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Cover Page Footnote

J.D. Candidate, 2009, Fordham University School of Law. I would like to thank my family, my friends, and Professor Robert Kaczorowski for all their support, patience, and input.

WAITING IN IMMIGRATION LIMBO: THE FEDERAL COURT SPLIT OVER SUITS TO COMPEL ACTION ON STALLED ADJUSTMENT OF STATUS APPLICATIONS

*Lauren E. Sasser**

This Note explores the conflict surrounding federal courts' authority to hear injunctive suits from adjustment of status applicants demanding U.S. Citizenship and Immigration Services action on significantly delayed applications. The conflict turns on whether the agency has a duty to adjudicate applications properly before it, whether it must do so in a reasonable time, and whether any statutes preclude jurisdiction. The Note argues that the agency has a duty to adjudicate applications properly before it in a reasonable time. When it violates that duty, applicants should have legal recourse in all jurisdictions.

INTRODUCTION

Akram Safadi was born in Lebanon and came to the United States as a student in 1983. After earning a Ph.D. in engineering, Safadi remained in the United States on a temporary work visa granted in 1997. In November 2002, he filed an application with U.S. Citizenship and Immigration Services (USCIS) for an adjustment to lawful permanent resident (LPR) status, a process that then typically took about six months.[1] Four years and multiple Federal Bureau of Investigation (FBI) name checks, fingerprint checks, and border inspection checks later, USCIS concluded that "issues remain requiring further inquiry," and declined to adjudicate Safadi's application.[2]

Safadi is not alone in experiencing an adjustment of status (AOS) application delay. Dr. Xiaoqing Tang is a Chinese diabetes researcher at the University of Kentucky.[3] She lives in Lexington with her husband, Dr. Guiliang Tang, and their daughter, Wendi.[4] In 2004, the family filed AOS

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1. Safadi v. Howard, 466 F. Supp. 2d 696, 697 (E.D. Va. 2006); *see infra* notes 86, 110–12 and accompanying text.

2. *Safadi*, 466 F. Supp. 2d at 697–98.

3. Guiliang Tang v. Chertoff, No. 07-203-JBC, 2007 WL 2462187, at *1 (E.D. Ky. Aug. 29, 2007).

4. *Id.*

applications to become permanent residents.[5] Three years later, Xiaoqing Tang received a $300,000 research grant from the National Institutes of Health, contingent on proof of her LPR status or evidence of meaningful progress toward that end.[6] At that time, USCIS still was processing the Tangs' applications, which were tied up in FBI name checks that, according to a USCIS fact sheet submitted at trial, take less than six months to complete ninety-nine percent of the time.[7]

The Tangs and Safadi are just four petitioners among thousands who have tried—with mixed success—to compel USCIS to decide on (or adjudicate) their AOS applications by filing original injunctive suits in district courts under writ of mandamus and Administrative Procedure Act (APA) theories.[8] The decision whether to adjust an applicant's status is at the agency's discretion by law,[9] but plaintiffs argue that the agency has a mandatory duty to conclude their applications—one way or another—within a reasonable time.[10] USCIS's response to these suits has varied, but in recent years, it has moved to have them dismissed based on lack of jurisdiction.[11] These jurisdictional challenges have created a split among district courts over their power to hear plaintiffs' suits.[12]

This Note examines the litigation commenced by AOS applicants and the government's motions to have the cases dismissed.[13] It seeks to resolve the following question: do federal courts have the authority to hear plaintiffs' injunctive suits demanding agency action on significantly delayed AOS applications? The answer turns on whether USCIS has a duty to adjudicate applications properly before it, whether it must do so in a reasonably timely manner, and whether any statutory provisions preclude federal courts from asserting jurisdiction.

Part I begins with a discussion of AOS. It explains the adjustment process and examines various institutional impediments to concluding applications quickly. Part I then surveys recent government policies for AOS applications and introduces the statutes and regulations governing the process. Part II presents the conflict over whether to grant defendants' motions to dismiss. First, it examines cases granting dismissal, including

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5. *Id.*

6. *Id.*

7. *Id.* at *1 n.2.

8. Pamela A. MacLean, *Immigrants Look to Speed Process: Suits to Compel Action on Stalled Visas Split Courts*, Nat'l L.J., July 16, 2007, at 1.

9. *See* 8 U.S.C. § 1255(a) (2000).

10. MacLean, *supra* note 8; *see infra* notes 120–22 and accompanying text.

11. MacLean, *supra* note 8.

12. *Id.*

13. This Note focuses only on adjustment of status (AOS) litigants who have met the prerequisites for AOS, *see infra* notes 40–52 and accompanying text, and whose applications are complete but for the Federal Bureau of Investigation (FBI) name checks, *see infra* notes 72–80 and Part I.B.3. This Note addresses the success of AOS litigants in surviving motions to dismiss, but not the merits of their individual cases. It also does not address any special issues raised by habeas petitions, applications made in removal proceedings, or applications for citizenship, among others.

the legal and policy justifications for those decisions. Part II goes on to evaluate the cases asserting jurisdiction and the reasons therefor. Part III seeks to resolve the conflict by advocating the position taken by federal courts declining the government's motions to dismiss. It argues that such a position is the most faithful to the letter and intent of the relevant immigration laws, the most workable, and best serves the issues underlying the AOS process and broader policy concerns.

I. AN INTRODUCTION TO ADJUSTMENT OF STATUS—AND ADJUSTMENT DELAYED

This part introduces AOS, the process that allows aliens living in the United States to become LPRs. It takes a detailed look at the procedure from applicant and agency perspectives and surveys recent government policies with respect to AOS. This part goes on to examine the institutional obstacles to timely application decisions that are at the heart of the applicants' injunctive suits. Finally, it gives a brief background on those suits, introducing the bases of litigants' claims and the statutes and regulations creating conflict among federal district courts.

A. *The Immigration and Nationality Act and U.S. Citizenship and Immigration Services*

Congress has plenary power in all matters pertaining to immigration and the regulation of alien conduct.[14] Immigration policy was set by piecemeal legislation until 1952, when Congress enacted the Immigration and Nationality Act (INA),[15] coordinating immigration law into one comprehensive statute.[16] The INA has been amended many times,[17] but it remains the foundation of U.S. immigration law.[18]

Over time, Congress delegated immigration enforcement and policy implementation to various agencies in the executive branch.[19] The Treasury Department administered immigration law until 1903, when those

14. H.R. Rep. No. 1365, at 1 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1653–54; *see also* Austin T. Fragomen, Jr. & Steven C. Bell, Immigration Fundamentals: A Guide to Law and Practice § 1:2, at 3 (4th ed. 2007). Authority is implied by U.S. Constitution Article I, Section 8, Clauses 3 and 4, and Section 9, Clause 1.

15. Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2000)).

16. Immigration and Nationality Act, http://www.uscis.gov/portal/site/uscis (follow "Laws and Regulations" hyperlink; then follow "Immigration and Nationality Act" hyperlink) (last visited Feb. 17, 2008). While it is proper to refer to INA provisions as they are codified within both the INA itself (e.g., INA § 245) and the U.S. Code (e.g., 8 U.S.C. § 1255), this Note uses the latter.

17. *Id.*; *see also* Fragomen & Bell, *supra* note 14, § 1:3, at 5–6; (detailing major reforms in 1965 and 1976, new provisions on political asylum and refugees in 1980, the Immigration Reform and Control Act of 1986, the Immigration Act of 1990, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the USA PATRIOT Act, and the Homeland Security Act).

18. David Weissbrodt, Immigration Law and Procedure: In a Nutshell 15 (4th ed. 1998).

19. Fragomen & Bell, *supra* note 14, § 1:2, at 4.

duties were transferred to what would become the Department of Labor.[20] In 1940, the Immigration and Naturalization Service (INS)—as it had been known since 1933—was moved to the Department of Justice (DOJ), where it stayed for more than sixty years.[21]

In the Homeland Security Act of 2002, Congress transferred the INS again, this time to the newly formed Department of Homeland Security (DHS), effective March 1, 2003.[22] The Homeland Security Act nominally abolished the INS and split its functions into three immigration-related bureaus: USCIS, Information and Customs Enforcement (ICE), and Customs and Border Protection (CBP).[23] Except where otherwise specified, the Homeland Security Act vested the exclusive authority to administer and enforce all immigration and naturalization law with the secretary of Homeland Security.[24] INS enforcement functions such as border security and inspections were split between CBP and ICE.[25] USCIS assumed responsibility for immigration benefits and applications, such as those for naturalization and those to change or adjust status.[26] The last of these is the topic of this Note, and the next section explains fully the process of adjusting status.

B. *Immigrating from Within: Adjusting to Lawful Permanent Resident Status*

The INA presumes that aliens[27] entering the United States intend to do so permanently—as "immigrants"[28]—unless they fit into specified nonimmigrant classes.[29] Unlike immigrants, nonimmigrants enter the United States for a limited time and purpose.[30] AOS is the process allowing nonimmigrants already physically present in the United States to "adjust" their immigration statuses to LPR,[31] essentially immigrating from within.[32] AOS is an alternative to consular processing, the more traditional

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20. Thomas Alexander Aleinikoff et al., Immigration: Process and Policy 101 n.2 (3d ed. 1995).

21. *See id.*

22. Noel L. Griswold, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 Suffolk U. L. Rev. 207, 221 (2005).

23. Fragomen & Bell, *supra* note 14, § 1:2, at 4.

24. 8 U.S.C. § 1103(a), (g) (2000 & Supp. V 2005).

25. Fragomen & Bell, *supra* note 14, § 1:4, at 20.

26. *Id.*

27. 8 U.S.C. § 1101(a)(3) (2000) (defining aliens as persons who are not U.S. citizens or U.S. nationals).

28. How Do I Get an Immigrant Visa Number?, http://www.uscis.gov/greencard (follow "Application Procedures: Becoming a Permanent Resident While in the United States" hyperlink; then follow "How Do I Get an Immigrant Visa Number?" hyperlink) (last visited Feb. 17, 2008).

29. Jain v. INS, 612 F.2d 683, 686 (2d Cir. 1979); *see* 8 U.S.C. § 1101(a)(15).

30. *Jain*, 612 F.2d at 686.

31. Lawful permanent resident (LPR) status means "having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

32. *See* Elkins v. Moreno, 435 U.S. 647, 667 (1978).

process requiring aliens to apply at U.S. consulates overseas before entering the United States.[33] AOS is codified in the INA, at 8 U.S.C. § 1255,[34] which gives the attorney general the discretionary power to grant qualified applicants LPR status.[35]

The benefits of permanent status—as opposed to that of nonimmigrant—are many. Permanent residents have the right to travel overseas freely and to petition for close family members' immigration.[36] Permanent residents also are not required to have actual dwellings in the United States. Thus, they may leave the country for prolonged periods without relinquishing their status, so long as they intend to remain residents.[37] Permanent resident status is also a requisite step in the path to U.S. citizenship.[38]

1. First Steps to Adjusting to Lawful Permanent Resident Status: Eligibility and Submitting Adjustment of Status Applications

This section introduces the steps an alien must take, and the requirements he or she must meet, to adjust status and join the group of approximately one million new permanent residents USCIS approves each year.[39] For most applicants, the process begins by obtaining USCIS approval of an immigrant petition,[40] usually in one of the three major categories of immigrant visas: family sponsored, employment based, or diversity.[41]

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33. 1 Am. Immigration Law. Assoc., Immigration & Nationality Law Handbook 229 (Randy P. Auerbach et al. eds., 2003–2004) [hereinafter Immigration Handbook]. Foreign nationals may prefer AOS to consular processing because

> (1) it avoids the expense and inconvenience of travel to the home country, (2) AOS applicants, including dependent family members, are entitled to employment authorization and permission to travel while the AOS application is pending, (3) employment-based AOS applicants receive job mobility (i.e., "portability") benefits . . . , and (4) there are more options for reconsideration of an unfavorable decision by [USCIS].

Id.

34. The regulations at 8 C.F.R. § 245.1–.11 (2006) govern eligibility and procedure for applications.

35. USCIS Instructions for Supplement A to Form I-485, Adjustment of Status Under Section 245(i) (OMB No. 1615-0023) 1 (2007) [hereinafter Supplement A Instructions], *available at* http://www.uscis.gov/files/form/i-485supainstr.pdf. While § 1255 refers only to the attorney general, the authority to adjust status was transferred to the Homeland Security secretary and his USCIS delegate in 2003. *See supra* note 24 and accompanying text. This Note follows many cases in referring to "USCIS." *See* 6 U.S.C. § 557 (Supp. V 2005).

36. Singh v. Still, 470 F. Supp. 2d 1064, 1070 (N.D. Cal. 2006).

37. Fragomen & Bell, *supra* note 14, § 1:5.4, at 35.

38. Ngwanyia v. Ashcroft, 302 F. Supp. 2d 1076, 1079–80 (D. Minn. 2004).

39. Audrey Hudson, *U.S. Faces Lawsuit on Citizenship Delays: Security Checks Take Many Years*, Wash. Times, Feb. 9, 2007, at A11.

40. *See* 8 U.S.C. § 1255(a) (2000); USCIS, How Do I Become a Lawful Permanent Resident While in the United States?, http://www.uscis.gov/greencard (follow "How Do I Become a Permanent Resident While in the United States?" hyperlink) (last visited Jan. 31, 2008).

41. Fragomen & Bell, *supra* note 14, § 1:6, at 36; *see also* USCIS Instructions for I-485, Application to Register for Permanent Residence or Adjust Status (OMB No. 1615-0023) 1–2 (2007) [hereinafter I-485 Instructions], *available at* http://www.uscis.gov/files/form/i-485instr.pdf. Within each of these three categories, visa allotment is broken down further by

Next, an immigrant visa number must be "immediately available" to an applicant.[42] After that, an applicant must apply to adjust to permanent resident status using a form provided by USCIS called "Form I-485, Application to Register Permanent Residence or Adjust Status."[43] With certain exceptions,[44] a qualified applicant must have been admitted or paroled to the United States[45] and must be physically located within its borders.[46] An applicant also must be admissible for permanent residence, must have maintained lawful nonimmigrant status,[47] engaged only in authorized employment, and must not be ineligible for AOS under § 1255(c).[48]

Generally, applicants must submit the following items with their I-485 forms: (1) documentation of any criminal history, (2) a copy of the applicant's birth certificate, (3) copies of any nonimmigrant visas obtained in the last year, (4) two passport photos, (5) a biographic information sheet, (6) a medical examination report, (7) evidence of eligibility for the category

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"preference" categories for various types of applications and again by native country. 8 U.S.C. § 1153; Fragomen & Bell, *supra* note 14, § 1:6, at 36, 42–43. For a more detailed discussion of the preference system, see Fragomen & Bell, *supra* note 14, § 1.6. Sometimes, applicants may establish with USCIS their eligibility for one of the preference categories while simultaneously applying for AOS. *See id.* § 2:1.2, at 9. Determining visa eligibility is not an issue considered in this Note, but for a discussion of the eligibility determination procedures, see *id.* § 2:1.2 (employment procedures), § 3:1.2 (family-based procedures), and § 4:2 (diversity procedures).

42. I-485 Instructions, *supra* note 41, at 1. Yearly numerical caps govern allotments to the various preference categories. *See* Fragomen & Bell, *supra* note 14, §§ 1:3.2, 1:6. Family-sponsored immigrant visas are capped at 480,000 annually; employment-based visas at 140,000; and diversity visas at 55,000. *Id.* § 1:6, at 36. Refugee and asylee visas are "not included in the annual cap" and are established by a separate annual allocation. *Id.* For immediate relatives of American citizens, visas are always deemed to be "immediately available," despite the caps. *Id.* § 2:10.2, at 124. For most applicants, however, visas are distributed chronologically, based on cutoff dates for the current processing of immigrant visa applications in each preference category. *Id.* LPR applicants with a spot on the waiting list before the cutoff date for their category have a visa "immediately available" to them. *Id.* Aliens with "immediately available" visas generally have one year from the date of notification to apply for an immigrant visa. 8 U.S.C. § 1153(g).

43. I-485 Instructions, *supra* note 41, at 1.

44. *See* 8 U.S.C. §§ 1255(g)–(i); 8 C.F.R. §§ 245.1(a), 245.8 (2007).

45. 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(b)(3). "Admitted" or "admission" means, "with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2000). "Paroled" is the term used to describe the attorney general's decision to let "into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." *Id.* § 1182(d)(5)(A). A parole is not an admission. *Id.* § 1101(a)(13)(B).

46. 8 C.F.R. § 245.1(a).

47. Supplement A Instructions, *supra* note 35, at 1. Certain exceptions to this requirement exist. For more information on these exceptions, see Fragomen & Bell, *supra* note 14, § 2:10.2[A], at 121–23.

48. Supplement A Instructions, *supra* note 35, at 1. Section 1255(c) concerns "[a]lien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa." 8 U.S.C. § 1255(c).

under which the applicant applies,[49] and (8) filing fees, including a $930 processing fee[50] and a $80 biometrics fee.[51] In some cases, applicants must also submit a police clearance, an affidavit of support, and/or an employment letter.[52] Following the initial filing, applicants are generally required to appear for biometric examinations and submit to background checks.[53] AOS is "a matter of grace, not right,"[54] but applications satisfying the criteria described above usually succeed in winning LPR status.[55]

2. On the Inside: Adjustment of Status Application Processing

This section details the AOS process from the agency's perspective. The process is case sensitive and heavily regulated, but the basic elements are the same for each application. First, USCIS issues the applicant a receipt as proof of filing.[56] It then checks for completeness of the I-485 form and other information submitted.[57] The form must establish the applicant's eligibility for immigration benefits, and if it does not, USCIS may deny the application, request more information from the applicant,[58] or send the applicant a "Notice of Intent to Deny" to afford him an opportunity to respond to the evidence meriting denial.[59]

USCIS requests most eligible applicants to appear for an interview at an agency office.[60] An applicant between the ages of fourteen and eighty must pass various background and security checks—including an FBI name check, FBI fingerprint check, and Interagency Border Inspection System (IBIS) check—to ensure that he has disclosed any criminal history and does not pose security risks.[61] Ordinarily, the checks must be complete before a

49. All of the preference categories mentioned at *supra* note 41 have various and individual approval procedures.

50. USCIS, USCIS Ombudsman 2007 Annual Report 47 (2007). Until mid-2007, the fee for AOS applications was $325. *Id.*

51. I-485 Instructions, *supra* note 41, at 3–5. Applicants adjusting status under § 1255(i) must also submit Supplement A to Form I-485 and an additional $1000 fee. *See* Supplement A Instructions, *supra* note 35, at 1.

