UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 21-2690-DMG (Ex)**	Date	July 15, 2022
Title	***John Fisher, et al. v. Tracy Renaud***	Page	1 of 10

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT RENAUD'S MOTION TO DISMISS OR TRANSFER [15]

On March 29, 2021, Plaintiffs John Fisher, Jai Chopra, Kulmeet Bhullar, Tanya Gandevia, Josip Mijic, and Pinku Patel filed their Complaint against Defendant Tracy Renaud, in her official capacity as the Acting Director for the U.S. Citizenship and Immigration Services ("USCIS"). [Doc. #1.][1] On June 22, 2021, USCIS filed the instant motion to dismiss Plaintiffs' Complaint or, in the alternative, to transfer this action to the United States District Court for the District of Columbia ("MTD"). [Doc. # 15.] The MTD is fully briefed. [Doc. ## 22 ("Opp."), 24 ("Reply").] For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** Defendant's MTD.

I.
PROCEDURAL BACKGROUND

Plaintiffs are foreign nationals who claim USCIS has unreasonably delayed in processing their EB-5 visa petitions. On June 21, 2021, Plaintiffs filed an *Ex Parte* Application for a Temporary Restraining Order ("TRO") to require USCIS to issue decisions on their petitions on or before June 30, 2021, when congressional authorization was to expire for the type of visa Plaintiffs seek. [Doc. # 14.] USCIS filed a timely response, asserting, *inter alia*, that this Court was not the proper venue. [Doc. # 16.]

The Court concluded that Plaintiffs had shown no likelihood of success on the merits or imminent irreparable harm. The Court also found that Plaintiffs were at fault in creating the crisis that required an *ex parte* application, and therefore had not shown they were entitled to emergency relief. The Court thus denied Plaintiffs' TRO. But the Court did conclude, based on declarations submitted in support of the TRO, that venue is proper in this District. [*See* Doc. # 21.]

[1] All page references herein are to page numbers inserted by the CM/ECF system.

The statutory authorization for the EB-5 Immigrant Investor Regional Center Program ended on June 30, 2021, and on August 2, 2021, this Court issued an order staying and administratively closing the action pending congressional reauthorization of the Program. [Doc. # 27.] On March 28, 2022, the parties filed a joint status report indicating the Program had been reauthorized. Consequently, the parties requested this Court reopen the case and render a decision on Defendant's fully-briefed MTD. [Doc. # 30.]

II.
FACTUAL BACKGROUND

A. EB-5 Immigrant Investor Regional Center Program

At the time Plaintiffs' visa petitions were filed,[2] the EB-5 Immigrant Investor Regional Center Program allowed immigrant investors and their families to obtain lawful permanent residence in the United States in one of several ways, including by investing at least $500,000[3] in a new commercial enterprise ("NCE") within a "regional center" approved for participation in the Program. *See* Compl. at ¶¶ 14-16; *see also* 8 C.F.R. § 204.6(j)(4)(iii) (amended Oct. 1, 2020), 8 U.S.C. § 1153(b)(5) (amended Mar. 15, 2022). The first step in the EB-5 petition process is to file Form I-526 and pay a filing fee. Compl. ¶¶ 17, 20. The Immigrant Investor Program Office ("IPO") adjudicates EB-5 petitions under the auspices of USCIS. *Id*. at ¶ 24.

B. The "Visa Availability" Method

On January 29, 2020, USCIS announced it would change its petition review process from a "first in, first out" approach to a "visa availability" approach, prioritizing petitioners from countries for which visas are immediately available. Compl. ¶ 35. USCIS describes the "visa availability" approach as using visa availability information, "along with other factors, to determine which Form I-526 petitions should be processed first." U.S. Citizenship and Immigration Services, *Questions and Answers: EB-5 Immigrant Investor Program Visa Availability Approach* (April 2, 2021), https://www.uscis.gov/working-in-the-united-

[2] USCIS continues to process regional center-based Forms I-526 filed before March 15, 2022 according to the eligibility requirements in place at the time the petitions were filed despite changes made to the program when it was reauthorized this year. *See* U.S. Citizenship and Immigration Services, *EB-5 Immigrant Investor Program*, https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program (last visited June 13, 2022).

