The Writ of Mandamus in the Fifth Circuit
With a Focus on the Immigration Law Context

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I. Introduction

The purpose of the writ of mandamus is to compel a public official to perform a ministerial duty. Although in the nineteenth century the writ of mandamus was extremely restricted in availability, the passage of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (the "Mandamus Act"), gave all federal district courts jurisdiction to grant mandamus relief. The U.S. Courts of Appeals are also empowered to award writs of mandamus under the All Writs Act, 28 U.S.C. § 1651.

Mandamus is regarded as an extraordinary and "drastic" remedy[1] and one that is within the court's discretion to grant or withhold.[2] Accordingly, it is granted only if all other avenues of relief have been exhausted.[3] In general, the duty sought to be compelled by the writ of mandamus must be ministerial, as opposed to discretionary. If an official has an element of discretion in deciding whether or not to perform a duty, mandamus will not issue unless the official has exceeded the bounds of his or her lawful discretion.[4]

The following sections describe the statutory basis for mandamus relief and the precedent within the Fifth Circuit concerning the availability of the writ, as well as certain procedural considerations. The concluding section surveys the cases within the Fifth Circuit that have addressed the question of mandamus in the immigration context.

II. Authority to Issue Mandamus—Historical and Contemporary Statutory Law

Historically, the availability of the writ of mandamus has been limited by the fact that most courts lacked jurisdiction to grant it. "By 1838 it was established that, largely as the result of historical accident, neither the state courts nor the federal courts generally, but only the Circuit Court for the District of Columbia, possessed that jurisdiction."[5]

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[1] *Will v. United States*, 389 U.S. 90, 104 (1967).
[2] *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359-60 (1933).
[3] *Heckler v. Ringer*, 466 U.S. 602, 616 (1984).
[4] *Work v. United States ex rel. Rives*, 267 U.S. 175, 177-78 (1925).
[5] Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 996 (4th ed. 1996). *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding that the Constitution precluded the Supreme Court from issuing original writs of mandamus); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813) (holding that a federal circuit court lacked statutory authority to issue a writ of mandamus); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604-05 (1821) (same, with respect to state courts).

With the passage of the Mandamus Act in 1962, the number of courts vested with jurisdiction to grant mandamus relief was greatly expanded. All federal district courts now have "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[6]

The U.S. circuit courts now also have original jurisdiction over writs of mandamus under the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[7] The federal circuit courts generally entertain petitions under that act for the purpose of correcting the error of a federal district court when the error is not redressable through the normal appeals process.[8]

III. Making a Mandamus Claim

A. Elements of mandamus

It is well settled in the Fifth Circuit that mandamus is a "drastic remedy."[9] "Mandamus is extraordinary relief that should not issue if 'other means of obtaining relief is available.'"[10] The Fifth Circuit "reserve[s] writs of mandamus only for the most egregious of discretionary abuses, and where other avenues of relief had been traversed without success."[11] In the context of mandamus directed at a district court, the Fifth Circuit has noted that mandamus "must not be used to regulate the trial court's judgment in matters properly left to its sound discretion, but [it] may be available to 'confine the lower court to the sphere of its discretionary power.'"[12]

Although mandamus is a legal remedy, the question of whether to grant it is, as with equitable remedies, a matter of the court's discretion. "Extraordinary writs, like equitable remedies, may be granted or withheld in the sound discretion of the petitioned court."[13] The burden of proof is on the petitioner to show "that (the) right to issuance of the writ is 'clear and indisputable.'"[14]

The Fifth Circuit has summarized the prerequisites for the issuance of a writ of mandamus as follows:

> Generally speaking, before the writ of mandamus may properly issue three elements must coexist: (1) a clear right in the plaintiff to the relief sought; (2) a

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[6] 28 U.S.C. § 1361.
[7] 28 U.S.C. § 1651(a).
[8] *See, e.g.*, *United States v. Denson*, 588 F.2d 1112, 1128 (5th Cir. 1979) (holding that the court "is authorized to issue a writ of Mandamus to correct the illegal sentences imposed by the District Court.").
[9] *In re Estelle*, 516 F.2d 480, 483 (5th Cir. 1975) (quoting *Will v. United States*, 389 U.S. 90, 104 (1967)).
[10] *Campanioni v. Barr*, 962 F.2d 461, 464 (5th Cir. 1992) (quoting *In re W.R. Grace & Co.*, 923 F.2d 42, 44 (5th Cir. 1991)).
[11] Coastal (Bermuda), Ltd. v. E.W. Saybolt & Co., 761 F.2d 198, 203-04 (5th Cir. 1985).
[12] *In re Estelle*, 516 F.2d at 483 (quoting *Will*, 389 U.S. at 104).
[13] *United States v. Denson*, 588 F.2d 1112, 1128 (5th Cir. 1979) (citing *Ex parte Peru*, 318 U.S. 578 (1942)).
[14] *Denson*, 588 F.2d at 1128 (alteration in original) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

> clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. In connection with the last requirement, it is important to bear in mind that mandamus does not supersede other remedies, but rather comes into play where there is a want of such remedies. Admittedly the alternative remedy must be adequate, i.e., capable of affording full relief as to the very subject matter in question.[15]

B. Mandamus and the Administrative Procedures Act

The existence of other remedies is particularly important in immigration cases, as many such plaintiffs bring multiple claims—for relief under the Administrative Procedures Act (A.P.A.), for declaratory judgment, for injunctions, and for habeas—simultaneously. In particular, the A.P.A. offers similar relief to the Mandamus Act, and requires a similar showing. Since many of those claims rise and fall together, based on the same considerations, courts often do not distinguish between them when discussing the viability of the claims, or will simply state that both claims are subject to the same standards.[16]

However, the very availability of an A.P.A. claim should fatally undermine a claim for mandamus, since mandamus will only issue if the plaintiff has no alternate remedy. Accordingly, a number of district courts have upheld a mandamus-type claim under the A.P.A. but dismissed a § 1361 claim because they found that the A.P.A. provided adequate relief.

For instance, in *Sawan*, the plaintiff asked the district court to compel the F.B.I. to complete a name check and the United States Citizenship and Immigration Services (USCIS) to adjudicate his N-400 application, which had been delayed by the F.B.I.'s failure to do the required investigation.[17] The court found that the availability of the A.P.A. claim rendered mandamus relief inappropriate, since "relief for immigration delays under the Mandamus Act and the A.P.A." require "essentially the same showing."[18] "As a result, the mandamus claim adds nothing to the A.P.A. claim and should be dismissed," both from general reasons of judicial economy as well as the requirement that there be no other adequate remedy.[19]

Likewise, in *Ahmadi v. Chertoff*, another "name check" delay case, the court noted that the mandamus claim essentially tread the same ground as the A.P.A. claim, and indeed relied upon it for certain principles. [20] "The propriety of mandamus relief depends on there being a 'duty owed,' and Ahmadi alleges that it springs from the A.P.A.'s requirement that their applications be completed within a reasonable time."[21] Yet the A.P.A. itself allows courts to compel an agency to act after unreasonable delay. Thus "the request for mandamus relief seems largely duplicative."[22] The court noted that the Tenth Circuit had found, for this reason, that the ability to obtain relief under the A.P.A. precluded

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[15] *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969) (footnote omitted); *see also In re Stone*, 118 F.3d 1032, 1034 (5th Cir. 1997) (reiterating the three requirements).
[16] *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 822-23 (S.D. Tex. 2008) (collecting cases).
[17] 589 F. Supp. 2d at 817.
[18] *Id.* at 825.
[19] *Id.* at 825-26.
[20] *Ahmadi v. Chertoff*, 522 F. Supp. 2d 816 (N.D. Tex. 2007).
[21] *Id.* at 818 n.3.
[22] *Id.*

mandamus, since mandamus "requires that there be no other adequate remedies."[23] Accordingly, the court only considered the plaintiff's A.P.A. claim.[24]

The Fifth Circuit has not weighed in on this in a published opinion, but in an unpublished immigration opinion, it reached a similar conclusion.[25] At least one court has found, however, that the two claims may not be coextensive in that discovery may be allowed under the Mandamus Act, while A.P.A. claims are confined to the record.[26]

IV. Subject Matter Jurisdiction Over Mandamus Claims

One of the most confused areas of the mandamus case law in both the Fifth Circuit and beyond is the concept of the court's jurisdiction to entertain a mandamus claim.

In the immigration context, 8 U.S.C. § 1252 presents a significant barrier to the court's assertion of mandamus jurisdiction. This statute withdraws federal court jurisdiction (whether exercised in mandamus or other authority) over, *inter alia*:

> (i) *any judgment regarding the granting of relief* under section 1182(h) [waiver for simple possession of marijuana], 1182(i) [extreme hardship waiver of misrepresentation], 1229b [cancellation of removal], 1229c [voluntary departure], or 1255 [adjustment of status] of this title, or
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> (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.
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> 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.[27]

The statute also requires that, notwithstanding the mandamus and habeas statutes, "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the *sole and exclusive means* for judicial review of an *order of removal* entered or issued under any provision of this chapter, except as provided in subsection (e)."[28]

Just how far these provisions reach has been extensively explored in much of the case law discussed below. Different courts have reached different conclusions as to how expansively to read "any other decision or action" and "commence proceedings, adjudicate cases, or execute removal orders." While the Fifth Circuit has weighed in on these issues,

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[23] *Id.* (citing *Mt. Emmons Min. Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997)).
[24] *Id.*
[25] *Guang Qiu Li v. Agagan*, No. 04-40705, 2006 U.S. App. LEXIS 6289, at *14 n.5 (5th Cir. 2006) (per curiam) ("Additionally, we note that Appellant implicitly acknowledged the existence of another remedy, under section 706 of the Administrative Procedures Act. *See* 5 U.S.C. § 706(1). This, too, would foreclose mandamus jurisdiction which requires that the party seeking the writ has no other adequate remedy.").
[26] *Conservation Law Found., Inc. v. Clark*, 590 F. Supp. 1467, 1472-73 (D. Mass. 1984).
[27] 8 U.S.C. §§ 1252(a)(2)(B), (g) (emphasis added).
[28] § 1252(a)(5) (emphasis added).

there are a number of contexts in which it has not done so in a precedential opinion, meaning that the field to some extent remains open for district court interpretation.

Moreover, even beyond the jurisdiction-stripping provisions of the I.N.A., there is a general blurring of the line in many mandamus cases between a jurisdictional analysis and finding that a plaintiff has failed to satisfy the elements, which would seem to be a decision on the merits. As the Seventh Circuit admitted nearly fifteen years ago:

> Our earlier decisions have not been entirely clear on the question whether an inability to grant effective relief goes to the court's subject-matter jurisdiction under the mandamus statute or if it addresses merely whether the party should prevail on her petition…. Other courts have given comparably conflicting signals in this complex area.[29]

Accordingly, the case law has not grown more coherent since. The touchstone for the merits-jurisdiction distinction is *Bell v. Hood*, in which the Supreme Court, in a non-mandamus context, admonished that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."[30] It did add a caveat, however: "a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," though even here, "the accuracy of calling these dismissals jurisdictional has been questioned."[31] As the Seventh Circuit concluded,

> [I]t is necessary to distinguish between the court's power to adjudicate the petition and the court's authority to grant relief. Only the former necessarily implicates the subject-matter jurisdiction of the court; the latter will depend on whether the statute on which the plaintiff is relying imposes a clear duty on the officer or employee of the United States.[32]

The Fifth Circuit, in other contexts, has held that *Bell v. Hood* and its progeny require it to retain jurisdiction where the merits are intertwined with the jurisdictional question, unless the claim is clearly foreclosed:

> Where the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, and assuming that the plaintiff's federal claim is neither insubstantial, frivolous, nor made solely for the purpose of obtaining jurisdiction, the district court should find that it has jurisdiction over the case and deal with the defendant's challenge as an attack on the merits.[33]
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> The Supreme Court has made it clear that in that situation no purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed

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[29] *Ahmed v. Dep't of Homeland Sec.*, 328 F.3d 383, 386 (7th Cir. 2003).
[30] *Bell v. Hood*, 327 U.S. 678, 682 (1946).
[31] *Id*. at 682-83.
[32] *Ahmed*, 328 F.3d at 386.
[33] *Clark v. Tarrant Cty.*, 798 F.2d 736, 742 (5th Cir. 1986).