52. I-485 Instructions, *supra* note 41, at 3–4.

53. *Id.* at 3. For a discussion of the FBI background checks, see *infra* notes 61–80 and accompanying text.

54. Elkins v. Moreno, 435 U.S. 647, 667 (1978).

55. *See In re* Arai, 13 I. & N. Dec. 494, 496 (B.I.A. 1970).

56. Immigration Handbook, *supra* note 33, at 233.

57. I-485 Instructions, *supra* note 41, at 8.

58. 8 C.F.R. § 103.2(b)(8) (2007); Rules and Regulations: Removal of the Standardized Request for Evidence Processing Timeframe, 72 Fed. Reg. 19,093, 19,100 (Apr. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 204, 214, 245, 245(a)).

59. Rules and Regulations: Removal of the Standardized Request for Evidence Processing Timeframe, 72 Fed. Reg. at 19,100.

60. I-485 Instructions, *supra* note 41, at 8; *see* 8 C.F.R. § 245.6.

61. *See* Saleem v. Keisler, 520 F. Supp. 2d 1048, 1949–50 (W.D. Wis. 2007); Safadi v. Howard, 466 F. Supp. 2d 696, 697 (E.D. Va. 2006).

final decision is possible,[62] although new USCIS policies may change that.[63]

The IBIS is a watch-listing system—an electronic warehouse of over a billion records[64] from more than twenty federal intelligence and law enforcement agencies, including the FBI, Department of State, the Central Intelligence Agency, CBP, and other DHS agencies.[65] An IBIS check usually returns information "immediately"[66] on businesses, vehicles, and individuals suspected of or involved in illegal activities.[67]

USCIS also checks an applicant's fingerprints.[68] In fiscal year 2006, the FBI ran print checks on more than three million fingerprints for USCIS, at a cost to USCIS of over $48.8 million.[69] Results are usually available in a day or two[70] and remain valid for fifteen months.[71]

Most I-485 applications require a definitive name check.[72] The FBI National Name Check Program conducts these checks for a fee and according to USCIS standards.[73] The FBI does not rule on name checks; rather, it provides the information to USCIS for its adjudication process.[74] To perform the checks, the FBI combs through law enforcement agencies' more than eighty-six million investigative files,[75] and any other criminal, personnel, administrative, or applicant files.[76] The FBI runs the check using an applicant's name and date of birth.[77] In doing so, the FBI runs combinations of some or all of the applicant's first, last, and middle names,

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62. *Saleem*, 520 F. Supp. 2d at 1050.

63. *See infra* notes 132–34 and accompanying text.

64. Review of the Terrorist Screening Centers, http://www.usdoj.gov/oig/reports/FBI/a0527/chapter2.htm (last visited Feb. 10, 2008).

65. Xin Liu v. Chertoff, No. Civ. S-06-2808 RRB EFB, 2007 WL 2433337, at *1 n.3 (E.D. Cal. Aug. 22, 2007).

66. *See id.* at *5.

67. *See* Review of the Terrorist Screening Centers, *supra* note 64.

68. I-485 Instructions, *supra* note 41, at 3.

69. USCIS, *supra* note 50, at 57.

70. *Xin Liu*, 2007 WL 2433337, at *5.

71. USCIS, *supra* note 50, at 58.

72. Interoffice Memorandum from Michael L. Aytes, Assoc. Dir., Domestic Operations, USCIS, FBI Name Checks Policy and Process Clarification for Domestic Operations 2 (Dec. 21, 2006) [hereinafter FBI Name Checks Memo], *available at* www.ailf.org/lac/lac_mandamus_aytesmemo.pdf.

73. USCIS, *supra* note 50, at 38.

74. FBI, National Name Check Program—Frequently Asked Questions, http://www.fbi.gov/page2/nationalnamecheck.htm (last visited Feb. 17, 2008). The checks "are not conducted by the FBI as part of ongoing investigations or from a need to learn more about an individual because of any threat or risk perceived by the FBI." USCIS, *supra* note 50, at 38.

75. Spencer S. Hsu & N.C. Aizenman, *FBI Name Check Cited in Naturalization Delays: Official Calls Backlog "Unacceptable,"* Wash. Post, June 17, 2007, at A1.

76. Xin Liu v. Chertoff, No. Civ. S-06-2808 RRB EFB, 2007 WL 2433337, at *1 n.3 (E.D. Cal. Aug. 22, 2007).

77. FBI Name Checks Memo, *supra* note 72, at 2. Occasionally, the FBI uses the place of birth where cases "are returned with an initial response of 'pending.'" *Id.* at 3. Alien Registration Numbers are not used in the name check process. *Id.*

as well as phonetic variations and similar spellings.[78] Additionally, they run automatic variations on the applicant's date of birth, searching the entire birth year.[79] Like fingerprint checks, name checks are valid for fifteen months.[80]

Once the application is complete, USCIS makes a decision whether to grant LPR status, and applicants receive notifications of these decisions by mail.[81] Denial notifications include the reasons therefor[82] and generally may not be appealed.[83] Applicants retain the right, however, to renew their applications in any removal proceedings that ensue after they are initially denied LPR status.[84]

3. Bureaucratic Hiccups: Waiting for an Outcome

Neither the INA nor its regulations set out a time frame for the application and security processes just described,[85] but ninety-nine percent of the time the entire AOS process takes less than six months.[86] Nevertheless, many applicants find themselves in a "bureaucratic nightmare," waiting years for a decision.[87] The delay has several causes, but in recent years, unresolved FBI name checks have been its chief source,[88] and a new processing backlog is likely to be a further obstacle to timely adjudication.[89]

FBI name checks usually are not problematic. About sixty-eight percent return no identifiable information on an individual within forty-eight to seventy-two hours.[90] Ninety percent of the name checks clear with "no record" within sixty days,[91] and overall less than one percent of the 1.5

78. *Id.* at 2–3.

79. *Id.* at 3. Because of the variations in FBI searches both with respect to name and date of birth, misspellings, alias names, and discrepancies within the day and month of an applicant's submission do not warrant resubmission of the checks. *Id.*

80. *Id.* at 4.

81. 8 C.F.R. § 103.2(b)(19) (2007).

82. *Id.* § 245.2(a)(5).

83. *Id.* § 245.2(a)(5)(ii).

84. *Id.* For more on removal proceedings, see *id.* § 240. Denied applicants may also reapply for immigrant visas in their home countries. Aleinikoff et al., *supra* note 20, at 441.

85. *See* 8 U.S.C. § 1255(a) (2000) (mentioning no time frame); 8 C.F.R. § 245 (same).

86. Guiliang Tang v. Chertoff, No. 07-203-JBC, 2007 WL 2462187, at *1 n.2 (E.D. Ky. Aug. 29, 2007). *But see infra* note 112 and accompanying text.

87. Paunescu v. INS, 76 F. Supp. 2d 896, 902 (N.D. Ill. 1999).

88. USCIS, *supra* note 50, at iv; *see, e.g.*, Yazbek v. Chertoff, No. 07-12566, 2007 WL 2875462, at *1 (E.D. Mich. Oct. 1, 2007); *Guiliang Tang*, 2007 WL 2462187, at *1. Fingerprint and IBIS checks usually return results in a matter of days, if not minutes. USCIS, *supra* note 50, at 38; *see supra* notes 66, 70 and accompanying text.

89. *See infra* notes 105–12 and accompanying text.

90. Guangming Liu v. Chertoff, No. 06-3297, 2007 WL 1202961, at *2 (C.D. Ill. Apr. 23, 2007).

91. Ma v. Gonzales (*Ma II*), No. C07-122RSL, 2007 WL 2743395, at *2 (W.D. Wash. Sept. 17, 2007).

million names USCIS submits each year are ultimately linked to potentially negative information.[92]

Nevertheless, the USCIS ombudsman called FBI name check delays the "single biggest obstacle" to timely application processing in his yearly report.[93] Before the terrorist attacks on September 11, 2001 (9/11), the FBI processed about 2.5 million name check requests each year.[94] Since then, the checks have been intensified and are now run "not only against the list of individuals under investigation by the FBI but also against the list of those named in investigative files for any reason."[95] Pursuant to this change in policy, USCIS resubmitted 2.7 million names for reexamination at the end of 2002—and the FBI is only recently getting through them.[96] The resubmission contributed to a name check backlog that continues to saddle the FBI. The backlog has doubled in size since 2005,[97] even though in 2006 alone the FBI processed more than 3.4 million name checks.[98]

Each week, the FBI receives over 62,000 name check requests, 27,000 of which come from USCIS.[99] In May 2007, USCIS had 329,160 name checks pending with the FBI, approximately sixty-four percent of which had been stalled for more than ninety days, thirty-two percent for more than one year,[100] and seventeen percent for more than two years.[101] Of these, 31,144 have been pending for more than thirty-three months—roughly 10,000 more such checks than in 2006.[102]

Institutional issues at USCIS compound the FBI name check problem and are another source of delayed application decisions. The agency "has long been criticized as a slow and confounding bureaucracy."[103] It is chronically underresourced[104] and has a processing backlog that is "different from the visa backlogs that have burdened the United States

92. *Id.*
93. USCIS, *supra* note 50, at 37.
94. *Guangming Liu*, 2007 WL 1202961, at *1.
95. Hsu and Aizenman, *supra* note 75.
96. *Id.*
97. *Id.*
98. *Guangming Liu*, 2007 WL 1202961, at *1.
99. FBI, *supra* note 74.
100. USCIS Ombudsman, 2007 Annual Report Highlights 2 (2007) [hereinafter Ombudsman 2007 Highlights], *available at* http://www.dhs.gov/xlibrary/assets/cisomb_annualrpt07__June_11_2007_highlights.pdf.
101. Hsu & Aizenman, *supra* note 75.
102. Ombudsman 2007 Highlights, *supra* note 100, at 2.
103. Julia Preston, *Legal Immigrants Facing a Longer Wait*, N.Y. Times, Jan. 18, 2008, at A13.
104. USCIS is funded primarily by user fees and does not receive regular congressional appropriations. USCIS, *supra* note 50, at 47. In 2001, however, Congress approved a $500 million package to help the agency reduce its backlog. Stephen Dinan, *Immigration Reduces Big Backlog: Will Meet Six-Month Goal in October, Official Says*, Wash. Times, Sept. 16, 2006, at A1. Another $160 million came in 2005. Press Release, DHS, Fact Sheet: Department of Homeland Security Appropriations Act of 2005 (Oct. 18, 2004), *available at* http://www.dhs.gov/xnews/releases/press_release_0541.shtm. By March 2007, the backlog was down to around 1.3 million, but USCIS needed more funds to maintain its reduction efforts. USCIS, *supra* note 50, at 11–12; *see* Dinan, *supra*.

immigration for years."[105] Processing backlogs arise when USCIS falls "behind on the bureaucratic work of logging in applications and deciding whether to grant visas,"[106] and they leave many applicants waiting months just to receive initial application receipts.[107]

In early 2007, then–USCIS Director Emilio Gonzalez announced a fee increase for immigration applications of all kinds—and a hike of nearly 150% for AOS application processing[108]—effective July 30.[109] He promised the agency would use the new funds to prevent future backlogs and reduce the waiting time for permanent resident visas from six to four months by the end of 2008.[110] The prospect of higher fees, however, precipitated a deluge of more than three million applications for immigration benefits of all kinds that Gonzalez called "unprecedented in the history of immigration services of our nation."[111] Gonzalez now estimates that until 2010, permanent residency applications that used to take six months or less to process will take about a year.[112]

C. *Addressing the Long, Long Wait*

As Part I.B explained, uncompleted name checks have been the primary source of application delay in recent years. Recently implemented policy changes could remedy that,[113] but the practicability of those changes remains to be tested, and a new processing backlog[114] could frustrate timely adjudication efforts. Regardless of their source, delays significantly affect AOS applicants' lives. Many of them cannot travel abroad to visit their families because they would not be permitted to reenter the United States.[115] In the course of waiting, the labor certifications underlying employment-based applications may be invalidated by changes in

105. Julia Preston, *Surge Brings New Immigration Backlog*, N.Y. Times, Nov. 23, 2007, at A26; *see also* sources cited *supra* note 42.

106. Preston, *supra* note 105.

107. *See id.* Initial receipts are the first step in AOS application processing. *See supra* note 56 and accompanying text. For example, the USCIS Ombudsman wrote in his 2007 report that "USCIS' inability to process enough green card applications and accurately track employment-based green card applications has resulted in a perpetual backlog of employment-based green card applications." USCIS, *supra* note 50, at iv. USCIS does not include in its backlog the 155,592 cases pending more than six months due to FBI name checks. *Id.* at 37.

108. Bob Egelko & Matthai Chakko Kuruvila, *Faced with Lawsuit, U.S. Finally Grants Residency to Immigrants*, S.F. Chron., Feb. 9, 2007, at B2.

109. Preston, *supra* note 103. As of the publication of this Note, a successor had not been named to Emilio Gonzalez's position. *See* Julia Preston, *Top Immigration Official to Resign in April*, N.Y. Times, Mar. 14, 2008, at A22 (indicating that Emilio Gonzalez had announced his resignation).

110. *See* Preston, *supra* note 103.

111. *Id.*; *see also* Editorial, *Citizenship Blues*, N.Y. Times, Feb. 17, 2008, at WK11 ("[T]he agency is drowning in applications from people who filed before the [fee] increase to avoid being gouged.").

112. Preston, *supra* note 103.

113. *See infra* notes 132–35 and accompanying text.

114. *See supra* notes 105–12 and accompanying text.

115. *See* Hsu & Aizenman, *supra* note 75.

applicants' duties and responsibilities.[116] Applicants may also lose job opportunities that require them to be permanent residents.[117] Other problems arise in purchasing property, qualifying for in-state tuition, and obtaining drivers' licenses, federal grants and funds, credit, and student loans.[118] Furthermore, delay postpones the naturalization process, which requires applicants to have had LPR status for five years.[119]

In the face of these problems, frustrated applicants have increasingly taken their cases to court, filing suits to force the government to act on their stalled applications.[120] Applicants generally argue that they have a right to a decision in a reasonable time and assert their claims based on the APA and the Mandamus and Venue Act (MVA).[121] They typically claim that one or all of the U.S. attorney general, DHS, FBI, USCIS and its local directors, and DOJ have unreasonably delayed their duty to adjudicate AOS applications.[122] Part I.C.1, below, details USCIS's vacillating position regarding these injunctive suits. Part I.C.2 introduces the statutes underlying plaintiffs' claims, the MVA and the APA. Finally, Part I.C.3 presents the INA provisions and implementing regulations at the heart of the conflict over whether to grant government motions to dismiss.

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116. Fragomen & Bell, *supra* note 14, § 2:10.1.

117. USCIS, *supra* note 50, at 39.

118. *Id.*

119. Xin Liu v. Chertoff, No. Civ. S-06-2808 RRB EFB, 2007 WL 2433337, at *6 n.13 (E.D. Cal. Aug. 22, 2007) (citing Singh v. Still, 470 F. Supp. 2d 1064, 1070 (N.D. Cal. 2006)).

120. *See supra* note 8 and accompanying text; *see also infra* note 130 and accompanying text.

121. The plaintiffs have also sued under the Declaratory Judgment Act, 28 U.S.C. § 2201 (2000), but courts agree that § 2201 "does not provide an avenue of relief for . . . plaintiffs." Zalmout v. Gonzalez, No. 07-12575, 2007 WL 3121532, at *2 (E.D. Mich. Oct. 24, 2007); *accord* Yong Tang v. Chertoff, 493 F. Supp. 2d 148, 151 (D. Mass. 2007).

122. *See, e.g.*, Ma v. Gonzales (*Ma II*), No. C07-122RSL, 2007 WL 2743395, at *3, 4 (W.D. Wash. Sept. 17, 2007). Courts have held that since the Department of Homeland Security (DHS) "is the agency responsible for implementing the [INA], . . . the only relevant [d]efendant is . . . [the] Secretary of the Department of Homeland Security." Dmitriev v. Chertoff, No. C 06-07677 JW, 2007 WL 1319533, at *4 (N.D. Cal. May 4, 2007). Thus, they dismiss all other defendants, including the FBI and its director and the attorney general and the Department of Justice. *Id.* at *1, 4; *accord* Huang v. Chertoff, No. C 07-0277 JF, 2007 WL 1831105, at *3 (N.D. Cal. June 25, 2007). Other courts have similarly held that since "USCIS is a division of the DHS," it was therefore a proper party. Konchitsky v. Chertoff, No. C-07-00294 RMW, 2007 WL 2070325, at *6 (N.D. Cal. July 13, 2007); *accord Ma II*, 2007 WL 2743395, at *3. A number of courts found that they lacked "jurisdiction to compel the FBI to perform name checks in connection with adjustment of status applications, reasoning that the FBI's involvement in processing name checks arises not by statute or regulation, but by contract between USCIS and FBI." *Ma II*, 2007 WL 2743395, at *3; *see also* Mitova v. Chertoff, No. 07-2631, 2007 WL 4373045, at *6 (E.D. Pa. Dec. 13, 2007); *Konchitsky*, 2007 WL 2070325, at *6.

1. U.S. Citizenship and Immigration Services Policy for Delayed Applications

As part of its efforts to reduce the name check backlog described earlier, USCIS issued a notice in January 2005 stating that it would request expedited name checks for AOS and citizenship applicants with mandamus lawsuits pending in federal court.[123] Although AOS applicants had utilized mandamus in situations of delayed AOS adjudication before,[124] USCIS's new policy prompted a wave of thousands of new suits from frustrated AOS applicants.[125] In the past, immigration officials had challenged such suits, moving to have the petitions dismissed for failure to state a claim for which relief can be granted and/or lack of subject matter jurisdiction.[126] Based on the January 2005 policy, however, after suits were filed USCIS requested that the FBI expedite the name checks, resolving cases quickly.[127]

Then, in December 2006, USCIS implemented a "first in, first out" policy for name checks.[128] The new policy provided that "[i]n the interest of fairness and in processing cases chronologically mandamus filings are no longer routinely treated expeditiously."[129] Despite the agency's change of course, frustrated applicants continued to file suits.[130] The government,

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123. Notice, USCIS, FBI Name Check Expedite Criteria (Jan. 2005) [hereinafter Expedite Criteria], *available at* http://immigrationvoice.org/media/forums/iv/others/Exhibit5FBINamecheckexpeditecriteria.pdf; *see also* MacLean, *supra* note 8. *See generally infra* Part I.C.2 and accompanying text. USCIS also requested expedited name checks if an applicant could establish imminent military deployment, "[a]ge-out benefits (not covered under the provision of the Child Status Protection Act)," a grant of lawful permanent residence from an immigration judge, or "[c]ompelling reasons as provided by the requesting office (i.e. critical medical condition) assessed on a case by case basis." Expedite Criteria, *supra*.

