

Immigration Insights Podcast - Episode 27

Kate Kalmykov: Hello everyone and welcome to the Immigration Insights Podcast hosted by Greenberg Traurig. My name is Kate Kalmykov and I co-chair the Global Immigration and Compliance Group at GT. And today we are going to talk about mandamuses [00:00:30] and using this federal litigation tool to move delayed cases in the immigration system, whether they're at USCIS or DOL or overseas at the consulates or the embassies. And I'm joined today by my colleague and a frequent guest on our podcast, Jennifer Hermansky, a shareholder in our Philadelphia office. Jen, thanks for joining us again.

Jennifer Herman...: [00:01:00] Happy to be here.

Kate Kalmykov: So Jen, mandamus has always been around. I know that when I was a young associate back in 2005, 2006, I was filing mandamuses for long delayed naturalization cases at that time. For some reason, naturalization just took forever. And this was a tool that we worked with our litigators here at GT, even back then to [00:01:30] really move cases through the system. And then processing times improved and they improved for a while and we didn't have to use mandamuses. COVID happened six years ago and everything just stopped. The government had to lay off people, people had to go remote. Consular services were shut down. Consular staff was reduced or brought back home. And so cases [00:02:00] really stopped. And then when processing resumed, it never really got back to the processing times that we were at before COVID. And before COVID also wasn't ideal, but it just wasn't as bad as post COVID when the agency was trying to staff back up, when consular officers were being sent back abroad.

And so mandamus started to sort of resurface and be something that [00:02:30] we use to really move along long delayed cases. So it is a tool under the Administrative Procedures Act. It's not something specific to immigration. It basically says that if you apply to a federal government agency for a benefit they, the government, cannot not issue that benefit in a reasonable amount of time. And what is reasonable? That is something that is really the focus [00:03:00] of mandamus litigation when the courts look at these cases. So certain types of cases and certain types of processes have in the statute or in the regulation a certain time period in which they need to be decided. A good example is the 829 versus the I-526 in the EB-5 context. Can you tell us a little bit about that, how they differ and then what the approach to mandamus needs to [00:03:30] be in that case?

Jennifer Herman...: Sure. So for the EB-5 investors out there who do frequently use the mandamus tool because of the EB-5 processing times, we sometimes help people at the first stage with the I-526 or the I-526E petition to file a mandamus on a case that we think has been unreasonably delayed by the government. So on the 526s [00:04:00] that were filed before the RIA was passed in 2022, there have been many investors that have used this tool to move along their case. And then since the RIA passed in 2022, even more investors have been using it as a tool to move their case along. So traditionally there has not been something in the statute at the I-526 stage that said, "You must, USCIS, decide this case within a

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set [00:04:30] amount of time." However, when the government, when Congress passed the RIA, they did explicitly state that rural petitions, so an investor who invests in a rural project and uses the rural set aside, they are supposed to be receiving priority processing.

And so where Congress has explicitly stated that something should be fast tracked, then there's a really good argument [00:05:00] for us to use the mandamus tool to speed that along when it's been taking too long. And on the I-829 side, actually there is a regulation that said those I-829 petitions should be adjudicated within six months time. And really the government has never hit USCIS has never hit a target processing time of 180 days for the I-829. At some point, the I-829 processing [00:05:30] time went up well over 60 months, more than five years, to decide an I-829. And that was really hurting the investors. It was sometimes hurting projects.

And so a lot of people used the mandamus tool to speed along their I-829. And where we have something directing the USCIS to process petitions faster, like the 180-day rule in the I-829 or the rural priority [00:06:00] processing in the I-526Es, it makes the mandamus easier to argue because we can say that Congress has explicitly given us some right to make this move along faster. Or in the case of the 829, we have a regulation saying that USCIS should be doing it.

Kate Kalmykov:

Right. The truth is most of these cases don't go to court. They don't go in front of a judge. A foreign national will file the federal [00:06:30] court litigation. And then what that does is opens up a channel of communication through the US Attorney's Office, through the DOJ with USCIS that we simply don't have now. So when we submit a status inquiry request, the USCIS will give us a form response, "Your case is under process." Well, thanks. Gee, I knew that. How do we move it along? The mandamus is what does that and usually the government will settle, [00:07:00] because they don't want to go to court, they don't want to have litigation, they don't want to have precedent decisions necessarily from our discussions with them on how quickly these cases need to be decided so they tend to settle. Now that may change, but that has just been the experience we've had to date.