> on the merits…. Therefore as a general rule a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action. The exceptions to this rule are narrowly drawn, and are intended to allow jurisdictional dismissals only in those cases where the federal claim is clearly immaterial or insubstantial. As we stated in *Bell v. Health-Mor, Inc.*, 549 F.2d 342 (5th Cir. 1977), the *Bell v. Hood* standard is met only where the plaintiff's claim "has no plausible foundation" or "is clearly foreclosed by a prior Supreme Court decision."[34]

In mandamus cases, the Fifth Circuit does seem to require a preliminary showing of nondiscretionary duty before the court will take the case—which appears to partially merge the two inquiries. Upon closer inspection, however, there is a distinction: while the jurisdictional analysis examines the type of relief requested, the investigation on the merits ascertains whether it is appropriate in this case.

For instance, in *McClain v. Panama Canal Commission*, the plaintiff sought to compel the Panama Canal Commission to hear her wrongful death suit. [35] The Commission had "refused to adjudicate [the suit] on grounds that the claim was barred by limitations and was for an amount in excess of the Commission's jurisdiction."[36] The Fifth Circuit held that it had jurisdiction to review the case. "The court should not look to the merits in deciding the jurisdictional question. Instead, the court must accept as true all non-frivolous allegations of the complaint."[37] The court found that the plaintiff was simply asking that the Commission assume jurisdiction, and not that the court dictate the outcome of the case; and furthermore, that she was asking the defendant "to perform a nondiscretionary duty imposed on it by law."[38]

Turning to the merits, the court then examined whether the plaintiff "has exhausted all other avenues of relief and . . . if the defendant owes him a clear nondiscretionary duty," [39] which sounds like the same inquiry as the jurisdictional question just discussed. However, in the court's treatment, they are distinct. Initially the court simply examined what type of act/relief the plaintiff sought: that the Commission take jurisdiction, which is a nondiscretionary act. For the merits, the court examined whether the Commission *should* take jurisdiction, which depended on an examination of the governing statutes.[40] In the end, it determined that the Commission was precluded from taking jurisdiction—but that did not strip the court from having jurisdiction over the mandamus. It simply meant that mandamus should not issue.[41]

Likewise, in *Wolcott v. Sebelius*, which concerned a dispute arising around reimbursement claims for Medicare benefits, the court found that it had jurisdiction over several mandamus claims since "the ultimate relief [the plaintiff] seeks in each count is an order compelling the defendants to perform a nondiscretionary duty," such as "to compel

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[34] *Williamson v. Tucker*, 645 F.2d 404, 415-16 (5th Cir. 1981).
[35] *McClain v. Panama Canal Com.*, 834 F.2d 452, 453 (5th Cir. 1987).
[36] *Id*.
[37] *Id.* at 454.
[38] *Id*.
[39] *Id*. at 455.
[40] *Id*.
[41] *Id*. at 454-55.

the defendants to process and pay claims in accordance with binding final administrative decisions," "to compel defendants to adhere to payment deadlines mandated in the Medicare Claims Processing Manual," and to compel the removal of the plaintiff "from prepayment review as required by 42 C.F.R. § 421.505(a)(1)."[42] The court found that it lacked jurisdiction over two claims that were in effect requesting relief in the nature of an injunction and declaratory judgment rather than mandamus.[43]

On the merits of the surviving claims, the court found that the plaintiff had only stated a claim to compel the already adjudicated payments, as the plaintiff "sufficiently alleged that the defendant has a nondiscretionary duty to issue payment for a successfully appealed claim and that there is no adequate alternative remedy."[44] As to the second claim, the plaintiff had not established a nondiscretionary duty or clear right to relief, "because the agency has established multiple time frames with multiple exceptions allowing variations in turnaround time and flexibility," and the failure of the complaint to address that variation "forces this Court to speculate as to whether TrailBlazer actually failed in their duty to timely pay, or whether there were circumstances present such that TrailBlazer had to pay by one of the many different deadlines set forth in the manual."[45] The court dismissed another claim for failure to state a claim on which relief could be granted because, "[e]ven if TrailBlazer has, in fact, kept Wolcott on prepayment review for longer than lawfully allowed, this does not mean that Wolcott's claims would have automatically been approved and paid had Wolcott been properly removed from prepayment review"—meaning that the plaintiff had failed to show a nondiscretionary duty and a clear right to relief.[46]

These two cases demonstrate that the jurisdictional analysis should be confined to an assessment that the relief the plaintiff seeks is the type over which the court has mandamus authority—not whether such authority is appropriate or even possible in the case on review. In other decisions, however, the Fifth Circuit and the district courts have sometimes done precisely the opposite of what this precedent appears to require. For instance, in *Jones v. Alexander*, a case concerning military promotions that is frequently cited by lower court opinions regarding immigration, the Fifth Circuit purported to "avoid tackling the merits under the ruse of assessing jurisdiction," then went on to state that "[t]he test for jurisdiction is whether mandamus would be an appropriate means of relief."[47]

The court reiterated this test in an unpublished decision denying mandamus relief to compel the Department of Homeland Security (D.H.S.) to adjudicate a plaintiff's adjustment application.[48] The plaintiff had "asked the court to either adjudicate his application for adjustment or to order the Department of Homeland Security (formerly the I.N.S.) to adjust his status."[49] This should be, under *McClain*, the type of ministerial request

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[42] *Wolcott v. Sebelius*, 635 F.3d 757, 766 (5th Cir. 2011).
[43] *Id*. at 767.
[44] *Id*. at 769.
[45] *Id*. at 771-72.
[46] *Sebelius*, 635 F.3d at 773.
[47] *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980) (listing the three requirements of the plaintiff's "clear right to the relief," the defendant's "clear duty to act," and inadequate alternative remedies).
[48] *Guang Qiu Li v. Agagan*, No. 04-40705, 2006 U.S. App. LEXIS 6289 (5th Cir. 2006) (per curiam) (unpublished).
[49] *Id*. at *3.

sufficient to provide for the federal court's jurisdiction; as in that case, the plaintiff requested not that the court directed a specific outcome, but that it required the agency to take jurisdiction over a case. Similarly, as in *McClain*, the case would then fail at the determination of the merits, as the agency's jurisdiction was not actually appropriate: having been placed into removal proceedings, the plaintiff would have to renew his application with the immigration judge, not the USCIS, and do so via a motion to reopen, which is discretionary. Yet despite the fact that reopening was not what the plaintiff had requested, the court found that it lacked jurisdiction "because Appellees did not owe Appellant a clear, nondiscretionary duty" to reopen the removal proceedings.[50] The court, in fact, explicitly collapsed the jurisdictional inquiry with the merits, citing *Jones*.[51]

This is precisely the type of reasoning that the Seventh Circuit rejected in *Ahmed*:

> [U]nless the claim is so frivolous that it fails the *Bell v. Hood* test, the district court has jurisdiction under § 1361 to determine whether the prerequisites for mandamus relief have been satisfied: does the plaintiff have a clear right to the relief sought; does the defendant have a duty to perform the act in question; and is there no other adequate remedy available. *See Iddir*, 301 F.3d at 499. A conclusion that any one of those prerequisites is missing should lead the district court to deny the petition, not because it now realizes that it had no power to be thinking about the case in the first place, but because the plaintiff has not demonstrated an entitlement to this form of extraordinary relief.[52]

It would seem to be of little practical importance for a plaintiff whether her petition is dismissed for lack of jurisdiction or on the merits. If the plaintiff states a clear right to a nondiscretionary duty and has exhausted any other available remedies, she will win. Otherwise, she will lose. Sometimes, however, there may be procedural implications as to how and when the issues are raised. For instance, a court's opinion on the merits could have preclusive effect on future proceedings before the agency or another court. It may be advantageous for a plaintiff to defeat a motion to dismiss for lack of jurisdiction, even if her claim may ultimately be vulnerable on the merits when that is later determined.

V. Procedural considerations

A. Discovery and evidence

The administrative record is the complete record of the proceedings before the agency—the documents that formed the basis for its decision, and the decision itself. It does not contain information extrinsic to its decision, such as a pattern of decision-making in other cases, new evidence, etc. If all the evidence relevant to the plaintiff's claim is contained in the administrative record—for instance, if the plaintiff challenges an agency's failure to consider evidence—then no other discovery or submission of evidence will likely be necessary.[53]

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[50] *Id*. at *12.
[51] *Id*. at *13.
[52] *Ahmed*, 328 F.3d at 386-87.
[53] *See* Fed. R. Civ. P. 26(a)(1)(B)(i) (rendering "exempt from initial disclosure … an action for review on an administrative record").

Even the administrative record may not be necessary to decide a motion to dismiss based on purely legal questions.[54] However, once the court reaches the merits of the claim, the record will often be necessary.[55]Neither the Federal Rules nor the mandamus statute set out any procedure for filing the administrative record. Typically, the agency will file the record.[56] Certifications of the record's completeness are often filed, though not required.[57]

If the plaintiff deems the record incomplete, the plaintiff can move that the agency supplement it or can file additional documents herself. A plaintiff can supplement the agency's record "(1) if the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) if background information was needed to determine whether the agency considered all the relevant factors, or (3) if the agency failed to explain administrative action so as to frustrate judicial review."[58] Additional evidence may be offered:

> [I]n one of two ways—either by (1) including evidence that should have been properly a part of the administrative record but was excluded by the agency, or (2) adding extrajudicial evidence that was not initially before the agency but the party believes should nonetheless be included in the administrative record.[59]

For instance, the plaintiff may wish to submit evidence to demonstrate the agency's failure to act. In *Korb v. Commissioner of Social Security*, the court denied a summary judgment motion and

> granted [the] plaintiff's Rule 56(d) motion[60] because Plaintiff did not have the opportunity to make full discovery in the case. The case had previously proceeded pursuant to the standard procedural order for Social Security cases, which limited the Court's review to what is contained in the S.S.A.'s administrative record . . . However, because Plaintiff's mandamus claim

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[54] *See, e.g., Anthony v. Heckler*, 1985 U.S. Dist. LEXIS 24131, at *1 (D. D.C. Jun. 25, 1985)(describing a court order denying the plaintiff's request to take discovery "and to obtain and file the administrative record . . . on the basis that the 'purely legal issues' raised by defendant's motion to dismiss did not call for discovery or the filing of the record of the administrative processing.").

[55] *Id*. at *12 (denying the motion to dismiss and ordering filing of the complete administrative record as well as additional discovery, if needed).

[56] *See, e.g., Figueroa v. Rodriguez*, No. CV 16-8218 PA (JCx), 2017 U.S. Dist. LEXIS 128120 (C.D. Cal. Aug. 10, 2017)(USCIS filed the record on mandamus and APA claim seeking review of I-485 denial).

[57] *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, Civil Action No. ELH-16-1015, 2017 U.S. Dist. LEXIS 117545, at *24 (D. Md. July 27, 2017) ("Although DOL and DHS, 'like many other federal agencies, file[] certifications with administrative records as a matter of practice, certifications are not required by the APA or any other law.'")(quoting *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 18 (D. D.C. 2013), vacated in part on other grounds on reconsideration, No. CV 10-01638 (CKK), 2013 U.S. Dist. LEXIS 147713 (D. D.C. Jul. 30, 2013)) (alteration in the original).