124. *See, e.g.*, Yu v. Brown, 36 F. Supp. 2d 922 (D.N.M. 1999); Agbemaple v. INS, No. 97 C 8547, 1998 WL 292441 (N.D. Ill. May 18, 1998); *see also* Nadler v. INS, 737 F. Supp. 658 (D.D.C. 1989).

125. MacLean, *supra* note 8; *see also* Emily Bazar, *Immigrants Sue to Speed Citizenship: Residents Tired of Long Delays in Background Checks Turn to Courts to Remove Barriers*, USA Today, Feb. 22, 2008, at 3A ("In 2005, about 270 lawsuits filed against USCIS were over delayed name checks . . . . [In 2007], there were more than 4,400 such suits.").

126. *See* Fed. R. Civ. P. 12(b)(1), (6); *see, e.g.*, *Yu*, 36 F. Supp. 2d at 926–27; *Agbemaple*, 1998 WL 292441, at *1.

127. MacLean, *supra* note 8.

128. Ma v. Gonzales (*Ma II*), No. C07-122RSL, 2007 WL 2743395, at *3 (W.D. Wash. Sept. 17, 2007); FBI Name Checks Memo, *supra* note 72, at 5–6.

129. FBI Name Checks Memo, *supra* note 72, at 5–6; *see also* Update, USCIS, USCIS Clarifies Criteria to Expedite FBI Name Check: Federal Litigation Removed as Sole Basis to Expedite Check (Feb. 20, 2007) [hereinafter USCIS Expedited Name Check Clarification], *available at* http://www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf (retaining the expedite policy in limited situations but stating that USCIS "is no longer routinely requesting the FBI to expedite a name check when the only reason for the request is that a mandamus (or other federal petition) is filed in the case").

130. *See* Bazar, *supra* note 125. There has been a fourfold increase in suits against USCIS since mid-2006. Hsu & Aizenman, *supra* note 75. Generally, AOS litigants have waited two to five years between filing their applications and pursuing remedies in court. *See, e.g.*, Mitova v. Chertoff, No. 07-2631, 2007 WL 4373045, at *1 (E.D. Pa. Dec. 13,

however, no longer responded by quickly concluding the applications, but instead returned to its previous policy of challenging the claims.[131] These challenges led to the fractured decisions that are the issue of this Note and discussed in Part II. The courts are split as to whether they have the authority to hear applicants' cases.

In February 2008, USCIS changed course once again. Now, if an LPR application "has been in the system for more than six months and the only missing piece is a name check by the F.B.I.,"[132] USCIS officials "shall approve the . . . [application] and proceed with card issuance."[133] The new policy provides that the name check will still be completed eventually and, "[i]n the unlikely event" that it turns up negative information, USCIS may cancel the visa and begin deportation proceedings.[134] The policy change, however, does not resolve the question of whether federal courts have the power to hear AOS applicants' injunctive suits—a question that may become very important for applicants mired in USCIS's new processing backlog or in the event that USCIS changes its policy again. Nor does the new policy say whether USCIS will stop challenging applicants' suits. Presumably, the suits will no longer be necessary when name checks are the cause of delay, since those will be automatically expedited. Nevertheless, immigration "officials are still reviewing how to implement the new policy," and as of this Note's writing, officials "could not say when they will start issuing green cards from the backlog."[135]

2007) (three years); Korobkova v. Jenifer, Civil Case No. 07-11335, 2007 WL 3245178, at *1 (E.D. Mich. Nov. 2, 2007) (more than two years); Saleem v. Keisler, 520 F. Supp. 2d 1048, 1049 (W.D. Wis. 2007) (almost five years); Zalmout v. Gonzalez, No. 07-12575, 2007 WL 3121532, at *1 (E.D. Mich. Oct. 24, 2007) (four years); Gershenzon v. Gonzalez, No. 07-109, 2007 WL 2728535, at *1 (W.D. Pa. Sept. 17, 2007) (three years); Landry v. Chertoff, No. 07-0506, 2007 WL 2007996, at *1 (E.D. La. July 5, 2007) (two and a half years). *But see, e.g.*, Houle v. Riding, No. CV-F-07-1266-LJO-GSA, 2008 WL 223670, at *1 (E.D. Cal. Jan. 28, 2008) (less than two years); Ibrahim v. Chertoff, No. 06cv2071-L (POR), 2007 WL 1558521, at *1 (S.D. Cal. May 25, 2007) (over seven years).

131. *See* MacLean, supra note 8; *see, e.g.*, *Ma II*, 2007 WL 2743395, at *3. These cases hinge on the courts' "resolution of the legal question whether the pace of [USCIS's] adjudication [of AOS applications] lies within or outside the discretion of that agency. Therefore, it is of no practical import" whether defendants move to dismiss under Rule 12(b)(1) or Rule 12(b)(6). He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *2 (N.D. Ill. Jan. 2, 2008).

132. Julia Preston, *Rules Eased to Expedite Green Card Applications*, N.Y. Times, Feb. 12, 2008, at A12.

133. Interoffice Memorandum from Michael L. Aytes, Assoc. Dir., Domestic Operations, USCIS, Revised National Security Adjudication and Reporting Requirements 2 (Feb. 4, 2008) [hereinafter Aytes Memo 2008], *available at* http://www.uscis.gov/files/pressrelease/DOC017.PDF.

134. *Id.* at 1.

135. Susan Carroll, *Green Cards Will Go Out, Background Check or Not: Move Meant to Ease Huge Backlog of Applicants, but Critics Warn It's a Threat to Security*, Hous. Chron., Feb. 12, 2008, at A1.

2. Applicants Make a Federal Case of It

The following sections introduce the MVA and the APA, the statutes upon which the vast majority of applicants have built their claims for relief.

a. *The Mandamus and Venue Act*

The common law remedy of mandamus was codified in the Mandamus and Venue Act of 1962.[136] Entitled "Action to compel an officer of the United States to perform his duty," the statute grants federal courts jurisdiction to compel government officials to carry out ministerial duties.[137] The court's power to intervene depends on the nature of the official's duty,[138] and relief "will issue only to compel the performance of 'a clear nondiscretionary duty.'"[139] It is an "extraordinary remedy."[140] To win relief under the statute, a petitioner must establish that "(1) [his] 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."[141]

Mandamus actions have had mixed success in immigration.[142] In the context of AOS applications, plaintiffs generally claim mandamus is proper because USCIS has a plainly prescribed, nondiscretionary duty to make a final decision on pending applications, and further that the agency's significant delays make their claims clear and certain.[143]

b. *The Administrative Procedure Act*

The APA codified a "developing common law presumption in favor of judicial review of administrative action."[144] Its premise is that "[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

136. Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. § 1361 (2000)).

137. *Id.* ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

138. Work v. United States *ex rel* Rives, 267 U.S. 175, 177 (1925).

139. Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988) (quoting Heckler v. Ringer, 466 U.S. 602, 616 (1984)).

140. *Id.*

141. Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997).

142. *See* AILF Legal Action Ctr., *Mandamus Actions: "How to" and Summary of Relevant Case Law*, *in* Immigration Handbook, *supra* note 33, at 61, 65 (surveying areas of immigration law other than AOS where the plaintiff alleged that the defendant had a nondiscretionary duty to act).

143. *See infra* Part II.B.5.b. The plaintiffs seek to compel the adjudication of their AOS applications, but not the substance of that decision, which is explicitly left to agency discretion. *See* 8 U.S.C. § 1255(a) (2000).

144. Cynthia Tripi, *Availability of Judicial Review of Administrative Action*, 55 Geo. Wash. L. Rev. 729, 729 (1986).

entitled to judicial review thereof."[145] A "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."[146] "[A]gency action" is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[147] A "failure to act" is a failure to take a discrete, required action.[148] To make a case under the statute, plaintiffs must establish "(1) a clear duty owed to him or her by the agency; (2) a duty which is mandatory and not discretionary; and (3) a clear right to relief."[149] To establish subject matter jurisdiction, however, a plaintiff needs to show only "that a defendant (1) had a nondiscretionary duty to act, and (2) unreasonably delayed in acting on that duty."[150]

The judicial review provisions of the APA have applied to the INA since the INA's enactment in 1952.[151] Plaintiffs in AOS suits ground their claims challenging application delays in § 555(b), which commands that "[w]ith 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."[152] The case law does not clearly indicate which party bears the burden of proving the reasonableness or unreasonableness of a delay.[153] Nor is "unreasonable delay" conclusively defined, although the circuit courts have found that it can exist even where the relevant statute does not specify a timeline for agency action.[154]

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145. 5 U.S.C. § 702 (2000); *see also* Tripi, *supra* note 144, at 729–30. The Administrative Procedure Act (APA) does not supply independent subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 105–07 (1977). Courts typically derive the authority to review agency action from the federal question statute. *See* 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); Tripi, *supra* note 144, at 730 n.3.

146. 5 U.S.C. § 706(1).

147. *Id.* § 551(13).

148. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62–63 (2004).

149. Yu v. Brown, 36 F. Supp. 2d 922, 930 (D.N.M. 1999) (citing Hernandez-Avalos v. INS, 50 F.3d 842, 844 (10th Cir. 1995)). Unlike relief under the mandamus statute, the APA does not require exhaustion of other remedies unless a statute mandates it or there is no provision for staying an administrative decision pending an administrative appeal. H. Ronald Klasko & Geoffrey Forney, Federal Court Litigation to Remedy Agency Delays 3 (2007), *available at* www.klaskolaw.com/library/files/federa~1.pdf (citing Darby v. Cisneros, 509 U.S. 137, 153–54 (1993)).

150. Xin Liu v. Chertoff, No. Civ. S-06-2808 RRB EFB, 2007 WL 2433337, at *3 (E.D. Cal. Aug. 22, 2007) (citing *Norton*, 542 U.S. at 63–65); *see also* Singh v. Still, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2006) (citing 5 U.S.C. § 555(b)).

151. *See* Gerald Seipp, *Federal Court Jurisdiction to Review Immigration Decisions: A Tug of War between the Three Branches* [07-04] Immigr. Briefings (West) 3 (Apr. 2007).

152. 5 U.S.C. § 555(b).

153. *See* Saleem v. Keisler, 520 F. Supp. 2d 1048, 1059 (W.D. Wis. 2007); *see also id.* (reviewing the case law and assigning the burden to the defendants because they had the best access to the information regarding the delay and adjustment applications).

154. Frey v. EPA, 403 F.3d 828, 834 (7th Cir. 2005) (expressing doubt, in dicta, that the agency should be protected from review "as long as [the agency] has any notion that it might, some day, take further unspecified action"); *Saleem*, 520 F. Supp. 2d at 1058 (finding unreasonable delay possible "even if the 'agency has no concrete deadline establishing a date by which it must act'" (quoting Forest Guardians v. Babbitt, 164 F.3d 1261, 1271 (10th Cir. 1998))).

The APA sets out two exceptions to general principles in favor of review,[155] both of which are important to the availability of the APA in AOS litigation.[156] First, § 701(a)(1) forecloses review where a statute specifically precludes it.[157] To satisfy § 701(a)(1), Congress must provide "clear and convincing evidence" of its intention to preclude review[158] through either the language or construction of the relevant statute.[159] The statute's "scheme, objectives, legislative history, and [the] nature of the administrative action involved are valid indicators of intent to preclude judicial review,"[160] so long as congressional intent to do so is "fairly discernible in the statutory scheme."[161]

Second, § 701(a)(2) forbids review if an agency's action is committed to its discretion by law.[162] It encompasses situations where the statute at issue provides "no meaningful standard against which to judge the agency's exercise of discretion."[163] In these "rare"[164] situations, "'the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely.'"[165]

c. *The Mandamus and Venue Act and the Administrative Procedure Act?*

While APA and mandamus remedies are "technically distinct[,] . . . relief is identical under either statute."[166] Thus, in recent years, "the Supreme Court has run together challenges to agency delay under the APA with the traditional *mandamus* requirements."[167] It has held that APA claims can only go forward "where the plaintiff asserts that 'an agency failed to take a discrete agency action that it is required to take.' These requirements reflect the traditional *mandamus* 'ministerial' element which normally limits the court's power to compel precise and definite acts over which an agency official has no discretion."[168]

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155. *See infra* notes 180–84 and accompanying text.

156. 5 U.S.C. § 701(a).

157. The full text of § 701(a)(1) reads, "This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review . . . ." *See also* Zheng v. Reno, 166 F. Supp. 2d 875, 878 (S.D.N.Y. 2001).

158. Shah v. Hansen, No. 1:07 CV 1576, 2007 WL 3232353, at *4 (N.D. Ohio Oct. 31, 2007) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)).

159. Tripi, *supra* note 144, at 732 (citing Heckler v. Chaney, 470 U.S. 821, 828 (1985)).

160. *Id.*

161. *Id.* at 733 (quoting Ass'n Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970)).

162. 5 U.S.C. § 701(a)(2) (2000). The full text of the provision reads, "This chapter applies, according to the provisions thereof, except to the extent that— . . . (2) agency action is committed to agency discretion by law." *Id.*

163. *Heckler*, 470 U.S. at 830.

164. Lincoln v. Vigil, 508 U.S. 182, 191 (1993).

165. *Id.* (quoting *Heckler*, 470 U.S. at 830).

166. Landry v. Chertoff, No. 07-0506, 2007 WL 2007996, at *2 n.4 (E.D. La. July 5, 2007) (citing Indep. Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997)).

167. Klasko & Forney, *supra* note 149, at 10.

168. *Id.* (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63–64 (2004)).

3. Sources of Conflict in the Immigration and Nationality Act

The chief sources of conflict in AOS applicants' APA and mandamus cases stem from different interpretations of two INA provisions. The first is the meaning of the word "discretion" in § 1255(a); the second is the preclusionary language found in § 1252(a)(2)(B)(ii). This section unpacks the language and some of the ambiguities of those two provisions and other relevant sections of the INA and its implementing regulations.

a. *The "Discretionary" Authority to Adjust Status: 8 U.S.C. § 1255(a)*

Congress enacted § 1255(a) in 1952 so that "aliens would not inevitably be required to leave the country and apply to a United States consul in order to obtain permanent-resident status."[169] Section 1255(a) gives USCIS the discretionary authority to adjust eligible applicants' status to that of legal permanent resident[170] and sets out AOS applicant requirements.[171] Courts disagree on what else § 1255(a) captures in its "discretion," aside from the actual decision whether or not to grant AOS. Specifically, they dispute whether it captures everything leading up to that decision, or only certain elements, such as active steps in the process. The competing approaches are discussed in Part II.[172]

b. *Precluding Judicial Review: 8 U.S.C. § 1252(a)(2)(B)(ii)*

Despite the INA section's name, "Judicial review of orders of removal,"[173] most courts have taken a broad view of its applicability, particularly with respect to § 1252(a)(2)(B),[174] "Denials of discretionary relief," which sets out instances where judicial review is unavailable. The provision states, in relevant part,

> Notwithstanding any other provision of law *(statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, . . . and regardless of whether the judgment, decision, or action is made in removal proceedings*, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under . . . section 1255 . . . , or

169. INS v. Bagamasbad, 429 U.S. 24, 25 n.* (1976) (emphasis omitted).

170. *See supra* notes 34–35 and accompanying text.

171. *See supra* notes 40–53 and accompanying text. Section 1255(a) reads, in relevant part, "The status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence . . . ." 8 U.S.C. § 1255(a) (2000).

172. *Compare infra* Part II.A.1, *with infra* Part II.B.1–2.

173. 8 U.S.C. § 1252 (2000 & Supp. V 2005).

174. Seipp, *supra* note 151, at 2.

> (ii) any other decision or action of the Attorney General *or the Secretary of Homeland Security* the authority for which is specified under this subchapter to be in the discretion of the Attorney General *or the Secretary of Homeland Security* . . . .[175]

Congress added this jurisdiction-stripping provision in 1996 to replace an affirmative grant of jurisdiction under a previous statute and to forbid federal courts' jurisdiction to review certain USCIS decisions.[176] The REAL ID Act of 2005 added the italicized language,[177] which extended the statute beyond the removal context, resolving a disagreement among the circuit courts about whether § 1252(a)(2)(B)(ii) applied only in removal cases.[178]

Disagreement continues, nonetheless. In the AOS cases at issue, judges agree that the jurisdiction-stripping language in subsection (i) precludes judicial review of the actual discretionary decision whether to adjust an applicant's status, but they dispute which other aspects of the AOS process subsection (ii) encompasses, specifically the pace at which the process proceeds and what actions during the process USCIS must take.[179] Part II explores these different interpretations in depth, but "longstanding principles of statutory construction"[180] provide that there is generally a "strong presumption in favor of judicial review of administrative action,"[181] and of interpreting statutes to allow judicial review of agency action,[182] even if Congress did not specifically provide for it.[183] Ambiguities are usually resolved in favor of aliens.[184]

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175. 8 U.S.C. § 1252(a)(2)(B) (emphasis added); *see infra* note 177 and accompanying text. Asylum and naturalization decisions are not included in the bar on jurisdiction. *See* 8 U.S.C. § 1252(a)(2)(B)(ii). The "subchapter" specified refers to *id.* §§ 1151–1378. Section 1361 refers to the mandamus statute and § 1651 refers to the All Writs Act.

176. Houle v. Riding, No. CV-F-07-1266-LJO-GSA, 2008 WL 223670, at *2 (E.D. Cal. Jan. 28, 2008).

177. REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101(f)(2), 106(a)(1)(ii), 106(b), 119 Stat. 231, 305, 310–11 (codified at 8 U.S.C. § 1252(a)(2)(B)).

178. Mary Kenney, Am. Immigration Law Found., Federal Court Jurisdiction over Discretionary Decisions After REAL ID: Mandamus, Other Affirmative Suits and Petitions for Review 3 (2006), *available at* http://www.ailf.org/lac/realid_update_040506.pdf; *see also* ANA Int'l, Inc. v. Way, 393 F.3d 886, 891 n.3 (9th Cir. 2004) (finding that "[t]he Sixth, Tenth, and Seventh Circuits have held that [it] does apply outside the context of removal decisions," while "[s]everal district courts . . . have held that [it] applies only to decisions made in the course of removal proceedings" (citations omitted)).

179. Safadi v. Howard, 466 F. Supp. 2d 696, 698–99 (E.D. Va. 2006).

180. Iddir v. INS, 301 F.3d 492, 496 (7th Cir. 2002).

181. INS v. St. Cyr, 533 U.S. 289, 298 (2001).

182. Yu v. Brown, 36 F. Supp. 2d 922, 933–34 (D.N.M. 1999) (citing McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991)).

183. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) ("[J]udicial review of . . . agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

184. *Iddir*, 301 F.3d at 497.

c. *Regulations at Issue and Other Relevant Statutory Provisions*

Several regulations related to AOS are relevant to the courts' analyses.[185] The directives and procedures they contain influence the courts' perspectives on the litigants' rights and inform their interpretations of § 1255(a) and § 1252(a)(2)(B)(ii). Section 103.2(b)(18), for example, details the procedure for immigration officials to use if and when they need to withhold an application.[186] Section 245.6 commands that certain AOS applicants "shall be interviewed by an immigration officer," although it provides for the interview to be waived in certain circumstances, including "when it is determined by the Service that an interview is unnecessary."[187] Several provisions set out the steps to be taken following decisions on applications, directing the agency to notify applicants of the outcomes and record those granted LPR status.[188]

185. INA regulations are all contained in title 8 of the Code of Federal Regulations.

186. 8 C.F.R. § 103.2(b)(18) (2007). The full text of the regulation, entitled "Withholding adjudication" reads,

> A district director may authorize withholding adjudication of a visa petition or other application if the district director determines that an investigation has been undertaken involving a matter relating to eligibility or the exercise of discretion, where applicable, in connection with the application or petition, and that the disclosure of information to the applicant or petitioner in connection with the adjudication of the application or petition would prejudice the ongoing investigation. If an investigation has been undertaken and has not been completed within one year of its inception, the district director shall review the matter and determine whether adjudication of the petition or application should be held in abeyance for six months or until the investigation is completed, whichever comes sooner. If, after six months of the district director's determination, the investigation has not been completed, the matter shall be reviewed again by the district director and, if he/she concludes that more time is needed to complete the investigation, adjudication may be held in abeyance for up to another six months. If the investigation is not completed at the end of that time, the matter shall be referred to the regional commissioner, who may authorize that adjudication be held in abeyance for another six months. Thereafter, if the Associate Commissioner, Examinations, with the concurrence of the Associate Commissioner, Enforcement, determines it is necessary to continue to withhold adjudication pending completion of the investigation, he/she shall review that determination every six months.

187. *Id.* § 245.6.

188. *Id.* § 245.2(a)(5). The text of the regulation reads, in relevant part,

> (i) *General.* The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial. (ii) *Under section 245 of the Act.* If the application is approved, the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of status. An application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State . . . . No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. . . . (iii) *Under the Act of November 2, 1966.* If the application is approved, the applicant's permanent residence shall be recorded in accordance with the provisions of section 1.

Id.; *see also id.* § 209.2(f) (containing same directives as § 245.2(a)(5) for asylum AOS applicants).

Other statutory provisions of the INA influence the opinions discussed in Part II as well. For example, 8 U.S.C. § 1103, describing the powers and duties of the highest-ranking immigration officials, dictates that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens."[189] Section 1571, detailing the purposes and policy of the subchapter, avers, "It 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 . . . ."[190] These INA provisions, together with other statutes and regulations introduced in this part, are at the heart of the split among federal courts concerning whether to grant the government's motions to dismiss the AOS suits. Issues related to the FBI name checks and systemic agency problems discussed earlier also shape the split. The next part of this Note examines the opposing conclusions of federal courts.

II. THE DISTRICT COURTS SPEAK—AND DISAGREE: THE SPLIT OVER MOTIONS TO DISMISS THE APPLICANTS' CASES[191]

District courts do not agree on whether to dismiss AOS applicants' injunctive suits claiming that USCIS violated a duty to adjudicate applications within a reasonable time. This part examines that split of authority. It refers to the courts granting defendants' motions to dismiss as "dismissing courts," and those allowing plaintiffs' claims to survive as "asserting courts." The two approaches depend on the construction and interpretation of the INA provisions and regulations, in addition to other public policy considerations introduced in Part I.

A. *Courts Granting Defendants' Motions to Dismiss*

This section introduces and discusses the legal arguments for dismissing AOS lawsuits. The dismissing courts generally take an approach that defers to "'[t]he power of congress to exclude aliens altogether from the United

189. 8 U.S.C. § 1103(a)(1) (Supp. V 2005).

190. *Id.* § 1571(b).

191. The courts are split both along and within districts. *See* Saleem v. Keisler, 520 F. Supp. 2d 1048, 1053 (W.D. Wis. 2007) (Crabb, J.) (denying motions to dismiss and noting that her ruling clashes with fellow Western District of Wisconsin Judge John C. Shabaz's holding in Bugulu v. Gonzalez, 490 F. Supp. 2d 965 (W.D. Wis. 2007)). *Compare* Tao Luo v. Keisler, 521 F. Supp. 2d 72, 72 (D.D.C. 2007) (finding no federal court jurisdiction), *with* Zaigang Liu v. Novak, 509 F. Supp. 2d 1, 7 (D.D.C. 2007) (allowing federal court jurisdiction). Courts do not even agree on which is the majority position. *Compare* Dong Liu v. Chertoff, No. 07CV0005 BEN (WMC), 2007 WL 1300127, at *5 (S.D. Cal. Apr. 30, 2007) (concluding that courts dismissing for lack of jurisdiction are in the majority), *with* He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *3 (N.D. Ill. Jan. 2, 2008) (determining that courts asserting jurisdiction are a "significant majority"). No appellate court has yet weighed in conclusively on the issue. *Grinberg v. Swacina*, 478 F. Supp. 2d 1350 (S.D. Fla. 2007) and *Feng Li v. Gonzalez*, No. 06-5911 (SRC), 2007 WL 1303000 (D.N.J. May 3, 2007), are both up for appeal in the U.S. Courts of Appeals for the Eleventh and Third Circuits, respectively. MacLean, *supra* note 8.

States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.'"[192] These courts generally do not find that immigration officials have a duty to adjudicate AOS applications in a reasonable time and that the jurisdiction-stripping provisions in § 1252(a)(2)(B)(ii) foreclose the possibility of judicial review. With no duty imposed on USCIS and no power of judicial review, AOS plaintiffs' APA and mandamus claims necessarily fail,[193] and these courts grant the defendants' motions to dismiss.

1. U.S. Citizenship and Immigration Services Does Not Have a Duty to Adjudicate Adjustment of Status Applications in a Reasonable Time

Dismissing courts reject plaintiffs' contentions that immigration officials have a nondiscretionary duty to adjudicate AOS applications in a reasonable time.[194] This section explores their reasoning on this point.

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192. Shen v. Chertoff, 494 F. Supp. 2d 592, 595 (E.D. Mich. 2007) (quoting Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)); *accord* Orlov v. Howard, 523 F. Supp. 2d 30, 36 (D.D.C. 2007) ("The Supreme Court has clearly stated that [matters of immigration and national security] are best decided by the legislative and executive branches of government and that judicial discretion should be accorded such decisions." (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999))); Eldeeb v. Chertoff, No. 8:07-cv-236-T-17EAJ, 2007 WL 2209231, at *11 (M.D. Fla. July 30, 2007).

193. *See supra* notes 141, 149 and accompanying text; *see also supra* note 168 and accompanying text.

194. It is unclear whether dismissing courts think that there is a duty to adjudicate at all. Some courts say USCIS has complete discretion. *See, e.g.*, *Feng Li*, 2007 WL 1303000, at *5; Elzerw v. Mueller, No. 07-00166, 2007 WL 1221195, at *3 (E.D. Pa. Apr. 23, 2007); Safadi v. Howard, 466 F. Supp. 2d 696, 699 (E.D. Va. 2006). In *Yanping Qiu v. Chertoff*, however, the court noted that it was "not persuaded by those cases which have held that immigration officials have a non-discretionary duty to adjudicate I-485 applications." 486 F. Supp. 2d 412, 417 (D.N.J. 2007). In fact, on many occasions USCIS conceded that it has a statutory obligation to adjudicate AOS applications at some point. *See* Houle v. Riding, No. CV-F-07-1266-LJO-GSA, 2008 WL 223670, at *4 (E.D. Cal. Jan. 28, 2008); Sayyadinejad v. Chertoff, Civil No. 07cv0631 JAH (LSP), 2007 WL 4410356, at *3 (S.D. Cal. Dec. 14, 2007); Gelfer v. Chertoff, No. C 06-06724 WHA, 2007 WL 902382, at *2 (N.D. Cal. Mar. 22, 2007); Singh v. Still, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2006). Many dismissing courts at least seem to imply the same. Some have noted that, at some point, delay becomes the abandonment of a duty to process an application. Zalmout v. Gonzalez, No. 07-12575, 2007 WL 3121532, at *2, 3 (E.D. Mich. Oct. 24, 2007) (Duggan, J.) (ordering a representative of USCIS or the FBI to testify at a later hearing regarding the cause and nature of a four-year delay). Another court reasoned that because federal courts have the authority to review improper exercises of discretion, indefinite delay would warrant judicial intervention since 8 U.S.C. § 1255(a) requires USCIS to adjudicate the AOS application. *See, e.g.*, Wei Tan v. Gonzales, No. 07-cv-00133-MEH-MJW, 2007 WL 1576108, at *3 (D. Colo. May 30, 2007) (quoting Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925)). Other courts distinguish between USCIS action and inaction on an application. *Shen*, 494 F. Supp. 2d at 597 (Friedman, C.J.) ("This is not a case where Defendants have taken *no* action or have refused to act on Plaintiff's application."). Generally, these courts will not intervene as long as USCIS is making some reasonable efforts toward concluding a plaintiff's application. *See* Li v. Chertoff, 482 F. Supp. 2d 1172, 1177–78 (S.D. Cal. 2007). For instance, in *Elzerw*, the court distinguished certain other cases that had asserted jurisdiction because "no action at all had been taken" on the plaintiffs' applications. 2007

a. *Section 1255(a) Leaves the Whole Adjustment of Status Process to U.S. Citizenship and Immigration Services Discretion*

Dismissing courts find that the grant of discretion in § 1255(a) gives USCIS discretion over all matters related to the AOS process, including the speed of its decisions.[195] Part of the reason they reach this conclusion is by contrasting § 1255(a)'s discretionary language with other INA provisions, such as 8 U.S.C. § 1153(c), "which 'repeatedly commands the Attorney General, in nondiscretionary language, to do a variety of tasks.'"[196] By comparison, the only limitations imposed on USCIS discretion in § 1255(a) are statutorily defined eligibility prerequisites, none of which mention the pace of adjudication, indicating "that Congress considered the decision to withhold adjudication to be within the discretion granted to [USCIS] in § 1255(a)."[197]

Dismissing courts cite the lack of timelines and judicial review provisions in § 1255(a) as additional evidence that Congress meant to impose no AOS processing duties on USCIS.[198] When Congress wants to create timelines and provide for judicial review, it does so, as it has elsewhere in the INA and in other statutes governing application procedures.[199] For example, one INA provision gives the government 120 days after a statutorily required applicant examination to grant or deny a naturalization application, and it specifically provides that after that time "the applicant may ask a U.S. district court to adjudicate the application."[200] In a statutory provision outside the INA pertaining to applications for licenses to manufacture or deal in firearms, Congress directs the attorney general to approve or deny an application for a license within sixty days of receiving the application, and that after that time applicants are expressly entitled to file a writ of mandamus to compel the attorney general's action.[201] Clearly, dismissing courts conclude, when Congress wants to

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WL 1221195, at *3. In one case of "inaction" the *Elzerw* court cited, *id.*, however, the applicant's security check had been initiated, an expedited processing request had been filed, and the name check had been processed, raising issues that "requir[ed] further inquiry," *Singh*, 470 F. Supp. 2d at 1065; *see also infra* notes 215–26 and accompanying text.

195. *See, e.g.*, Zhang v. Sec'y of Homeland Sec., No. 1:07CV224, 2007 WL 2572179, at *4 (N.D. Ohio Aug. 31, 2007); *Shen*, 494 F. Supp. 2d at 595–96; *Yanping Qiu*, 486 F. Supp. 2d at 417–20; *Li*, 482 F. Supp. 2d at 1178; *Grinberg*, 478 F. Supp. 2d at 1352; *Safadi*, 466 F. Supp. 2d at 699; *see also* text accompanying *supra* note 171.

196. He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *2 (N.D. Ill. Jan. 2, 2008) (quoting Iddir v. INS, 301 F.3d 492, 499–500 (7th Cir. 2002)). As an example of the repeated commands the *He* court identifies, 8 U.S.C. § 1153(c)(1)(A)–(D) (2000), regarding allocation of diversity immigrant visas, directs the attorney general to perform various tasks, using the word "shall" six times. *See id.*

197. *Yanping Qiu*, 486 F. Supp. 2d at 419–20; *Feng Li*, 2007 WL 1303000, at *6.

198. *See, e.g.*, *Shen*, 494 F. Supp. 2d at 595–96; *Elzerw*, 2007 WL 1221195, at *2; *Safadi*, 466 F. Supp. 2d at 699.

199. *Grinberg*, 478 F. Supp. 2d at 1352; *Yanping Qiu*, 486 F. Supp. 2d at 417–18.

200. Walji v. Gonzales, 500 F.3d 432, 433 (5th Cir. 2007) (citing 8. U.S.C. § 1447(b)); *accord Yanping Qiu*, 486 F. Supp. 2d at 417 n.5.

201. *Yanping Qiu*, 486 F. Supp. 2d at 417 n.5 (quoting 18 U.S.C. § 923(d)(2) (2006)).

confer nondiscretionary duties on executive officers, it knows how to do so—but it did not in § 1255(a), which indicates its intention to leave the entire process to USCIS discretion.[202]

b. *Immigration and Nationality Act Regulations Support Complete U.S. Citizenship and Immigration Services Discretion over the Adjustment of Status Process*

Dismissing courts also cite the INA's implementing regulations as support for their no-duty theory.[203] For instance, the regulation giving immigration officers the authority to withhold adjudication pending the investigation of an application[204] "clearly contemplate[s] that certain applications may require lengthy investigations,"[205] and explicitly gives officials unreviewable discretion to withhold adjudication of applications while investigations are ongoing.[206] While the regulation demands periodic review of withheld applications, it never decrees a time for adjudication.[207] Consequently, judges ought to "defer to [USCIS's] decision to withhold adjudication pursuant to a regulation that [it] was entitled to promulgate" by the discretion § 1255(a) grants.[208]

The dismissing courts also find that the regulations the asserting courts cite as evidence of a duty are weak. To the dismissing courts, the asserting courts impute too much to regulations like § 209.2(f) and § 245.2(a)(5).[209] The phrases they contain—"shall be notified" and "shall record"—are not the same as "shall adjudicate."[210] Section 209.2(f) "refers to Defendants' duties *after* a decision has been reached, while § 103.2(b)(18) grants discretion to withhold adjudication while an application is pending."[211] Section 209.2(f), therefore, does not limit USCIS's power to withhold

202. *Id.* at 418.

203. Orlov v. Howard, 523 F. Supp. 2d 30, 34–35 (D.D.C. 2007) (stating that the applicable regulations indicate Congress's clear intent to leave the pace of processing AOS applications within agency discretion); *Yanping Qiu*, 486 F. Supp. 2d at 418–19; *Safadi*, 466 F. Supp. 2d at 698–99; Alomari v. Reno, No. 97 Civ. 6837(DAB), 1997 WL 724815, at *2 (S.D.N.Y. Nov. 19, 1997); *cf. supra* notes 162–65 and accompanying text.

204. 8 C.F.R. § 103.2(b)(18) (2007).

205. *Yanping Qiu*, 486 F. Supp. 2d at 419; *see also* Emamian v. Dep't of Homeland Sec., No. SA-06-CA-0789-RF, 2007 WL 3047213, at *1 (W.D. Tex. Oct. 11, 2007) (looking to 8 U.S.C. § 1154(b) (2000), which provides when petitions shall not be approved, and 8 C.F.R. § 103.2(b)(18), the withholding regulation, to conclude that immigration officials have discretion to withhold adjudication).

206. Chehab v. Chertoff, No. 07-11068, 2007 WL 2372356, at *1 (E.D. Mich. Aug. 17, 2007); *Yanping Qiu*, 486 F. Supp. 2d at 418–19.

207. 8 C.F.R. § 103.2(b)(18); *see also supra* note 186 and accompanying text.

208. *Yanping Qiu*, 486 F. Supp. 2d at 419 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). Section 1255(a) authorizes the attorney general (and now the secretary of Homeland Security, *see supra* note 35 and accompanying text) to exercise his discretion with respect to AOS applications "under such regulations as he may prescribe." 8 U.S.C. § 1255(a).

209. For the text of these regulations, see *supra* note 188.

210. *Yanping Qiu*, 486 F. Supp. 2d at 418.

211. *Id.* at 419.

adjudication.[212] Likewise, the regulation directing that applicants "shall be interviewed" allows the interview to be waived "when it is determined by [USCIS] that an interview is unnecessary."[213] Far from supporting a duty theory, the regulations actually support defendants' authority to exercise discretion throughout the application process.