And when you settle, it typically doesn't mean necessarily that an approval is being issued. If the government has questions on the case, [00:07:30] they have the right to issue a request for evidence. If they think you haven't met the evidentiary standard, then they can issue a notice of intent to deny. The goal of the mandamus is to compel movement on the case. It doesn't in any way impact what that movement will be, what the adjudication of the case will result in. That is something that is based on the merits and on the substance of the case like it always would be. That doesn't change. Now going back to the EB-5 [00:08:00] category before we pivot to business immigration-

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Kate Kalmykov: ... category before we pivot to business immigration and family-based cases and how mandamus works there, regional centers and projects have to file a Form I-956 for project pre-approval before they can go into the market to raise capital from foreign investors. Now, many times we also need the project to be approved before investor I-526 [00:08:30] petitions can be approved. That's what the RIA, the Reform and Integrity Act, that you mentioned requires. And so we have also seen that many projects will sue and file a mandamus on the project approval.

Jennifer Herman...: Yeah, I think that's right. And again, the RIA is prioritizing the rural set-aside category. Many rural projects have used the mandamus as a [00:09:00] tool to move along their I-956F approvals. And as Kate mentioned, the RIA set this rule where a project must file the I-956 before investors can file their I-526Es. And recently the USCIS announced in a policy memo and in a policy announcement that the way that they would adjudicate I-526E petitions is to [00:09:30] first look at the I-956F. And only after that is approved will they move the petitions along for that particular project in the USCIS processing times. So it's important for many projects to file the mandamus. They feel that this is good for the investors. The investors have some form of security that their project has been approved and so many [00:10:00] of them have used this tool successfully.

Kate Kalmykov: Absolutely. Now one thing I want to say is that we also have to be prudent when we're thinking about what case is ripe for filing, that I know everybody wants their case adjudicated and everybody wants a decision and it's a little bit of a hassle to wait for the decision because everybody wants to get their green card permanent or conditional in hand, but you really have to be prudent because, to date, [00:10:30] the USCIS has really been amenable to settling the cases where there truly is an unreasonable delay.

But if we see mass filings that are being submitted too early just because people want to abuse the mandamus and they don't file it when there's truly a delay, but they file very soon thereafter filing their 526 or their adjustment of status to try to jump ahead of the line, we may see a trend where there's [00:11:00] pushback from the USCIS. And in that case, we actually will be going in front of judges and arguing and some of those cases may end up being not successful if they're filed too early. And we've already seen this issue being raised at some local state bar associations that have reached out to us to let us know that DHS is concerned that there may be some abuse in the system where people and their counsel are just filing [00:11:30] prematurely because this really is a tool to help in unreasonable delay.

Now, what is unreasonable? Sometimes the USCIS will say, "Well, our posted processing times are two years to issue a decision on this type of case," whether it's a green card process, whether it's a non-immigrant process. And in that case, their argument has been, "We aren't going to agree to the mandamus [00:12:00] because you haven't reached the posted processing time and you have to be beyond the posted processing time to try to settle with us."

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I think the counter argument to that is it shouldn't take USCIS two years to decide a case and that in and of itself is unreasonable. If that's your processing time, you need to get it down. And that is certainly an argument that we see in mandamus litigation often, especially [00:12:30] if, for example, the government doesn't want to settle and they're filing a motion to dismiss. They're saying, "Well, you're not beyond posted processing times, but wait, hey, your posted processing times are completely unreasonable." And that's what we were seeing in the 829s, even without the requirement for 180 days, any process that's taking four years is ridiculous. It is a huge administrative burden for the agency itself because they have to collect fingerprints and biometrics all over again. [00:13:00] They have to issue multiple receipt notices. People can't travel freely until they have those receipt notices. Sometimes they're going to local offices to try to get passports stamped. So there's a lot of costs associated with delaying adjudication too, that from a broader macro perspective need to be considered.

Now besides EB-5, mandamus, as I said, is just a tool we can use broadly in immigration. So for business immigration [00:13:30] cases where we're filing for various types of benefits through employer sponsorship, the employer has to be the litigant and has to agree oftentimes as the sponsor to file a mandamus on a case. So that is something if there is a delay in adjudication of a certain type of process, that applicants really need to discuss with their sponsors because this is federal court litigation, it is public and it's [00:14:00] a matter of public record, and some employers may not be willing to file litigation. Maybe they have conflict issues with suing in federal district court and they're just not willing to do that.

So it's important for applicants in that case to think about whether premium processing is available in their case and that is usually where you pay an extra fee in certain visa categories to expedite a decision. It used to be in 15 days. [00:14:30] The government has now changed it to 15 business days, so it's a little bit longer in the non-immigrant context. And in the immigrant visa context, it's 45 business days to get a decision under premium processing. So that is certainly a tool that is also available.

Now one thing to remember is what happens at the consulates. So we've talked a lot about dealing with USCIS. The process is [00:15:00] you file in federal district court and they have jurisdiction. If there's a delay with the Department of Labor and issuing a prevailing wage or anything like that, likewise you can file in federal district court, they have jurisdiction. It's trickier when we get into consular issues. Oftentimes we have applicants who are stuck at the consulate because they get something called a 221(g). Jen, can you tell us what that is?

