



PRACTICE TIP
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**OPPOSING A MOTION TO DISMISS ASSERTING THE CONSULAR
NONREVIEWABILITY DOCTRINE IN AGENCY DELAY CASES¹**

By the American Immigration Council²

An attorney filed a lawsuit because a client’s application to renew their visa remains stuck in “administrative processing.” The government just filed a motion to dismiss claiming that the consular nonreviewability doctrine bars judicial review.

I. What is the Consular Nonreviewability Doctrine?

The doctrine of consular nonreviewability is a bar on review of visa determinations by consular officers that federal judges created. The doctrine reflects the separation of powers among the three branches of government: The Constitution vests exclusive authority in Congress to formulate policies about the admissibility of citizens to the United States, *Kleindienst v. Mandel*, 408 U.S. 753, 768-70 (1982), and Congress can delegate to the Executive Branch to implement policies. *Id.* Thus, decisions relating to immigration rest with the political branches of government and not with the judicial branch. *Id.*; see also *Kerry v. Din*, 576 U.S. 86, 103-04 (2015) (Kennedy, J. concurring) (the *Mandel* decision “was based upon due consideration of congressional power to make rules for the exclusion of [noncitizens]” and to delegate to the Attorney General substantial discretion “in that field”).

The D.C. Circuit articulated two bases for the doctrine: a combination of (1) the political nature of visa determinations, and (2) the absence of congressional authorization, through specific statutory language, for judicial review. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). “The [consular nonreviewability] doctrine holds that a consular official’s decision to issue or withhold a visa is not subject to judicial review, at least until Congress says otherwise.” *Id.*

Two narrow exceptions to the doctrine exist. The first is a two-part test when a U.S. citizen asserts injury from a visa denial: (1) did the denial burden a constitutional right, and if so, (2) did the consular officer base the denial on a “facially legitimate and bona fide reason.” *Kerry v. Din*,

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576 U.S. 86, 104 (2015) (Kennedy, J., concurring) (*quoting Mandel*, 408 U.S. at 770).³ The second exception is if Congress expressly authorizes judicial review of a consular officer’s actions. *Saavedra Bruno*, 197 F.3d at 1159.

II. Grounds for Dismissal

Practitioners may encounter a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Because the doctrine was created by the judiciary, most courts recognize that jurisdiction exists but that the doctrine, if applicable, precludes relief. *E.g.*, *Del Valle v. Sec’y of State*, 16 F.4th 832, 838, 844 (11th Cir. 2021) (if the doctrine bars review, dismissal must be for failure to state a claim and not lack of jurisdiction); *Baan Rao Thai Rest. v. Pompeo*, 985 F.3d 1020, 1027 (D.C. Cir. 2021) (“Dismissal based on consular nonreviewability . . . is a merits disposition” under Fed. R. Civ. P. 12(b)(6) and not for lack of subject matter jurisdiction); *Allen v. Milas*, 896 F.3d 1094, 1102 (9th Cir. 2018) (describing the doctrine as a “rule of decision,” and affirming the district court’s dismissal of an action challenging a visa denial based on Fed. R. Civ. P. 12(b)(6)).

III. Strategy to Oppose

Consider thwarting the government’s motion with this fundamental point: the lawsuit challenges the lack of a decision. The consular nonreviewability doctrine does not apply because the consular officer has not made a visa determination. “[T]he doctrine of consular nonreviewability is not triggered until a consular officer has made a decision with respect to a particular visa application.” *Nine Iraqi Allies v. Kerry*, 168 F. Supp. 3d 268, 290 (D.D.C. 2016) (emphasis in original). In *Trump v. Hawaii*, the Supreme Court assumed, without deciding, that the consular nonreviewability doctrine did not bar its review of plaintiffs’ claims that the Muslim ban violated certain provisions of the Immigration and Nationality Act (INA). 138 S. Ct. 2392, 2407 (2018). The Court specifically noted that “[t]he Government does not argue that the doctrine of consular nonreviewability goes to the Court’s jurisdiction, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs’ [statutory] claims.” *Id.* (Citations omitted).

A few courts apply the consular nonreviewability doctrine to all phases of the visa application process. Some district court decisions within the jurisdiction of the Second Circuit have cited *Wan Shih Hsieh v. Kiley* as authority for precluding judicial review even when the lawsuit challenges delay in adjudicating the visa application. 569 F.2d 1179 (2d Cir. 1978). *See, e.g.*, *Abdo v. Tillerson*, No. 17 Civ. 7519, 2019 WL 464819, at *3 (S.D.N.Y. Feb. 5, 2019) (collecting

³ In *Kerry*, a consular officer denied an immigrant visa to the husband of a U.S. citizen for inadmissibility pursuant to 8 U.S.C. § 1182(a)(3)(B) (“terrorist activities”), without any explanation. The U.S. citizen challenged the visa denial, claiming she was denied the right to live in the United States with her spouse. 57 U.S. at 89-90. Three Justices concluded that the visa denial violated no constitutional right, so they did not address whether the denial was sufficient. *Id.* at 101. The concurrence (joined by Justice Scalia), assumed a violation, found “the reasoning and the holding in *Mandel*” controlling, and concluded that the consular officer’s citation to the inadmissibility statute was sufficient. *Id.* at 104, 106.