2. No Judicial Review for You: The Preclusionary Language in § 1252(a)(2)(B)(ii) Encompasses the Pace of Adjudication

Many judges also grant the government's motions to dismiss based on 8 U.S.C. § 1252(a)(2)(B)(ii), holding that the provision precludes judicial review of all discretionary decisions and actions related to the AOS process, including the pace at which the process proceeds.[214] Most dismissing courts concur with the interpretation of § 1252(a)(2)(B)(ii) set out in *Safadi v. Howard*.[215] In *Safadi*, Judge Thomas Selby Ellis stated that § 1252(a)(2)(B) "is refreshingly free from ambiguity and its terms are pellucidly clear."[216] Subsection (i) excludes any judgment granting or denying AOS from judicial review, while subsection (ii) excludes from review "any other [discretionary] decision or action specified to be within USCIS's discretion."[217] The process leading up to a decision on an AOS application clearly falls within subsection (ii)'s scope, since § 1255(a) "specifically provides that USCIS has the discretion to adjust an alien's status, under such regulations as it may prescribe."[218] The question for the court, then, is whether the pace of processing is within the purview of the term "action" in subsection (ii).[219]

To determine the meaning of "action" in *Safadi*, Judge Ellis looked to *Black's Law Dictionary*, where it was defined as "an act or series of acts."[220] He reasoned that this definition "encompasses the *entire* process of reviewing an adjustment application, including the completion of background and security checks and the pace at which the process

212. *Id.*
213. *Id.* at 418 (quoting 8 C.F.R. §§ 245.6, 1245.6 (2006)).
214. *See, e.g.*, Shen v. Chertoff, 494 F. Supp. 2d 592, 595–99 (E.D. Mich. 2007); Bugulu v. Gonzalez, 490 F. Supp. 2d 965, 967 (W.D. Wis. 2007); Dmitrenko v. Chertoff, No. 1:07cv82 (JCC), 2007 WL 1303009, at *1 (E.D. Va. Apr. 30, 2007).
215. 466 F. Supp. 2d 696 (E.D. Va. 2006); *see, e.g.*, Korobkova v. Jenifer, Civil Case No. 07-11335, 2007 WL 3245178, at *3–4 (E.D. Mich. Nov. 2, 2007); Wang v. Chertoff, No. 1:07-cv-00948-WSD, 2007 WL 4139475, at *4, 6 (N.D. Ga. Oct. 30, 2007); Eldeeb v. Chertoff, No. 8:07-cv-236-T-17EAJ, 2007 WL 2209231, at *11, 13, 23 (M.D. Fla. July 30, 2007); Sharif v. Chertoff, 497 F. Supp. 2d 928, 932–33 (N.D. Ill. 2007); Zhang v. Chertoff, 491 F. Supp. 2d 590, 592 (W.D. Va. 2007); *Bugulu*, 490 F. Supp. 2d at 967; Grinberg v. Swacina, 478 F. Supp. 2d 1350, 1353–54 (S.D. Fla. 2007). For the text of § 1252(a)(2)(B)(ii), see *supra* note 175 and accompanying text.
216. *Safadi*, 466 F. Supp. 2d at 698.
217. *Id.* (emphasis omitted).
218. *Id.*
219. *Id.*; *accord Grinberg*, 478 F. Supp. 2d at 1353.
220. *Safadi*, 466 F. Supp. 2d at 699 (citation omitted).

proceeds."[221] Any other interpretation would "impermissibly render the word 'action' superfluous."[222] In enacting subsection (ii), he continued, Congress could not have intended to preclude judicial review of all discretionary actions in the AOS process except for the pace of application processing.[223] Such an interpretation would ignore the absence of timelines for AOS processing in the INA, permitting judicial review where it was clearly not intended.[224] In sum, he concluded, "Because the pace of processing an adjustment application comprises a part of USCIS's 'action,' and because USCIS has discretion over such actions, there is no jurisdiction over plaintiff's complaint."[225]

3. No Dice: The Administrative Procedure Act and Mandamus and Venue Act Cannot Supply Subject Matter Jurisdiction

Another reason these courts dismiss AOS litigants' suits is that given the INA's grant of discretion in § 1255(a) and its jurisdiction-stripping provision in § 1252(a)(2)(B)(ii), neither the APA nor the MVA could supply or restore subject matter jurisdiction. One reason the APA is unavailable to AOS litigants is that their APA claims cannot go forward unless they "'assert[] that an agency failed to take a *discrete* agency action that it is *required to take*.'"[226] As the U.S. Supreme Court noted, "'[A] delay cannot be unreasonable with respect to action that is not required.'"[227]

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221. *Id.*

222. *Id.* at 700; *accord Grinberg*, 478 F. Supp. 2d at 1354 (quoting *Safadi*, 466 F. Supp. 2d at 700).

223. *Safadi*, 466 F. Supp. 2d at 700.

224. *See id.*; *see also supra* notes 198–202 and accompanying text.

225. *Safadi*, 466 F. Supp. 2d at 701. The *Safadi* court hedged with respect to the plaintiff's four-year delay, stating, "Importantly, not addressed here is the question whether jurisdiction would exist in a district court to review plaintiff's case where USCIS refused altogether to process an adjustment application or where the delay was so unreasonable as to be tantamount to a refusal to process the application." *Id.* at 700; *cf.* Dong Liu v. Chertoff, No. 07CV0005 BEN (WMC), 2007 WL 1300127, at *5 n.2 (S.D. Cal. Apr. 30, 2007) ("The Court makes no determination whether a district court could ever have mandamus jurisdiction under § 1361 to hear a petition to compel USCIS to adjudicate an I-485 application."). Akram Safadi's was "clear[ly]" not such a case, the court held, because "issues remain[ed] requiring further inquiry." *Safadi*, 466 F. Supp. 2d at 697. *But see* Singh v. Still, 470 F. Supp. 2d 1064, 1065, 1072 (N.D. Cal. 2006) (asserting jurisdiction under both mandamus and APA statutes even though the incomplete name check response "raises issues requiring further inquiry"); *see also supra* note 194 and accompanying text.

226. *Dong Liu*, 2007 WL 1300127, at *6 (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)). At least one court has held that the APA does not apply at all to delays in immigration proceedings because the decision whether to adjust status is governed by the INA. Wei Tan v. Gonzales, No. 07-cv-00133-MEH-MJW, 2007 WL 1576108, at *2 (D. Colo. May 30, 2007) ("We emphasize that our review is conducted under the INA and not under the [APA]. Unlike the INA, the APA includes a judicially enforceable duty to proceed within a reasonable time." (quoting Kowalczyk v. INS, 245 F.3d 1143, 1149 n.5 (10th Cir. 2003))).

227. *Dong Liu*, 2007 WL 1300127, at *6 (quoting *Norton*, 542 U.S. at 63 n.1).

Because the AOS process is discretionary, allegations of unreasonable delay cannot be grounds for relief.[228]

APA claims also fail because both preclusionary provisions of § 701(a) apply.[229] The first preclusionary provision prohibits APA claims when the relevant statute precludes judicial review, and § 1252(a)(2)(B)(ii), they hold, is just such a statute.[230] The other preclusionary provision, forbidding plaintiffs from compelling agency actions committed to agency discretion, also bars jurisdiction in these cases.[231] Section 1255(a) clearly gives USCIS complete discretion over actions taken in the course of the AOS process.[232] Moreover, the APA's definition of "action" includes a "failure to act,"[233] so a lack of action on a plaintiff's application is still within the agency's discretion and captured by the APA's preclusionary provisions. Furthermore, § 701(a)(2) applies when a statute does not provide a meaningful standard with which to judge agency actions.[234] The INA contains no timeline for the speed of AOS processing; instead, it grants the agency complete discretion over the matter. Agency action can never be "unreasonably withheld," as the APA requires, and a claim can never be "clear and certain," as the mandamus statute requires, because the INA contains no standard for judging the agency's exercise of discretion with respect to AOS claims.[235]

Likewise, these courts hold that defendants cannot state claims under the mandamus statute. The mandamus statute only applies to plainly prescribed, nondiscretionary actions.[236] The discretionary nature of AOS pacing is fatal to these mandamus actions.[237] Nor can plaintiffs' claims ever be "clear and certain," as mandamus requires, since no time frame limits the action they request.[238]

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228. *See id.*

229. Orlov v. Howard, 523 F. Supp. 2d 30, 36–37 (D.D.C. 2007); *Safadi*, 466 F. Supp. 2d at 700; *see supra* notes 157–65 and accompanying text.

230. Grinberg v. Swacina, 478 F. Supp. 2d 1350, 1355 (S.D. Fla. 2007) (citing 5 U.S.C. § 701(a) (2006)); *see supra* Part II.A.2.

231. Shen v. Chertoff, 494 F. Supp. 2d 592, 596–97 (E.D. Mich. 2007).

232. *See supra* Part II.A.1; *see also supra* notes 147–48 and accompanying text.

233. *See* Qiu v. Chertoff, 486 F. Supp. 2d 412, 421 n.11 (D.N.J. 2007).

234. Heckler v. Chaney, 470 U.S. 821, 830 (1985); *see also supra* notes 162–65 and accompanying text.

235. *See* Safadi v. Howard, 466 F. Supp. 2d 696, 699–700 (E.D. Va. 2006).

236. *See supra* note 141 and accompanying text.

237. *See* Elzerw v. Mueller, No. 07-00166, 2007 WL 1221195, at *2 (E.D. Pa. Apr. 23, 2007); *Safadi*, 466 F. Supp. 2d at 700; *see also* Saleh v. Ridge, 367 F. Supp. 2d 508, 511 (S.D.N.Y. 2005) ("Adjustment of immigration status . . . is a discretionary act, and therefore, '[i]n keeping with the plain language [of 8 U.S.C. § 1255(a)], courts have consistently found mandamus inappropriate in actions based on the government's failure to adjust an applicant's status.'" (second and third alterations in original) (quoting Vladagina v. Ashcroft, No. 00 Civ. 9456(DAB), 2002 WL 1162426, at *4 (S.D.N.Y. Apr. 8, 2002))).

238. *See, e.g.*, Dong Liu v. Chertoff, No. 07CV0005 BEN (WMC), 2007 WL 1300127, at *3, 6 (S.D. Cal. Apr. 30, 2007) ("Plaintiffs have failed to identify any statute or regulation requiring the FBI and/or USCIS to complete their name checks in any period of time, reasonable or not. Therefore, the Court declines Plaintiffs' invitation to judicially impose new heightened requirements."); *see also* Yan v. Mueller, No. H-07-0313, 2007 WL

4. Our Hands Are Tied: Public Policy Supports Dismissal

Courts granting motions to dismiss have numerous policy reasons for their decisions. The possibility of overwhelming agency resources, which judges historically have factored into decisions regarding agency actions, often arises as a concern,[239] and it is likely to become an increasingly prevalent reason not to assert jurisdiction given the new processing backlog USCIS will have to address.[240] In *Yanping Qiu v. Chertoff*, Judge Stanley Chesler worried that creating a duty to act on AOS applications "'would have the potential for mischievous interference with the functioning of already overburdened administrative agencies.'"[241] Since his court did not have the authority to review the ultimate AOS outcome—and with the agency already backlogged—Judge Chesler felt that "granting the writ to compel adjudication would do nothing more than shuffle to the front of the line those [AOS] applicants canny enough to file a complaint in federal district court."[242] In *Orlov v. Howard*, Judge John Bates agreed and thought that granting relief

> "would set a dangerous precedent, sending a clear signal that more litigious applicants are more likely to be moved to the top of the proverbial pile over other applicants that have waited even longer. Such a situation hardly optimizes resources, and serves only the individual at the detriment to the group."[243]

These dismissing courts frequently cite post-9/11 concerns as a major reason not to intervene where the delay is centered on an unresolved name check.[244] They are loath to meddle where it could compromise or obstruct investigations crucial to national security.[245] There is no need to determine jurisdiction at all, one court held, when an application is legitimately delayed by the agency taking the time to resolve security concerns.[246] In *Safadi*, Judge Ellis echoed this concern, remarking that "in this post-9/11 world USCIS must carefully and thoroughly investigate adjustment

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1521732, at *6 (S.D. Tex. May 24, 2007) (finding no mandamus jurisdiction because no time limit had been set on the FBI's completion of background checks); *cf.* Omar v. Mueller, 501 F. Supp. 2d 636, 639 (D.N.J. 2007) (explaining that the court lacked jurisdiction to compel a naturalization application because there was no requirement that immigration officials complete an examination in a defined time period).

239. *See* Wan Shih Hsieh v. Kiley, 569 F.2d 1179, 1182 (2d Cir. 1978).

240. *See supra* notes 104–12 and accompanying text.

241. Yanping Qiu v. Chertoff, 486 F. Supp. 2d 412, 420 (D.N.J. 2007) (quoting Zheng v. Reno, 166 F. Supp. 2d 875, 879–80 (S.D.N.Y. 2001)).

242. *Id.* (citing Liberty Fund, Inc. v. Chao, 394 F. Supp. 2d 105, 116 (D.D.C. 2005)).

243. Orlov v. Howard, 523 F. Supp. 2d 30, 36 (D.D.C. 2007) (quoting Dmitrenko v. Chertoff, No. 1:07cv82 (JCC), 2007 WL 1303009, at *1 (E.D. Va. Apr. 30, 2007)).

244. *See, e.g.*, *Orlov*, 523 F. Supp. 2d at 36, 38; Zhang v. Sec'y of Homeland Sec., No. 1:07CV224, 2007 WL 2572179, at *6 (N.D. Ohio Aug. 31, 2007); Dong Liu v. Chertoff, No. 07CV0005 BEN (WMC), 2007 WL 1300127, at *5 (S.D. Cal. Apr. 30, 2007); Safadi v. Howard, 466 F. Supp. 2d 696, 700 (E.D. Va. 2006).

245. Shen v. Chertoff, 494 F. Supp. 2d 592, 597 (E.D. Mich. 2007).

246. Sayyadinejad v. Chertoff, Civil No. 07cv0631 JAH (LSP), 2007 WL 4410356, at *5–6 (S.D. Cal. Dec. 14, 2007).

applications to ensure they are not granted without the appropriate good cause. Our national security requires that caution and thoroughness in these matters not be sacrificed for the purpose of expediency."[247]

Other concerns also arise. Where a name check is the source of application delay, some courts feel that holding USCIS responsible for the delay would be unjust, since name checks are the FBI's responsibility.[248] Others express sympathy for plaintiffs but conclude that the political branches are the ones best suited to address the issue of delay,[249] since making "wholesale improvement[s]" of administrative programs is not a judicial function.[250]

Part II.A of this Note has detailed the statutory interpretations underlying some district courts' decisions to grant the government's motions to dismiss the AOS cases. These courts and the asserting courts introduced in Part II.B take opposing views on nearly every relevant issue; the courts even differ on the way in which the issues are framed. As Part II.A has shown, the dismissing courts see the important question in these cases as whether USCIS has discretion over the pace of adjudication. To the asserting courts, discussed in Part II.B, the main question is whether USCIS has a duty to adjudicate applications in a reasonable time. The next section describes the asserting courts' arguments.

B. *Courts Asserting Jurisdiction*

This section introduces and discusses the legal arguments that district courts employ in asserting jurisdiction over AOS suits and denying the government's motions to dismiss. To these courts, USCIS has a duty to process AOS applications within a reasonable time, and nothing in the preclusionary language in § 1252(a)(2)(B)(ii) forecloses judicial review.[251] The posture of these courts reflects the general idea that the federal judiciary has an obligation to review cases where "'an agency's recalcitrance, inertia, laggard pace or inefficiency sorely disadvantages the class of beneficiaries Congress intended to protect.'"[252]

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247. *Safadi*, 466 F. Supp. 2d, at 701; *accord* Alkenani v. Barrows, 356 F. Supp. 2d 652, 657 (N.D. Tex. 2005).

248. *See, e.g.*, Wei Tan v. Gonzales, No. 07-cv-00133-MEH-MJW, 2007 WL 1576108, at *3, 4 n.1 (D. Colo. May 30, 2007) (finding that the FBI was not a party in the suit, but even if it was the court was "presented with no authority which would allow it to require the FBI to conduct a security background check more expeditiously, absent a showing of complete inaction by the FBI"). Courts declining to dismiss are much less receptive to this argument. *See infra* notes 328–29 and accompanying text.

249. Maftoum v. Chavez, No. 07-CV-12819, 2007 WL 3203850, at *4 (E.D. Mich. Oct. 31, 2007); *Safadi*, 466 F. Supp. 2d at 701.

250. Yan v. Mueller, No. H-07-0313, 2007 WL 1521732, at *9 n.9 (S.D. Tex. May 24, 2007) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)).

251. *See infra* Part II.B.1–3.

252. Yu v. Brown, 36 F. Supp. 2d 922, 929 (D.N.M. 1999) (quoting *In re* Am. Fed'n of Gov't Employees, AFL-CIO, 790 F.2d 116, 117 (D.C. Cir. 1986)).

1. U.S. Citizenship and Immigration Services Has a Duty to Process and Adjudicate Adjustment of Status Applications

To make out a claim under either the APA or the mandamus statute, the defendant must owe the plaintiff a nondiscretionary duty.[253] Thus, courts asserting jurisdiction necessarily make a preliminary inquiry into whether immigration officials have a duty to adjudicate AOS applications, which this section addresses, and whether they must act on that duty in a reasonable time, which Part II.B.2 addresses below.

a. *Section 1255(a) Supports a Duty to Adjudicate Adjustment of Status Applications*

It is undisputed that the decision whether to grant or deny an AOS is a matter of agency discretion.[254] Asserting courts, however, draw a distinction between USCIS's "discretion over *how* to resolve an application and . . . discretion over *whether* it resolves an application."[255] The latter, they hold, is a nondiscretionary duty owed to those whose AOS applications are properly before USCIS.[256] Congress enacted § 1255(a) to statutorily authorize noncitizens to seek AOS.[257] Deciding those applications, then, is a congressionally assigned task that USCIS cannot refuse or neglect to perform.[258] The lack of a time frame in § 1255(a) does not alter the nondiscretionary nature of USCIS's duty. "Congress imposes many duties on executive agencies without prescribing specific time frames for their completion."[259] In other areas of immigration, the U.S. Court of

253. *See supra* notes 141, 149–50 and accompanying text.

254. *See, e.g.*, Reply to Defendants' Opposition at 4, Xin Liu v. Chertoff, No. CV S 06-2808 RRB EFB, 2007 WL 2973375 (E.D. Cal. Aug. 15, 2007) ("Plaintiffs are not attempting to . . . challeng[e] how the agency is adjudicating applications."); *see also* Razaq v. Poulos, No. C 06-2461 WDB, 2007 WL 61884, at *3 (N.D. Cal. Jan. 8, 2007) ("[T]he substance of the decision to grant or deny a petition obviously is discretionary."); *supra* note 143; *supra* note 179 and accompanying text.

255. Singh v. Still, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2006) (citation omitted); *accord* Soneji v. Dep't of Homeland Sec., 525 F. Supp. 2d 1151, 1155 (N.D. Cal. 2007); Landry v. Chertoff, No. 07-0506, 2007 WL 2007996, at *3 (E.D. La. July 5, 2007).

256. *Singh*, 470 F. Supp. 2d at 1067; Fu v. Reno, No. CIV.A. 3:99-CV-0981, 2000 WL 1644490, at *5 (N.D. Tex. Nov. 1, 2000); *accord* Shah v. Hansen, No. 1:07 CV 1576, 2007 WL 3232353, at *4 (N.D. Ohio Oct. 31, 2007); Yong Tang v. Chertoff, 493 F. Supp. 2d 148, 155 (D. Mass. 2007) ("A grant of adjustment of status is not 'legally required,' but adjudication of the application one way or the other certainly is."); Duan v. Zamberry, No. 06-1351, 2007 WL 626116, at *3 (W.D. Pa. Feb. 23, 2007).

257. Saleem v. Keisler, 520 F. Supp. 2d 1048, 1054 (W.D. Wis. 2007); *see also supra* note 169 and accompanying text.

258. Belegradek v. Gonzales, 523 F. Supp. 2d 1364, 1367 (N.D. Ga. 2007) ("Moreover, the Eleventh Circuit has held that the eligibility standards contained in 8 U.S.C. § 1255(a) limit the Attorney General's discretion to categorically deny certain classes of individuals consideration for a status change, further suggesting the non-discretionary nature of the Attorney General's duty to adjudicate." (citing Scheerer v. U.S. Att'y Gen., 445 F.3d 1311, 1322 (11th Cir. 2006))).

