at least two independent sources for the duty to adjudicate adjustment of status applications. First, the INA’s enabling regulations provide that each “applicant for adjustment of status *shall* be required to have a medical examination,” 8 C.F.R. § 245.5; that

“[e]ach applicant for adjustment of status under this part *shall* be interviewed by an immigration officer,” 8 C.F.R. § 245.6; and that the “applicant *shall* be notified of the decision of the director, and, if the application is denied, the reasons for the denial,” 8 C.F.R. § 245.2(a)(5)(i) (all emphases added). “The language of . . . these regulations is mandatory not discretionary. Thus, regardless of the ultimate decision, [USCIS] has a non-discretionary, mandatory duty to act on Plaintiffs' applications.” Yu v. Brown, 36 F. Supp. 2d 922, 931 (D.N.M. 1999); see also Gershenson v. Gonzalez, 2007 WL 2728535, at *4 (W.D. Pa. Sept. 17, 2007) (language of statute and regulations indicates that adjudication is mandatory); Saleem v. Keisler, 2007 WL 3132233, at *6 (W.D. Wis. Oct. 26, 2007) (“[T]he regulations are drafted on the assumption that defendants *will* decide each application.”) (emphasis in original).

Second, as suggested above, the APA itself imposes a duty on USCIS to adjudicate applications. Section 555(b) provides that “with due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b) (emphasis added). In the absence of any contradictory authority in the INA, this Court agrees with the many courts that have held that § 555(b) imposes a non-discretionary duty on USCIS to adjudicate adjustment of status applications. See e.g., Okunev v. Chertoff, 2007 WL 2023553, at *2 (N.D. Cal. July 11, 2007); Kim v. Ashcroft, 340 F. Supp. 2d 384, 389 (S.D.N.Y. 2004); Aboushaban v. Mueller, 2006 WL 3041086, at *2 (N.D. Cal. Oct. 24, 2006) (finding duty in APA and C.F.R.).

Because the Court finds that USCIS has a positive duty to adjudicate adjustment of status applications, the government’s reliance on Norton and cases following its reasoning is misplaced.

C. Jurisdiction Over FBI Defendant

Having concluded that *USCIS* has a duty to adjudicate plaintiff's application in a timely manner, it follows that the Court retains jurisdiction over plaintiff's claim against *USCIS* defendants under the APA and the mandamus statute. However, the same cannot be said for defendant Robert Mueller, Director of the FBI. Unlike the other defendants, the FBI is not statutorily charged with overseeing *USCIS* or executing its functions. More to the point, neither Director Mueller nor the FBI owe a duty to the plaintiff. See Eldeeb v. Chertoff, 2007 WL 2209231, at *21-22 (M.D. Fla. July 30, 2007) (citations omitted) (noting, *inter alia*, that while the FBI may have a duty to *USCIS* to process name checks, the court, like other federal courts, declines to extend that duty to the plaintiff). The relevant INA provisions and its regulations speak only to the duties of *USCIS* and its employees and officers. Id. at *22 (“[T]here is no sole statute or regulation that imposes a duty on the FBI to an applicant [for adjustment of status].”); cf. Antonishin v. Keisler, 2007 WL 2788841, at *6 (N.D. Ill. Sep. 20, 2007) (“There is no statute or regulation that ‘expressly imposes a mandatory duty on the FBI to perform background checks.’”) (*quoting Kaplan*, 481 F. Supp. 2d at 400); Shalabi v. Gonzales, 2006 WL 3032413, (E.D. Mo. Oct. 23, 2006) (same).

The Court notes that some courts, including at least one in this district, have inferred a duty on the part of the FBI to complete background checks, notwithstanding the lack of any controlling statute or regulation. See Kaplan, 481 F. Supp. 2d at 401. In Kaplan, the court acknowledged that “there appears to be no single statute that, standing alone, expressly imposes a mandatory duty on the FBI to perform background checks,” but found it “clear from a number of Congressional enactments” that Congress has imposed such a duty on the FBI “in these particular circumstances.” Id. at 400. This Court, like many others, disagrees. The statutes

referenced in Kaplan do not, individually or in combination, impose upon the FBI a mandatory, non-discretionary duty to individual applicants for legal permanent resident status. See Antonishin, 2007 WL 2788841, at *6-7. Accordingly, this Court declines to extend to the FBI the duty owed by USCIS or infer one. See Eldeeb, 2007 WL 2209231, at *22.

For these reasons, the Court concludes that it lacks jurisdiction under the APA and the mandamus statute to compel Director Mueller to complete the background checks at issue in this case.

III. CONCLUSION

Because USCIS has a duty to adjudicate applications for adjustment of status within a reasonable time, the Court has jurisdiction over plaintiff's claim against the USCIS defendants under 28 U.S.C. § 1361 and the APA, in conjunction with 28 U.S.C. § 1331. For this reason, the defendants' motion to dismiss is denied as to all USCIS defendants. However, for the reasons stated above, the motion to dismiss is granted as to the FBI defendant.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.