E.D.N.Y. and S.D.N.Y. cases). In *Wan Shih Hsieh*, the Second Circuit made a broad statement: “The district court correctly held that no jurisdictional basis exists for review of the action of the [consular officer] suspending or denying the issuance of immigration visas to appellant’s children.” 569 F.2d at 1181. But the Second Circuit was reviewing an unusual set of circumstances that does not reflect the typical delay case. Based on the family’s “household register,” the consular officer suspected that the parent had falsified her work experience to obtain her employment-based permanent resident status. *Id.* at 1180-81. The consular officer requested that INS investigate the basis for her adjustment application, but an interview did not resolve the issue. *Id.* at 1181. The parent then sued the INS District Director for unreasonable delay and her request for relief included ordering the consular officer to issue immigrant visas to her children. *Id.* The Second Circuit affirmed the district court’s decision that the consular officer’s actions were unreviewable. *Id.*⁴ The parent’s claim against the consular officer failed because she asked the court to compel immigrant visa issuance—a discretionary decision that district courts lack authority to require. *See id.* at 1180-81. In contrast, agency delay cases under the APA or the Mandamus Act seek an order compelling the consular officer to issue *any* decision, whether it be to grant the visa or deny it. These cases do not seek to constrain or compel the consular officer’s ultimate discretion to grant or deny. Therefore, practitioners should be able to distinguish *Wan Shih Hsieh*.

The court in *Al-Gharawy v. U.S. Dep’t of Homeland Sec.* provided two reasons why decisions finding that the doctrine does not apply in delay cases is the better view: 1) whether unreasonable delay has occurred is a procedural consideration courts are qualified to determine rather than the “inherently political nature” of considerations as to visa approvals; and 2) consular officers do not have discretion to delay indefinitely a decision on a visa application. No. 21-1521, 2022 WL 2966333, at *7 (D.D.C. July 27, 2022).

A. What if the consular officer has refused the visa under INA § 221(g)?

The Department of State (DOS) explains on its website that if an applicant does not establish visa eligibility, then the consular officer “must refuse” the visa application.⁵ However, the consular officer may issue a § 221(g) notice either to request additional documents or information from the applicant or to inform the applicant that the application is in “administrative processing” while they await additional information from a source other than the applicant (such as for completion of background checks).⁶ As the website acknowledges: “It is

⁴ The Second Circuit also reversed the district court’s holding that it had jurisdiction to decide that the pace of INS’ investigation was not unreasonable. *Id.* at 1181-82. The court concluded that the INS’ decisions whether to investigate or to rescind the parent’s permanent resident status were solely within the agency’s discretion. *Id.* at 1182.

⁵ U.S. Department of State, Bureau of Consular Affairs, *Administrative Processing Information*, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html> (last visited Dec. 14, 2022).

⁶ A § 221(g) notice refers to the INA section that prohibits a consular officer from issuing a visa if “it appears to the consular officer” from statements in the visa application or documents submitted with the application that the foreign national is “ineligible to receive a visa.” INA

possible that a consular officer will reconsider a visa application refused under 221(g) at a later date, based on additional information or upon the resolution of administrative processing, and determine that the applicant is eligible.”⁷ This section will discuss the legal basis for 221(g) refusals and outline the case law and arguments to show that a 221(g) refusal is not a consular officer’s final decision so the doctrine of consular nonreviewability would not apply.

The government may claim that a court cannot review a delay in visa application processing after the consular officer issues a § 221(g) notice because the visa refusal is a visa determination covered by the consular nonreviewability doctrine. Alternatively, the government may argue that the court must dismiss for mootness: the visa refusal is a final decision so there is no actual controversy for the court to decide. *See Elhabash v. U.S. Dep’t of State*, No. 09-5849, 2010 WL 1742116, at *2-3 (D.N.J. Apr. 27, 2010) (mootness one ground for dismissal because consular officer made a decision by refusing the visa application and placing into administrative processing); *contra Amerkhail v. Blinken*, No. 4:22-cv-149, 2022 WL 4093932 at *5-6 (E.D. Mo. Sept. 7, 2022) (administrative processing refusal does not moot plaintiff’s unreasonable delay claim). The government’s legal theories are based on the position that the applicant received a decision and any subsequent action by the consular officer would be a redetermination.

The government may assert the DOS regulations requiring a consular officer to issue or refuse a visa as authority that a § 221(g) notice is a determination not subject to judicial review. The regulation for immigrant visa applications states:

When a visa application has been properly completed and executed before a consular officer in accordance with the provisions of the INA and the implementing regulations, the consular officer must issue the visa, refuse the visa under INA 212(a) or 221(g) or other applicable law or, pursuant to an outstanding order under INA 243(d), discontinue granting the visa.

22 C.F.R. § 42.81(a).⁸ In relevant part, the regulation for nonimmigrant visa applications is identical. *See* 22 C.F.R. § 41.121(a).

Plaintiffs should consider opposing on the ground that a § 221(g) notice is not a final decision, citing *Patel v. Reno*, in which the Ninth Circuit held that a “refusal” under the regulation cited above is not a final decision. In *Patel v. Reno*, immigrant visa applications for the spouse and children of a U.S. citizen were pending for eight years when the husband and wife filed suit.

