

U-Visa Delay Litigation

Bringing a Federal Action to Compel USCIS to Adjudicate U
Visa Applications

What is the problem?

Victim of crime seeks benefit of immigration law.

USCIS does nothing.

Victim of crime suffers.

What is the solution?

Litigation is NOT the solution. It is a tool to create legal space for a political or policy solution.

Policy solution: (1) USCIS treat I-918s with I-918B and supporting docs as bona fide & auto-issue EADs (2) USCIS allocates sufficient resources to keep I-918 wait-list adjudication within 6 months; (3) meta-policy: advocacy to eliminate the cap

Delay Litigation as a tool

De-centralized suits challenging unreasonable agency delay.

Close collaboration + information sharing + pleadings sharing.

Make no bad law + make the legal space better for the next case

Elements

A plaintiff

+

With a cause of action

+

Against a defendant

Lawsuit

What is the wrong to make right?

- **INA § 214(p)(6)**: The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).

- **8 CFR § 214.14(d)(2)**: All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list . . . USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while . . . on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.

What is the cause of action to convert wrong to right?

- Administrative Procedures Act § 706(1)
 - Permits courts to compel “agency action unlawfully withheld or unreasonably delayed.”

- Mandamus Act 28 U.S.C. § 1361
 - Grants authority to the courts to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Subject Matter Jurisdiction

Subject Matter Jurisdiction

3. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1361. The mandamus statute vests original jurisdiction in the federal courts. It provides that “[t]he district courts shall have original jurisdiction of any action in the nature of mandamus.” 28 U.S.C. § 1361.

4. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). The statute provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

5. Jurisdiction lies to grant declaratory relief pursuant to 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act).

- 28 U.S.C. § 1361: Mandamus Statute
- 28 U.S.C. § 1331: Federal Question
- 28 U.S.C. §§ 2201-2202: Declaratory Judgment Act

Venue

◀ Venue

6. Pursuant to 28 U.S.C. § 1391(e), venue is proper in the District of Oregon because the plaintiffs reside in Oregon. The statute provides that in an action in which a defendant is an officer or employee of the United States, the action “may . . . be brought in any judicial district in which . . . the plaintiff resides if no real property is involved in the action.” *Id.* There is no real property involved in this action.

- 28 U.S.C. § 1391(e)

Parties

Plaintiff

- Client (U Visa Application Submitted, awaiting EAD)

Defendants

- **Jeh C. Johnson** – Secretary of Homeland Security and head of U.S. Department of Homeland Security (DHS)
 - Ultimate responsibility for the administration and enforcement of the immigration laws
- **Loretta Lynch** – Attorney General of the United States and the head of the U.S. Department of Justice (DOJ)
 - Shares responsibility for the administration and enforcement of immigration laws
- **Leon Rodriguez** – Director of U.S. Citizenship and Immigration Services, a component of DHS
 - Direct authority over all USCIS policies, procedures, and practices relating to the processing and adjudication of applications for U nonimmigrant status
- **Michael Paul** – Field Office Director of the USCIS Vermont Service Center
 - Exercises authority over USCIS activities related to the U nonimmigrant applications

Parties

7. Plaintiff Jose Sanchez is a native and citizen of Mexico. He was the victim of a serious crime, fully cooperated with Oregon law enforcement and has sought special nonimmigrant status under § 101(a)(15)(U) of the Immigration and Nationality Act (hereinafter INA).

8. Plaintiff Maria Sanchez is a native and citizen of Mexico. She is married to Jose Sanchez and, through him, is derivatively eligible for special nonimmigrant status.

9. Defendant Jeh C. Johnson is the Secretary of Homeland Security and is the head of the U.S. Department of Homeland Security (DHS) and has ultimate responsibility for the administration and enforcement of the immigration laws. He is sued in his official capacity.

10. Defendant Loretta Lynch is the Attorney General of the United States and the head of the U.S. Department of Justice (DOJ). She shares responsibility for the administration and enforcement of the immigration laws. She is sued in her official capacity.

11. Defendant Leon Rodriguez is the Director of U.S. Citizenship and Immigration Services, a component of DHS. In that capacity, he has direct authority over all USCIS policies, procedures, and practices relating to the processing and adjudication of applications for U nonimmigrant status. He is sued in his official capacity.

12. Defendant Michael Paul is the Field Office Director of the USCIS Vermont Service Center in Vermont. He exercises authority over USCIS activities related to the U nonimmigrant applications. He is sued in his official capacity.

Tell Stories

Good complaints tell compelling narratives.

PLOT + CHARACTERS

- The way it was
- The trouble
- The resolution
- The good guys
- The bad guys
- The hero

- **Bad Complaints have no story, focus on technical rules, do not shape thinking because they lack a framework.**

Our story

Congress created a statutory program to protect noncitizen victims of serious crime because of the benefit to society when victims cooperate with law enforcement. Regulations provide important protection to these noncitizens to cooperate including work authorization and legal recognition. The USCIS has failed to follow its own regulations and, thus, is harming this individual plaintiff and the objectives of Congress's program towards this person. The court can cure the problem with a simple, surgical solution by ordering USCIS to follow the law and put his name on the waiting list.

Iqbal and *Twombly*: The Well Pleased Complaint

Conceivable



Plausible

Twombly:

- FRCP Rule 8 requires that a complaint include facts giving rise to a “plausible” entitlement to relief
- No longer sufficient to only provide defendants with fair notice of a claim and its grounds

Iqbal:

- Confirmed that *Twombly* applied to civil suits as well as antitrust/complex cases
- Courts should not accept the truth of factual allegations that are “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”

- Avoid allegations that contain legalese or otherwise state legal conclusions
 - i.e. “he drove negligently”
 - Instead, “he drove with his eyes closed”
- Consider obvious, alternative, and lawful explanations of the alleged conduct
- *Twombly* and *Iqbal* do not suspend Rule 12(d)'s requirement that motions to dismiss relying on facts outside the pleadings be treated as motions for summary judgment
- Take notice of the elements that a plaintiff must plead to state a claim
- Plaintiffs are still able to allege facts based “upon information and belief”
 - Two instances:
 - When the fact is truly within a defendant’s exclusive possession
 - Where the belief is based on factual information that makes the inference of culpability plausible
 - Consider whether the complaint has pleaded any of the factual information required for the inference

The Takeaway from *Iqbal* and *Twombly*

Useful Resources

- *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation*, Practice Advisory (May 13, 2010) Legal Action Center, AIC and National Immigration Project ([here](#))
- *Mandamus Actions: "How To" and Summary of Relevant Case Law*, Practice Advisory (June 2003) American Immigration Law Foundation ([here](#))
- *Mandamus Actions: Avoiding Dismissal and Proving the Case*, Practice Advisory (November 2003) American Immigration Council ([here](#))
- *Immigration Lawsuits and the APA: The Basics of a District Court Action*, Practice Advisory (June 20, 2013) Legal Action Center, AIC ([here](#))