



## AMERICAN IMMIGRATION LAW FOUNDATION

---

---

### PRACTICE ADVISORY<sup>1</sup>

*Revised June 2003*

## **MANDAMUS ACTIONS: “HOW TO” AND SUMMARY OF RELEVANT CASE LAW**

This advisory provides basic information for immigration lawyers about filing a mandamus action in federal district court. The advisory includes selected federal court decisions in immigration-law related mandamus actions. The cases are not necessarily consistent with each other and should be consulted for details.

The information in this document is accurate and authoritative as of June 2003, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. This guide is, by necessity, very general. Practitioners should consult local federal practice rules and procedures for courts in their jurisdictions. Local practices may vary.

### **I. GENERAL INFORMATION ON FILING A MANDAMUS ACTION**

Mandamus can be used to compel administrative agencies to act. The federal statute authorizing mandamus actions is 28 U.S.C. § 1361, sometimes known as “The Mandamus Act.” That statute says, in its entirety:

1361. Action to compel an officer of the United States to perform his duty.

The district courts shall 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.

**JURISDICTION:** This statute authorizes the court to order a remedy. It does not provide independent, substantive grounds for a suit. That is, the plaintiff still must allege a sufficient claim for relief and standing to bring the action. The Mandamus Act provides the remedy once the plaintiff has alleged the cause of action and established her or his standing to bring suit.

---

<sup>1</sup> Copyright (c) 2003, American Immigration Law Foundation. See [www.aifl.org/copyright](http://www.aifl.org/copyright) for information on reprinting this practice advisory.

In the immigration context, jurisdiction for actions for mandamus relief usually should be alleged under both the Administrative Procedures Act (“APA”), 5 U.S.C. § 551 *et seq.* and the Mandamus Act.<sup>2</sup> Both acts compel government officials to perform duties owed to the plaintiffs. The Mandamus Act encompasses constitutional obligations as well as statutory duties. Complexity and novelty of the issues on the merits do not affect the court's mandamus authority.

It is thus essential in a mandamus action to plead and prove that the defendant(s) owe a duty to the plaintiff or the class of people to which the plaintiff belongs. That is, the plaintiff needs to show that the interest he or she seeks to vindicate falls within the zone of interest of the underlying statute.<sup>3</sup> (This is discussed in further detail below.)

**WHO IS THE DEFENDANT:** Mandamus actions are attempts to force an officer or employee of the government of the United States to take an action, such as adjudicate a visa petition. For example, a mandamus action to compel the BCIS district office to take an action should name the BCIS District Director, BCIS Director, and DHS Secretary as defendants. A mandamus action to compel the Service Center to take an action should name the Service Center Director, BCIS Director, and DHS Secretary as defendants.

Although the above-named persons are the defendants in a mandamus action, a new Department of Homeland Security regulation<sup>4</sup> requires that all legal action for the BCIS be served to:

Office of the General Counsel  
United States Department of Homeland Security  
Washington, DC 20258

**WHERE TO FILE THE PETITION:** Venue for the mandamus action, unless otherwise specified in some other statute, can be in any judicial district in which the defendant “resides;” in which a substantial part of the events or omissions giving rise to the claim occurred; or in which the plaintiff resides. 28 U.S.C. § 1391(e).

**FILING REQUIREMENTS:** Because mandamus is a civil action, the plaintiff should follow the procedures for filing a civil action outlined in the Federal Rules of Civil Procedure and the local rules adopted by each federal district court. The local rules generally are available on the courts’ websites.

**FEE:** A mandamus action is a civil action. Parties instituting a civil action in a district court are required to pay a filing fee pursuant to 28 U.S.C. § 1914. The current fee is \$150. Complaints may be accompanied by an application to proceed in forma pauperis, if the plaintiff is incapable of paying the filing fee.

---

<sup>2</sup> See Hernandez-Avalos v. INS, 50 F.3d 842 (10th Cir. 1995); Giddings v. Chandler, 979 F.2d 1104 (5th Cir. 1992).

<sup>3</sup> See Hernandez-Avalos v. INS, 50 F.3d 842 (10th Cir. 1995) (holding that incarcerated noncitizen not entitled to mandamus relief to compel swift adjudication of his deportability because his interest is not within the zone of interests the statute seeks to protect); Giddings v. Chandler, 979 F.2d 1104 (5th Cir. 1992).

<sup>4</sup> Production or Disclosure of Official Information in Connection with Legal Proceedings, 68 Fed. Reg. 4070 (Jan. 27, 2003); 6 C.F.R. § 5.42 (2003).

**COMPARED TO INJUNCTIVE RELIEF:** A mandamus suit is an action for affirmative relief, as compared to an injunction, which typically seeks to prohibit improper action. Courts have held that 28 U.S.C. § 1361 does not authorize injunctive relief, but mandamus jurisdiction permits a flexible remedy. That is, a complaint could request declaratory, injunctive, and mandamus relief, for example, respecting a written policy or regulation. The court could declare the policy or regulation illegal, enjoin its enforcement, and order affirmative relief all at the same time.

## II. MANDATORY DUTY / DISCRETION

In a mandamus action, the federal district court can compel an officer or employee of the United States to perform a duty owed to the plaintiff. It is usually said that this duty must be mandatory or ministerial, but mandamus actions also have been brought successfully to compel the exercise of permissible discretion. In those cases, it is not the failure of the officer or employee to exercise favorable discretion but rather the failure of the officer or employee to make any decision whether to exercise discretion or the manner in which such duties were performed that is the subject of the mandamus action.

It is thus essential in a mandamus action to plead and prove that the defendant(s) owe a duty to the plaintiff or the class of people to which the plaintiff belongs. That is, the plaintiff needs to show that the interest he or she seeks to vindicate falls within the zone of interest of the underlying statute. The mandamus action must compel the defendant to issue a decision, rather than attempt to compel them to issue a *favorable* decision.

In some but not all cases, courts have found that they have jurisdiction to review the failure to adjudicate a petition or application because defendants have a non-discretionary duty to adjudicate an application fairly and in a reasonable period of time. Courts have found that, although they cannot compel a certain result, they can compel officers or employees of the federal government to exercise their discretion.

- Iddir v. INS, 301 F.3d 492 (7<sup>th</sup> Cir. 2002) The INS denied the diversity visa lottery winners' applications for adjustment of status because their interviews were held after the fiscal year in which they had won the lottery. The court held that although plaintiffs had a right to have their applications adjudicated, the statute unequivocally stated that the applicants only remain eligible "through the end of the specific fiscal year for which they were selected." Therefore, the INS lacks the statutory authority to award the relief sought by the petitioners. The mandamus remedy is not appropriate because one of the conditions – the clear duty to adjudicate the petitions -- is not present.
- Yue Yu v. Brown, 36 F. Supp. 2d 922 (D.N.M. 1999). Plaintiff established that INS had a non-discretionary duty to process special immigrant juvenile applications, even though the INS had discretion in the ultimate decision whether to grant LPR status. The government's argument confused its discretion over how it resolves the applications with its [lack of] discretion over whether it resolves them.