§ 221(g), 8 U.S.C. 1201(g). *See also* U.S. Department of State, Bureau of Consular Affairs, *What does a visa refusal under section 221(g) mean?* <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html> (last visited Dec. 14, 2022).

⁷ U.S. Department of State, Bureau of Consular Affairs, *What does a visa refusal under section 221(g) mean?* <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html> (last visited Dec. 14, 2022).

⁸ The “discontinue” provision of the regulation is limited to the circumstance where the foreign national’s country has not cooperated when the United States sought to remove a national or citizen to that country. *See* 8 U.S.C. § 1253(d).

134 F.3d 929, 931 (9th Cir. 1997). Plaintiffs were unaware when they sued that the consular officer had returned the immigrant visa petitions to legacy Immigration and Naturalization Service (INS), but INS had not acted against the husband. *Id.* Plaintiffs dismissed the lawsuit after INS agreed to return the immigrant visa petitions to the consulate. *Id.* However, plaintiffs filed a second lawsuit when a senior consular officer refused the visa applications pending INS completing denaturalization proceedings against the husband, which would determine his eligibility to petition for his wife and children. *Id.*

The government claimed that the refusal was not subject to judicial review. *Patel*, 134 F.3d at 932. But the Ninth Circuit concluded that the refusal was not a final decision. *Id.* The court cited 22 C.F.R. § 42.81 as requiring a consular officer to act on an application. *Id.* However, the court did not agree the regulatory text that “the consular officer shall either issue or refuse the visa” barred review in these circumstances. *Id.*⁹ The court noted that the consulate was “holding the visa applications in abeyance” and that the spouse and children would not be required to submit new visa applications if the sponsoring spouse retained his U.S. citizenship. *Id.* The court said that 22 C.F.R. § 42.81 did not provide for a “suspension” of the visa applications or a “temporary refusal,” so the consular officer’s refusal (which stated that the denials were under INA § 221(g)) “was not a refusal within the meaning of 22 C.F.R. § 42.81.” *Id.* While the government labeled the action a “refusal,” the court determined that in the context of the consular officer’s actions, the officer had not made a final decision.

INA § 221(g) “merely contains the (expansive) criteria for refusing a visa application; it does not establish when, or whether, as a matter of law, an application has been refused.” *Nine Iraqi Allies v. Kerry*, 168 F. Supp. 3d 268, 288 (D.D.C. 2016). In *Nine Iraqi Allies*, the court concluded, based on agency reports to Congress, that administrative processing was an interim “mandatory step” in the special immigrant visa application process, after the interview and before the medical exam, but it was not a final decision. *Id.* at 284-85. The court accused the government of using administrative processing to assert consular nonreviewability while avoiding reporting to Congress that visas had been finally refused. *Id.* at 289. The court noted that the government could only have one outcome: if the applications were undergoing multi-step processing, then there was no final refusal. *Id.*; *see also Afghan & Iraqi Allies v. Pompeo*, No. 18-cv-1388, 2019 WL 367841, at *9-10 (D.D.C. Jan. 30, 2019) (evidence presented that DOS policy “mandates administrative processing” after interview; a “mandatory intermediate step” rather than a final refusal for SIV applicants).

Other decisions similarly have found administrative processing to be an interim step in the application process for nonimmigrant visas and other categories (*i.e.*, not limited to the special immigrant category), even when the notification says the visa was refused. *Al-Gharawy*,

⁹ In 1997, the relevant text read: “When a visa application has been properly completed and executed before a consular officer in accordance with the provision of INA and the implementing regulations, the consular officer shall either issue or refuse the visa. Every refusal shall be in conformance with the provisions of 22 C.F.R. 40.6.” *Patel*, 134 F.3d at 932. The court’s construction appears equally applicable to the current text (quoted in full at p.4 above): “the consular officer must issue the visa, refuse the visa under INA 212(a) or 221(g) or other applicable law or . . . discontinue granting the visa.” 22 C.F.R. § 42.81(a).

2022 WL 2966333, at *9 (INA § 221(g) establishes limits on the consular officer’s authority, but does not address whether a refusal pending administrative processing is a final decision; notifications during eight years after § 221(g) refusal of immigrant visa applications by parents of a U.S. citizen, such as the Embassy “will reach out” after administrative processing concluded, are inconsistent with a final decision); *Biloo v. Baran*, No. 2:21-cv-05401, 2022 WL 1841611, at *1, 4 (C.D. Cal., Mar. 18, 2022) (repeated requests for more information after immigrant visa application by spouse of a U.S. citizen refused under § 221(g) and placed in administrative processing demonstrates the refusal was not a final decision); *Vulupala v. Barr*, 438 F. Supp. 3d 93, 98 (D.D.C. 2020) (§ 221(g) notice that a specialty occupation H-1B nonimmigrant visa was refused subject to further administrative processing does not make an interim decision “sufficiently final” to warrant applying the consular nonreviewability doctrine); *Ibrahim v. Dep’t of State*, No. 19-610, 2020 WL 1703892, at *5 (D.D.C. Apr. 8, 2020) (and cases cited therein for different types of visas) (multiple consular communications that visa application was still pending for six years after a § 221(g) refusal of an immigrant visa for the parent of a U.S. citizen were “fatal” to the government’s claim that the consular nonreviewability doctrine applied).

