

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ARTUR KUMYKOV,

Plaintiff,

v.

WILLIAM CARLSON, et al,

Defendants.

CIVIL ACTION
NO. 1:09-CV-1217-CAP

O R D E R

This matter is before the court on the plaintiff's emergency motion for temporary restraining order ("TRO") [Doc. No. 5]. A hearing on this motion was held on June 2, 2009.

Factual Background and Procedural History

The plaintiff is present in the United States pursuant to lawful admission in nonimmigrant visa status and has been offered a position as Chief Financial Officer ("CFO") of Belgud International, Inc. ("Belgud"). Belgud seeks to sponsor the plaintiff for Lawful Permanent Residence in the United States so that he may perform the job of CFO indefinitely. On July 17, 2008, Belgud electronically filed the pre-requisite Form ETA-9089 Application for Permanent Employment Certification with the United States Department of Labor ("DOL"). As of the date of hearing on the instant motion, the ETA-9089 has not been adjudicated by the DOL.

The plaintiff's family members, wife Irina Kunovskaya, daughter Elina Kумыkova, and son Alim Kумыkova, are lawfully present in the United States. The plaintiff's son, Alim, plans to seek Lawful Permanent Residence as a derivative beneficiary of Belgud's sponsorship of his father. In order to move forward on this, an I-140 Immigrant Petition for Alien Worker must be filed with the United States Citizenship and Immigration Services prior to Alim's 21st birthday. Alim will turn 21 on Sunday, June 7, 2009. However, the I-140 immigrant petition cannot be filed until ETA-9089 application has been certified by the DOL.

On May 5, 2009, the plaintiff filed this mandamus action seeking to have the ETA-9089 adjudicated prior to June 1, 2009 in an effort file the I-140 petition prior to Alim's birthday. The defendants were served with the complaint, but responsive pleadings are not due until well after the date upon which Alim turns 21.

On May 27, 2009, the plaintiff filed the instant motion for emergency TRO seeking an order from this court compelling the defendants to adjudicate the plaintiff's ETA-9089 prior to the date Alim turns 21. The court issued an expedited briefing schedule, and after receiving a response brief by the defendants and a reply brief by the plaintiff, the court conducted a hearing.

Legal Analysis

In response to the emergency motion, the government argues that the court lacks subject matter jurisdiction to consider the plaintiff's claim. The plaintiff, in response, argues that the court has subject matter jurisdiction pursuant to 28 U.S.C. § 1361 (Mandamus Act) and 5 U.S.C. § 701 *et seq.* (Administrative Procedure Act ("APA")).

The APA authorizes suit by a "person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. "Where no other statute provides a private right of action, the 'agency action' complained of must be a 'final agency action.'" Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62 (2004). "Agency action" includes the failure to act. Id. The "failure to act" is not the same thing as a denial. Id. at 62. "The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request" Id.

The only agency action that can be compelled under the APA is action that is legally required. Id. "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law. Thus, when an agency is compelled by law to act within a certain time period, but the

manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." Id. at 65.

It is undisputed in this case that the government has discretion over whether to certify or not certify the plaintiff's ETA-9089 application. The court, therefore, has no power to specify how the government should adjudicate the plaintiff's application. The plaintiff, however, does not ask the court compel the government to certify his application. He asks the court to compel the government to make a decision, any decision, on his ETA-9089 application.

The court could not locate any binding precedent addressing whether the DOL has a nondiscretionary duty to adjudicate the plaintiff's ETA-9089 within a certain time period. Although there is no ruling by the Eleventh Circuit Court of Appeals, numerous district courts throughout the United States have addressed the issue in the context of immigration-related applications. Relying on § 6 of the APA, many district courts have concluded that they do have subject matter jurisdiction to compel the government to adjudicate an application for adjustment of status. See, e.g., Belegradek v. Gonzales, No. 1:07-CV-0589-RWS, 2007 WL 3091078, at *3 (N.D. Ga. Oct. 18, 2007); Alkeylani v. Department of Homeland Security, 514 F.Supp.2d 258, 263 (D.Conn. 2007); Liu v. Novak, 509

F.Supp.2d 1, 6 (D. D.C. 2007); Tang v. Chertoff, 493 F.Supp.2d 148, 153-54 (D. Mass. 2007); Cohen v. Ashcroft, 1:05-CV-182-CC, (N.D. Ga. October 12, 2005); Kim v. Ashcroft, 340 F. Supp.2d 384, 389 (S.D.N.Y. 2004); Bartolini v. Ashcroft, 226 F. Supp.2d 350, 353-54 (D. Conn. 2002). Section 6 states, "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (emphasis added). These courts also note that a contrary position would allow the government to delay indefinitely. See Agbemape v. I.N.S., No. 97-CV-8547, 1998 WL 292441 at *2 (N.D. Ill. May 18, 1998).