- Paunescu v. INS, 76 F. Supp. 2d 896 (N.D. Ill. 1999). Plaintiffs filed for adjustment of status on the basis of eligibility for a 1998 diversity visa. They submitted fingerprints to the INS three separate times. The FBI failed to return the last set to the INS before the fiscal year expired. Plaintiffs were told that absent the fingerprint problem, the applications would have been approved. The District Court for the Northern District of Illinois granted plaintiffs' request for mandamus relief and ordered defendants to process plaintiffs' applications and grant plaintiffs all relief to which they would have been entitled had defendants processed their applications in a timely fashion. The court found that, although the statute does not specify a time by which an adjudication should be made, courts have found that "the adjudication must occur within a reasonable time" and that "[a] contrary position would permit the INS to delay indefinitely."
- Cervantes v. Perryman, 954 F. Supp. 1257 (N.D. Ill. 1997). In denying a motion for a preliminary injunction, the District Court for the Northern District of Illinois found that plaintiffs were not likely to succeed on the merits because they were attempting to compel a discretionary action through a mandamus action. The court found that the issuance of an order to show cause was a discretionary decision and that "the only limitation that may be imposed on the exercise of prosecutorial discretion is that it may not be based on impermissible standards such as race, religion or other arbitrary standards."
- Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979). Mandamus to compel government officials either to issue a visa or to grant a priority date to enable parents to obtain permanent resident status in the United States would be inappropriate because the decision to issue a visa is the type of discretionary conduct not within the scope of mandamus jurisdiction.
- Wan Shih Hsieh v. Kiley, 569 F.2d 1179 (2d Cir. 1978), cert. denied 439 U.S. 828. Inquiry into person's immigration status was solely within the discretion of the INS, and hence not reviewable under 28 U.S.C. § 1361.
- Naporano Metal & Iron Co. v. Secretary of Labor, 529 F.2d 537 (3d Cir. 1976). Mandamus is proper to compel the Secretary of Labor to issue a certification to a noncitizen employee, where under the circumstances the Secretary has no discretion to deny the certification. Where the action taken by the government official was contrary to law and so plainly prohibited as to be free from doubt, the action may be remedied by issuance of a writ of mandamus.

### III. MOOTNESS

The courts generally have found that when the agency fails to adjudicate an application, and, as result of the passage of time, the applicant becomes ineligible for the benefit requested (e.g., adjustment of status through the diversity visa lottery), the issue is moot, and therefore, the court lacks subject matter jurisdiction over the mandamus claim.

- Nyaga v. Ashcroft, 323 F.3d 906 (11th Cir. 2003). Plaintiffs' mandamus action seeking to compel INS processing of their adjustment application would not result in "meaningful relief" and was, therefore, moot. The court held that plaintiffs, by statute, were no longer

eligible for a diversity visa because the INS had not adjudicated their application by the end of the fiscal year in which the plaintiffs were selected as lottery winners.

- Sadowski v. U.S. INS, 107 F. Supp. 2d 451 (S.D.N.Y. 2000). Plaintiff's mandamus action sought to compel INS to act on an adjustment of status application. Plaintiff filed as a derivative beneficiary through his mother and was about to "age out" (reach the age of 21). The District Court of the Southern District of New York held that it did not have subject matter jurisdiction to review the case because the issue was moot – plaintiff had already turned 21. Additionally, the court found that the plaintiff had failed to exhaust all administrative remedies.
- Zapata v. INS, 93 F. Supp. 2d 355 (S.D. N.Y. 2000). Plaintiffs filed for adjustment of status on the basis of eligibility for a 1998 diversity visa. Approval was put on hold until plaintiffs' fingerprints "cleared." The court held that plaintiffs' mandamus suit was moot because the fiscal year had expired, and therefore, the INS no longer had authority to issue visas to plaintiffs. For that reason, the court ruled that it had no subject matter jurisdiction to adjudicate plaintiffs' diversity visa application.
- Rahman v. McElroy, 884 F. Supp. 782 (S.D.N.Y. 1995). "Extraordinary relief" of mandamus is not available to noncitizens who were selected for possible immigrant visas in diversity visa lottery. Plaintiffs alleged that the INS acted arbitrarily in its scheduling of interviews but the INS has no duty to schedule adjustment interviews in the order in which applicants are accepted. Plaintiffs do not have a constitutionally protected interest in an immigrant visa, let alone an interest in a particular adjustment interview date.