Jennifer Herman...:

Sure. A 221([00:15:30] g) notice is similar to, I guess, what we would call a Request for Evidence from USCIS. It is called administrative processing by the State Department. It could be that the applicant is put into administrative processing because of background or security check issues, in which case no additional information is required by the applicant. They just need to wait until

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the consulate has finished their required [00:16:00] checks. It could also be that the 221-

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Jennifer Herman...: Required checks. It could also be that the 221(g) notice contains a list of documents for the applicant to provide back to the consulate before they can issue the visa or make a final decision on the visa. So these are basically administrative processing notices where you could fall into a void. Unfortunately some people do where their case just languishes there in [00:16:30] maybe a security background check. We do know that the State Department might be liaising with other government agencies. They liaison with the FBI and other security agencies both in the US and globally to clear people. So sometimes these checks take a really long time and the State Department is waiting on another agency to answer their [00:17:00] request or complete the request. So mandamus can still potentially be a tool there where the processing has just gone on for way too long without any guidance or clarity from the State Department as to what the holdup is.

Kate Kalmykov: So let's dig a little bit deeper into that because yes, mandamus is certainly something to consider, but it is definitely not something that is guaranteed because within [00:17:30] our jurisprudence, the federal courts have traditionally taken on the posture that they cannot review what happens at the consulate. There's a doctrine of consular non-reviewability in the law, where as they can review the substance of USCIS decisions and after appeals through the agency have been exhausted, they can evaluate whether they were reasonable or done properly [00:18:00] in accordance with the law.

The situation is a little bit different at the consulates. The federal courts have traditionally said non-reviewability of consular decisions. However, mandamus has really pushed I think the envelope with this stance because many courts have said, and we have even been successful on some of these cases where they've said, "Okay, consular non-reviewability, [00:18:30] we're not reviewing the substance of the case, but we can certainly review whether your adjudication time period is reasonable. And if somebody has been pending a very long time, you have a duty to complete the adjudication, the security check or request whatever information you need to do so."

Now, that being said, they may have also turned around and said, "One year is not unreasonable. Two years is not unreasonable." Because they also [00:19:00] have to weigh the factors against the government really letting people into the country that are permitted to be here and that aren't a security risk. And that is something that the Department of State has the right to do. They have the right to vet individuals. And certainly under this administration, that has been something that has been a heightened focus of the Department of State is conducting very robust security checks of people applying [00:19:30] for both non-immigrant and immigrant visas. They want to make sure that people coming into the country will be here and comply with the legal requirements of

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being here of their visas and that they are declaring everything that they should in their visa applications.

And that is certainly why we have seen a change in some of the visa applications asking, for example, because of executive [00:20:00] order and really focusing on it, if you've been a party member of the communist party, for example, they're requesting social media handles and for active and inactive accounts, they're reviewing all of that. So Jen, that is something we're definitely seeing, I think, consulates worldwide focus on as well as for any criminal history in someone's past or if they're under investigation.

Jennifer Herman...:

Yeah, that's true. [00:20:30] And I think this is bringing up a really good point that you stated earlier, which is we need to use the mandamus in a prudent way. Not every client is the perfect client for a mandamus. And I think it's really important for the investor or the applicant, whoever it is using the tool to speak with the lawyer about the possible success or possible ramifications [00:21:00] coming from a mandamus. So we have seen, for example, in the I829EB5 space, we have seen some RFEs come after the fact about national security concerns at the IA29. And the RIA has a section that was passed by Congress that states a bunch of national security factors that the officers are now supposed to look at at [00:21:30] USCIS. And so we have seen a number of recent RFEs or notices of intent to deny at the I829 stage that come as a result of the USCIS looking at the source of funds again and looking at the applicant from a security concern perspective.

And sometimes the mandamus might make that issue really come to light, might push the issue. So I think it's [00:22:00] really good just as a practice to discuss with the lawyer the source and the path of funds that was in the I829 petition before filing a mandamus.

Kate Kalmykov:

Absolutely. Now, what does the actual process look like? So first, you have to work with counsel to determine proper jurisdiction. What is proper jurisdiction? Well, it can often be where an applicant resides, or it [00:22:30] may be if they're overseas, what we've seen the USCIS argue in many motions to dismiss or motions to change venue is that people who are outside the US should be filing in DC because for example, in the EB-5 context, that's where their application is being adjudicated by the agency and certainly where you file matters because different courts approach unreasonable delay and immigration issues differently. [00:23:00] So that is something to clearly review with counsel as well.