Other courts, however, have held that the § 221(g) notice was a decision subject to the consular nonreviewability doctrine. *See OC Modeling, LLC v. Pompeo*, No. CV-20-1687, 2020 WL 7263278, at *3 (C.D. Cal. Oct. 7, 2020) (consular nonreviewability doctrine applies because the consular officer rendered a decision when he issued a § 221(g) notice refusing an extraordinary ability nonimmigrant O-1 visa); *Elhabash*, 2010 WL 1742116, at *2-3 (consular nonreviewability doctrine one ground for dismissal because § 221(g) refusal of a J-1 visa for postgraduate medical training was a decision). *Cf. Tesfaye v. Blinken*, No. 22-411, 2022 WL 4534863, at *5 (D.D.C. Sept. 28, 2022) (court rejected an APA unlawfully withheld claim when diversity visas were refused pursuant to § 221(g) as plaintiffs did not cite any provisions compelling DOS to take “any further administrative steps” within a specified time period).

Accordingly, Plaintiffs should consider presenting any evidence indicating that the consular officer is still considering the visa application after issuing the § 221(g) refusal, such as notifications from the consulate, requests for additional information, or email communications. *See Al-Gharawy*, 2022 WL 2966333, at *9; *Biloo*, 2022 WL 1841611, at *1, 4; *Ibrahim*, 2020 WL 1703892, at *5.

B. What if the government relies on the DOS’ change in identifying visa application status from “administrative processing” to “refused”?

On March 3, 2020, DOS updated the Consular Electronic Application Center (CEAC), its online portal for visa applicants.¹⁰ DOS announced that an application in administrative processing would display the application status as “refused” rather than administrative processing.¹¹ The government may argue that this designation supports the conclusion that administrative

¹⁰ U.S. Department of State, Bureau of Consular Affairs, *Visas: CEAC Case Status Change*, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-news-archive/visas-ceac-case-status-change.html> (last visited Dec. 14, 2022).

¹¹ *Id.*

processing is a final refusal. But the website language is consistent with the decisions identifying administrative processing as an interim step in the application process:

- DOS describes its action as an administrative change because the former “administrative processing” designation meant that a visa had been “refused under section 221(g).”¹² Changing the labeling does not make the action final. The website states that the “refused” status may change based on additional information that “resolve[s] any outstanding issues relating” to visa eligibility.¹³ This language reflects an interim state rather than a final decision.
- On the CEAC page, DOS also directs readers to more information on the webpage entitled “Administrative Processing Information.”¹⁴ At this page, DOS describes a § 221(g) refusal that includes the consular officer’s request to provide additional information. DOS states: “If the consular officer refuses a visa, but requests additional information, an applicant has one year from the date the visa was refused to submit the additional information.”¹⁵ By its terms, this refusal is not final. This conclusion is reinforced by the agency’s statement: “If an application was refused and a consular officer indicates administrative processing is required, processing times can vary based on individual circumstances.”¹⁶

C. What if the government relies on the Foreign Affairs Manual (FAM)?

Language in the FAM positions a visa refusal under § 221(g) as a final decision. “A refusal under INA 221(g) is, legally, a refusal on a visa application, even if that refusal is eventually overcome.” 9 FAM 302.1-8(B)(c)(U). Guidance to consular officers as to acceptable text for a § 221(g) notice also promotes finality. *See* 9 FAM 403.10-3(A)(2)(U)(2)(U)(b)(U) (nonimmigrant visa 221(g) refusal letter may refer to further administrative processing but must not use terms like the denial is “pending,” “temporary,” or “interim”); 9 FAM 504.11-3(A)(1)(U)(e)(U)(c)(U) (immigrant visa 221(g) refusal letter must include that for “U.S. visa purposes” the decision “constitutes a [visa] denial”; for petition-based visas, the letter must state that if the applicant fails to act, the petition “will be permanently terminated under INA 203(g)”).

Practitioners can rebut this argument by explaining to the court what actually happens when a consular officer issues a refusal under § 221(g). Despite the FAM’s framing of the § 221(g) refusal as a final decision, the reality is that the consular officer has yet to make a final decision. The cases cited in § III.A support this approach. While the DOS regulations include INA

¹² *Id.*

¹³ *Id.*

¹⁴ U.S. Department of State, Bureau of Consular Affairs, *Administrative Processing Information*, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html> (last visited Dec. 14, 2022).

¹⁵ *Id.* at *Can a refusal under section 221(g) be overturned?*

¹⁶ *Id.*

§ 221(g) as a ground for visa refusal,¹⁷ these cases rejected the agency’s claim that the consular officer’s decision was a final action.

IV. Should a Complaint Challenging Consular Delay Include a Mandamus Cause of Action?

Lawyers often say they plan to file a “mandamus” action to challenge agency delay. But a mandamus action may not be the best choice when there is no statute or regulation that requires a decision within a specified time period. Consider whether a cause of action for unreasonable delay pursuant to the Administrative Procedure Act (APA) would have a greater chance of success.

Judicial review is available pursuant to the APA when a person is adversely affected by agency action, including the failure to act. 5 U.S.C. §§ 551(13), 702.¹⁸ The agency must have a nondiscretionary duty to take a discrete action. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). A court “shall compel agency action . . . unreasonably delayed.” 5 U.S.C. § 706(1).