[58] *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (internal quotation marks and citations omitted).

[59] *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 5 n.4 (D. D.C. 2009).

[60] FED. R. CIV. P. 56(d): ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.").

> was before the Court, the Court ordered that the S.S.A. provide discovery to "allow Plaintiff to ascertain whether the S.S.A.'s payments to him satisfy in form and in amount the May 2009 judgment."[61]

Likewise, the court in *Omoruyi v. Chertoff*, considered the plaintiffs' "three exhibits that include records of inquiries about the status of the visa petition at issue in this case sent to the D.H.S., and a copy of the opinion issued by the B.I.A. on March 19, 2008."[62] Evidence extrinsic to the administrative record may consist of

> 1) . . . newly created evidence, such as through the collection of direct testimony from agency decision makers, typically requested by the court to explain part of the record or 2) . . . documents or other information that were not before the agency when the decision was made, such as post-decision comments or studies.[63]

Some courts have required a preliminary "showing of bad faith or improper purpose" to justify going beyond the administrative record.[64] Plaintiffs who challenge the completeness of the administrative record may also be forced to make an initial showing of necessity, and the court will not always accept the plaintiff's evidence.[65]

However, courts have ordered discovery in mandamus cases when the plaintiff shows that it is relevant to the resolution of the case, either to resolve the question of jurisdiction or to address the merits.[66] An initial showing of necessity may also be required in this context.[67]

B. Motion practice

The defendants may move to dismiss a case for lack of subject matter jurisdiction under Fed. R. Civ. Pro. 12(b)(1), or for failure to state a claim, under Fed. R. Civ. Pro. 12(b)(6). Additionally, either party may move for summary judgment, under Fed. R. Civ.

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[61] *Korb v. Commissioner'r of Social. Security.*, No. 12-cv-03847-JST, 2016 U.S. Dist. LEXIS 6178 (N.D. Cal. Jan. 19, 2016) (citations omitted).
[62] *Omoruyi v. Chertoff*, No. H-08-0106, 2008 U.S. Dist. LEXIS 34690, at *7 (S.D. Tex. Apr. 28, 2008).
[63] *Am. Farm Bureau Fed'n v. U.S. EPA*, No. 1:11-CV-0067, 2011 U.S. Dist. LEXIS 148637, at *11-12 (M.D. Pa. Dec. 28, 2011).
[64] *Ohio Valley Envtl. Coal. v. Whitman*, No. CIV.A. 3:02-0059, 2003 U.S. Dist. LEXIS 148 (S.D. W. Va. Jan. 6, 2003)(*citing Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)); *see also Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 29 (D.D.C. 2002) ("courts have found discovery to be appropriate where an agency has either completely abrogated its enforcement responsibilities or acted clearly outside the bounds of relevant statutes.").
[65] *United States v. Bell Petroleum Servs., Inc.*, 718 F. Supp. 588, 591 (W.D. Tex. 1989) (finding that "to determine whether the administrative record is complete, some evidence as to the documents, etc. considered by the EPA is relevant."); *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, Civil Action No. ELH-16-1015, 2017 U.S. Dist. LEXIS 117545, at *32 (D. Md. July 27, 2017) ("Plaintiffs essentially dump at the Court's doorstep a number of documents produced by DHS in response to a FOIA request, but do not actually articulate with any concrete specificity why these documents, to the extent any of them are in fact non-privileged, are relevant, who at the agency should have considered them, under what context they would have been considered, or any other basis to conclude these documents were in fact directly or indirectly before the decisionmaker with respect to the 2015 Rules.").
[66] Baptist Mem'l Hosp. v. Johnson, 603 F. Supp. 2d 40, 44-45 (D.D.C. 2009) (collecting cases); Conservation Law Found., Inc. v. Clark, 590 F. Supp. 1467, 1472-73 (D. Mass. 1984) (same).
[67] *Id*.

Pro. 56. A 12(b)(6) motion cannot rely upon evidence, for any argument that the factual allegations in the complaint are not true converts the motion to one for summary judgment. FED. R. CIV. P. 12(d). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[68]

A motion for summary judgment does rely upon evidence, but may only be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[69] In the course of deciding a summary judgment motion, both sides may submit additional evidence.

Jurisdictional claims are more varied. To evaluate jurisdiction, the court may examine "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[70]

Accordingly, motions under 12(b)(1) come in two types: facial and factual.

> Simply stated, if the defense merely files a Rule 12(b)(1) motion, the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true. If those jurisdictional allegations are sufficient the complaint stands. If a defendant makes a "factual attack" upon the court's subject matter jurisdiction over the lawsuit, the defendant submits affidavits, testimony, or other evidentiary materials. In the latter case a plaintiff is also required to submit facts through some evidentiary method and has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction.[71]

If the defendants raise a factual attack, "no presumption of truthfulness attaches to the plaintiffs' jurisdictional allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." [72] This analysis "does not convert the motion" to one for summary judgment.[73]

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[68] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Ramming v. United States*, 281 F.3d 158, 161-62 (5th Cir. 2001).

[69] FED. R. CIV. P. 56(a).

[70] *Willoughby v. United States*, 730 F.3d 476, 479 (5th Cir. 2013) (quoting Spotts v. United States, 613 F.3d 559, 565-66 (5th Cir. 2010)).

[71] *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *see also Construtodo, S.A. de C.V. v. Conficasa Holdings, Inc.*, No. H-12-3026, 2014 U.S. Dist. LEXIS 13782, at *3-4 (S.D. Tex. Jan. 31, 2014) (describing a "facial attack" as an argument that "the allegations in the complaint are insufficient to invoke federal jurisdiction," and a "factual attack" as questioning the truth of "the facts in the complaint supporting subject matter jurisdiction.").

[72] *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981).

[73] *See Robinson v. Paulson*, No. H-06-4083, 2008 U.S. Dist. LEXIS 84808, at *10 (S.D. Tex. Oct. 28, 2008); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); The difference between the two types of attacks is neatly demonstrated by *Dawoud v. Department of Homeland Security*, No. 03:06-CV-1730-M (BH), 2007 U.S. Dist. LEXIS 94450, at *9 (N.D. Tex. Dec. 26, 2007). There, the USCIS raised a facial attack on a mandamus claim to compel adjudication of an N-400, arguing that "(1) the 120-day period under 8 U.S.C. §1447(b) has not been triggered, and (2) Plaintiff's application for naturalization is not ripe for judicial decision." *Id.* at *4. The FBI, who had also been sued, raised a factual

Which type of challenge the defendants raise affects not only the way the district court will approach the case, but also the standard of review on appeal. If the defendants raise a factual challenge, the district court may allow discovery in order to give the plaintiffs a fair chance to rebut the allegations, allow testimony to be given in court, or deny the motion because the plaintiff has not had sufficient opportunity for discovery.[74] The appellate court reviews the district court's "determination of disputed factual issues . . . as we would any other district court resolution of factual disputes—we must accept the district court's findings unless they are 'clearly erroneous.'"[75] By contrast, on a facial challenge, the appellate court "is limited to determining whether the district court's application of the law is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed."[76]

The Fifth Circuit has intimated that only facial attacks will be permitted on mandamus claims.[77] Factual attacks do sometimes appear to be entertained in practice, however.[78]

The court will rule on a motion to dismiss for lack of subject matter jurisdiction before any other motion, as this "prevents a court without jurisdiction from prematurely dismissing a case with prejudice."[79] The party asserting jurisdiction bears the burden of proof, and the court is presumed to lack jurisdiction unless the plaintiff can prove otherwise.[80] Jurisdiction may be raised at any point in the course of the case, even on appeal, and even by the party who initially invoked it.[81]

VI. Mandamus in the Immigration Law Context within the Fifth Circuit

Although the writ of mandamus is perhaps most frequently sought as a remedy for unlawful behavior by a judge,[82] it will also issue to compel an action by an agency

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attack, asserting that it had no duty to investigate, and submitting information explaining "the background investigation process," and an affidavit asserting that the "results of [Plaintiff's] name check will be forwarded to USCIS in Washington, D.C., in due course, in accordance with FBI's normal protocol." *Id.* at *7.

[74] *See Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981)

[75] *Id.* at 413.

[76] *Id.*

[77] *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980) ("In resolving whether section 1361 jurisdiction is present, allegations of the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction.") (citing *Carter v. Seamans*, 411 F.2d 767, 770 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970).

[78] *See, e.g.*, *Obiri v. Holder*, No. H-10-208, 2011 U.S. Dist. LEXIS 30919, at *21 (S.D. Tex. Mar. 24, 2011) (granting a motion to dismiss for lack of subject matter jurisdiction, in which the defendants submitted information about the status of removal proceedings against the plaintiff).

[79] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination on the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction.") (citing *Hitt v. Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam)).

[80] *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 548 n.8 (5th Cir. 2008) (citing *Renne v. Geary*, 501 U.S. 312, 316 (1991)); *Ramming*, 281 F.3d at 161.

[81] *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 223 (5th Cir. 2012).

[82] *See, e.g., In re McBryde*, 117 F.3d 208 (5th Cir. 1997).

official.[83] Accordingly, mandamus can be available to compel actions by officials of the USCIS and other agencies. Nevertheless, such petitions are frequently unsuccessful in practice.[84] The jurisdiction-stripping provisions of the I.N.A. foreclose many suits and are often invoked even when they would not seem to be directly relevant.

For instance, the Fifth Circuit has refused on several occasions to issue writs of mandamus to compel initiation of deportation or removal proceedings, and it and district courts have used that precedent to deny claims requesting prompt agency adjudication of benefits applications. Other cases find that mandamus may be appropriate in such a case. In other contexts, relief will depend on whether the action sought is discretionary and obligatory, and what other options the plaintiffs have for relief. As the following survey will show, however, how courts answer these questions often varies from case to case.

A. Mandamus directed at the district court

1. *In re Reyes* involved a writ of mandamus directed at a court instead of an administrative agency.[85] In a suit brought by the petitioners under the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), the Fair Labor Standards Act (FLSA), and Texas law, the district court had issued a discovery order seeking to compel the petitioners, who were seasonal or migrant workers, to reveal their immigration status.[86]

The Fifth Circuit agreed with the petitioners that their immigration status was of no relevance to their AWPA and FLSA claims; consequently, the district court had exceeded its authority.[87] Since a discovery order was not ordinarily appealable, a writ of mandamus under the All Writs Act was justified "to confine an inferior court to a lawful exercise of its prescribed jurisdiction . . . ."[88] The court stressed the existence of a strong "justification in this case where there is no possible relevance and the discovery could place in jeopardy unrelated personal status matters."[89]

2. Conversely, mandamus was denied (without prejudice) in *In re United States Department of Homeland Security.*[90] There, the D.H.S. sought the writ to reverse a discovery order issued by the district court in a dispute concerning immigration delivery bonds.[91] The court agreed with the D.H.S. that the law enforcement privilege could shield documents from disclosure, but remanded to the district court to examine the papers in question to see if they fell within the privilege.[92] The court acknowledged its prior precedent granting mandamus in the context of privileged documents, finding the writ

[83] 28 U.S.C. § 1361; *see, e.g.*, *Naporano Metal & Iron Co. v. Sec'y of Labor*, 529 F.2d 537 (3d Cir. 1976) (holding that a writ of mandamus was proper to compel the Secretary of Labor to issue certification to an alien employee).
[84] *See* 28 U.S.C.S. § 1361, note 80 (compiling cases involving mandamus relief in the context of aliens and immigration).
[85] *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) (per curiam).
[86] *Id.* at 169-70.
[87] *Id.* at 170.
[88] *Id.* (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)).
[89] *In re* Reyes, 814 F.2d at 171.
[90] *In re* U.S. Dept. of Homeland Security, 459 F.3d 565, 571 (5th Cir. 2006).
[91] *Id.* at 567-68.
[92] *Id.* at 571.