[3] During the period in which all Plaintiffs filed their petitions, the investment minimum relevant to Plaintiffs was $500,000. 8 C.F.R. § 204.6 (amended Nov. 21, 2019).

states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/questions-and-answers-eb-5-immigrant-investor-program-visa-availability-approach. USCIS says the "visa availability" approach better aligns the adjudication process with congressional intent and increases fairness in the petition process. *Id.* But Plaintiffs allege that, despite USCIS's announcement, the agency does not prioritize adjudication of Form I-526 "in any manner" or process petitions on a first in, first out basis. Compl. ¶¶ 35, 100, 101 ("USCIS regularly adjudicates later-filed Forms I-526 prior to earlier-filed Forms I-526."); *cf. id.* at ¶ 103 ("Upon information and belief, USCIS adjudicates Forms I-526 on a first in, first assigned basis, but USCIS has no logic or rationale for assigning the cases."). Indeed, Plaintiffs allege that USCIS "expedites the processing of [petitions] for certain NCEs but not others and has reassigned staff away from processing applications." *Id*. at ¶ 102. As of March 18, 2021, USCIS indicated I-526 petitions are generally adjudicated within 29 to 57.5 months of filing. *Id.* at ¶ 36.[4]

Plaintiffs also allege that IPO is funded primarily by fees, not appropriations, and is specifically authorized to charge the fees necessary and hire the personnel necessary to adjudicate EB-5 petitions. *See* Compl. ¶¶ 26-28, 30, 34, 104, 108-09. IPO increased its full-time staff by 33% between 2018 and 2020. *Id*. at ¶ 110. The same period saw a sharp decline in the number of Forms I-526 IPO actually adjudicated, from 15,122 in 2018 to 4,673 in 2019 and 4,378 in 2020. *Id*. at ¶ 31. The number of petitions filed has also decreased substantially, from 12,165 in 2017 to 6,424 in 2018, 4,194 in 2019, and 3,421 in 2020. *Id*. at ¶ 32.

C. Plaintiffs' Petitions

Plaintiffs are foreign nationals who filed Form I-526 petitions with USCIS between December 17, 2018 and July 19, 2019. Josip Mijic filed his Petition on December 17, 2018, 41 months ago. Compl. ¶ 81. John Fisher and Jai Chopra filed their Petitions on December 21, 2018, 41 months ago. *Id*. at ¶¶ 54, 61. Kulmeet Bhullar filed his Petition on June 14, 2019, 35 months ago. *Id.* at ¶ 68. Pinku Patel filed his Petition on July 19, 2019, 34 months ago. *Id.* at 87.[5] Plaintiffs allege they fully comply with all applicable laws, regulations, and procedures

[4] Currently, USCIS reports that 80 percent of Forms I-526 are processed within 48.5 months. *See* U.S. Citizenship and Immigration Services, *Check Case Processing Times*, https://egov.uscis.gov/processing-times/ (last visited June 13, 2022).

Plaintiffs allege, "upon information and belief," that USCIS artificially inflates these processing times in order to avoid judicial scrutiny. Compl. ¶ 106. Plaintiffs do not assert, however, any facts that would support such a belief.

[5] Plaintiff Tanya Gandevia filed her Petition on October 10, 2018. Compl. ¶ 75. It was approved by USCIS on June 3, 2021. Young Decl. at ¶ 24 [Doc. # 15-1]. Both sides agree Gandevia's claim is moot.

related to their Petitions. *Id.* at ¶ 40. Plaintiffs allege they are eligible for prioritization based on the "visa availability" approach as visa numbers are available for their respective countries of origin. *Id*. at ¶¶ 57, 64, 72, 79, 84, 90. Plaintiffs also assert that IPO has previously approved aspects of the NCEs in which Plaintiffs have invested, which should reduce the amount of time for adjudicating Plaintiffs' petitions in light of USCIS's policy of deferring to its own prior favorable determinations. *Id*. at ¶¶ 40, 44. But their visa petitions have not yet been adjudicated. *See id.* at ¶¶ 56, 63, 70, 83, 89. Plaintiffs allege the delay compromises their investments, prevents them from obtaining credit from U.S. lenders, and prolongs their inability to coordinate their financial future. *Id.* at ¶ 50.

Plaintiffs allege USCIS is unreasonably delaying adjudication of Plaintiffs' petitions in violation of sections 555(b) and 706(1)-(2) of the Administrative Procedures Act. *Id.* at ¶ 117. Plaintiffs seek declaratory and injunctive relief to compel agency action or, in the alternative, seek *mandamus* relief to compel USCIS to adjudicate the Petitions. *Id.* at ¶ 1.

II.
LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson,* 355 U.S. 41, 47 (1957)).

Federal Rule of Civil Procedure 12(b)(6) states that a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id.*

III.
DISCUSSION

A. Impact of TRO Order

Defendant's MTD was filed before the Court denied Plaintiffs' TRO, but Plaintiffs' Opposition and Defendant's Reply were filed afterward. Defendant moves to transfer this action on the basis that venue is improper in this district, but the Court concluded in its TRO Order that venue is proper. Defendant's motion to transfer is therefore **DENIED.**

In its Reply, USCIS asks the Court to dismiss Plaintiffs' Complaint because the Court already ruled on the merits of Plaintiffs' unreasonable delay claim in its TRO Order. Reply at 2. But the question of whether Plaintiffs have presented sufficient evidence to meet the high standard necessary to support issuance of a mandatory injunction is distinct from the question of whether Plaintiffs have pled factual allegations sufficient to state a claim under Rule 12. The Court therefore proceeds to consider USCIS's MTD on its merits.

B. Motion to Dismiss

USCIS moves to dismiss on the basis that Plaintiffs fail to allege sufficient facts to state a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, or under the Mandamus Act, 28 U.S.C. §1361. USCIS also argues that Plaintiffs' factual allegations are excessively conclusory. The Court discusses USCIS's arguments together herein.

1. The Administrative Procedure Act

Under the APA, a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Since the term "agency action" includes an agency's failure to act, "courts are empowered to compel agency action unlawfully withheld or unreasonably delayed." *Khan v. Johnson*, 65 F. Supp. 3d 918, 925 (C.D. Cal. 2014) (internal quotations omitted). To state an APA claim arising from an agency's failure to act, a petitioner must show that the agency "(1) has a clear, certain, and mandatory duty, and (2) has unreasonably delayed in performing such duty." *Vaz v. Neal*, 33 F.4th 1131, 1136 (9th Cir. 2022) (citations omitted). Plaintiffs allege Defendant has unreasonably delayed adjudication of their petitions in violation of the APA. Compl. ¶ 97.[6]

[6] Plaintiffs also assert a claim under the Mandamus Act. The Mandamus Act allows a district court to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

USCIS does not contend it has no mandatory duty to act. Instead, the parties dispute whether Defendant has unreasonably delayed in carrying out that duty. The Ninth Circuit employs the six-factor *TRAC* test to determine whether an agency's delay is unreasonable. These factors are:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc., 798 F.3d 809, 813 (9th Cir. 2015) (citing *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*")).

USCIS argues this Court should find the fourth factor favors USCIS and end the inquiry there. MTD at 11-12; *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (observing that the D.C. Circuit has prioritized the fourth *TRAC* factor when "a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain.") (citations omitted). But the Ninth Circuit has stated that "[t]he most important *TRAC* factor is the first factor, the 'rule of reason.'" *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020) (citations omitted).

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28 U.S.C. § 1361. Relief under the Mandamus Act is only available if: "(1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997). When a petitioner seeks to compel an agency to act on a nondiscretionary duty, "mandamus relief and relief under the APA are 'in essence' the same." *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997) (citing *Indep. Min. Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997)). A mandamus claim can be analyzed under the APA where there is an adequate remedy under the APA. Plaintiffs seek the same remedy under the APA and the Mandamus Act: to compel adjudication of their visa petitions. The Court therefore analyzes Plaintiffs' APA and Mandamus claims together.

a. Whether the Order by which Defendant Adjudicates Petitions is Governed by a Rule of Reason

The first *TRAC* factor "considers 'whether the time for agency action has been reasonable.'" *Vaz*, 33 F.4th at 1138 (quoting *In re Nat. Res. Def. Council*, 956 F.3d at 1143). While this is the most important factor, it need not be dispositive if the other factors weigh strongly in the other direction. *Id*.

A number of district courts have concluded that USCIS's visa availability approach constitutes a "rule of reason," both on a motion to dismiss and on a motion for a preliminary injunction. *See, e.g.*, *Nadhar v. Renaud*, No. 21-275, 2021 WL 2401398 (D. Ariz. June 11, 2021) (denying plaintiffs' motion for a preliminary injunction) (collecting cases). Other courts have concluded to the contrary, either because reasonableness is an inherently fact-intensive inquiry unsuitable for resolution on the pleadings or because the plaintiff had adequately alleged a violation of the APA. *See, e.g.*, *Gutta v. Renaud*, No. 20-CV-06579-DMR, 2021 WL 533757, at *8 (N.D. Cal. Feb. 12, 2021) (whether USCIS actually follows a rule of reason "is a question of fact unsuitable for determination at the pleadings stage"); *see also Jingjing Liu v. Mayorkas*, No. 20-CV-654 (CRC), 2021 WL 2115209, at *5 (D.D.C. May 25, 2021) (concluding plaintiff plausibly alleged delay in processing EB-5 petition violated APA).

The courts that have concluded the visa availability approach did not constitute a rule of reason generally reached that conclusion not because the visa availability approach to prioritizing petitions was not a reasonable alternative to first-in, first-out, but based on the plaintiff's allegations that USCIS did not actually follow that approach. *See, e.g.*, *Liu*, 2021 WL 2115209, at *5 ("Even if USCIS's ordering system is perfectly rational, the agency could still be liable if it adjudicates each petition at an unjustifiably slow pace, resulting in unreasonably long overall wait times."). Although Plaintiffs assert that USCIS "identifies no processing logic" for its assignment of visa petitions, the Court does not find this argument compelling. USCIS apparently takes account of whether a visa is immediately available, whether an NCE has been reviewed, and when an application was filed in determining the order in which to adjudicate petitions. These factors are sound, and the Court concludes that USCIS's visa availability approach is logical. The actual delay in adjudicating Plaintiffs' petitions also does not indicate unreasonable delay here: none of Plaintiffs' petitions has been under review for longer than the estimated time range provided by USCIS, especially accounting for the nine-month suspension in processing after the program sunset.[7]

[7] Plaintiffs' allegations that USCIS artificially inflates these figures are conclusory, and the Court does not rely on them herein.

Whether USCIS actually follows that approach, on the other hand, is a factual question, and Plaintiffs have adequately alleged facts to allow them to seek discovery on this issue. Plaintiffs' vague allegations that IPO frequently adjudicates petitions out of the order in which they were filed, and that IPO "expedites the processing of Forms I-526 for certain NCEs but not others," are insufficiently pled, but in their Complaint and their Opposition, Plaintiffs also point to statistics showing that the rate at which IPO adjudicates I-526 forms has slowed sharply in recent years. USCIS offers no response or explanation for this decline. Plaintiffs' allegations raise questions as to whether USCIS actually processes petitions according to its otherwise reasonable protocol in a reasonable manner. *Cf. Jain v. Renaud*, No. 21-CV-03115-VKD, 2021 WL 2458356, at *4 (N.D. Cal. June 16, 2021) (observing that "the decline in productivity is significant and that USCIS has not fully explained it"). This factor therefore favors Plaintiffs.

b. Whether Congress Has Provided a Timetable or Other Indication of the Speed with Which It Expects Defendant to Proceed

The statutory structure sets no explicit timeframe for adjudicating Form I-526 petitions. *See* 8 C.F.R. § 204.6; 8 U.S.C. § 1153(b)(5). Plaintiffs invoke language from 8 U.S.C. section 1571(b)—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"—to argue that the Court should use that timeframe as a guidepost here. Compl. ¶ 105, Opp. at 10. The Ninth Circuit has held, however, that similar "sense of Congress" language is "non-binding, legislative dicta." *Yang v. California Dep't of Soc. Servs.*, 183 F.3d 953, 961–62 (9th Cir. 1999). Nonetheless, district courts have interpreted that language to tip the scales slightly in favor of immigration benefit petitioners. *See Khan*, 65 F. Supp. 3d at 930; *see also Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1073 (N.D. Cal. 2014), *Uranga v. U.S. Citizenship & Immigr. Servs.*, 490 F. Supp. 3d 86, 103 (D.D.C. 2020). Like those other courts, this Court concludes this factor slightly favors Plaintiffs.

c. The Nature of the Interests Prejudiced by the Delay and Whether Health and Human Welfare Are at Stake

Plaintiffs allege USCIS's delayed adjudication of their petitions prevents them "from obtaining conditional green card status, freeing Plaintiffs to work and live as they please, as opposed to being under restriction of their current nonimmigrant visa classifications or out of the country." *Id.* at ¶ 107. Four Plaintiffs allege the delay causes them anxiety due to the possibility

they may lose their current employment-based or student visas in the interim. *Id.* at ¶¶ 59, 66, 73, 92. Plaintiff Josip Mijic does not assert he is likely to lose his visa status if his I-526 petition is not adjudicated. *See id.* at ¶¶ 81-86.

While the basis of Plaintiffs' EB-5 visa applications is economic, any visa necessarily touches on the health and welfare of those seeking to plan their lives in the United States. Plaintiffs plead specific facts alleging the delay has prejudiced their interest in moving to the next step of the visa process. Plaintiffs' anxiety, uncertainty, and economic harm arises from the allegedly delayed adjudication and affects their welfare.

USCIS argues Plaintiffs' worries are merely speculative, and that adjudication of the petitions is merely one step in the process toward naturalization. MTD at 14. But delays in the process are still delays, with real impacts on Plaintiffs' lives. This factor favors Plaintiffs.

d. The Effect of Expediting the Delayed Action on Agency Activities of a Higher or Competing Priority

USCIS argues that an order compelling it to adjudicate Plaintiffs' petitions would "simply move all others back one space and produce no net gain." *See Mashpee*, 336 F.3d at 1100 (citing *In re Barr Laboratories*, Inc., 930 F.2d 72, 75 (1991)). Plaintiffs counter that USCIS charges application fees sufficient to cover the cost of petition adjudication, and therefore there should be no competing demands on IPO's resources. The fact that USCIS can gather the resources to adjudicate all its petitions does not mean that USCIS has sufficient resources to adjudicate them all at once. There is no real question here that IPO has a line, and that compelling action here would vault Plaintiffs to the head of the line. Ultimately, Plaintiffs have not shown they receive worse or different treatment from other petitioners similarly situated. *Cf. Calderon-Ramirez v. McCament*, 877 F.3d 272, 275-76 (7th Cir. 2017) (affirming dismissal of complaint based in part on the petitioner's failure to differentiate himself from others "waiting in the same line"). This factor favors USCIS.

e. Agency Bad Faith

"The sixth factor of the *TRAC* test is not really a 'factor', but merely a confirmation that agency delay need not be intentional to be unreasonable." *Feng v. Beers*, No. 2:13-CV-02396 JAM, 2014 WL 1028371, at *5 (E.D. Cal. Mar. 14, 2014) (citing *TRAC*, 750 F.2d at 80). Still, Plaintiffs suggest that IPO's delay is intentional. Plaintiffs vaguely allege that USCIS "expedites the processing of Form I-526 for certain NCEs but not others and has reassigned staff away from processing applications." *Id.* at ¶ 102. In their Opposition, Plaintiffs argue that USCIS

prioritizes petitions for NCEs linked to former President Donald Trump, *see* Opp. at 16-17. Based on the facts alleged in Plaintiffs' Complaint, the sixth factor does not weigh in favor of either party.

* * * * *

The first factor, which the Ninth Circuit has stated is the most important factor, weighs in Plaintiffs' favor, as do factors two, three, and five. Factor four weighs in USCIS's favor, and factor six is neutral. Plaintiffs have stated a claim under the APA. Because Plaintiffs have stated a claim under the APA, the Court also concludes Plaintiffs have stated a claim under the Mandamus Act.

IV.
CONCLUSION

For the foregoing reasons, Defendant's MTD is **GRANTED** as to Plaintiff Tanya Gandevia, whose claim is moot. Defendant's MTD is **DENIED** in all other respects. USCIS shall file its answer by **August 5, 2022**.

IT IS SO ORDERED.