In contrast, a mandamus action requires (1) a clear and certain claim to relief, (2) a ministerial, nondiscretionary duty to adjudicate the visa application, and (3) no other adequate remedy at law available to compel adjudication. 28 U.S.C. § 1361.¹⁹

Since a successful APA unreasonable delay claim can provide the plaintiff with the same relief as mandamus, practitioners should consider including only the APA cause of action in the complaint. Generally, when both are plead, a court will order relief under the APA unreasonable delay claim since the relief under both is “essentially the same.” *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir. 2010); *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). Including a mandamus claim could add to the time and expense of litigation, either by triggering a partial motion to dismiss or by requiring a plaintiff to address both sets of criteria when the APA unreasonable delay claim would be sufficient. Some courts have dismissed mandamus claims because the absence of a statutory or regulatory deadline for the consular officer to act means that plaintiff cannot demonstrate a clear and certain claim to relief, *El Centro Reg’l Med. Ctr. v. Blinken*, No. 3:21-cv-361, 2021 WL 3141205, at *3 (S.D. Cal. July 26, 2021), or because an APA unreasonable delay claim means plaintiff has an adequate alternative remedy, *Jaraba v. Blinken*, 568 F. Supp. 3d 720, 731 (W.D. Tex. 2021).

¹⁷ See 22 C.F.R. § 41.121(a) (nonimmigrant visa refusal); 22 C.F.R. § 42.81(a) (immigrant visa refusal); see also 22 C.F.R. §§ 41.121(b), 42.81(b) (visa refusal procedure).

¹⁸ The federal question statute provides the federal district court with subject matter jurisdiction for an APA cause of action. 28 U.S.C. § 1331. The APA does not confer jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

¹⁹ The Mandamus and Venue Act also confers subject matter jurisdiction on the federal district court. *Id.*

To determine whether the delay is unreasonable, most courts apply the six factors identified in *Telecomms. Rsch. & Action Ctr. v. FCC* (“TRAC”), 750 F.2d 70, 80 (D.C. Cir. 1984). Some courts consider the TRAC analysis premature at the motion to dismiss stage. The court does not need to decide the merits in order to decide whether the court has jurisdiction and the complaint states a claim to relief. *Al-Gharawy v. U.S. Dep’t of Homeland Sec.*, No. 21-1521, 2022 WL 2966333, at *10 (D.D.C. July 27, 2022); *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 44 & n.6 (D.D.C. 2020).

V. Considerations When Addressing the TRAC Factors

A. TRAC factor #1: Is the delay subject to a “rule of reason”?

Do not be discouraged by the decisions available through the research services on this factor. These are the cases the government decided to fight. While practitioners cannot guarantee a particular outcome to their clients, there are many cases where the consular officer adjudicated the visa application before the government’s response was due, and the lawsuit was dismissed before the issue reached the judge for decision. However, since the INA does not specify a timeframe for visa adjudication, practitioners need to be creative in identifying a benchmark for the court to use to determine whether the delay is unreasonable.

Some decisions use a “cookie-cutter” approach and look at the length of time other judges in the district considered “reasonable.” *See e.g., Khan v. Blinken*, No. 21-1683, 2021 WL 5356267, at *3 (D.D.C. Nov. 17, 2021) (less than one-year delay in deciding K-1 fiance(é) visa application reasonable when compared with “lowest threshold” of various cases finding immigration processing delays of two to five years to be reasonable (and without distinguishing between DOS and USCIS)); *Dastagir v. Blinken*, 557 F. Supp. 3d 160, 165 (D.D.C. 2021) (immigrant visa application for spouse of U.S. citizen pending 29 months not unreasonable based on time periods of 27-29 months found reasonable in other cases). If the government cites timeframes in random delay cases as supplying a rule of reason, the court may benefit from an explanation as to why the delays in those cases have no bearing on what timeframe is reasonable for processing a particular type of visa application at a specific U.S. Embassy or consulate.

Plaintiffs who filed lawsuits in 2020 and 2021 sometimes encountered judges sympathetic to the government’s claims that the delays were reasonable due to the disruptions caused by the COVID-19 pandemic. *See, e.g., Dastagir*, 557 F. Supp. at 166-67; *Poursahi v. Blinken*, No. 21-cv-1960, 2021 WL 5331446, at *6-7 (D.D.C. Nov. 16, 2021). However, as *Al-Gharawy* demonstrates, judges may no longer accept generalized COVID-19 claims as evidence of reasonableness:

COVID-19 cannot excuse the suspension of consular services indefinitely, and, Defendants have not provided sufficient information to permit the Court to understand how pandemic conditions affect services at the Embassy at Baghdad specifically.

2022 WL 2966333 at *11.

A search of the DOS website and a few of the U.S. Embassy websites did not yield processing times for visa applications placed in administrative processing. A 180-day benchmark is a possibility based on the following statement from the DOS website: “Except in cases of emergency travel . . . before making inquiries about status of administrative processing, applicants should wait at least 180 days from the date of interview or submission of supplemental documents, whichever is later.”²⁰ Another possibility, although likely quite time-consuming, is to obtain information from other practitioners and submit their declarations as to how long their clients’ applications have been in administrative processing at the same U.S. Embassy or consulate in the same visa category as plaintiff’s application. The absence of publicly available data could be the basis for a discovery request and creating a factual issue through attorney declarations may improve plaintiff’s chance of surviving a motion to dismiss and moving on to discovery. However, consider whether the agency’s processing times would even be relevant as a timeframe. *See Barrios v. U.S. Dep’t of Homeland Sec.*, 25 F.4th 430, 454 (6th Cir. 2022) (unhelpful to compare “snails against snails in a snails’ race”).

Instead, consider using DOS data as to the number of visas being adjudicated monthly at the U.S. Embassy or consulate where the plaintiff noncitizen applied to demonstrate that the delay is unreasonable as to their category.²¹ This may be more persuasive if a plaintiff can identify a national policy that prioritizes a particular category, such as students or researchers in a STEM field. *Ramirez v. Blinken* is instructive, although it involved DOS’ four-tier COVID-19 prioritization of visa categories. 594 F. Supp. 3d 76 (D.D.C. 2022). Plaintiffs claimed that the second-tier priority for fiancé(e) visas established a rule of reason that the U.S. Embassy in Manila was violating. *Id.* at 93. The court found plaintiffs’ submission of DOS’ data as to the Embassy’s adjudication of various visa categories over several months was sufficient to survive the government’s motion to dismiss. *Id.* at 92, 95.²² *See also Jaraba*, 568 F. Supp. 3d at 741-42 (court granted leave to amend complaint where plaintiffs’ response to a motion to dismiss “suggested” allegations that the U.S. Embassy in Manila was “undermining” DOS’ rule of reason as to fiancé(e) visas).

²⁰ U.S. Department of State, Bureau of Consular Affairs, *Administrative Processing, Important Notice*, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html> (last visited Dec. 14, 2022).

²¹ Separate monthly reports for nonimmigrant and immigrant visas issued by post and visa class are available at DOS’ website in its U.S. Visa Law and Policy section, under Visa Statistics, at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html.html>.

²² Plaintiffs’ data showed that after DOS issued the four-tier prioritization, the number of fiancé(e) visas the U.S. Embassy in Manila adjudicated remained “flat” while other categories increased. *Id.* at 92. The court noted that the “limited data set” was not definitive and the record could be developed for summary judgment. *See id.* at 92-93, 95. While plaintiffs could proceed with their claims against the Embassy, the court dismissed plaintiffs’ claim against the Secretary of State for “deprioritizing” by placing fiancé(e) visas into the second tier, finding that the prioritization system itself was committed to the Secretary’s discretion and thus unreviewable. *Id.* at 88.

B. TRAC factor #2 (if applicable): When a statute contains a timetable or Congress has given another indication of the speed with which it expects the agency to act, the statutory scheme “may supply content for this rule of reason.”

For most visa categories there is no statutory or regulatory deadline within which a consular officer must decide a visa application. In those cases, a court would not consider TRAC factor #2. However, in *Nine Iraqi Allies*, the court concluded that in the statutes establishing the Iraqi and Afghan special immigrant visa programs, Congress “instruct[ed] that Defendants shall process SIV applications within nine months.” 168 F. Supp. 3d at 293.²³ With diversity visas, practitioners may be able to stress that plaintiff’s eligibility is restricted to the fiscal year in which they were selected, pursuant to 8 U.S.C. § 1153(c)(1). However, the government likely will counter that the statute contains an expiration date for the annual diversity visa allocation, but no requirement that all visa applicants be adjudicated within that fiscal year. Some decisions have construed the statute as providing an indication from Congress as to the speed for adjudicating diversity visa applications generally, but not as to the speed for adjudicating each application. *Gulen v. Blinken*, No. 4:22-CV-790, 2022 WL 4544696, at *4 (E.D. Tex. Sept. 28, 2022) (“[N]o court has ever concluded that [DOS] has a duty to process and adjudicate individual [diversity] visa applications.”); *Babamuradova v. Blinken*, No. 22-1460, 2022 WL 4479801, at *11 (D.D.C. Sept. 27, 2022); *Nishihata v. Blinken*, No. 21-2173, 2021 WL 4476750, at *6-7 (D.D.C. Sept. 30, 2021).

But courts have applied the statutory deadline when plaintiffs demonstrated that the agency implemented unlawful policies to halt or severely restrict the processing of diversity visa (DV) applications. *Filazapovich v. Dep’t of State*, 560 F. Supp. 3d 203, 236 (D.D.C. 2021) (“Congress legislated the fiscal year deadline knowing that [DOS] would have other, competing draws on its resources”); *Gomez v. Trump*, 485 F. Supp. 3d 145, 196 (D.D.C. 2020) (“[T]he September 30 deadline manifests Congress’s intent that the [DOS] undertake good-faith efforts to ensure that diversity visas are processed and issued before the deadline”). However, success did not guarantee that all plaintiffs would receive DVs. For example, court orders reserving visa numbers reduced the total by the percentage likelihood that DV applicants would have received visas and by accounting for COVID-19 processing reductions. *See, e.g., Filazapovich v. Dep’t of*