appropriate because of "'the difficulty of obtaining effective review of discovery orders, the serious injury that sometimes results from such orders, and the often recurring nature of discovery issues . . . .'"[93] Nevertheless, the court denied the writ of mandamus in this case "without prejudice to the rights of the parties to seek additional relief following the review," because it felt "[c]onfident that the district court will conduct its review in accordance with this opinion."[94]

Judge Dennis's concurrence quoted a string of older Supreme Court cases to make the point that "the writ has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so," and that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[95] Whether to grant mandamus is discretionary, and the relief should not be a substitute for appeal.[96]

B. Mandamus to compel initiation of deportation or removal proceedings

1. In *United States v. Morales*, an alien incarcerated in federal prison in Pennsylvania filed a mandamus action to compel the I.N.S. to initiate deportation proceedings against him.[97] The government argued that venue was improper because Morales did not reside in the Eastern District of Louisiana.[98] The court rejected this argument, noting that under 28 U.S.C. § 1361(1), "action[s] in the nature of mandamus [could] be brought in any district court of the United States," and that 28 U.S.C. § 1391(e) "provid[ed] for nationwide service of process in mandamus [claims] involving officers of the United States."[99]

> The court denied Morales's motion on the merits, however.[100] *Morales* relied on *Soler v. Scott*, which held "that mandamus was an appropriate remedy to compel compliance" with the requirement in 8 U.S.C. § 1252(i) that the I.N.S. process deportations "as expeditiously as possible."[101] The district court declined to accept the Ninth Circuit's reasoning, noting "the great weight of authority which has held that 8 U.S.C. § 1251(i) [sic] does not create a private cause of action in favor of alien prisoners serving criminal sentences in the United States."[102]

2. The Fifth Circuit endorsed this reasoning later the same year in *Giddings v. Chandler*.[103] The plaintiff, who had been convicted of federal drug offenses, sought a writ of mandamus to compel the I.N.S. to commence deportation proceedings against him, as

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[93] *Id.* at 568 (quoting *In re* Burlington N., Inc., 822 F.2d 518, 522 (5th Cir. 1987)).
[94] *In re* U.S. Dep't of Homeland Sec., 459 F.3d. at 567.
[95] *Id.* at 572 n.1 (Dennis, J., concurring) (quoting Will v. United States, 389 U.S. 90, 95 (1967)) (internal quotation marks omitted).
[96] *In re U.S. Dep't of Homeland Sec.*, 459 F.3d at 572.
[97] United States v. Morales, No. CR 90-0095, 1992 U.S. Dist. LEXIS 9951, at *1 (E.D. La. Jun. 30, 1992).
[98] *Id.*
[99] *Id.* (citing Stafford v. Briggs, 444 U.S. 527, 542 (1980)).
[100] *Id.* at *3.
[101] Soler v. Scott, 942 F.2d 597 (9th Cir. 1991).
[102] *Id.* (citing Aguirre v. Meese, 930 F.2d 1292 (7th Cir. 1991); Gonzalez v. United States INS, 867 F.2d 1108 (8th Cir. 1989)).
[103] Giddings v. Chandler, 979 F.2d 1104 (5th Cir. 1992).

he apparently preferred deportation over serving a federal prison sentence.[104] He also argued that the I.N.S. had violated its obligations under 8 U.S.C. § 1252(i) (1988) (repealed 1996).[105]

The Fifth Circuit acknowledged the applicability of the Mandamus Act in the immigration context but denied relief because it determined that the plaintiff lacked standing.

> For Giddings to have standing under the Mandamus Act, he must not only satisfy the constitutional requirements of injury, causation, and redressability, but must also establish that a duty is owed to him. Any duty owed to the plaintiff must arise from another statute—in this case § 1252(i)—or from the United States Constitution. When the right alleged stems from a statute, a duty is owed to the plaintiff for the purpose of the Mandamus Act if—but only if—the plaintiff falls within the "zone of interest" of the underlying statute.[106]

The court concluded that Giddings did not fall within the "zone of interest" of § 1252(i) because the legislative history of that statute indicated that it was enacted for the purpose of "reducing prison overcrowding and cost to the government."[107] Accordingly, Giddings lacked standing and mandamus relief was not available.[108]

3. In *Channer v. Hall*, an alien brought a mandamus claim similar to the one at issue in *Giddings*, seeking to compel the I.N.S. to commence removal proceedings.[109] Channer relied, as had Giddings and Morales, on former 8 U.S.C. § 1252(i).[110] He also cited former 8 U.S.C. § 1252(c) (1994) (repealed 1996), which "provided that an alien who was not deported within six months of receiving a final order of deportation was to be released subject to supervision."[111]

The Fifth Circuit rejected Channer's claim.[112] It first noted that the relevant provisions of § 1252 had been repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[113] but it did not reach the issue of whether the changes made by IIRIRA were retroactive.[114] Even under the former version of § 1252, the I.N.S. had not acted improperly because § 1252(h) mandated that "an alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement."[115] Accordingly, "had the I.N.S. 'expeditiously' deported him before he began serving his Connecticut sentence, it would have violated

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[104] *Id.* at 1104.
[105] *Id.* at 1106.
[106] *Giddings*, 979 F.2d at 1108 (footnote omitted).
[107] *Id.* at 1109.
[108] *Id.* at 1110.
[109] Channer v. Hall, 112 F.3d 214 (5th Cir. 1997).
[110] *Id.*
[111] *Id.* at 216.
[112] *Id.* at 219.
[113] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[114] *Channer*, 112 F.3d at 215–16.
[115] *Id.* at 216 (quoting 8 U.S.C. § 1252(h) (1994) (repealed 1996)).

§ 1252(h)."[116] The court also cited *Giddings* for the proposition that "Channer has no implied private cause of action for damages for the I.N.S.'s failure to expedite his deportation."[117]

4. Even when the plaintiffs do not request initiation of deportation or removal proceedings, the Fifth Circuit may recharacterize their claims as such and find that it lacks jurisdiction to entertain such a claim. The foundational case for this type of analysis is *Alvidres-Reyes v. Reno*, in which fifty resident aliens brought a suit for mandamus, declaratory, and injunctive relief in federal district court.[118] The plaintiffs sought to compel the Attorney General and the I.N.S. "to consider their applications for suspension of deportation under a now-repealed provision of the Immigration and Naturalization Act ('I.N.A.') rather than the more onerous criteria for cancellation of removal imposed by the IIRIRA."[119] Although the plaintiffs did not "explicitly pray for the court to order the Attorney General to initiate proceedings or adjudicate their deportability," the court found that, "[i]f successful, . . . plaintiffs' suit would compel the Attorney General to do so in order to consider their applications for suspension of deportation."[120] This was foreclosed by § 1252(g) 's "exclusive jurisdiction provision," which "applies retroactively to deprive courts of jurisdiction to hear any cause 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, subject to exceptions not applicable in the present case."[121] In fact, in *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court had held that the express purpose of the statute was to protect the agency's prosecutorial discretion.[122] The Fifth Circuit therefore held in *Alvidres-Reyes* that dismissal for lack of jurisdiction was necessary to give effect to the statute.[123]

5. The court followed up on this holding in *Cardoso v. Reno*, a case that did not discuss mandamus but has been relied upon by subsequent cases dismissing mandamus claims.[124] *Cardoso* involved three applicants who sought "to compel the Attorney General to adjust their immigration status, permit them to remain in the United States, and provide them with work authorization."[125] One applicant had already received an order of removal, one was "currently subject to summary removal," and one "fear[ed] deportation because the I.N.S. denied her request for an adjustment of status."[126]

The court found that § 1252(g) 's ban on judicial review of the agency's "decision or action to commence proceedings, adjudicate immigration cases, or execute removal orders," precluded their claims.[127] The applicants who were subject to removal orders

[116] *Id.* at 216.
[117] *Id.*
[118] Alvidres-Reyes v. Reno, 180 F.3d 199 (5th Cir. 1999).
[119] *Id.* at 201.
[120] *Id*. at 205.
[121] *Id*. at 201, 205.
[122] Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999).
[123] *Alvidres-Reyes*, 180 F.3d at 206.
[124] Cardoso v. Reno, 216 F.3d 512 (5th Cir. 2000).
[125] *Id*. at 513.
[126] *Id*. at 517.
[127] *Id.* at 516.

wanted to adjust status in order to "avoid that order."[128]

> Although the Supreme Court's decision in *American-Arab* narrowly construed the reach of section 1252(g), nothing in that decision permits aliens to make an end-run around the terms of the statute by simply characterizing their complaint as a challenge to a denial of adjustment of status, rather than a challenge to the execution of a removal order. To permit such challenges would "lead to the deconstruction, fragmentation, and hence prolongation of removal proceedings at which the Supreme Court concluded that § 1252(g) is directed." [129]

The court also lacked jurisdiction over the claim of the applicant who was not currently subject to a removal order because she could still renew her adjustment application in removal proceedings, if and when they commenced, so she had not exhausted her administrative remedies, as required by 8 U.S.C. § 1252(d).[130]

6. This reasoning was applied in *Ovalle v. Chertoff*, in which an alien who was removed on the basis of an *in absentia* order in a proceeding that had been subsequently reopened filed a habeas claim and requested mandamus.[131] The court found that it lacked jurisdiction under § 1252(a)(5) and (g) because the petitioner in effect sought review of the deportation order. "[P] laintiff's request cannot be granted without an inquiry into the validity of the deportation order and propriety of the government's actions in executing that order."[132] Furthermore, as the petitioner could seek an I-212 waiver, "mandamus jurisdiction, which requires that the party has no other remedy, is foreclosed."[133] Finally, the relief was discretionary, and so "exercise of this court's mandamus jurisdiction is not appropriate because the respondents do not owe petitioner a clear non-discretionary duty."[134]

7. On the other hand, the court in *Landry v. Chertoff*, found that § 1252(g) did not apply to a plaintiff who was "not in the United States illegally," and who therefore was "not subject to a removal order."[135]

C. Mandamus to Compel USCIS adjudication of adjustment of status applications

While it is well established that 8 U.S.C. § 1252(a)(2)(B)(I) strips the federal courts of jurisdiction to review "the discretionary denial of relief under 8 U.S.C. § 1255" and other immigration provisions,[136] mandamus has frequently been invoked to attempt to speed the processing of various applications before the USCIS, particularly I-485 applications to adjust status and N-400 applications for naturalization, both of which may be delayed for months or years while awaiting completion of a background check by the

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[128] *Id*.
[129] *Id*. (quoting *Alvidres-Reyes*, 180 F.3d at 205) (citations omitted).
[130] *Cardoso*, 216 F.3d at 518.
[131] Ovalle v. Chertoff, 546 F. Supp. 2d 333 (W.D. La. 2008).
[132] *Id.* at 337.
[133] *Id.* at 338.
[134] *Id.*
[135] *Landry v. Chertoff*, No. 07-0506, 2007 U.S. Dist. LEXIS 49081, at *5-6 (E.D. La. July 5, 2007).
[136] *See Ramzan Jiwan Hadwani v. Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006).

F.B.I. The cases have built an extensive and contradictory jurisprudence at the district court level regarding the availability of mandamus relief in this context. The Fifth Circuit has yet to weigh in with a precedential opinion, though its non-precedential decisions suggest that it will find that courts lack jurisdiction for such an order.

There are too many district court opinions on both sides of the issue to cite them all here, but the following discussion should give a flavor of the issues involved.[137]

1. In *Jianjun Fu v. Reno*, three aliens sought a writ of mandamus to compel the I.N.S. to act on their petitions for adjustment of status, which had been filed approximately two years earlier.[138] The petitioners argued that the I.N.S. owed them a mandatory duty to process the applications within a reasonable time.[139]

The magistrate judge found that the petitioners did not meet the threshold requirements for mandamus relief, since the I.N.S. adjudication process was still underway, meaning that the petitioners had not met the requirement that there be no available alternative remedy.[140] Furthermore, citing *Alvidres-Reyes v. Reno*,[141] the magistrate believed that § 1252(g) deprived it of federal question jurisdiction.[142] The magistrate judge thus recommended that the petition for mandamus be dismissed.[143]

The district court initially accepted the recommendations. After the petitioners filed a motion to reconsider, however, the district court set aside key portions of its opinion. The court held that § 1252(g) applied only in the removal context and thus presented no barrier to its jurisdiction over disputes over adjustment of status.[144] It distinguished *Alvidres-Reyes*, holding that it was limited to cases in the context of deportation proceedings.[145] Referring to *Alvidres-Reyes* and *Reno v. American-Arab Anti-Discrimination Comm*., 525 U.S. 471 (1999), the court remarked, "although these cases do not explicitly state that actions unrelated to removal or deportation are not covered by section 1252(g), neither do they clearly interpret the scope as broader than such actions."[146] At the very least, it would be reasonable to infer from these precedents that § 1252(g) applies only to I.N.S. actions related to deportation or removal."[147] It did not refer to *Cardoso v. Reno*, which it postdated.[148]

The court also held that the magistrate judge had erred in concluding that the I.N.S. adjudication process qualified as an alternate remedy precluding the petitioners' claim for

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[137] *See* Abanov v. Gonzales, No. H-06-3725, 2007 U.S. Dist. LEXIS 72630, at *9-13 (S.D. Tex. Sep. 28, 2007) (collecting cases).
[138] *Jianjun Fu v. Reno*, No. 3:99-CV-0981-L, 1999 U.S. Dist. LEXIS 22326 (N.D. Tex. Sept. 3, 1999) (*Jianjun Fu I*), *vacated in part*, Jianjun Fu v. Reno, No. 3:99-CV-0981-L, 2000 U.S. Dist. LEXIS 16110 (N.D. Tex. Nov. 1, 2000) (*Jianjun Fu II*).
[139] *Jianjun Fu I*, 1999 U.S. Dist. LEXIS at 2–3.
[140] *Id.* at 6 (citing United States v. O'Neil, 767 F.2d 1111 (5th Cir. 1985).
[141] *Alvidres-Reyes v. Reno*, 180 F.3d 199, 204 (5th Cir. 1999).
[142] *Id.* at 7.
[143] *Id.*
[144] *Jianjun Fu II*, 2000 U.S. Dist. LEXIS 16110 at 9-10 (collecting cases).
[145] *Id.* at 8-9.
[146] *Id.* at 9.
[147] *Jianjun Fu II*, 2000 U.S. Dist. LEXIS 16110, at *9.
[148] *Cardoso v. Reno*, 216 F.3d 512 (5th Cir. 2000).

mandamus relief.[149] Since the mandamus claim sought to compel the agency to *begin* the adjudication process, it was not reasonable to require the petitioners to wait for the completion of that process: "Waiting for an agency to act cannot logically be an adequate alternative to an order compelling the agency to act."[150] The court concluded that the petitioners' complaint sought a proper form of relief.[151] It denied their motion for judgment on the pleadings, however, since the record contained insufficient facts to determine whether the I.N.S.'s delay in processing the application had been reasonable.[152]

2. *Jianjun Fu II* did not discuss 8 U.S.C. § 1252(a)(2)(B). However, a later court dismissed the notion that this provision precluded jurisdiction over a claim regarding the pace of an I-485 adjudication. In *Ahmadi v. Chertoff*, the plaintiff's I-485 was delayed for nearly four years by the F.B.I.'s failure to perform a "name check."[153] He sued under the A.P.A. as well as the Mandamus Act in order to compel this adjudication.[154] The court found that the A.P.A. created a requirement that the agency act "within a reasonable time."[155] It also shrugged off the claim that § 1252 barred its jurisdiction.

> The Court is well aware that it does not have jurisdiction to review a *judgment* regarding the granting or denial of an A.O.S. application, but the question presented is whether the Court has jurisdiction to review the failure to make a judgment. Section 1252(a)(2)(B) does not speak to that question. And although the Government's failure to adjudicate the A.O.S. application may be characterized as a "decision or action," section 1252(a)(2)(B)(ii) only preludes judicial review of decisions or actions that are specified to be within the discretion of the Attorney General. As the Court has explained, *supra* II(A), the duty to act on an application, as distinguished from how to act, is not specified to be within the discretion of the Attorney General.[156]

However, the court found that the mandamus claim was duplicative of the A.P.A. claim and so limited its holding to the A.P.A. claim.[157]

3. After a lengthy discussion of the relevant case law, the court in *Abanov v. Gonzales*, reached the opposite conclusion as to the import of § 1252(a)(2)(B), with reasoning later adopted by the Fifth Circuit.[158] Abanov had sued to compel the processing of his I-485 application, which had also been delayed pending background checks.[159] The court reviewed the national jurisprudence, as well as cases within the Fifth Circuit, as to "whether the pace of adjudication is discretionary," which would mean that under 8 U.S.C. § 1252(a)(2)(B)(ii), the district court would have no jurisdiction.[160] The court decided it

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[149] *Jianjun Fu II*, 2000 U.S. Dist. LEXIS 16110, at *9.
[150] *Id.* at 15.
[151] *Id.* at 16.
[152] *Id.* at 19.
[153] Ahmadi v. Chertoff, 522 F. Supp. 2d 816, 817 (N.D. Tex. 2007).
[154] *Id.*
[155] *Id.* at 819.
[156] *Ahmadi*, 522 F. Supp. at 819 (emphasis in the original).
[157] *Id.* at 818.
[158] Abanov v. Gonzales, No. H-06-3725, 2007 U.S. Dist. LEXIS 72630 (S.D. Tex. Sep. 28, 2007).
[159] *Id.* at 1-4.
[160] *Id.* at 9-13.

was discretionary.[161]

> The court is unpersuaded that there is any meaningful distinction between the adjustment status decision, which all agree is unreviewable, and the process of reaching that decision. Were the term "action" limited only to the final decision regarding an adjustment of status application, then the term "action" in "decision or action" would be superfluous, a result which violates basic principles of statutory interpretation. Thus, "action" must contemplate more than merely the ultimate decision made by the USCIS on an applicant's I-485 petition.[162]

Moreover, "section 1252 expressly precludes judicial review notwithstanding section 1361 (Mandamus Act) or any other provision of law," and "the government does not have a 'clear nondiscretionary duty' to process his adjustment of status application at any particular pace or speed."[163] Accordingly, mandamus could not issue.

4. In a series of unpublished opinions in the mid-2000s, the Fifth Circuit also concluded, on a variety of grounds, that it lacked jurisdiction to compel agency adjudication of I-485 applications. It reached this decision not only on the basis of § 1252(g), finding that, as in *Cardoso*, despite "characteriz[ing] his claim as a request for adjustment of status, [the appellant] is actually seeking review of the decision to execute a removal order against him,"[164] but also that the appellant failed to prove a right to the relief, which is discretionary.[165] Furthermore, since "an alien who is denied adjustment of status by the district director may renew his adjustment of status application upon commencement of removal proceedings, which constitutes a further mechanism for judicial review," the plaintiff had "failed to exhaust his administrative remedies," as required by regulations and mandamus both.[166]

5. Finally, in a published opinion that was later vacated for mootness, the Fifth Circuit found that § 1252(a)(2)(B) stripped it of jurisdiction to compel the USCIS to adjudicate applications for adjustment of status.[167] An applicant brought suit to compel adjudication of her I-485, which she had filed with the USCIS over three years before.[168] The D.H.S. countered that her visa number was not current, and that the court "lack[ed] jurisdiction to compel the USCIS to adjudicate an I-485 application, as Congress has left

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[161] *Id.* at 14.
[162] *Id.* at 14-15.
[163] *Id.* at 15.
[164] Guang Qiu Li v. Agagan, No. 04-40705, 2006 U.S. App. LEXIS 6289, at *13 (5th Cir. Mar. 14, 2006) (per curiam) (unpublished), *cert. denied by* Li v. Agagan, 549 U.S. 1323 (2007).
[165] Akinmulero v. Holder, 347 Fed. Appx. 58, 60, 62 (5th Cir. 2009) (per curium) (unpublished)); *Li*, 2006 U.S. App. LEXIS 6289, at *13.
[166] *Maringo v. Mukasey*, 281 F. Appx 365, 367-68 (5th Cir. 2008) (per curiam) (unpublished) (citing *Cardoso*, 216 F.3d at 518), for the proposition "that the alien did not exhaust her administrative remedies regarding her denial of adjustment of status because she could renew her request for adjustment of status upon the commencement of removal proceedings" and *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980), for the principle that "unavailability of other adequate remedy is requirement for mandamus jurisdiction." *Maringo*, 281 F.Appx at 368.
[167] Bian v. Clinton, 605 F.3d 249 (5th Cir. 2010), (*vacated as moot*, 2010 U.S. App. LEXIS 27333 (5th Cir. Sep. 16, 2010)).
[168] *Id.* at 251.

the agency's decision-making process—including the pace of the adjudication process—entirely to agency discretion."[169] The court agreed, finding that § 1252(a)(2)(B), which protects from judicial intervention "(i) any judgment regarding the granting of relief under section … 1255 [adjustment of status] … or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security" that is discretionary, precluded any court involvement with the adjudication process.[170] In so holding, the court rejected the analysis of the district court, which had drawn a line between the final decision (which it acknowledged was unreviewable because discretionary) and the process of reaching that decision, and announced that it agreed with Judge Harmon's decision in *Abanov v. Gonzales.*[171]

> If Congress had intended for only the USCIS's ultimate decision to grant or deny an application to be discretionary—as distinguished from its interim decisions made during the adjudicative process—then the word "action" would be superfluous. Instead, Section 1252 expressly exempts from judicial review any "action" that is within the USCIS's discretion and is necessary to carry out the agency's statutory grant of authority. This includes establishing "such regulations as [the agency] may prescribe" to carry out its statutory duty, such as 8 C.F.R. § 245.2(a)(5)(ii), which specifies that "[a]n application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State…." As Bian contests the USCIS's decision to adjudicate her application in compliance with regulations that are clearly within the agency's discretion to establish, the federal courts are without jurisdiction to entertain her claim.[172]

Section 1252(a)(2)(B), by its own terms, supplants mandamus jurisdiction, and even if it did not, the statute does not impose any time limit for adjudications of I-485 applications. Moreover, it gives the USCIS discretion to pass whatever regulations it deems necessary for this process. Therefore, the court concluded "that the Mandamus Act is unavailable to Bian in requesting us to compel adjudication of her application in violation of the USCIS's established regulations."[173] The court rejected the plaintiff's argument that 8 U.S.C. § 1571, "which states that '[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application,'" creates either a "'plainly prescribed' duty" or a "'clear and certain' right" to prompt adjudication.[174]

The case was later vacated as moot, and so has limited precedential value.[175]

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[169] *Id.* at 252.
[170] *Id.* at 253-55.
[171] *Id.* at 254 n.8.
[172] *Bian*, 605 F.3d at 253-54.
[173] *Id.* at 255.
[174] *Id.*
[175] The practice in federal court when a case becomes moot on appeal "is to reverse or vacate the judgment below and remand with a direction to dismiss," in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." United States v. Munsingwear, Inc., 340 U.S. 36, 39, 41 (1950); *see also* Motient Corp. v. Dondero, 529 F.3d 532, 537 (5th Cir. 2008) ("Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review.") (quoting Munsingwear, 340 U.S. at 40) (internal quotation marks omitted).

Nevertheless, it still provides insight into the type of reasoning the court employs.

D. Mandamus to compel USCIS adjudication of naturalization applications

Naturalization applications also engender long delays, often for the same reason: the backlog in F.B.I. background checks. By law, the USCIS must investigate the background of each applicant.[176] The investigation entails:

> (a) a record check of the alien made against the Department of Homeland Security ("D.H.S.") immigration system; (b) a Federal Bureau of Investigation ("F.B.I.") fingerprint check for relevant criminal history records on the alien (e.g., arrests and convictions); (c) a check against the DHS-managed Interagency Border Inspection System ("IBIS"), which contains records and "watch list" information for more than twenty federal law enforcement and intelligence agencies, including the Central Intelligence Agency, F.B.I., other divisions of the United States Department of Justice, the Department of State, DHS/U.S. Customs and Border Protection and other D.H.S. agencies; and (d) an F.B.I. name check, which is run against F.B.I. investigative databases containing information that is not necessarily revealed by the F.B.I.'s fingerprint check or IBIS.[177]

As a result, many cases have been "filed around the country to challenge the delays in adjudicating naturalization applications resulting from delays in name-check processing."[178]

1. The district court in *Alkenani v. Barrows* entertained the notion that such delays could be remedied in mandamus, though it denied the petitioner's claim on the merits.[179] The petitioner's N-400 had been denied on the basis that he had obtained the wrong sort of clearance from the police.[180] He appealed this determination, received "a *de novo* hearing before a senior immigration examiner on November 5, 2003," and "his application for naturalization was taken under advisement pending the results of a criminal background check."[181] At the time of filing his suit, the petitioner had been waiting for a determination on his appeal for nine months, and the whole process since filing his N-400 had taken three years.[182]

The government argued that the petitioner had not exhausted his administrative remedies. The court found that the exception to this requirement in naturalization cases, 8 U.S.C. § 1447(b), which allows an applicant a district court hearing if the agency does not make a final decision "before the end of the 120-day period after the date on which the

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[176] 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1.

[177] *Dawoud v. Dep't of Homeland Sec.*, No. 3:06-CV-1730-M (BH), 2007 U.S. Dist. LEXIS 101788, at *4-5 (N.D. Tex. Nov. 30, 2007) (quoting the USCIS's brief). As the FBI has a years-long backlog in such background checks, this can occasion extended processing delays. "The USCIS name-check requirement 'has become a bottleneck because the FBI has large numbers of pending name-check requests and limited resources to complete them.'" *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 821 (S.D. Tex. 2008) (quoting *Ali v. Frazier*, 575 F. Supp. 2d 1084, at 1 (D. Minn. 2008)).

[178] *Id.*

[179] *Alkenani v. Barrows*, 356 F. Supp. 2d 652 (N.D. Tex. 2005).

[180] *Id.* at 653-54.

[181] *Id.* at 654.

[182] *Id.* at 653-54.

examination is conducted,"[183], did not apply here because "petitioner is not challenging the denial of his naturalization application. Rather, he seeks judicial intervention pursuant to 8 U.S.C. § 1447(b) because the immigration service has yet to decide his appeal."[184] The court could hear the case because "[u]nder these circumstances, there are no administrative remedies to exhaust."[185] By the same token, however, the court was not authorized to hold a § 1447(b) hearing for an appeal, only from a denial.[186]

It did find that it had jurisdiction under the A.P.A. and entertained the notion that it could have jurisdiction under the Mandamus Act.[187] It determined that the petitioner had "a clear right to have his naturalization application adjudicated" within a reasonable time, satisfying the first of the three requirements for mandamus.[188] It also found that "mandamus may be the only remedy available to petitioner," satisfying the third requirement, since "[u]nless and until the immigration service decides his appeal, petitioner remains in perpetual limbo—he cannot become a naturalized citizen or seek judicial review of an adverse decision on his application."[189] The court denied relief, however, since it was "not convinced that the 15-month delay in deciding petitioner's appeal is unreasonable under the unique circumstances of this case."[190]

The court noted that the agency did not "have authority to expedite the F.B.I. investigation or give petitioner priority over background checks requested by other agencies," and perceived this kind of delay as "inevitable and becoming more frequent in light of heightened security concerns in the post-911 world."[191] It did invite the petitioner to "seek appropriate relief from the court if this delay persists," though it did not suggest how long a delay would justify court intervention.[192]

2. The stage of the proceedings at which the delay occurred is crucial to whether the plaintiff can receive relief. In *Walji v. Gonzales*, an applicant whose N-400 had been delayed for two years filed in mandamus, "ask[ing] the district court to (1) assume jurisdiction over and adjudicate his application for naturalization or (2) compel the defendants to perform their duty to adjudicate his application."[193]

The laws and statutes governing naturalization envision the following process: first, the applicant submits the N-400; second, the USCIS investigates the applicant, which includes background and criminal record checks; third, once the investigation is completed, the USCIS conducts an in-person interview, which includes an examination as to English and history; and fourth, the USCIS makes a decision, either "at the time of the initial examination or within 120-days after the date of the initial examination," and administers

[183] *Id.* at 655.
[184] *Id.* at 655.
[185] *Alkenani*, 356 F. Supp. 2d at 655.
[186] *Id.* at 655-56.
[187] *Id.*
[188] *Id.* at 657.
[189] *Id.* (Note that this does not take into account that relief under the APA could serve as another adequate remedy.).
[190] *Id.*
[191] *Alkenani*, 356 F. Supp. 2d at 657.
[192] *Id.*
[193] *Walji v. Gonzales*, 500 F.3d 432, 433 (5th Cir. 2007).

an oath of allegiance.[194]

In order to expedite the process despite the delay with the background check, the USCIS held the initial examination of Walji before the F.B.I. had completed its investigation. Walji then sued to compel a decision, citing 8 U.S.C. § 1447(b), which allows application to the district court for decision or remand if the USCIS does not decide the application within 120 days of the examination. The court was thus required to determine whether "the 120 days begin to run after the application interview or after the background investigation is complete."[195]

The court initially decided the latter, holding "that when the C.I.S. examination is premature because the mandatory security investigation is not complete, the 120-day time period of 8 U.S.C. § 1447(b) does not begin to run until C.I.S. receives the F.B.I.'s 'definitive response,' described in 8 C.F.R. § 335.2(b)," and affirming the denial of mandamus, on the basis that "[g]overnment delay alone, unless it is shown to be in bad faith or extraordinary, does not warrant such an extraordinary remedy."[196]

Upon petition for rehearing, however, the panel determined that the initial interview does trigger the 120-day deadline, even if the F.B.I. check isn't completed.[197] However, it also found that there was no deadline for the F.B.I. background check itself, stating, "because there is currently no required period of time for C.I.S. to conduct the initial interview, C.I.S. could avoid the jurisdiction of the courts by following its own order of events. As a practical matter, this may yet result in long waiting times for applicants."[198] The court did not separately mention whether the plaintiff had a right to mandamus.[199]

3. *Walji* was decided during the pendency of *Abusadeh v. Chertoff*, which involved another plaintiff interviewed before the F.B.I. investigation was completed.[200] Relying on *Walji*, the court ordered the USCIS to require that the F.B.I. expedite the plaintiff's name check, and imposed time limits on USCIS's processing of the application.[201] It also considered whether it should use its mandamus powers to impose similar limits on the F.B.I. investigation.[202] The court observed that "there is no statutory time limit within which the F.B.I. must complete the name and background check. The F.B.I. is, however, subject to the requirement of reasonable action."[203]

Referring to the mandamus requirement that a plaintiff have "no other adequate means to attain the relief sought" and have a "clear and indisputable" right to a particular result, the court found that "[t]he record in this case shows that there may be no other adequate means to attain relief other than to compel the *F.B.I.* to act," as "the delay is extreme—three and one-half years—and its causes difficult to address."[204] However, since

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[194] 8 C.F.R. §§ 334.2; 335.2; 335.3(a); 337.1; 337.9; *Walji*, 500 F.3d at 434.
[195] *Walji*, 500 F.3d at 433.
[196] *Walji v. Gonzales*, 489 F.3d 738, 739 (5th Cir. 2007).
[197] *Walji*, 500 F.3d at 439.
[198] *Id.* (footnote omitted).
[199] *Id.*
[200] *Abusadeh v. Chertoff*, No. H-07-3155, 2007 U.S. Dist. LEXIS 94428 (S.D. Tex. Dec. 27, 2007).
[201] *Id.* at 15.
[202] *Id.*
[203] *Id.* at 13.
[204] *Id.* at 13-14.

the F.B.I. had "not had an opportunity to act after receiving an instruction from USCIS to expedite Abusadeh's name-check review," the court remanded the case to "allow the F.B.I. an opportunity to complete the name check in a reasonably prompt period after it receives a request from the USCIS to handle it on an expedited basis."[205]

4. The N-400 of the plaintiff in *Dawoud v. Dep't of Homeland Sec.* was also delayed, for more than three years, pending an F.B.I. background check.[206] Both the USCIS and the F.B.I. filed motions to dismiss under Fed. R. Civ. Pro. 12(b)(1) for lack of subject matter jurisdiction.[207] The court quickly rejected the USCIS's argument that the plaintiff was "attempt[ing] to invoke jurisdiction under § 1447(b)," then turned to the F.B.I.'s contention that it had no duty to conduct a background check.[208]

> As Defendant F.B.I. notes, there is no statute or regulation that explicitly imposes a mandatory duty upon the F.B.I. to investigate for the USCIS the criminal background of an applicant for citizenship. The USCIS, however, does have a mandatory duty to process applications for naturalization, 8 C.F.R. § 316.14, and as part of its review of an application, the USCIS must determine whether an applicant has met his burden to establish "good moral character." 8 U.S.C. § 1427(a). This inquiry entails several security and background checks . . . which are performed by the F.B.I. 8 U.S.C. §§ 1105(b), 1446.[209]

The court observed that there was no controlling precedent regarding this issue, but "[t]he majority of the few courts to address the issue have specifically found that the F.B.I. has a mandatory duty to perform backgrounds checks; this is based upon the statutory provisions (1) that allow the F.B.I. to establish and collect fees in order to process fingerprint identification records and (2) that provide aliens must pay an application fee to USCIS, a portion of which USCIS must share with the F.B.I."[210]

The court further found that there is an obligation to process applications within a "reasonable time" under the A.P.A., 5 U.S.C. § 555, and that "Congress intended 'that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application.'"[211] The F.B.I.'s evidence had failed to justify the almost four-year delay in the plaintiff's application. The court therefore denied the F.B.I.'s motion to dismiss both the A.P.A. and the mandamus claims.[212]

5. *Sawan v. Chertoff* also found that it retained jurisdiction to consider both the A.P.A. and mandamus claims.[213] The plaintiff had filed in mandamus to ask the district

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[205] *Id.* at 15.
[206] The discussion of the case is provided by the Recommendation of the Magistrate Judge, which was accepted in full by *Dawoud v. Dep't of Homeland Sec.*, No. 3:06-CV-1730-M (BH), 2007 U.S. Dist. LEXIS 94450 (N.D. Tex. Dec. 26, 2007).
[207] *Id.* at 1.
[208] *Id.* at 12, 23.
[209] *Dawoud*, 2007 U.S. Dist. LEXIS 101788 at 15 (some internal citations omitted).
[210] *Id.* at 16 (collecting cases).
[211] *Dawoud*, 2007 U.S. Dist. LEXIS 101788 at 17-18 (citing 8 U.S.C. § 1571(b)). (A similar argument was later rejected by the Fifth Circuit in *Bian*.).
[212] *Id.* at 21-25.
[213] *Sawan v. Chertoff*, 589 F. Supp. 2d 817 (S.D. Tex. 2008).