259. *Saleem*, 520 F. Supp. 2d 1048, 1053 (noting that courts dismissing the AOS cases have not cited other situations where the failure to impose a deadline amounted to a

Appeals for the Seventh Circuit has inferred a nondiscretionary duty to adjudicate applications without express statutory commands to do so.[260]

b. *The Applicable Regulations Support a Duty to Adjudicate*

Asserting courts also cite applicable INA regulations as evidence that a duty to process AOS applications exists.[261] The phrasing of the regulations assumes each application will be decided.[262] For example, one regulation for asylum-based applications directs that applicants "shall be notified of the decision" and that "the director shall record the alien's admission."[263] Decisions on marriage-based applications contain a similar directive: "The applicant shall be notified of the decision," and the "permanent residence shall be recorded."[264]

The regulation set out for "Withholding adjudication" supports the duty as well.[265] In *Dong v. Chertoff*, Judge Saundra Armstrong noted that the regulation ensures some timely decision on AOS applications by setting forth detailed procedural requirements for lawfully withholding adjudication, permitting adjudication to be withheld for specific time intervals.[266] The section does not, as dismissing courts suggest, give USCIS "blanket authority" to withhold an application indefinitely.[267] If USCIS wishes to withhold adjudication, Judge Armstrong concluded that it must do so in compliance with this regulation.[268]

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withdrawal of jurisdiction); *Razaq*, 2007 WL 61884, at *4 (compelling action on an "immediate relative" determination, not AOS).

260. *Saleem*, 520 F. Supp. 2d at 1054 (citing Iddir v. INS, 301 F.3d 492, 499–500 (7th Cir. 2002)).

261. *See, e.g.*, *id.*; Singh v. Still, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2006) ("Regulations support there being such a duty . . . .").

262. *Shah*, 2007 WL 3232353, at *5; *Saleem*, 520 F. Supp. 2d at 1054.

263. 8 C.F.R. § 209.2(f) (2007); *see* Haidari v. Frazier, Civil No. 06-3215 (DWF/AJB), 2006 WL 3544922, at *4 (D. Minn. Dec. 8, 2006); Aboushaban v. Mueller, No. C 06-1280 BZ, 2006 WL 3041086, at *1–2 (N.D. Cal. Oct. 24, 2006); *Singh*, 470 F. Supp. 2d at 1067 n.6; *see also supra* note 188 and accompanying text. *But see supra* notes 211–12 and accompanying text.

264. 8 C.F.R. § 245.2(a)(5)(i)–(ii); Fonov v. Gonzales, No. C-3-07-207, 2007 WL 2815451, at *4 (S.D. Ohio Sept. 25, 2007) (holding that the plaintiff could not meet the second element of a mandamus claim); *Singh*, 470 F. Supp. 2d at 1067 n.6; *see also supra* note 188 and accompanying text.

265. Dong v. Chertoff, 513 F. Supp. 2d 1158, 1166 (N.D. Cal. 2007) ("Thus, the source of the defendants' non-discretionary duty to 'act' upon the plaintiffs' application is specifically traced to 8 C.F.R. § 103.2(b)(18)."); *see supra* note 186 and accompanying text.

266. *Dong*, 513 F. Supp. 2d at 1166–68.

267. *Id.* at 1168; *see also* Al-Juburi v. Chertoff, No. 3:06-CV-1270-D, 2007 WL 2285964, at *6 (N.D. Tex. Aug. 9, 2007); Elmalky v. Upchurch, No. 3:06-CV-2359-B, 2007 WL 944330, at *4 (N.D. Tex. Mar. 28, 2007).

268. *Dong*, 513 F. Supp. 2d at 1167 ("[W]hile the regulation gives authority to withhold adjudication . . . , this must be done consistent with the terms of the regulation."); Han Cao v. Upchurch, 496 F. Supp. 2d 569, 576 (E.D. Pa. 2007) ("In the absence of compliance with the stated procedure, § 103.2(b)(18) does not give defendants discretion to delay resolution of plaintiffs' applications.").

2. Make It Happen: The Duty to Adjudicate an Application Must Be Fulfilled in a Reasonable Time

The previous section detailed the asserting courts' analysis regarding whether there is a duty to adjudicate AOS applications. This section follows the next step in their reasoning—that USCIS not only has a duty to adjudicate, but also that it must do so within a reasonable time.

a. *Tracing the Reasonable Time Mandate to the Administrative Procedure Act*

One source of USCIS's duty to adjudicate in a reasonable time, asserting courts find, is the APA itself.[269] The duty to adjudicate applications established in Part II.B.1 is an agency "action" of the sort the APA was established to regulate.[270] Section 706(1) of the APA clearly sanctions judicial intervention to compel any agency action unreasonably delayed or unlawfully withheld.[271] In *Yong Tang v. Chertoff*, Judge Nancy Gertner cited this provision in response to defendants' argument that Congress meant to restrict judicial review to instances where agencies violated fixed statutory or regulatory deadlines.[272] If the defendants were correct, she reasoned, the statute would say "agency action unlawfully withheld or delayed."[273] Inserting "unreasonably" before the word "delayed," however, clearly indicates that Congress contemplated judicial review of agency conduct and determinations of what is "unreasonable" in the pace of AOS adjudications.[274] She concluded that any other interpretation would render § 706(1) and § 555(b) "hortatory," and undermine the very purpose of the APA.[275]

Section 555(b) commands that an agency "shall proceed to conclude a matter presented to it" within a "reasonable time."[276] Asserting courts acknowledge that no bright line exists to determine when delay on AOS applications becomes unreasonable.[277] However, that does not render the standard meaningless,[278] since "federal courts routinely assess the

269. Saleem v. Keisler, 520 F. Supp. 2d 1048, 1057–58 (W.D. Wis. 2007) ("[T]he APA itself provides the appropriate standard of review ('unreasonable delay') . . . ." (citing Yu v. Brown, 36 F. Supp. 2d 922, 931–32 (D.N.M. 1999))).

270. *See supra* note 147 and accompanying text.

271. *See supra* note 146 and accompanying text.

272. Yong Tang v. Chertoff, 493 F. Supp. 2d 148, 155 (D. Mass. 2007).

273. *Id.*

274. *Id.*

275. *Id.* at 155–56; *see also In re* Am. Fed'n of Gov't Employees, AFL-CIO, 790 F.2d 116, 117 (D.C. Cir. 1986) (stating that courts must "assure the vitality of the congressional instruction that agencies conclude matters presented to them 'within a reasonable time'"); *see also Saleem*, 520 F. Supp. 2d at 1058 ("[A]n interpretation of 'unreasonably delayed' to mean only 'beyond a statutory deadline' would render the phrase superfluous.").

276. 5 U.S.C. § 555(b) (2000).

277. Belegradek v. Gonzales, 523 F. Supp. 2d 1364, 1368 (N.D. Ga. 2007) (quoting Linville v. Barrows, 489 F. Supp. 2d 1278, 1282 (W.D. Okla. 2007)).

278. Yong Tang v. Chertoff, 493 F. Supp. 2d 148, 155 (D. Mass. 2007).

'reasonableness' of the pace of agency action under the APA."[279] It is the appropriate standard any time Congress "imposes a duty [on an agency] but does not articulate a specific timeframe within which that duty must be honored," despite defendants' arguments to the contrary.[280]

b. *Tracing the Reasonable Time Mandate to Immigration and Nationality Act Provisions and Agency Policy*

Asserting courts argue that § 1255(a), entitling noncitizens to apply to adjust status, necessarily must be tied to a duty of reasonableness. Deferring to USCIS on the pace of adjudication would obliterate the agency's duty to adjudicate and effectively gut the notification requirements found in the regulations.[281] In *Saleem v. Keisler*, Judge Barbara Crabb questioned, "If defendants have an obligation to decide applications but have unfettered discretion to put off deciding an application for as long as they want, how could the duty to decide ever be judicially enforced?"[282] Never, she answered, which "would strip defendants' duty of any meaning,"[283] an outcome Congress could not have intended.[284] In *Duan v. Zamberry*, the court elaborated on this idea, stating that "the danger posed by non-reviewability is the 'unfettered discretion to relegate aliens to a state of 'limbo,' leaving them to languish there indefinitely."[285]

At least one court noticed an inherent contradiction in dismissing courts' reasoning that immigration officials do not have to act in a reasonable time. In *Ping Qiu v. Chertoff*, Judge Thelton Henderson pointed out that *Safadi* and its progeny are

279. Ma v. Gonzales (*Ma I*), No. C07-122RSL, 2007 WL 1655188, at *5 (W.D. Wash June 5, 2007) (explaining that, "when an agency is required to act—either by organic statute or by the APA—within [a] . . . reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable" (alterations in original) (quoting Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1998))).

280. Razaq v. Poulos, No. C 06-2461 WDB, 2007 WL 61884, at *4 (N.D. Cal. Jan. 8, 2007); *see* Yu v. Brown, 36 F. Supp. 2d 922, 931–32 (D.N.M. 1999) (stating that the APA imposes the duty to adjudicate applications in a reasonable time); *see also Forest Guardians*, 174 F.3d at 1190 ("[I]f an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions—such as [those contained in 5 U.S.C. § 555(b)]—a court must compel only action that is delayed unreasonably."); *Yong Tang*, 493 F. Supp. 2d at 155 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)); *supra* notes 154, 158–61 and accompanying text.

281. *Yong Tang*, 493 F. Supp. 2d at 156; *accord* Gelfer v. Chertoff, No. C 06-06724 WHA, 2007 WL 902382, at *2 (N.D. Cal. Mar. 22, 2007) ("Allowing the respondents a limitless amount of time to adjudicate petitioners' application . . . could negate the USCIS's duty under 8 C.F.R. § 245.2(a)(5).").

282. Saleem v. Keisler, 520 F. Supp. 2d 1048, 1055 (W.D. Wis. 2007).

283. *Id.*; *see also Yong Tang*, 493 F. Supp. 2d at 150 ("The duty to act is no duty at all if the deadline is eternity."); Razaq v. Poulos, No. C 06-2461 WDB, 2007 WL 61884, at *3 (N.D. Cal. Jan. 8, 2007) ("A 'duty to decide' becomes no duty at all if it is accompanied by unchecked power to decide when to decide.").

284. Agbemaple v. INS, No. 97 C 8547, 1998 WL 292441, at *2 (N.D. Ill. May 18, 1998).

285. Duan v. Zamberry, No. 06-1351, 2007 WL 626116, at *4 (W.D. Pa. Feb. 23, 2007) (quoting Kim v. Ashcroft, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004)).

> internally inconsistent in that they conclude that courts do not have jurisdiction to review the reasonableness of the pace of processing [AOS] applications as long as the agency "is making reasonable efforts," thereby implying that a court does have some authority to review the reasonableness of the agency's efforts.[286]

Furthermore, the dismissing courts' rationale that the judiciary "should not wade into an area without readily applicable statutory standards collides with these same cases' insistence that district courts can and should grant relief where delay amounts to a refusal to act."[287]

Courts have found the reasonable time duty in other places, too. One court found that USCIS itself had established a timetable for application processing.[288] In *Ibrahim v. Chertoff*, the court noted that, on USCIS's web site, a May 18, 2007, post stated that the agency was processing applications received on January 1, 2006.[289] The application at issue had been received on February 11, 2000, which meant that USCIS's "processing ha[d] been delayed for over six years by the agency's own standards."[290] Other courts have also looked to the INA's so-called "Sense of Congress" statute, which sets out goals for expeditiously processing applications for immigration benefits, such as AOS.[291] Although the statute has been called "no more than non-binding, legislative dicta,"[292] these courts have found it persuasive in the context of unreasonably delayed AOS applications. They reason that, "[a]lthough Congress has not established a mandatory time frame for the USCIS to complete the adjudication, Congress sets a normative expectation . . . of a reasonable processing time for an immigrant benefit application as no more than 180 days after initial application."[293]

Based on all of the foregoing analysis, asserting courts find that USCIS not only has a duty to adjudicate AOS applications, but also a duty to do so in a reasonable time. Having reached this conclusion, they go on to consider whether the INA's jurisdiction-stripping provisions apply. Their reasoning for finding that the provisions do not apply is examined next.

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286. Ping Qiu v. Chertoff, No. C07-0578 TEH, 2007 WL 1831130, at *2 (N.D. Cal. June 25, 2007) (citing Li v. Chertoff, 482 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007)); *see supra* note 194.

287. He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *6 (N.D. Ill. Jan. 2, 2008); *see* sources cited *supra* notes 194, 225.

288. Ibrahim v. Chertoff, No. 06cv2071-L (POR), 2007 WL 1558521, at *7 (S.D. Cal. May 25, 2007).

289. *Id.*

290. *Id.*

291. 8 U.S.C. § 1571(b) (2000); *see also supra* note 190 and accompanying text.

292. Yang v. Cal. Dep't of Soc. Servs., 183 F.3d 953, 961–62 (9th Cir. 1999).

293. Konchitsky v. Chertoff, No. C-07-00294 RMW, 2007 WL 2070325, at *4 (N.D. Cal. July 13, 2007); *accord* Ma v. Gonzales (*Ma II*), No. C07-122RSL, 2007 WL 2743395, at *6 (W.D. Wash. Sept. 17, 2007).

3. Nothing Strips Away Subject Matter Jurisdiction: § 1252(a)(2)(B)(ii) Does Not Foreclose Judicial Review

As previous discussion has explained, asserting courts hold that USCIS has a duty to adjudicate AOS applications in a reasonable time. Before asserting jurisdiction in these cases, however, asserting courts confront § 1252(a)(2)(B)(ii). They hold that the statute's jurisdiction-stripping provisions are not broad enough to encompass the duty to conclude AOS applications in a reasonable time.[294]

a. *Delay in Adjustment of Status Application Processing Is Not a Discretionary "Decision or Action" Under § 1252(a)(2)(B)(ii)*

By its own terms, § 1252(a)(2)(B)(ii) applies only to a discretionary "decision or action" of the attorney general and the Homeland Security secretary.[295] In *Saleem*, Judge Crabb used a definition of "action" different from and less expansive than the *Safadi* court's.[296] Although "action" is certainly broader than a "decision," she wrote, it also "suggests that some conclusion has been made about the appropriate course to take."[297] Immigration officials' failure to render decisions they are required to make does not fit that definition and so does not constitute a "decision or action" within the plain meaning of the statute.[298] The Seventh Circuit, for example, has read the phrase "decision or action" to bar only "actual discretionary decisions,"[299] such as a "denial of relief or decision to defer [an application]," which are fundamentally different from "complete inaction and failure to make any decision."[300] The latter, the Seventh Circuit held, escapes the jurisdiction-stripping language.[301] Similarly, in *Duan v. Zamberry*, Chief Judge Donetta Ambrose held that § 1255(a), the source of AOS authority,

> . . . specifies only that it is within the discretion of the Attorney General to adjust one's status; it does not address, much less specify any discretion associated with, the pace of application processing. Given the absence of an explicit provision to that effect, the principles [of narrowly reading the

294. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (2000 & Supp. V 2005); *see supra* notes 173–79 and accompanying text.

295. 8 U.S.C. § 1252(a)(2)(B)(ii).

296. Saleem v. Keisler, 520 F. Supp. 2d 1048, 1051 (W.D. Wis. 2007); *cf. supra* note 220 and accompanying text.

297. *Saleem*, 520 F. Supp. 2d at 1051; *see also* Dong v. Chertoff, 513 F. Supp. 2d 1158, 1165–66 (N.D. Cal. 2007) ("The phrase 'decision or action' connotes some affirmative conduct by the Attorney General.").

298. *Saleem*, 520 F. Supp. 2d at 1051 ("Because plaintiff's claim is premised on defendants' *refusal* to make a 'decision' or to take 'action' on his application, I must conclude that § 1252(a)(2)(B) is not implicated in this case."); *accord* Soneji v. Dep't of Homeland Sec., 525 F. Supp. 2d 1151, 1154 (N.D. Cal. 2007); Zaigang Liu v. Novak, 509 F. Supp. 2d 1, 6–7 (D.D.C. 2007).

299. Iddir v. INS, 301 F.3d 492, 497 (7th Cir. 2002).

300. *Id.* (citations omitted).

301. *Id.* at 498.

> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and a strong presumption in favor of judicial review of administrative action] render § 1252(a)(2)(B)(ii) inapplicable to a claim of adjudicatory delay. Although the speed of processing may be "discretionary" in the sense that it is determined by choice, and that it rests on various decisions that Defendants may be entitled to make, it is not discretionary in the manner required by the jurisdiction-stripping language of the IIRIRA.[302]

Indeed, "no matter how narrowly a court defines 'action,' it would require an Orwellian twisting of the word to conclude that it means a failure to adjudicate."[303]

These courts have also responded to the dismissing courts' reasoning. In *Duan*, for example, Chief Judge Ambrose noticed a contradiction in the *Safadi* interpretation of § 1252(a)(2)(B)(ii).[304] She recalled *Safadi*'s holding that immigration officials' four-year delay was not tantamount to a refusal to adjudicate an application, and he wondered "how an unreasonable delay might not qualify as 'action' under the court's analysis, while a reasonable delay unambiguously does constitute 'action.'"[305]

The government has pointed out that § 1252(a)(2)(B)(ii) forbids review of any "decision or action," and argued that "agency action" includes the "failure to act" under the APA definitions.[306] The asserting courts reject this argument, pointing out that § 551(13) specifies that the definition applies only "[f]or the purpose of this subchapter."[307] Nothing indicates that the definition also applies to § 1252(a)(2)(B)(ii).[308] Furthermore, the APA, located in title 6, is clearly not "specified in" the subchapters of title 8 to which § 1252(a)(2)(B)(ii) applies.[309]

b. *"Specified Under This Subchapter" Means "Specified Under This Subchapter"*

Section 1252(a)(2)(B)(ii) singles out for preclusion the discretionary acts "the authority for which is specified under this subchapter," referring to §§ 1151 through 1381 of title 8.[310] In *Belegradek v. Gonzales*, the court held that in order for the government to invoke § 1252(a)(2)(B)(ii), it had to rely on an "explicit, 'Congressionally-defined, discretionary *statutory* power'" in the specified subchapters of title 8 and "not an administrative or other implied discretionary power," such as § 103.2(b)(18).[311] While § 1255(a)

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302. Duan v. Zamberry, No. 06-1351, 2007 WL 626116, at *2 (W.D. Pa. Feb. 23, 2007).
303. *Saleem*, 520 F. Supp. 2d at 1052.
304. *Duan*, 2007 WL 626116, at *3; *see supra* notes 215–25 and accompanying text.
305. *Duan*, 2007 WL 626116, at *3.
306. 5 U.S.C. § 551(13) (2000).
307. Soneji v. Dep't of Homeland Sec., 525 F. Supp. 2d 1151, 1154 n.2 (N.D. Cal. 2007).
308. *Id.*
309. *See infra* note 311 and accompanying text.
310. 8 U.S.C. § 1252(a)(2)(B)(ii) (Supp. V 2005); *see supra* note 175 and accompanying text.
311. Belegradek v. Gonzales, 523 F. Supp. 2d 1364, 1367 (N.D. Ga. 2007) (quoting Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1361 (11th Cir. 2006)); *accord* Saleem v. Keisler, 520 F.

falls within title 8, the *Belegradek* court noted that the provision did not explicitly enumerate inaction on an AOS application as a discretionary act and therefore escaped preclusion.[312] In fact, another court noted that nothing in the INA "addresses, much less specifies, any discretion associated with the pace of adjudication."[313] On this point, the U.S. Court of Appeals for the Fifth Circuit held that "[t]he statutory language is uncharacteristically pellucid . . . ; it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'"[314]

c. *The Title and Construction of § 1252 Do Not Support Preclusion*

Courts have also examined § 1252's name and construction in determining whether it precludes judicial review of the plaintiff's claims.[315] In *Shah v. Hansen*, the court reasoned that by its own title, § 1252 applies to "Judicial review of orders of removal," and subsection 1252(a)(2)(B), "Denials of discretionary relief," applies only where relief has actually been denied.[316] For AOS litigants, relief has been neither granted nor denied, and so the statute is inapplicable.[317] Even on a broad reading of the statute, the plaintiffs ask the court "to examine and rectify a gross inaction," not for review of a decision or action regarding the granting of relief.[318]

In *Saleem*, Judge Crabb examined § 1252(a)(2)(B)'s purpose, namely, to "shield from judicial review judgments regarding the propriety of adjusting

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Supp. 2d 1048, 1056 (W.D. Wis. 2007) ("Obviously, because § 103.2(b)(18) is a regulation and not a statute, any discretion granted by the regulation is not 'specified under this subchapter' for the purpose of acting as a bar to judicial review." (citing Soltane v. U.S. Dep't of Justice, 381 F.3d 143, 146 (3d Cir. 2004))). For a list of the "myriad Congressionally-defined, discretionary *statutory* powers" set out in those subchapters, see *Zafar*, 461 F.3d at 1361.