²³ In *Afghan and Iraqi Allies*, the court found that DOS officials unreasonably delayed in deciding SIV applications, concluding that Congress clearly “did not intend to give Defendants an unbounded, open-ended timeframe” and had considered national security and complexity when setting the nine-month benchmark. No. 18-cv-1388, 2019 WL 4575565, at *6-8 (D.D.C. Sept. 20, 2019). The court ordered that a plan for promptly processing and deciding class members’ SIV applications be submitted for court approval and progress reports following plan approval. *Id.* at *11. The court recently granted in part defendants’ motion to modify the plan, which had been approved in June 2020, but stayed in October 2021. *See* No. 18-cv-1388, 2022 WL 17338049, at *1 (D.D.C. Nov. 30, 2022). The court found continuing unreasonable delay, as the class members’ SIV applications were pending “beyond the statutory deadline” without any “concrete timetable” for adjudication. *Id.* at *4. However, the court ordered development of a new plan, in recognition of the increased size of the class, with a warning that the stay could be lifted if “significant delay or noncompliance” occurred. *Id.* at *6.

State, 567 F. Supp. 3d 83, 96-97 (D.D.C. 2021);²⁴ *see also P.K. v. Tillerson*, 302 F. Supp. 3d 1, 9-10 (D.D.C. 2017), *clarified by Almagrami v. Blinken*, 569 F. Supp. 3d 1, 3-4 (D.D.C. 2021) (order entered near the end of FY 2017, when DOS had already issued 44,000 DVs, to reserve any numbers that remained unused as of September 30, for issuance to plaintiffs if they prevailed). *But see Kassem v. Blinken*, No. 1:21-cv-1400, 2021 WL 4356052, at *8 (E.D. Cal. Sept. 24, 2021) (court ordered that the interview and decision occur before FY 2021 ended for principal and derivative family members).

C. TRAC factor #3: Impact of delay on human health and welfare, which makes delay less tolerable than when considering economic regulation and TRAC factor #5: Nature and extent of the injuries prejudiced by the delay.

Courts often consider these two factors together, and plaintiffs usually prevail on these factors. *See, e.g., Kassem*, 2021 WL 4356052, at *7; *Afghan & Iraqi Allies*, 2019 WL 4575565, at * 8-9.

Including information about the hardships caused by the delay serves two purposes: 1) to demonstrate to the court and to government counsel why this visa application merits attention now (particularly when the government is likely to argue that plaintiff should not receive “special treatment” when others are waiting (*see infra* TRAC factor #4)) and 2) to present sufficient facts in the complaint to overcome a motion to dismiss. The following are examples, but certainly not the only bases, for demonstrating the impact on human health and welfare and the nature and extent of the injuries caused by delayed adjudication:

- The emotional toll from family separation such as depression, anxiety, especially where they may have preexisting mental health conditions. For a fiancé(e) or a spouse visa applicant, the emotional toll may include the impact on children or on family-planning. Even if the family member in the United States can travel to the foreign country, identify burdens resulting from such travel in addition to the expense.
- The risk of being unable to immigrate to the United States as a family and the loss of opportunities (such as employment, education, medical care) available in the United States, from diversity visa delays.
- Disruption of education or experience related to field of study for F-1 student or J-1 exchange visitor visa delays.
- Disruption of career, particularly if the plaintiff has established a life in the United States, such as an H-1B visa renewal, or if the plaintiff has a time-sensitive opportunity, such as research, entertainment, or sports.

²⁴ Appeals are pending in consolidated cases. *Goh v. Biden*, No. 21-5272 (D.C. Cir. filed Nov. 29, 2021); *Goodluck v. Biden*, No. 21-5270 (D.C. Cir. filed Nov. 29, 2021); *Goh v. Biden*, No. 21-5271 (D.C. Cir. filed Nov. 24, 2021); *Goh v. Biden*, No. 21-5263 (D.C. Cir. Filed Nov. 8, 2021).

D. TRAC factor #4: The effect of expediting delayed action on higher or competing priorities

Prevailing on TRAC factor #4 is a significant challenge in bringing a delayed visa claim since judges may decide that granting relief to your client is unwarranted when so many other people are also waiting for a decision on their visa applications. Some district courts are bound by appellate court decisions to add an additional restriction: granting relief must result in a “net gain” in processing. *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (“Assuming constant resources for the [agency’s] generic drug program, a judicial order putting Barr at the head of the queue simply moves all others back one space and produces no net gain.”); *see also Cumberland Co. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 55 (4th Cir. 2016). The court may be more receptive if you can demonstrate that the U.S. Embassy or consulate is unreasonably delaying adjudication of applicants in your client’s visa category. *See supra* TRAC factor #1.

E. TRAC factor #6: The court need not find “impropriety” to hold that agency action is unreasonably delayed.

The government may argue that when there is no impropriety, TRAC factor #6 should weigh in its favor. If the circumstances support a claim that the delay is due to indifference at the U.S. Embassy or consulate to processing plaintiff’s visa application (or, even stronger, applications in a particular visa category) within a reasonable time, then TRAC factor #6 should weigh in plaintiff’s favor. In circumstances where there is no impropriety, or evidence of indifference, then TRAC factor #6 should be neutral (not favoring either side) since unreasonable delay can occur without impropriety or indifference.