court to compel the F.B.I. to complete his name check within thirty days and the USCIS to adjudicate his N-400 application within sixty days.[214] The district court initially dismissed for lack of subject matter jurisdiction, but then granted the plaintiff's motion for reconsideration and determined that it did have jurisdiction to consider the plaintiff's claims.[215]

The court examined the various time limitations on the different stages of N-400 processing, observing that, as a whole, "[t]here is no explicit statutory or regulatory requirement that a naturalization application be adjudicated within a particular period after filing."[216] However, the court noted that the A.P.A. requires matters to be completed within "a reasonable time," and that the act authorizes district courts to "compel agency action unlawfully withheld or unreasonably delayed."[217]

Though the defendants had argued for lack of jurisdiction because "the USCIS 'has no non-discretionary duty to immediately process the Plaintiff's naturalization application prior to the favorable completion of all mandatory background checks'" or to operate within a certain time frame, that goes to the merits of whether the plaintiff is entitled to relief, not to the court's jurisdiction to entertain the claim.[218] "[W]hether a plaintiff is *entitled to relief* is a separate question from whether a court has jurisdiction to *decide* whether a plaintiff is entitled to relief."[219] Thus, the court held, on reconsideration, that it retained "subject-matter jurisdiction to decide whether Sawan has the right to relief that he claims."[220]

On the merits, however, it found that mandamus relief was not appropriate, since "relief for immigration delays under the Mandamus Act and the A.P.A." require "essentially the same showing."[221] "As a result, the mandamus claim adds nothing to the A.P.A. claim and should be dismissed," both from general reasons of judicial economy as well as the requirement that there be no other adequate remedy.[222]

6. On the other hand, in *Hussain v. Mueller*, the district court found that it lacked subject matter jurisdiction over the plaintiff's suit to compel the USCIS to adjudicate his N-400, which had been delayed by the background check, because "Plaintiff has not pled that Defendants have failed to perform any act that they presently have a *clear duty* to perform as a basis for mandamus relief."[223]

7. *Ayyub v. Blakeway* also denied a mandamus claim. The plaintiff argued that the two-year delay on the name check provided the basis for a suit.[224] Noting that he had not yet been interviewed, the court disagreed, stating that the plaintiff could "not establish a

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[214] *Id.* at 821.
[215] *Id.* at 834.
[216] *Id.* at 820.
[217] *Id.* at 821 (quoting 5 U.S.C. §§ 555(b), 706(1)).
[218] *Id. at 822*.
[219] *Id.* at 823 (quoting *Ali v. Frazier*, 575 F. Supp. 2d 1084, at *3 (D. Minn. 2008)) (emphasis in original).
[220] *Id.* at 825.
[221] *Id.*
[222] *Id.* at 825-26.
[223] *Hussain v. Mueller*, 2008 U.S. Dist. LEXIS 47961 (S.D. Tex. Jun. 19, 2008); *Id.* at 10.
[224] *Ayyub v. Blakeway*, Civil Action No. SA-10-CV-149-XR, 2010 U.S. Dist. LEXIS 82739, at 13 (W.D. Tex. Aug. 13, 2010); *Id.* at 10.

clear right to relief" because "[t]he F.B.I. is not compelled to conduct that investigation within a certain period of time."[225] The court also denied the plaintiff's A.P.A. claim, quoting the Fifth Circuit's discussion in *Walji* of when and how the investigation and examination can proceed.[226]

E. Mandamus to compel adjudication of visas

Visa determinations do not follow the same analysis as I-485 applications, as discretion is not vested in the agency by statute. Thus, courts can review the pace and even the merits of the agency's determination. However, court review is still limited by who makes the visa determination.

1. Originally, visas were regarded as similar to adjustment applications in terms of what a court could and could not review. For instance, in *Kummer v. Schultz*, a husband and wife sought to compel the Secretary of State to "diligently and expeditiously" process the wife's immigrant visa request.[227] The court held that because the visa issuing process was committed to agency discretion, it lacked jurisdiction to address the plaintiffs' claim.[228] It also found that mandamus was not appropriate, since such relief is available only in extraordinary situations, and the plaintiffs had not demonstrated a clear or indisputable right to it.[229] Accordingly, it denied the plaintiff's mandamus request.[230]

2. The Fifth Circuit charted a different path in *Ayanbadejo v. Chertoff*.[231] The plaintiffs pursued declaratory, injunctive, and mandamus relief to challenge the USCIS's denial of their I-130 and I-485 for marriage fraud.[232] The district court dismissed the claims, finding that § 1252(a)(2)(B) denied it jurisdiction to review matters within the agency's discretion.[233] The Fifth Circuit agreed that the denial of the I-485 was discretionary, but found that determinations concerning I-130s are not, relying on *Zhao v. Gonzales*, which held that only those matters that are specified *by statute* to be discretionary are encompassed by § 1252. he court noted, "Even though all judgments regarding relief under § 1255, including reviews of I-485 applications, are specifically categorized as discretionary and non-reviewable by § 1252(a)(2)(B)(i), I-130 petitions are authorized by § 1154(a)(1)(A)(i), not § 1255, and are not mentioned in § 1252(a)(2)(B)(i)."[234] Even though the *regulations* governing I-130 petitions "might lead one to infer that I-130 determinations are discretionary, and thus non-reviewable," the actual statute, § 1154, does not mention discretion.[235] Therefore, for purposes of § 1252(a)(2)(B), "[d]eterminations regarding the validity of marriage for I-130 petition purposes are not discretionary," and

[225] *Id*. at 11, quoting the discussion in *Sawan*, 589 F. Supp. 2d at 826 of the lack of statutory or regulatory requirements for FBI-conducted name checks).
[226] *Id.* at 14-18.
[227] *Kummer v. Schultz*, 578 F. Supp. 341 (N.D. Tex. 1984).341.
[228] *Id.* at 341-42.
[229] *Id.* at 342.
[230] *Id.*
[231] *Ayanbadejo v. Chertoff*, 517 F.3d 273 (5th Cir. 2008).
[232] *Id.*
[233] *Id.* The opinion did not distinguish between the different types of relief sought by the plaintiff, or address whether mandamus is appropriate if other relief is also available.
[234] *Ayanbadejo*, 517 F.3d at 277.
[235] *Id*.

so courts retain jurisdiction to review them.[236]

3. *Omoruyi v. Chertoff* built on this precedent.[237] The plaintiffs alleged that they had attempted to appeal the denial of their I-130 petition, but the USCIS, "despite numerous requests … failed to perform its duty to forward the EOIR-29 Notice of Appeal to the B.I.A."[238] The court relied on the Fifth Circuit's ruling in *Ayanbadejo* "that adjudication of an I-130 petition is not discretionary," and observed that, "[a]lthough there is no statutory or regulatory deadline by which an I-130 petition must be adjudicated, at some point failure to take action on such a petition runs afoul of the Administrative Procedure Act's (A.P.A.) requirement that agencies perform nondiscretionary functions within a reasonable time."[239]

During the pendency of the mandamus case, the plaintiffs' "appeal was forwarded to the B.I.A., and on March 19, 2008, the B.I.A. adjudicated that appeal by remanding the case to the district director of the D.H.S."[240] The defendants thus argued that the case was moot.[241] The court disagreed, since the B.I.A. had remanded on the basis that the record contained neither a copy of the petition in question nor the document on which the fraud finding was based.[242] Accordingly, it took the case under advisement pending a status report as to the progress of the I-130's adjudication.[243]

4. On the other hand, in *Offiiong v. Holder*, after a long discussion of the facts of the case, the court found it lacked jurisdiction because "Plaintiff has not shown and cannot show that he had a 'clear and indisputable right' to a visa and to an adjustment of status," the first requirement of mandamus relief.[244] The plaintiff had claimed that the USCIS had "improperly denied" the I-130 filed on his behalf and "improperly determined that he had never been granted lawful permanent resident status because he had participated in a marriage fraud scheme."[245] He sued for mandamus as well as declaratory and injunctive relief.[246]

5. *Pedrozo v. Clinton* illuminates the importance of who makes the decision to the availability of mandamus.[247] An employee and his employer sought "to compel action on a previously filed H-1B Petition for non-immigrant, Alien Worker status."[248] The USCIS had approved the H-1B petition and the employee, who was residing outside the U.S., had then filed a visa application with the embassy.[249] When he appeared for an interview, the consular officer denied the application, finding that the job did not meet the statutory

[236] *Id.* at 278.
[237] *Omoruyi v. Chertoff*, No. H-08-0106, 2008 U.S. Dist. LEXIS 34690 (S.D. Tex. Apr. 28, 2008).
[238] *Id.* at *3.
[239] *Id.* at *10.
[240] *Id.* at *12.
[241] *Id.* at *15.
[242] *Id.* at *16.
[243] *Id.* at *17-18.
[244] *Offiiong v. Holder*, 864 F. Supp. 2d 611, 627 (S.D. Tex. 2012).
[245] *Id.* at 614.
[246] *Id.*
[247] *Pedrozo v. Clinton*, 610 F. Supp. 2d 730 (S.D. Tex. 2009).
[248] *Id.* at 731.
[249] *Id.*

requirements and that the employee's credentials did not satisfy the job specifications.[250] The consular officer then returned the petition to USCIS "for reconsideration."[251] After an eleven-month delay, the plaintiffs sued for mandamus, declaratory judgment, and relief under the A.P.A. to compel the embassy to "complete the processing of Pedrozo's visa application and also to compel USCIS to complete the processing of Coane's H-1B petition."[252] The USCIS subsequently issued a notice of intent to revoke the H-1B petition.[253] The court found that the consular decision was completed (rendering the claim moot) and in any case not reviewable by courts.[254] USCIS's decision was another matter. The court found that, under *Zhao*, its jurisdiction was not undermined by 8 U.S.C. § 1252(a)(2)(B)(ii) (review of discretionary decisions), because "USCIS has a non-discretionary duty to process non-immigrant status petitions pursuant to § 1184(c)."[255] However, the court found on the merits that the eleven-month period was not an unreasonable delay, and in any case the USCIS's issuance of the NOIR rendered the case moot.[256] It did not separately address the plaintiffs' right to mandamus.