312. *Belegradek*, 523 F. Supp. 2d at 1367–68.

313. Ma v. Gonzales (*Ma I*), No. C07-122RSL, 2007 WL 1655188, at *3 (W.D. Wash. June 5, 2007).

314. Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005) (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)); *accord* Khan v. Att'y Gen., 448 F.3d 226, 232 (3d Cir. 2006) (quoting *Zhao*, 404 F.3d at 303).

315. *See, e.g.*, Shah v. Hansen, No. 1:07 CV 1576, 2007 WL 3232353, at *4 (N.D. Ohio Oct. 31, 2007) (examining the section's titles); Paunescu v. INS, 76 F. Supp. 2d 896, 899–900 (N.D. Ill. 1999) (same).

316. *Shah*, 2007 WL 3232353, at *4. *But see* Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528 (1947) (reasoning that examining statute titles is not useful for interpretive purposes); He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *5 n.3 (N.D. Ill. Jan. 2, 2008) ("Plaintiffs do not make the futile argument, suggested by headings within the statute, that section 1252(a)(2)(B)(ii) bars judicial review only of decisions in removal proceedings. The law in this Circuit is that the statute's coverage is not limited in this way." (citing El-Khader v. Monica, 366 F.3d 562, 566 (7th Cir. 2004))).

317. *Shah*, 2007 WL 3232353, at *4 (referring to § 1252(a)(2)(B)(i), which also falls under the title "Denials of discretionary relief" (citing *Paunescu*, 76 F. Supp. 2d 896)).

318. *Paunescu*, 76 F. Supp. 2d at 900.

an alien's status."[319] She held that given its purpose, § 1252(a)(2)(B) could not be interpreted in a way that would permit USCIS to refuse to act on AOS applications or in a way that would allow them to "obtain the benefit of a statute that protects 'discretionary' acts when they have not exercised any discretion."[320] More broadly, she noted that since Congress intended to authorize noncitizens to seek AOS, "it is 'unlikely that Congress . . . at the same time also intended section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullified the statute.' In other words, a right to request relief inherently implies a corresponding obligation to respond."[321]

This section has shown the reasoning behind the asserting courts' findings that the INA's jurisdiction-stripping provisions do not foreclose courts from hearing the AOS litigants' suits. These courts have also gone on to debunk the myriad policy arguments the dismissing courts make. The next section explores their thoughts.

4. Plaintiffs' Rights Trump National Security Concerns and Agency Issues

Like their dismissing counterparts, the asserting courts consider the many relevant policy issues. Where the source of the delay is a name check, these courts, like their counterparts, are sympathetic to the national security concerns implicated in granting aliens permanent resident status. The asserting courts, however, weigh the meticulousness of the background checks against the need to actually conduct them, since applicants work and live in the United States while investigations proceed.[322] "If there is some legitimate national security concern with them or other applicants currently living and working in the country, this surely militates in favor of prompt security checks, not in favor of delay."[323]

Many courts are skeptical of the government's national security arguments. Judge Crabb said,

> "[N]ational security" is not a magic talisman that can be waved in front of courts whenever the government seeks to insulate itself from judicial review. Defendants must make some showing that a requirement to process plaintiff's application in five years presents a danger; they cannot rely solely on an *ipse dixit*.[324]

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319. Saleem v. Keisler, 520 F. Supp. 2d 1048, 1057 (W.D. Wis. 2007) (quoting Subhan v. Ashcroft, 383 F.3d 591, 594 (7th Cir. 2004)).

320. *Id.*

321. *Id.* at 1054 (quoting *Subhan*, 383 F.3d at 595).

322. Dong v. Chertoff, 513 F. Supp. 2d 1158, 1170 (N.D. Cal. 2007).

323. *Id.*; *see also* USCIS, *supra* note 50, at 40 (concluding that, although name checks were implemented to enhance national security, they "may increase the risk . . . by extending the time a potential criminal or terrorist remains in the country"); Hsu & Aizenman, *supra* note 75.

324. *Saleem*, 520 F. Supp. 2d at 1060; *see also* Singh v. Still, 470 F. Supp. 2d 1064, 1069 (N.D. Cal. 2006) (holding that the "mere invocation of national security is not enough to render agency delay reasonable per se").

One court thought these arguments were simply "red herring[s]."[325] Defendants must offer meaningful explanations for the lengthy delays.[326] Name checks may become less of a problem for applicants—depending on how USCIS implements its new expediting policy and whether the agency maintains it[327]—but national security is still worth noting as a factor in these courts' decisions.

These courts are also unreceptive to other policy arguments from the government. In *He v. Chertoff*, the court refused to participate in what it called "'shell game' reasoning," which would allow USCIS to dodge its duties to applicants by shifting blame to the FBI when a name check was the cause of delay.[328] It is true that the FBI controls the pace of name check processing, the *He* court held, but USCIS has the ability to expedite checks, promptly request them, and follow up with the FBI to keep checks from "slip[ping] through the cracks."[329] In *Dong*, Judge Armstrong recognized the fiscal and administrative burdens of processing millions of name checks each year, but she insisted that the courts are "not in a position to relieve the defendants of their obligation to comply with their mandatory duties. . . . [I]t is not the place of the judicial branch to weigh a plaintiff's clear right to administrative action against the agency's burdens in complying."[330] The political question at issue, then, was not the judiciary's role in administrative improvements, as the dismissing courts held. Rather, the issue concerned whether the FBI had adequate resources to process such an enormous volume of name checks, and she declined "to attempt to address this issue by sanctioning the defendants' non-compliance."[331] Judge Armstrong also tackled the ancillary applicant fairness issue the government successfully raised in dismissing courts. To her, the line-cutting argument was specious: "[T]hese plaintiffs have more than 'waited their turn,' having seen millions of later-filed applications processed before theirs. . . . [They] are simply asking to be placed back in the queue."[332]

For the asserting courts, the policy issues weigh strongly in favor of hearing the AOS litigants' cases. Thus, having addressed the legal and policy issues relevant in the AOS cases, the asserting courts deny the government's motions to dismiss the suits on one or both of the plaintiffs' theories. The success of the various theories is explored in the section that follows.

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325. *Dong*, 513 F. Supp. 2d at 1170.

326. *See, e.g.*, Zalmout v. Gonzalez, No. 07-12575, 2007 WL 3121532, at *3 (E.D. Mich. Oct. 24, 2007) (scheduling an evidentiary hearing since defendants provided no explanation for the four-year delay).

327. *See supra* notes 104–12 and accompanying text for a discussion of the new policy and other challenges the agency faces.

328. He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *4 (N.D. Ill. Jan. 2, 2008); *see also Singh*, 470 F. Supp. 2d at 1068 (emphasizing that "[t]he critical issue . . . is whether the individual petitioner versus the government *qua* government is responsible" for the delay).

329. *He*, 2008 WL 36634, at *4.

330. *Dong*, 513 F. Supp. 2d at 1170–71.

331. *Id.* at 1171.

332. *Id.*

5. Successful Plaintiff Theories: The Administrative Procedure Act, the Mandamus and Venue Act, or Both?

Having found that immigration officials have a nondiscretionary duty to AOS applicants to adjudicate their applications within a reasonable time and that § 1252(a)(2)(B)(ii) does not foreclose judicial review, these courts then analyze which of the APA and mandamus theories of relief supported subject matter jurisdiction at trial. Some courts only proceed on one theory or the other; other courts proceed on both.

a. *Success on Administrative Procedure Act Grounds*[333]

Most asserting courts hold that the APA offers appropriate grounds for the plaintiffs' claims, relying on § 555(b) and § 706(1) of the statute, which provide for agency action within a reasonable time.[334] The first prong of a two-part APA jurisdictional analysis,[335] which calls for the existence of a nondiscretionary duty to act, is established by virtue of the analysis in Part II.B.1 of this Note.[336] Surviving the government's motions to dismiss, then, hinges on whether there has been unreasonable delay to support the second jurisdictional prong.[337]

In *Shah v. Hansen*, Judge Patricia Gaughan began this analysis by determining whether any of the APA preclusionary provisions at § 701(a) foreclosed judicial review.[338] She found that § 701(a)(1), precluding review where Congress has so mandated, did not apply because Congress did not provide clear and convincing evidence in § 1252(a)(2)(B) of its intention to divest district courts of subject matter jurisdiction over actions to compel adjudication of AOS applications.[339] Section 701(a)(2), prohibiting review of actions specifically left to agency discretion, was also

333. Many courts premise jurisdiction only on APA grounds. *See* Shah v. Hansen, No. 1:07 CV 1576, 2007 WL 3232353, at *7 (N.D. Ohio Oct. 31, 2007); Saleem v. Keisler, 520 F. Supp. 2d 1048, 1049 (W.D. Wis. 2007) (deciding on APA grounds and not reaching mandamus); Landry v. Chertoff, No. 07-0506, 2007 WL 2007996, at *2 (E.D. La. July 5, 2007); Gelfer v. Chertoff, No. C 06-06724 WHA, 2007 WL 902382, at *3 (N.D. Cal. Mar. 22, 2007) ("In light of their similarities and by finding jurisdiction under the APA, this order need not address whether mandamus jurisdiction exists in the context of petitioner's claim.").

334. *See, e.g.*, Duan v. Zamberry, No. 06-1351, 2007 WL 626116, at *4 (W.D. Pa. Feb. 23, 2007) (quoting Hu v. Reno, No. 3-99-CV-1136-BD, 2000 WL 425174, at *3 (N.D. Tex. Apr. 18, 2000)); *see also supra* notes 151–54 and accompanying text.

335. *See supra* note 150 and accompanying text.

336. *See supra* notes 253–90 and accompanying text.

337. *See infra* notes 341–44 and accompanying text.

338. *Shah*, 2007 WL 3232353, at *4; *see also supra* notes 157–61. Jurisdiction was properly premised on the federal question statute, 28 U.S.C. § 1331. *See supra* note 145 and accompanying text.

339. *Shah*, 2007 WL 3232353, at *4; *see also* Saleem v. Keisler, 520 F. Supp. 2d 1048, 1052 (W.D. Wis. 2007) ("The question is not whether evidence exists to show that Congress intended to *allow* review; rather, the question is whether there is 'clear and convincing' evidence that Congress intended to *preclude* review." (citation omitted)); *supra* notes 173–75 and accompanying text.

inapplicable because nothing in the INA or its implementing regulations gives USCIS discretion over whether or not to act on an application, but the implementing regulations and APA § 555(b) support such a duty.[340]

Some districts require plaintiffs to show that they have a clear right to relief under the APA to survive dismissal, which requires the plaintiff to "demonstrate there has been a final agency action for which there is no other adequate remedy in court."[341] While immigration officials in these cases have taken no explicit "final action," courts have held that USCIS "cannot legitimately evade judicial review forever by continually postponing any consequence-laden action and then challenging federal jurisdiction on 'final agency action' grounds."[342] Under APA definitions, "agency action" includes the failure to act,[343] and at some point, that failure to act becomes final.[344]

b. *Success on Mandamus Grounds*

Many courts have recognized that USCIS's duties with respect to AOS applications support mandamus jurisdiction.[345] For relief under the statute, a petitioner must establish that "(1) [their] 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."[346]

In districts where the duty to adjudicate AOS applications in a reasonable time exists, AOS litigants' mandamus claims usually survive the dismissal stage with a preliminary showing of possible unreasonable application delay that would make their claims clear and certain. With regard to the last element, courts have held that "'[w]aiting for an agency to act cannot logically be an adequate alternative to an order compelling the agency to act. Neither would it be reasonable to require Plaintiffs to wait to raise their

340. *Shah*, 2007 WL 3232353, at *5; *see also* Soneji v. Dep't of Homeland Sec., No. 07-2290 SC, 2007 WL 3101660, at *3 (N.D. Cal. Oct. 22, 2007) ("[Having discretion in application adjudication does not mean that the government has] the discretion to do nothing with an I-485 application. Such an interpretation not only pushes the bounds of common sense but is also contradicted by a wealth of authority from this and other districts." (citations omitted)); Gelfer v. Chertoff, No. C 06-06724 WHA, 2007 WL 902382, at *2 (N.D. Cal. Mar. 22, 2007) ("[R]espondents have a statutorily prescribed duty to adjudicate petitioner's application 'within a reasonable time' under 5 U.S.C. § 555(b) . . . ."); *supra* notes 269–75 and accompanying text.

341. *Shah*, 2007 WL 3232353, at *6 (citing 5 U.S.C. § 704 (2000)).

342. *Id.* (quoting Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1239 (11th Cir. 2003)).

343. 5 U.S.C. § 551(13).

344. *Shah*, 2007 WL 3232353, at *6 (citing 5 U.S.C. § 551(13)).

345. *See, e.g.*, Xu v. Chertoff, No. 07-366, 2007 WL 2033834, at *4 (D.N.J. July 11, 2007) (concluding that "the duty to process [AOS] applications in a reasonable time [is] a nondiscretionary duty imposed by the APA and reviewable through the mandamus statute"); Ma v. Gonzales (*Ma I*), No. C07-122RSL, 2007 WL 1655188, at *4 (W.D. Wash. June 5, 2007); Duan v. Zamberry, No. 06-1351, 2007 WL 626116, at *5 (W.D. Pa. Feb. 23, 2007).

346. *See supra* note 141 and accompanying text.

claims until the government initiated removal proceedings.'"[347] Furthermore, even if aspects of the process are discretionary, an official's "'duty may be discretionary within limits. He can not [sic] transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has.'"[348] In these districts, immigration officials do not have discretion to sit on an application indefinitely.

c. *Success on Both Administrative Procedure Act and Mandamus and Venue Act Grounds*

Some courts have asserted jurisdiction under both the mandamus and APA statutes.[349] For example, in *Dong v. Chertoff*, Judge Armstrong held that USCIS violated its duty to comply with the procedural requirements for withholding adjudication of an AOS application at 8 C.F.R. § 103.2(b)(18), clearing the way for subject matter jurisdiction under both statutes.[350] Other jurisdictions have declined to reach mandamus jurisdiction, finding that the availability of the APA forecloses plaintiffs from satisfying the last prong of a mandamus claim.[351]

Part II.B has explored the asserting courts' approach to the many legal and policy issues relevant to AOS litigants' cases. Their reasoning contrasts starkly with the dismissing courts at nearly every turn. Part III advocates the asserting courts' approach, arguing that it is the most faithful to the spirit and the letter of U.S. immigration law, the most workable, and the approach that best serves the broader policy and human interest concerns at stake in these cases.

III. OUT OF LIMBO AND INTO A RESOLUTION

Parts I and II introduced the AOS process and reasons a conclusion is sometimes delayed, the litigation surrounding that delay, and the district courts' approaches in deciding the government's motions to dismiss. The two approaches ask the same three basic questions—and reach completely different answers. First, they ask whether there is a duty to adjudicate AOS applications at all.[352] Then, they ask whether USCIS has a duty to do so in a reasonable time. Finally, they ask whether the INA's jurisdiction-

347. Singh v. Still, 470 F. Supp. 2d 1064, 1071 (N.D. Cal. 2006) (quoting Fu v. Reno, No. 3:99-CV-0981-L, 2000 WL 1644490, at *4 (N.D. Tex. Nov. 1, 2000)).

348. Wei Tan v. Gonzales, No. 07-cv-00133-MEH-MJW, 2007 WL 1576108, at *2 (D. Colo. May 30, 2007) (quoting Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925)).

349. *E.g.*, He v. Chertoff, No. 07 C 363, 2008 WL 36634, at *4–5 (N.D. Ill. Jan. 2, 2008); *Singh*, 470 F. Supp. 2d at 1067.

350. Dong v. Chertoff, 513 F. Supp. 2d 1158, 1161–62, 1169 (N.D. Cal. 2007).

351. *E.g.*, Saleh v. Ridge, 367 F. Supp. 2d 508, 511–12 (S.D.N.Y. 2005).

352. This question is less controversial than the second two. *See supra* note 194.

stripping provisions apply to foreclose judicial review.[353] In reaching their divergent conclusions, the courts have analyzed in detail the relevant statutes and regulations. Part III reviews their opposing interpretations of the law and argues that the asserting courts' reading is superior. It also argues, however, that the decisions described in this Note are more heavily informed by a backdrop of policy considerations than they appear to be, and that close consideration of that backdrop weighs strongly in favor of the asserting courts' position.