Now, after you submit the mandamus and file it with the court, the court will issue summons, defendants are served. This is also something interesting to consider. In these cases, we're typically involving the attorney general, the US attorneys for the state where we're filing in and the USCIS or another government agency that is being sued.

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So that is also [00:23:30] something that should be discussed with counsel. And then as I said, this opens up the door to communication with USCIS. So through the Department of Justice who serve as the government's attorneys, you will usually get a response to the complaint within 60 days. Sometimes there may be an extension of time and that response may be a request for an extension of time and as we said, it may be requests for more information or it may [00:24:00] be a decision on the case. Now, oftentimes clients-

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Kate Kalmykov:

... Be a decision on the case. Now, oftentimes clients say, "Look, we come from a country where we're scared to sue the government. It's not something common. Can the government deny our case because we've decided to file a mandamus?" And that is always, I think, an interesting question to field because certainly this is simply a request to cure an unreasonable delay. It [00:24:30] does not mean that there will be a retribution and that the substance of your case will be denied. And that is something that really shouldn't be a concern for applicants. But as we said, you want to be prudent in filing the mandamus cases. Now we talked about business cases, we talked about EB-5 cases, but mandamus is also a tool for delayed family-based cases. It can certainly be used [00:25:00] for helping to speed up an I-130, where you're perhaps sponsoring a spouse, a parent or another relative and the case is beyond processing time.

It can be used for naturalization cases. And as I said, back in 2005, 2006, naturalization were incredibly delayed. They're actually moving really quickly right now. They're starting to slow down over the past year, but prior to that they were moving [00:25:30] pretty quickly. It was taking about a year to get a decision, which for an immigration naturalization case that is fairly reasonable, a year. And now they're starting to possibly slow down a lot. There's more questions being asked. So sometimes we see a delay in interview scheduling. Mandamus can also be used in the asylum context and we've done that on certain cases in asylum too, where [00:26:00] we had an affirmative case filed and it was pending for over nine years. And so we used the mandamus as a tool to get an interview for our family. So that was also something that was effective. But I also want to stress that sometimes the USCIS has administrative issues internally and receipt notices aren't issued.

Cases are approved, but approval notices aren't sent. Green cards are approved, [00:26:30] but green cards aren't sent. Maybe they're produced but they're never sent. And you submit inquiry after inquiry after inquiry and you're ineffective in resolving the administrative issue. But you need that receipt notice. If you're an EB-5 project, you can't go into the market until you get the receipt notice. If you need a certain type of benefit to show your employer, for example, you need the physical approval notice. You need a physical green card [00:27:00] to be able to travel in and out of the country. You can't just rely constantly on an I-551 stamp. So the mandamus, we've also used it effectively in those cases and it seems ridiculous to have to file a case in federal district court

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to get a receipt notice on your case, but that is something that we've had to do unfortunately to resolve these sort of administrative issues.

And as we see a rush for filings, particularly in the EB-5 context before [00:27:30] September 30th, we may see some erroneous rejections by the agency. Perhaps they're not processing filing fees correctly. Sometimes cases are just kicked back because the mail room incorrectly does that. At times they have a lot of cases and sometimes that happens. If people are filing right before their children age out, then there's a risk that they have to refile and the child is not included. And if you can't resolve something like [00:28:00] that through contacting the USCIS through the dedicated email address, mandamus is also an option. So Jen, I think the takeaway here is that this is a powerful remedy. It is something that is available in the Administrative Procedures Act, and that it is something that should be used prudently. What are your closing thoughts?

Jennifer Herman...:

Yeah, agree. I think that we have to continue [00:28:30] monitoring the USCIS and the State Department processing times. Even those can themselves become unreasonable. For example, we're talking about the I-829 going up to 60 months. The fact that you're not yet outside of their normal processing time still doesn't mean that it's unreasonable. It can be unreasonable. And I think we need to watch certain types of applications moving forward, [00:29:00] especially ones where the government is trying to really restrict benefits. So one thing that came to my mind when we were talking about this podcast is the I-765 and the I-131 for people to get EAD cards for employment authorization. Or I-131s for the advanced parole travel documents.

There's many employment-based applicants out there for a green card. There's many EB-5 investor applicants out there for a green card and the government [00:29:30] is trying to restrict the validity dates of these documents now to just 12 months. And where the processing time gets very long for these types of applications, we've seen the advanced parole go well over 12 months in the past up to 18 months sometimes. People will lose their ability to travel. They might lose their work authorization if the processing times get too long. So the mandamus can be a good tool [00:30:00] in those scenarios maybe moving forward where we have to also combat against the government restricting timelines for documents.

Kate Kalmykov:

Absolutely. Well, thank you so much for joining me today, Jen, and thank you to all of our listeners.

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