F. Mandamus to compel USCIS adjudication of other relief

1. In *Kale v. United States I.N.S.*, the beneficiary of an employer's application for a change of the beneficiary's nonimmigrant status attempted to reopen or reconsider the denial of the application.[257] The court held that the beneficiary had "no clear right to relief," as required by the mandamus jurisprudence, because he was not the "affected party" under the regulations, and so lacked standing, and because the regulations provided for no right of appeal.[258] Finally, motions to reopen or reconsider are discretionary, and so are not the kind of "ministerial, nondiscretionary act" that mandamus can compel.[259]

2. The court also found that it lacked jurisdiction to issue a mandamus order in *Orosco v. Napolitano*.[260] There, the appellant sought a certification from law enforcement so that he could be eligible to receive a U-visa.[261] The court determined "that the decision to issue a law enforcement certification is a discretionary one," and therefore not ministerial.[262] It therefore affirmed the district court's dismissal of the suit on the basis of subject matter jurisdiction and standing.[263] The court's opinion did not distinguish between the types of relief sought (habeas, declaratory judgment, and injunctive relief) in its discussion, or address whether mandamus is appropriate if other relief is also available.[264]

G. Mandamus to challenge denial or revocation of citizenship

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[250] *Id.* at 732.
[251] *Id.*
[252] *Id*. at 732-33.
[253] *Clinton*, 610 F.Supp.2d at 733.
[254] *Id.* at 738.
[255] *Id*. at 737.
[256] *Id.* at 738.
[257] *Kale v. United States INS*, 37 Fed. App'x. 90 (5th Cir. 2002) (per curiam) (unpublished)
[258] *Id.* at *5-6.
[259] *Id*. at *6.
[260] *Orosco v. Napolitano,* 598 F.3d 222 (5th Cir. 2010).
[261] *Id.*
[262] *Id*. at 226.
[263] *Id.* at 224.
[264] *Id.*

1. *Fabuluje v. Ashcroft* involved an alien whose citizenship had been revoked following his conviction for "obtaining naturalization by fraud in violation of 18 U.S.C. § 1425(a)."[265] Fabuluje sought a writ of mandamus "to compel respondents to perform a duty owed him under 8 C.F.R. § 340.1(b)(6) and to apply the ruling in *United States v. Pasillas-Gaytan*."[266]

The magistrate judge recommended that Fabuluje's mandamus claim be rejected, concluding that neither § 340.1 nor *Pasillas-Gaytan* supported his argument that the respondents owed him a duty.[267] Concluding that Fabuluje's action was without merit, the magistrate judge recommended that it be dismissed as a frivolous action within the meaning of 28 U.S.C. § 1915(e)(2).[268]

2. The petitioner's case was also dismissed in *Robertson-Dewar v. Mukasey*.[269] There, the petitioner, pro se, sought mandamus after his N-400 was denied, asking the court to require the agency to process his long-delayed application, *nunc pro tunc*; or declare that he had acquired citizenship as of the year his father had applied on his behalf (the application was for a minor child of a U.S. citizen and had been delayed for over ten years with no explanation).[270] The retroactivity was required because he had since aged out of eligibility.[271] The court found that it lacked jurisdiction, stating, "it is unclear whether this Court ever has the power to order a naturalization application retroactively adjudicated."[272] Even if it did, it could not order the agency to consider the petitioner's application while he was in removal proceedings, since such consideration is barred by 8 U.S.C. § 1429.[273] The court did note that if the removal proceedings terminated in the petitioner's favor, he could bring his mandamus suit again in district court.[274]

H. Miscellaneous Matters

The same considerations play out in other contexts, as well. Relief will depend on whether the requested action is discretionary, whether the plaintiff exhausted all administrative remedies, and, once those hurdles have been cleared, on whether relief is appropriate under the circumstances.

1. *Breve v. Caplinger* involved an alien who had conceded deportability and been granted voluntary departure.[275] Breve sought a six-month extension of his voluntary departure date in order to remain in the United States while the I.N.S. processed an alien relative petition filed by his wife on his behalf.[276] After the I.N.S. granted only a two-week extension of his voluntary departure date, Breve sought declaratory, mandamus, and injunctive relief in district court, arguing that the district director had abused his discretion

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[265] *Fabuluje v. Ashcroft*, No. 3:01-CV-1371-P, 2002 U.S. Dist. LEXIS 4422 (N.D. Tex. Mar. 18, 2002), at *3.
[266] *Id.* at *8; *United States v. Pasillas-Gaytan*, 192 F.3d 864 (9th Cir. 1999).
[267] *Fabuluje*, No. 3:01-CV-1371-P at *13.
[268] *Id.*
[269] *Robertson-Dewar v. Mukasey*, 599 F. Supp. 2d 772 (W.D. Tex. 2009).
[270] *Id.* at 776.
[271] *Id.* at 782.
[272] *Id.*, citing *INS v. Pangilinan*, 486 U.S. 875, 883-84 (1988).
[273] *Id.*
[274] *Id.*
[275] *Breve v. Caplinger*, No. 93-2086, 1993 U.S. Dist. LEXIS 10165 (E.D. La. Jun. 30, 1993).
[276] *Id.* at *2.

in refusing to grant a full six-month extension.[277]

The court denied Breve's claim for relief, adopting the holding of other courts that had found a lack of jurisdiction to review discretionary decisions relating to voluntary departure relief.[278] Breve had presented no evidence to support his claim that the I.N.S. had abused its discretion.[279] The court further held that mandamus relief was not appropriate because "its use is limited to the enforcement of nondiscretionary, plainly defined, and purely ministerial duties."[280]

2. Discretion was also crucial in *Aigbevbolle v. Caplinger*, in which an alien sought a writ of mandamus to compel the I.N.S. to rule on his motion for redetermination of custody status and to review the merits of its determination that he posed a flight risk.[281] Aigbevbolle's first mandamus claim became moot after the director ruled on the redetermination motion.[282] The district court rejected his second claim on two grounds.[283] First, the question of an alien's right to bail was committed to agency discretion, so no clear duty existed on the part of the I.N.S.[284] Second, Aigbevbolle had not exhausted his alternate remedies, because he had taken advantage of his right under 8 U.S.C. § 1252(c) to seek habeas corpus review in a court of competent jurisdiction.[285] For both of these reasons, the court held that mandamus was not available.[286]

3. Failure to exhaust administrative remedies guides a number of these cases. In *Ayala v. Reno*, an alien sought mandamus and injunctive relief to challenge a deportation order.[287] The I.N.S. had reinstated a deportation order under I.N.A. § 241(a)(5) [8 U.S.C. § 1231(a)(5)] on the ground that Ayala had reentered the United States illegally after having previously been deported.[288]

The court dismissed Ayala's complaint for lack of jurisdiction, as under 8 U.S.C. § 1252(g), courts were deprived of jurisdiction over challenges to removal orders.[289] It further noted that Ayala had failed to pursue administrative challenges to the deportation order before her original departure from the U.S., and I.N.A. § 241(a)(5) precluded the court from hearing her renewed challenge to the order.[290] Accordingly, it dismissed her petition for relief.[291]

4. Likewise, *Alcala-Gonzales v. Ashcroft* involved an alien, Alcala, who had

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[277] *Id.*
[278] *Id.* at *3-4 (citing *Contreras-Aragon v. I.N.S.*, 789 F.2d 777, 779 (9th Cir. 1986); *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 598 (7th Cir. 1991)).
[279] *Id.* at *5.
[280] *Id.* (citing *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984)).
[281] *Aigbevbolle v. Caplinger*, No. 92-4122, 1993 U.S. Dist. LEXIS 6783 (E.D. La. May 6, 1993).
[282] *Id.*
[283] *Id.*
[284] *Id.* at *2.
[285] *Id.*
[286] *Id.*
[287] *Ayala v. Reno*, 995 F. Supp. 717 (W.D. Tex. 1998).
[288] *Id.* at 718.
[289] *Id.*
[290] *Id.*
[291] *Id.*

sought to remove the conditions on his permanent resident status.[292] The I.N.S. denied his petition on the ground that he was no longer married to his wife and had not filed for a waiver of the joint filing requirement.[293] Alcala then petitioned the district court for a writ of mandamus ordering the I.N.S. to grant him "a waiver of the joint filing requirement."[294]

The court rejected Alcala's mandamus petition, holding that Alcala should have renewed his claim before the immigration judge, not before the district court.[295] Since Alcala had failed to exhaust his administrative remedies, a writ of mandamus was not warranted.[296]

5. The same consideration prevented the court from addressing the merits of an I-485 denial in both *Chavira v. Upchurch*,[297] and *Obiri v. Holder*.[298] Both cases challenged the USCIS's denial of an I-485 petition after a child aged out of derivative beneficiary status.[299] Both courts found they lacked jurisdiction "over agency denials of adjustment of status even where removal proceedings have not been commenced."[300] "Since the district director of USCIS denied [the daughter's] application for adjustment of status, her remedy now is to renew her application before an immigration court in removal proceedings, over which the immigration judge has exclusive authority to consider the application *de novo* . . ." and then seek review on appeal, if necessary.[301]

Chavira went on to note that, even after the plaintiff had exhausted remedies by renewing the application in removal proceedings, "this court would still lack jurisdiction to enjoin those proceedings or to instruct the agency on the proper legal standards," due to § 1252(g).[302] "[I]f a final order of removal has been issued, the exclusive means of review is to file a petition of review directly with the Fifth Circuit."[303]

6. On the other hand, the court reached the merits of the alien's claim and granted relief in *Guerrero v. Johnson*.[304] There, the court denied the defendant's motion to dismiss the plaintiff's mandamus claim, and concluded that "summary judgment for Guerrero is likely warranted pursuant to Federal Rule of Civil Procedure 56(f)(3)" (allowing the court to issue summary judgment sua sponte).[305] The USCIS had denied the plaintiff's I-485 because he had entered as an alien crewman, a class of aliens specifically excluded from

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[292] *Alcala-Gonzales v. Ashcroft*, No. 3:01-CV-0589-P, 2002 U.S. Dist. LEXIS 2336 (N.D. Tex. Feb. 13, 2002) at *2.
[293] *Id.* at *3.
[294] *Id.* at *4.
[295] *Id.* at *6.
[296] *Id.* at *8.
[297] *Chavira v. Upchurch*, No. 4:07-CV-381, 2007 U.S. Dist. LEXIS 61527, at *7 (E.D. Tex. Aug. 16, 2007), Report and Recommendation accepted by *Chavira v. Upchurch*, 2007 U.S. Dist. LEXIS 63883, at *2 (E.D. Tex. Aug. 28, 2007).
[298] *Obiri v. Holder*, No. H-10-208, 2011 U.S. Dist. LEXIS 30919 (S.D. Tex. Mar. 24, 2011).
[299] *Obiri*, 2011 U.S. Dist. LEXIS 30919 at *8; *Chavira*, 2007 U.S. Dist. LEXIS 61527 at *2.
[300] *Obiri*, 2011 U.S. Dist. LEXIS 30919 at *21, citing *Cardoso v. Reno*, 216 F.3d 512 (5th Cir. 2000). *Chavira*, 2007 U.S. Dist. LEXIS 61527 at *6-7.
[301] *Obiri*, 2011 U.S. Dist. LEXIS 30919 at *20.
[302] *Chavira*, 2007 U.S. Dist. LEXIS 61527 at *7.
[303] *Id.* at *8.
[304] *Guerrero v. Johnson*, 138 F. Supp. 3d 754 (E.D. La. 2015).
[305] *Id.* at 756.

eligibility by I.N.A. § 245.[306] However, he had also been granted temporary protected status, which he argued overrode the prohibition on crewmen.[307] The plaintiff attempted to reopen the denial, then sued to "order[] the USCIS to reopen his I-485 application and proceed with a corrected interpretation of §§ 1254a and 1255."[308] The court agreed with the applicant's interpretation and found that the plaintiff had exhausted his administrative remedies.[309]

In a separate opinion, after considering the defendant's arguments, the court issued summary judgment for the plaintiff. However, it noted in a footnote that, "[w]hile petitioner's complaint is styled as a 'writ of mandamus,' plaintiff asserted jurisdiction under the Administrative Procedure Act and the Court is satisfied that relief to petitioner is most properly granted under that Act pursuant to 5 U.S.C. § 706."[310]

7. In *Santana v. Chandler*, an alien sought appointment of counsel to assist him in preparing a petition for mandamus.[311] The court rejected the request, holding that although the issue was "of sufficient complexity that a pro se prisoner, particularly an alien with language difficulties, would not be expected to present it satisfactorily,"[312] there were decisions in other circuits on the same issue that could provide adequate guidance. "[T]he Eighth and Ninth Circuits provide extensive discussions in *Gonzalez* and *Soler*, respectively, that may serve to guide us, in light of which it is doubtful that an attorney could provide more than marginal assistance to Santana or to this court."[313] It thus concluded that appointment of counsel was unnecessary.[314]

[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.* at 756 n.2.
[310] *Guerrero v. Johnson*, No. 15-1135, 2015 U.S. Dist. LEXIS 172797, at *3-5 n.2 (E.D. La. 2015) (citing *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 238-39 (5th Cir. 2007)).
[311] *Santana v. Chandler*, 961 F.2d 514 (5th Cir. 1992).
[312] *Id.* at 516.
[313] *Id.*
[314] *Id.*