A. *Interpreting the Law*

Part III begins by addressing the many statutes and regulations at issue in AOS litigation. It answers the three basic questions posed above and argues that together they weigh strongly in favor of denying the government's motions to dismiss in these cases.

1. The Duty to Adjudicate Adjustment of Status Applications Exists

The first question courts ask is whether USCIS has a duty to adjudicate AOS applications. For several reasons, the answer must be yes. First, defendants have conceded this duty on many occasions.[354] Second, the dismissing courts sometimes concede that the duty to adjudicate AOS applications exists, and, if not, they often imply it. In their opinions, they frequently leave themselves escape hatches should a case come before them where delay was "indefinite" or "tantamount to abandonment" of an application.[355] Caveats like these evince the weakness of the dismissing courts' interpretation of § 1255(a).

Third, the asserting courts are correct that the duty should be inferred from the existence[356]—if not the letter—of § 1255(a), which says that the attorney general may "in his discretion and under such regulations as he may prescribe" adjust a qualified alien's status to LPR.[357] Fairly read, the primary purpose of this provision is to authorize qualified aliens to seek LPR status,[358] and secondarily to give the attorney general discretion over application decisions. Even denied applicants "retain[] the right" to apply for AOS in removal proceedings.[359] Dismissing courts that disagree inappropriately place agency discretion above the duty to adjudicate an application. Such a reading contravenes the INA provision commanding

353. Interestingly, in no case researched for this Note was there a decision holding that there was a duty to act in a reasonable time but that the jurisdiction-stripping provision precluded the lawsuit. The courts answered either "yes" or "no" to both the second and third questions.

354. *See* sources cited *supra* note 194.

355. *See* sources cited *supra* note 194.

356. *See supra* note 257 and accompanying text.

357. 8 U.S.C. § 1255(a) (2000); *see supra* Part I.C.3.a; *see also supra* note 35 and accompanying text.

358. *See supra* notes 169, 257 and accompanying text.

359. *See supra* note 188 and accompanying text.

that the Homeland Security secretary "shall be charged with the administration and enforcement [of immigration]."[360] The secretary cannot be charged with immigration administration and simultaneously have no duty to administrate. Such a result is irrational.

2. The Duty to Adjudicate Adjustment of Status Applications in a Reasonable Time Exists

In answer to the second question, a reasonable time duty must accompany the duty to adjudicate AOS applications if it is to have any meaning.[361] The dismissing courts are right that the text of the INA does not explicitly confer on USCIS a duty to process and adjudicate AOS applications in a reasonable time,[362] but that does not necessarily lead to the conclusion that the agency has unlimited time to reach decisions. As the *Razaq* court put it, the "'duty to decide' becomes no duty at all if it is accompanied by unchecked power to decide when to decide."[363]

The APA provision directing an agency to "conclude a matter presented to it" within a "reasonable time" substantiates this position.[364] Dismissing courts argue that the absence of a time frame for AOS adjudication in the INA nullifies the applicability of that provision and the availability of APA relief in these suits.[365] They cite the explicit time frames set out for naturalization applications and those for firearms dealer and manufacturer licenses to show that Congress could have placed time constraints on the AOS process if it had wanted to.[366] Asserting courts have not been persuaded by this argument, and neither is this Note. For one, defendants have not cited analogous situations where such an absence was fatal to APA claims.[367] Second, Supreme Court decisions support the idea that the APA's reasonableness provisions are appropriate in situations where Congress meant to provide for review and did not supply timelines.[368] It makes sense that Congress would want to give USCIS flexibility in making AOS decisions. For one, Congress might recognize that because the agency is largely self-funded and has struggled with backlogs for years—and is currently grappling with a new processing backlog—it would be impracticable to hold it to deadlines that it might not have the resources to meet.[369] Second, AOS applications, unlike those for citizenship the

360. *See supra* note 189 and accompanying text.

361. *See supra* notes 281–85 and accompanying text. In 2005, USCIS at least implicitly agreed: its official policy was to fast-track name checks for applicants who filed mandamus suits in federal courts. *See supra* notes 123–27 and accompanying text.

362. *See supra* notes 198–202 and accompanying text.

363. Razaq v. Poulos, No. C 06-2461 WDB, 2007 WL 61884, at *3 (N.D. Cal. Jan. 8, 2007); *see supra* note 283 and accompanying text.

364. 5 U.S.C. § 555(b) (2000); *see supra* note 152 and accompanying text.

365. *See supra* notes 198–202 and accompanying text.

366. *See supra* notes 200–02 and accompanying text.

367. *See supra* note 259 and accompanying text.

368. *See supra* note 280 and accompanying text.

369. *See supra* notes 104, 111–12 and accompanying text.

dismissing courts cite, are not constrained by sponsorship requirements, visa caps, waiting lists, and cutoff dates.

The two approaches interpret the same regulations and reach opposite conclusions as to whether they support a duty to adjudicate in a reasonable time. The dismissing courts note that the regulations command many things, but they never dictate that USCIS shall adjudicate.[370] To the asserting courts, the regulations' phrasing assumes adjudication will occur, and a reasonable time duty must accompany the regulations for them to have any meaning.[371] Another convincing reason for the asserting courts' position lies with the regulation articulating procedures for withholding applications.[372] Although defendants rarely utilize this avenue, its existence is revealing: an agency having unfettered discretion in all matters related to the timing and processing of applications would have no need for withholding procedures. Dismissing courts correctly cite this provision as evidence of USCIS's right to withhold adjudication,[373] but they wrongly grant dismissal just because it is on the books. On the contrary, this provision's existence supports the conclusion that USCIS may not indefinitely withhold adjudication unless it is following its procedures for doing so.[374]

Many of the dismissing courts contradict their position that USCIS does not have a duty to act in a reasonable time, further weakening their holdings.[375] On the one hand, they hold that actions in the AOS process and the pace of adjudication are completely within USCIS's discretion, but then they look for evidence of the agency's action on an application, dismissing a case as long as USCIS has not "refused to act" or has taken no action.[376] This inquiry is illogical given the dismissing courts' position that the agency's discretionary power is plenary and their reluctance to create time frames where they believe none were intended.[377] Furthermore, the conclusions they reach making this inquiry fall apart when one examines the facts. The "action" that dismissing courts identify is the same as the "inaction" asserting courts find, at least where an unresolved name check is involved[378]: USCIS typically completes all aspects of an application and then waits for the FBI name check to come through.[379] This distinction is untenable. The dismissing courts ignore the fact that USCIS could take action by exercising its power to expedite name checks but has chosen not

370. *See supra* notes 186, 204–07 and accompanying text.
371. *See supra* notes 188, 260–62 and accompanying text.
372. *See supra* note 186 and accompanying text.
373. *See supra* notes 204–08 and accompanying text.
374. These procedures provide for withheld applications to be reviewed every six months by increasingly senior officials. *See supra* note 186 and accompanying text; *see also supra* notes 265–68 and accompanying text.
375. *See supra* notes 286–87 and accompanying text.
376. *See* sources cited *supra* notes 192, 225.
377. *See supra* notes 198–202, 287, 366 and accompanying text.
378. *See* sources cited *supra* notes 194, 225.
379. *See, e.g.*, sources cited *supra* note 194.

to do so.[380] That significant passage of time and repeated applicant inquiry do not rouse the agency to do so is surely tantamount to "inaction" or a "refusal to act."[381] That it chose litigation over expedition for more than a year is even more powerful proof that it "refuses to act."[382]

USCIS's new expediting policy implicitly acknowledges this point.[383] The policy further bolsters the idea that the agency has a duty to act and undermines the dismissing courts' position that it does not. An underresourced agency with no duty to act would hardly make the expeditious—and costly—resolution of name checks a priority.[384] Thus, the facts do not square with the dismissing courts' conclusions.

The asserting courts, on the other hand, have not boxed themselves in the way the dismissing courts have on an action-inaction distinction. Since they allow these suits to survive the dismissal stage, they are not forced to toe an untenable line between what constitutes "action" or "inaction." The INA does not define these words, and *Black's Law Dictionary*[385] is an insufficient alternative: "action" and "inaction" in these cases are questions of fact better decided on their merits.

The idea that USCIS has no duty to decide in a reasonable time also clashes with other facts on the ground. Congress has allocated hundreds of millions of dollars to USCIS—an ordinarily self-funded agency—specifically to clear up backlogged cases.[386] If Congress were unconcerned with timely application adjudications, it would not bother with these grants. Furthermore, at a hearing before the House Subcommittee on Immigration, then–USCIS Director Emilio Gonzalez stated, "I am mindful of my sworn duty to maintain the integrity of our immigration service. Therefore, my goal and heartfelt obligation is to make sure that USCIS has the resources required to provide immigrants with the high quality professional assistance they expect and deserve."[387] Granted, speedy adjudication can be a priority without being a duty, but Gonzalez's conceptions of his job as USCIS director and of his agency's purpose squares better with the asserting courts' position than with the dismissing courts' idea that USCIS is free to leave applicants in immigration limbo.

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380. *See supra* Part I.C.1; *supra* note 329 and accompanying text.

381. *See* sources cited *supra* note 194.

382. Compare USCIS's expediting policy from January 2005 to December 2006, *supra* notes 123–27, with its expediting policy from December 2006 to February 2008, *supra* notes 128–31.

383. *See supra* notes 132–35 and accompanying text.

384. *See supra* notes 69, 104 and accompanying text.

385. *See supra* notes 220–22 and accompanying text.

386. *See supra* note 104 and accompanying text.

387. *Proposed Immigration Fee Increase: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 12 (2007) (statement of Emilio Gonzalez, Director, USCIS), *available at* http://judiciary.house.gov/media/pdfs/printers/110th/33313.pdf.

3. The Preclusionary Provisions Do Not Apply

In answer to the third question, the INA's jurisdiction-stripping provisions do not preclude review of these cases. Both courts make heavily textual analyses of the language in § 1252(a)(2)(B)(ii).[388] The plain language of the provision supports the approach in favor of judicial review. The statute clearly precludes courts from asserting jurisdiction only where (1) there is a discretionary "decision or action" by the attorney general or the secretary of Homeland Security and (2) the authority for which is specified within certain subchapters of title 8.[389] In these cases, neither requirement is satisfied because, as the courts succinctly explained, no statutory provision in the relevant subchapters expressly gives the government the power not to adjudicate an AOS application.[390]

The problem with the dismissing courts' analysis is that it focuses heavily on the meaning of the word "action" in the first part of the provision.[391] This ignores the word's connection to the later, stricter aspects of § 1252(a)(2)(B)(ii) requiring "action" to be expressly and statutorily specified to be in the attorney general or Homeland Security secretary's authority.[392] Once again, the dismissing courts trap themselves by trying to answer as a matter of law factual questions about what constitutes "action" and what does not.[393]

In sum, the dismissing courts take an exclusionary approach to the law, showing great deference to USCIS and its discretion and reading the INA's preclusionary provisions broadly.[394] The asserting courts take a far less restrictive approach to immigrants' rights, vigorously working to retain jurisdiction, honoring the APA's presumption in favor of judicial review of administrative actions, and trying to achieve a just result.[395] When it comes to the many thousands of aliens who have waited a year, or many more, for decisions on their AOS applications, the best approach to the law is the second one.[396] The first approach allows—and probably encourages—USCIS to drag its heels, leaving thousands of people in immigration limbo without a judicial remedy. Surely, Congress did not create the AOS process with this result in mind.

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388. *See supra* Parts II.A.2, II.B.3.
389. *See supra* Part II.B.3.a–b; *supra* note 173 and accompanying text.
390. *See supra* Part II.B.3.a.
391. *See supra* Part II.A.2.
392. *See supra* note 192 and accompanying text.
393. *See* sources cited *supra* notes 194, 225.
394. *See supra* note 192 and accompanying text.
395. *See supra* note 252 and accompanying text.
396. After proper inquiry, it may be found that the facts support the government's argument that it needs more time and is currently doing all that it can. Regarding the plaintiffs' theories for relief, courts get it right when they dismiss the writs of mandamus and uphold the APA claims. Although mandamus and APA relief run together and may be in many ways indistinguishable, *see supra* Part I.C.2.c, mandamus requires that no other relief be available, and the APA is certainly "other relief." *See supra* notes 141, 351 and accompanying text.

B. *Incorporating the Circumstances*

The conflict among the courts reflects not only different readings of the relevant statutes and regulations but also two very different approaches to the policy issues and circumstances underlying these cases. These issues help explain the contradictions and caveats characteristic of the dismissing courts' opinions. This section explores those issues and circumstances and attempts to demonstrate that they actually support the asserting courts' position.

The dismissing courts often cite USCIS's crucial and expanded national security role in the wake of 9/11 as a reason for their holdings.[397] Their concern is well-placed, but these courts uncritically accept blanket "national security" arguments from USCIS and allow that significant delays are an inevitable post-9/11 reality.[398] It is irrational to think that further delays on security checks for aliens already living within America's borders does anything to promote public safety. As the USCIS ombudsman and the asserting courts argue, delayed background checks actually pose a significant security risk by allowing subversives to remain in this country longer.[399] USCIS's new policy helps address the human element of this issue by expediting adjudications and completing the name checks later,[400] but this is not enough. If USCIS is serious about national security, it should be agency policy not to postpone but to focus on resolving the name checks themselves—not to settle lawsuits, but to quickly weed out dangerous individuals and have them deported.[401] If the courts presented with these cases intend to advance national security, they should allow the suits to survive the dismissal stage in order to make meaningful inquiries into what is really going on and encourage the speedy resolution of name checks.

USCIS's various expediting policies also undermine the credibility of the agency's national security arguments. For almost two years after 9/11, USCIS's expediting policy was petitioner friendly: the agency expedited name checks for applicants who filed mandamus suits in federal court.[402] Dismissing courts have ignored this. National security was the same if not more of a concern for the agency when it had this policy in place, so attempting to justify dismissal based on national security concerns is irrational. Furthermore, USCIS's February 2008 policy directly contradicts the arguments it has been making since December 2006: that national security demands completion of the checks before application adjudication by directing officials to go forth with not only adjudication but actual approval of applications without a completed name check.[403] If the new expediting policy remains in place and stems the flow of name-check-based

397. *See supra* notes 244–47 and accompanying text.
398. *See supra* notes 247, 323–25 and accompanying text.
399. *See supra* notes 93, 323 and accompanying text.
400. *See supra* notes 133–34 and accompanying text.
401. *See supra* notes 93, 315–18 and accompanying text.
402. *See supra* notes 123, 127 and accompanying text.
403. *See supra* note 133 and accompanying text.

AOS litigation, USCIS may never have to explain this contradiction to a judge. But the agency has a pattern of abruptly changing its name check expediting policies,[404] and if the policy changes back to its more restrictive version in the future, judges should be wary of any delays USCIS attempts to justify with "national security" concerns.[405]

Since USCIS's national security arguments are so weak, one suspects that something else is going on here. The likely answer is that the dismissing courts' concern that granting injunctions will overwhelm the already overextended agencies involved in the AOS process[406] and thereby undermine Congress's power "'to have its declared policy . . . enforced exclusively through executive officers, without judicial intervention.'"[407] Agency resources are especially relevant given that the agency's planned fee increase last summer, which was supposed to bring AOS processing times down from six to four months, prompted a surge of applications that doubled processing times instead.[408] In the wake of this ironic outcome, the agency's own processing backlog is likely to become the new wellspring of AOS litigation. But as some asserting courts rightly point out, it is not the judiciary's job to alleviate the agencies' bureaucratic problems at the applicants' expense.[409] Indeed, where "'an agency's recalcitrance, inertia, laggard pace or inefficiency sorely disadvantages the class of beneficiaries Congress intended to protect,'"[410] judicial review is appropriate.

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404. *See supra* notes 123–35 and accompanying text.

405. Furthermore, one suspects that dangerous aliens would be rare in AOS litigation. It is doubtful that applicants with something to hide would draw attention to themselves by bringing a case in federal court. Petitioners are more likely to be people like Dr. Xiaoqing Tang who have valid reasons for needing their applications decided quickly. *See supra* notes 3–7, 92 and accompanying text.

406. *See supra* notes 112, 248–50 and accompanying text.

407. Shen v. Chertoff, 494 F. Supp. 2d 592, 595 (E.D. Mich. 2007) (quoting Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)).

408. *See supra* notes 108–12 and accompanying text. Incidentally, this new backlog will affect all applicants equally (as delayed name checks do not), and thus might lead to a redefinition of what adjudication in a "reasonable time" means, making it much harder for applicants who survive the dismissal stage to prove their cases under the APA and the MVA.

409. *See supra* note 330 and accompanying text. Given its limited resources, it seems like the agency's job should be to focus on resolving the applications (which it will have to do anyway) and arguing for funds from Congress instead of arguing against the applicants trapped in its backlog. Indeed, the law requiring USCIS to be funded by user fees needs to be repealed. As evidence by the 150% AOS application fee hike last year, which doubled the adjudication waiting time, this system is "unfair" and "forces immigrants to pay ever more dearly for bad service." Editorial, *Citizenship, Thwarted*, N.Y. Times, Mar. 19, 2008, at A18; *see supra* notes 108, 112 and accompanying text. Although this Note does not discuss delayed citizenship applications, a similar pre-fee-hike surge occurred for those applications during summer 2007, raising citizenship waiting times from five months to fourteen to sixteen months. Editorial, *supra*. As a result, many would-be citizens likely will be unable to vote in the November presidential election. Such "intentional disenfranchisement" is even more alarming evidence of how "dear[]" is the cost of a broken immigration system. *Id.*

410. Yu v. Brown, 36 F. Supp. 2d 922, 929 (D.N.M. 1999) (quoting *In re* Am. Fed'n of Gov't Employees, AFL-CIO, 790 F.2d 116, 117 (D.C. Cir. 1986)).

CONCLUSION

This Note explored the conflict surrounding AOS applicants' injunctive suits seeking decisions on their applications to become LPRs. The law in this area is fractured and unsettled, but it centers primarily on interpretations of two provisions in the INA and other relevant laws and regulations, heavily informed by a host of policy considerations. The superior interpretation is that USCIS has a clear duty to adjudicate all applications properly before it in a reasonable time. When it violates that duty, applicants have (in some jurisdictions) or should have (in others) legal recourse. The United States owes more than a closed courtroom door to individuals utilizing legal immigration channels.

This Note hopes that the cases on appeal in the circuit courts will resolve this split, which exhibits a certain amount of arbitrariness. Around the country, aliens with substantially similar circumstances pleading their cases in courts interpreting exactly the same law have opposite experiences.[411] The courtroom door is open or closed depending, not upon the strength of an applicant's case, but whether he lives in the right district or comes before the right judge.[412]

411. *See* sources cited *supra* notes 191–94.
412. *See* sources cited *supra* notes 191–94.