#### **IV. PLAINTIFF'S STANDING (RIGHT TO RELIEF OR ZONE OF INTEREST TEST)**

The question of the plaintiff's "standing" is sometimes stated in those terms, and sometimes as whether the specific plaintiff has a clear right to relief, or whether the plaintiff is within the "zone of interest" of the statute. The issue is closely related to, but not identical to, the question of the defendant's duty to the plaintiff. For example, in an illustrative case, the Seventh Circuit held that the plaintiffs had a clear right to have their cases adjudicated by the defendants, but that, because the fiscal year statutory deadline had passed, the defendants no longer had a mandatory duty to act. *See Iddir v. INS*, 301 F.3d 492 (7<sup>th</sup> Cir. 2002), *infra*.

Before 1996, many detainees used mandamus actions to compel the INS to initiate deportation proceedings against them. Most courts held that detainees did not have standing to bring this mandamus action, although the Ninth Circuit suggested otherwise in Garcia v. Taylor, *infra*.

- Iddir v. INS, 301 F.3d 492 (7<sup>th</sup> Cir. 2002). The INS denied the diversity visa lottery winners' applications for adjustment of status because their interviews were held after the fiscal year in which they had won the lottery. The court held that although plaintiffs had a right to have their applications adjudicated, the statute unequivocally stated that the applicants only remain

eligible “through the end of the specific fiscal year for which they were selected.” Therefore, the INS lacks the statutory authority to award the relief sought by the petitioners. The mandamus remedy is not appropriate because one of the conditions – the clear duty to adjudicate the petitions -- is not present.

- Hernandez-Avalos v. INS, 50 F.3d 842 (10th Cir. 1995). Incarcerated noncitizen not entitled to mandamus relief to compel swift adjudication of his deportability because his interest is not within the zone of interests the statute seeks to protect. Mandamus is properly sought where government officials owe duty to plaintiff. Such a duty is owed in the administrative context if plaintiff's interests fall within zone of interests which underlying statute protects. Plaintiff seeking mandamus in administrative context need only show that the interest he or she seeks to vindicate falls within the statutory zone of interests.
- Garcia v. Taylor, 40 F.3d 299 (9th Cir. 1994). Incarcerated permanent resident has standing to bring mandamus action seeking to compel INS to give him expedited deportation hearing. The government has the statutory duty to initiate and, to the extent possible, complete deportation proceedings, including any administrative appeals, before his release date. The program adopted by the government makes it impossible to complete administrative appeals before the release date. Therefore, the policy may be beyond the limits of the INS's discretion (distinguishing Silveyra v. Moschorak, see below. See also, Soler v. Scott, 942 F.2d 597 (9th Cir. 1991), vacated as moot, 506 U.S. 969 (1992).
- Silveyra v. Moschorak, 989 F.2d 1012 (9th Cir. 1993). Mandamus cannot be used to instruct an official how to exercise discretion unless that official has ignored or violated statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In other words, mandamus is appropriate if an official transgresses the limits of his or her discretion. But permanent resident was not entitled to mandamus relief where he alleged only that the INS breached its discretionary duty by failing to initiate deportation proceedings in his case. See also Soler v. Scott, 942 F.2d 597 (9th Cir. 1991), vacated as moot, 113 S.Ct. 454, 121 L.Ed.2d 364 (1992).
- Giddings v. Chandler, 979 F.2d 1104 (5th Cir. 1992). Noncitizen incarcerated in federal correctional institution does not have standing to sue under Mandamus Act to compel INS to begin deportation proceedings against him. To have standing, plaintiff must be within zone of interest protected by underlying statute; that is, whether the plaintiff is an intended beneficiary of the statute and whether the creation of a right of action would conflict with the purpose of the statute.

The zone of interest test denied a right of review [or action] if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. Allowing a criminal alien to compel his own deportation does not further the purposes of the underlying statute.

## V. EXHAUSTION OF OTHER REMEDIES

Courts reviewing mandamus claims have said that a mandamus action under 28 U.S.C. § 1361 is not appropriate if the plaintiff has alternative, fully adequate remedies, either judicial or administrative. Generally, other remedies must have been exhausted, and the plaintiff must not be entitled to maintain a suit or appeal in some other forum. See Sadowski v. U.S. INS, 107 F. Supp 2d 451 (S.D.N.Y. 2000), and citations therein.

Some courts, however, have found that waiting 1) until the government institutes removal proceedings against them and they have raise their claims before the Immigration Judge, or 2) until their cases are adjudicated were not valid options. Iddir, 166 F. Supp. 2d at 1258, aff'd on other grounds, 301 F. 3d 492 (7<sup>th</sup> Cir. 2002) ("Waiting for an agency to act cannot logically be an adequate alternative to an order compelling the agency to act.") (citations omitted); Paunescu, 76 F. Supp. 2d at 901.

## VI. OTHER IMMIGRATION-RELATED MANDAMUS DECISIONS

- Robertson v. Attorney General of the United States, 957 F. Supp. 1035 (N.D. Ill. 1997). Plaintiffs' complaint for declaratory judgment against defendant for failing to make timely decision on petition for removal of conditional status is dismissed for lack of subject matter jurisdiction. For plaintiffs to obtain mandamus relief, they must have a clear right to demand performance by the defendant of a plainly defined, peremptory, and ministerial duty, and the lack of an adequate remedy other than mandamus.

If defendant's duty is not mandatory, but merely directory, plaintiffs lack any right to compel action, and jurisdiction may not be founded on § 1361. The nature of the duty is defined by legislative intent and history. If Congress failed to specify some sort of penalty or sanction for an agency's failure to comply with a deadline, that deadline is deemed to be directory only. If the legislative history of the statute provides no indication that Congress believed compliance with the duty at issue to be essential to the effective operation of the statute, the duty will be deemed directory. Here, neither the statute nor its implementing regulation makes any mention of a penalty or sanction for the Attorney General's failure to make a decision on a petition to remove conditions within 90 days.

- Clow v. Nelson, 579 F. Supp 981 (W.D.N.Y. 1984). Mandamus jurisdiction exists under 28 U.S.C. § 1361 where plaintiff alleges that INS improperly found that it could not consider his petition for remission or mitigation and requests order requiring INS to exercise its authority and discretion.
- Kulle v. Springer, 566 F. Supp 279 (N.D. Ill 1983). The Mandamus Act does not confer subject matter jurisdiction over petition for writ of mandamus to force immigration judge to allow discovery in deportation hearing, since determinations involving discovery in such hearings fall within the exclusive jurisdiction of the Court of Appeals under [former] § 106(a) of the INA.
- Liem Duc Nguyen v. United States Catholic Conference, 548 F. Supp. 1333 (W.D. Pa. 1982) affd, 719 F.2d 52 (3d Cir. 1983). The failure of a charitable organization to provide a refugee with the unused part of a capital resettlement grant made by the federal government

to the charitable agency is not sufficient to establish mandamus jurisdiction over agency and its officers. The Fifth Amendment, the Migration and Refugee Assistance Act (22 USC § 2601) and contracts with the State Department do not obligate the charitable agency to provide cash grants to the refugee.

- Piledrivers' Local Union v. Smith, 541 F. Supp. 460 (C.D. Cal. 1982) affd, 695 F.2d 390 (9th Cir. 1982). The court lacks subject matter jurisdiction of action under 28 U.S.C. 1361 to compel federal officials to enforce the INA because it cannot be said that the Department of Justice has a clear duty to act. An amendment to the Outer Continental Shelf Lands Act created uncertainty as to whether the Department of State is required to enforce labor certification sections of the INA.
- Haidar v. Coomey, 401 F.Supp. 717 (D. Mass. 1974). Mandamus action denied requiring INS to give preferential treatment to immediate relative petition of citizen's wife; mandamus would be appropriate if the INS had refused to adjudicate the petition at all, but not where all the INS did was require the plaintiff to wait his turn.