VI. Pre-Filing Considerations

A. Who should be sued?

At a minimum, practitioners should include the consular officer, and consider including the (immigrant or nonimmigrant) visa section chief, for two reasons. First, the INA gives authority to the consular officer to issue or deny a visa. 8 U.S.C. §§ 1104(a)(1), 1201(a)(1). Second, a decision in the client’s favor will include an order that action be taken on the visa application. Use “John Doe” or “Jane Doe” if the name of the consular officer is unknown.²⁵ Many practitioners also include the Secretary of State or the assistant secretaries responsible for consular affairs or visa services.²⁶

When the consular officer is not included as a defendant, the government may move to dismiss for failure to name the proper party on the ground that the consular officer is the decision-maker. In *Al-Gharawy v. U.S. Dep’t of Homeland Sec.*, DOS-related defendants included the agency, the

²⁵ Practitioners may be able to identify the section chief through a telephone directory with listings for “Key Officers of Foreign Service Posts,” which is available on the DOS website: <https://www.state.gov/telephone-directory/>.

²⁶ For additional information about government defendants and service of process, see the practice advisory by AIC, NILA, NIP/NLG, [Whom to Sue and Whom to Serve](#).

Secretary of State, the U.S. Embassy in Baghdad, and the U.S. Ambassador to Iraq. No. 21-1521, 2022 WL 2966333 (D.D.C. July 27, 2022). The government moved to dismiss the Secretary of State on the grounds that he cannot decide a visa application and “lacks the authority to control consular officials’ visa determinations.” *Id.* at *3 (citing Defendants’ pleading); *see also Ramirez v. Blinken*, 594 F. Supp. 3d 76, 89 (D.D.C. 2022) (government suggested only consular officers are responsible for interview scheduling). These decisions rejected the government’s position, noting that the Secretary has control over the timing of adjudication. *Al-Gharawy*, 2022 WL 2966333 at *5 (Secretary oversees DOS, which includes authority to direct consular officers as to timing); *Ramirez*, 594 F. Supp. 3d at 89-90 (Secretary of State has authority to manage operations and retains the authority delegated to consular officers to determine interview scheduling).

B. Where to sue

The lawsuit must be filed in the proper venue, which is the location over which the federal district court has jurisdiction. For a delay action against a federal agency, or federal official or employee, venue is determined by 28 U.S.C. § 1391(e)(1). Section 1391(e)(1) presents three alternatives: (A) where any defendant resides, (B) where “a substantial part of the events or omissions giving rise to the claim occurred,” or (C) where any plaintiff resides, when no real property is involved.

If the visa applicant is the only plaintiff, and has no current ties to the United States, then consider including the Secretary of State as one of the defendants. This strategy provides for venue in the federal district court in D.C., as one defendant resides there.

For an employment-based visa applicant who has been residing in the United States, such as a noncitizen who has been working in H-1B status, but is currently abroad after applying to renew an H-1B visa, consider using the noncitizen’s U.S. residence as an alternative to a D.C. venue. Usually an employment-based visa renewal applicant maintains the U.S. residence while abroad so the “ties” to the United States will be strong. If you have strategic reasons for avoiding D.C. as a venue, but also have concerns about relying solely on the noncitizen’s U.S. residence, then you may wish to consider adding the petitioner/company as a plaintiff and using its principal place of business as an alternative.²⁷ In *Dhimar v. Blinken*, an H-1B visa applicant sued U.S. officials for unreasonable delay after his application had been in administrative processing for roughly seven months. No. 22-2175, 2022 WL 17540972, at *1 (D. Md. Dec. 8, 2022). The applicant was in India, and unable to return to his employment in the United States, without receiving the H-1B visa. His employer was not a plaintiff. The government moved to dismiss, or alternatively to transfer, for improper venue and asserted that venue was either in D.C., where DOS is located, or in North Carolina, where his H-1B employer apparently was located. *Id.* Although the court transferred the lawsuit to D.C., it is significant that the government identified

²⁷ When an entity has the capacity to sue in its own name, its principal place of business is its residence when it is a plaintiff. 28 U.S.C. § 1391(c).

the employer's place of business as an appropriate forum. *Id.* at *1-2.²⁸ *Cf. Wolfram Alpha LLC v. Cuccinelli*, 490 F. Supp. 3d 324, 339-40 (D.D.C. 2020) (venue transferred to jurisdiction where sole plaintiff company headquartered and where noncitizen/beneficiary lived and would continue to work in lawsuit challenging H-1B petition denial).

For family-based visa applications, the U.S. citizen or permanent resident who filed the underlying visa petition is often an additional plaintiff in a delay lawsuit. If so, the petitioner's U.S. residence could be the basis for venue. *Cf. Amerkhail v. Blinken*, No. 4:22-cv-149, 2022 WL 4093932 (E.D. Mo. Sept. 7, 2022) (U.S. citizen petitioner and fiancée visa applicant are plaintiffs in delay lawsuit).

²⁸ The court found no connection to Maryland other than the location of USCIS headquarters. *Id.* at *2. While the court's decision was limited to venue, USCIS likely would be dismissed as a party since it does not adjudicate a visa application. The court explained that it chose D.C. because any U.S.-based records or witnesses would be located there and not because DOS was headquartered there. *Id.* A stronger case could be made for venue where the employer is located, if the employer is also a plaintiff, since the employment interests would be stronger than the physical location of records and witnesses, which can be made available remotely.