This court concludes that, as is true for immigration-related matters, there is subject matter jurisdiction to consider the plaintiff's request regarding adjudication of the ETA-9089 application. The federal question presented by the plaintiff turns on the interpretation of § 6 of the APA. The court concludes that § 6 of the APA imposes a non-discretionary duty upon the DOL to process the plaintiff's application within a reasonable time period. The plaintiff argues that the government's 10-month delay is unreasonable. These allegations are sufficient to confer

subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and the APA.¹

The court also has jurisdiction under 28 U.S.C. § 1361. Under § 1361, otherwise known as the Mandamus Act, a district court has original jurisdiction over a mandamus action "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "[M]andamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases." Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969).

Mandamus relief is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) "no other adequate remedy [is] available." Id. "A writ of mandamus is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear

¹ The APA does not provide an independent basis for subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 107 (1977). A federal district court, however, does have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The federal question statute, in combination with § 706 of the APA, vests the court with jurisdiction to compel agency action that has been unreasonably delayed or withheld. See Sierra Club v. Glickman, 156 F.3d 606, 617 (5th Cir. 1998).

nondiscretionary duty." Cash v. Barnhart, 327 F.3d 1252, 1258 (11th Cir. 2003).

While it is true that the ultimate ETA-9089 certification decision is entirely discretionary, the government does not have discretion as to whether to adjudicate the application. See 8 U.S.C. § 1182(a)(5)(A). Since the DOL has a duty to adjudicate the plaintiff's ETA-9089 application, the government also has a clear duty to certify or not certify the application within a reasonable time as required by § 6 of the APA. The plaintiff also lacks an alternative, adequate remedy other than through the intervention of this court. Accordingly, because the government owes the plaintiff a clear nondiscretionary duty to adjudicate his ETA-9089 application within a reasonable time period and no other remedy is available to the plaintiff, the court concludes that it has subject matter jurisdiction to consider the plaintiff's claim under the Mandamus Act.

The court also notes that the plaintiff is prejudiced by the government's delay. Without an adjudication of the ETA-9089, the plaintiff cannot file his I-140 application prior to his son turning 21, resulting in the loss of the derivative benefit. The DOL's 10-month delay, therefore, leaves the plaintiff between the proverbial "rock and a hard place."

Because the court has concluded that it has subject matter jurisdiction to consider the plaintiff's claims, the only question remaining in this case is whether the government's 10-month delay is reasonable. The determination of what constitutes a "reasonable period of time" varies according to the circumstances of each particular case. The court looks to the source of the delay - e.g., the complexity of the investigation, as well as the extent to which the plaintiff has participated in delaying the proceeding. The government does not allege that the plaintiff has contributed to the delay. Moreover, the DOL has offered no reason for the delay in processing the plaintiff's ETA-9089 application.²

The DOL has submitted the declaration of William Carlson, Administrator of the Office of Foreign Labor Certification. In his declaration, Carlson admits that applications submitted are adjudicated on a first in/first out basis. Despite this admitted process, the plaintiff has submitted evidence that the DOL is

²The only hint that the plaintiff's application is somehow out of the ordinary is in the Declaration of William Carlson in which he vaguely states, "If for some reason there is an issue with the application that would suggest an audit or an additional review is necessary, as is the case with the plaintiff's application, it will be subject to additional review even though cases with later priority dates have been also opened for processing." [Doc. No. 8-2 at 3-4. Carlson fails to explain whether the plaintiff's application is being subjected to an audit or additional review and offers no basis for either of these alternatives.

currently processing labor certifications filed in November, 2008, four months after the plaintiff filed his ETA-9089.

Most notable, however, is the DOL's Final Rule, published at Vol. 69 Fed. Reg. 77326 (December 27, 2004), which implemented a new system for the filing and processing of labor certification applications that became effective on March 28, 2005. In the preamble to this rule, the DOL states, "We anticipate an electronically filed application not selected for audit will have a computer-generated decision **within 45 to 60 days** of date the application was initially filed." (Emphasis added) [Doc. No. 13-2 at 5]. The defendants have offered absolutely no explanation for why the plaintiff's ETA-9089 has been languishing for 320 days, more than five times the outside estimate provided by the DOL.

Therefore the DOL's 10-month delay in adjudicating the plaintiff's ETA-9089 is unreasonable. The plaintiff electronically filed his ETA-9089 in July 2008. The court has nothing before it to indicate that the delay in adjudicating the plaintiff's ETA-9089 is attributable in any way to the plaintiff. Moreover, the DOL has not alleged that the plaintiff's case is complex or that special circumstances exist. The court, therefore, holds that under the particular facts of this case, the plaintiff has experienced an unreasonable amount of delay.

Conclusion

For the reasons stated above, the court hereby:

GRANTS the plaintiff's emergency motion [Doc. No. 5]. The defendants are DIRECTED issue a decision regarding the plaintiff's ETA-9089 no later than Friday June 5, 2009 at 2 p.m. The defendants shall promptly inform the court of its decision. This court will retain jurisdiction over the matter in the interim to ensure that the defendants comply with this order.

SO ORDERED, this 4th day of June, 2009.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge