

APPENDIX

TABLE OF CONTENTS

APPENDIX A:	Second Circuit Court of Appeals Summary Order (May 22, 2025) ...	1a
APPENDIX B:	District Court Memorandum and Order (June 5, 2024).....	9a
APPENDIX C:	Second Circuit Court of Appeals Order Denying Petition for Rehearing En Banc (Sept. 10, 2025).....	26a
APPENDIX D:	5 U.S.C. § 555.....	28a
APPENDIX E:	5 U.S.C. § 706.....	30a
APPENDIX F:	Complaint (Feb. 21, 2023).....	31a

APPENDIX A

[FILED: MAY 22, 2025]

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of May, two thousand twenty-five.

Present:

GUIDO CALABRESI,
BARRINGTON D. PARKER, JR.,
WILLIAM J. NARDINI,
Circuit Judges.

BAOMING CHEN,

Plaintiff-Appellant,

v.

24-2058-cv

KRISTI NOEM, IN HER OFFICIAL
CAPACITY AS SECRETARY OF THE
DEPARTMENT OF HOMELAND
SECURITY, AND UR M. JADDOU,
IN HER OFFICIAL CAPACITY AS
DIRECTOR OF U.S. CITIZENSHIP
AND IMMIGRATION SERVICES,

*Defendants-Appellees.**

For Plaintiff-Appellant: SAMUEL I. FERENC
(Andrew T. Tutt, Tess C.
Saperstein, *on the brief*),
Arnold & Porter Kaye
Scholer LLP, Washington,
D.C., and New York, NY;
Jan Potemkin, Esq., Law
Office of Jan Potemkin, New
York, NY.

For Defendants-Appellees: ELLIOT M. SCHACHNER
(Varuni Nelson, *on the brief*),
Assistant United States
Attorneys, *for* John J.
Durham, United States
Attorney for the Eastern

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), the Clerk of Court is respectfully directed to amend the caption as reflected above.

District of New York, New
York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Pamela K. Chen, *District Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED** as moot, the June 6, 2024, judgment of the district court is **VACATED**, and the case is **REMANDED** with instructions to dismiss the complaint for lack of subject matter jurisdiction.

Plaintiff-Appellant Baoming Chen, a native and citizen of the People’s Republic of China, appeals from a judgment of the United States District Court for the Eastern District of New York (Pamela K. Chen, *District Judge*) entered on June 6, 2024, dismissing for failure to state a claim Chen’s action against Defendants-Appellees, the Secretary of the Department of Homeland Security and the Director of U.S. Citizenship and Immigration Services (USCIS) (collectively, the “Government”). *See Chen v. Mayorkas*, 736 F. Supp. 3d 151 (E.D.N.Y. 2024). Chen brought this action pursuant to the Mandamus Act, 28 U.S.C. § 1361, and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(1), seeking a court order directing USCIS to adjudicate and approve within 30 days his I-601A Application for Provisional Unlawful Presence Waiver (“I-601A”), which, he contends, USCIS had unreasonably delayed adjudicating. After the district court granted the Government’s motion to dismiss pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6), and shortly after Chen filed his notice of appeal, USCIS approved his I-601A. Despite receiving the relief he sought, Chen continues to pursue his appeal, invoking two exceptions to the mootness doctrine—

“voluntary cessation” of the challenged conduct and issues “capable of repetition, yet evading review.” We assume the parties’ familiarity with the case.

“Article III of the Constitution grants the Judicial Branch authority to adjudicate ‘Cases’ and ‘Controversies.’” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013).¹ “To qualify as a case fit for federal-court adjudication, ‘an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.’” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Prieser v. Newkirk*, 422 U.S. 395, 401 (1975)). “A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,” *Already*, 568 U.S. at 91, making it “impossible for a court to grant any effectual relief whatever to the prevailing party,” *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 109 (2d Cir. 2016).

Chen does not dispute that his unreasonable delay claim was mooted when the Government granted his then-pending I-601A waiver. He nevertheless argues that approval of his I-601A soon after he filed this notice of appeal constituted a “tactic to evade judicial review,” Appellant’s Br. at 62, which triggers the voluntary cessation doctrine—“an exception to mootness that applies where a defendant voluntarily ceases the offending conduct—[that] aims to prevent parties from evading judicial review . . . by temporarily altering questionable behavior.” *Ruesch v. Comm’r of Internal Revenue Serv.*, 25 F.4th 67, 70-71 (2d Cir. 2022).

¹ Unless otherwise indicated, when quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

As an initial matter, Chen offers no adequate basis for his contention that the Government’s adjudication of his waiver was done as a matter of gamesmanship, in a ploy to thwart appellate review. All he points to is the fact that the Government granted the waiver on August 5, 2024—three calendar days (and as Chen points out, only one business day) after he filed his notice of appeal. This approval occurred approximately 40 months after Chen filed his application, which is consistent with USCIS’s publicly disclosed data that as of June 5, 2024, it was then processing 80% of I-601A applications within 43 months, Joint App’x at 51 (quoting *USCIS, Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> (last visited June 5, 2024))—a fact of which we can take judicial notice, *see United States v. Akinrosotu*, 637 F.3d 165, 168 (2d Cir. 2011) (taking judicial notice of government website, which listed defendant’s projected release date from prison).²

Putting aside the question of strategic behavior, we have held that “[a]n alleged wrongdoer’s voluntary cessation of a disputed action will still render a case moot if the wrongdoer can show that (1) there is no reasonable expectation the action will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation,” *Srouer v. New York City*, 117 F.4th 72, 82 (2d Cir. 2024). The Government satisfies both requirements here.

First, there is no reason to believe that Chen will once again face delayed adjudication of his I-601A application,

² Consistent with this timeline, USCIS reports that processing times for I-601A waivers have gone down since then, with 80% of cases complete within 36 months. See *USCIS, Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> [<https://perma.cc/P834-HHS9>] (last visited May 13, 2025).

for the simple reason that his application is no longer pending. His argument to the contrary depends on speculation that the following chain of events will come to pass: that the Government will someday revoke his waiver; that he will then submit a new I-601A application; and that the Government will again unreasonably delay its adjudication. Chen directs our attention to USCIS regulations that allow the agency to “reopen and reconsider” its grant of the waiver, 8 C.F.R. § 212.7(e)(13), but the mere existence of such authority does not give rise to a “reasonable expectation” that the agency will in fact exercise it in his case. *See New Yorkers for Religious Liberty, Inc. v. City of New York*, 125 F.4th 319, 327–28 (2d Cir. 2024) (city’s withdrawal of vaccine mandate mooted claim for injunctive relief because plaintiff demonstrated only that the city could “theoretical[ly] . . . reinstate[.]” the mandate). Chen has alleged no specific facts that, if proven, would establish that the Government is considering revoking its approval of Chen’s I-601A application. We are thus left with a hypothetical scenario that raises “at best, only a theoretical and speculative possibility” that Chen might one day experience another unreasonable delay in adjudication. *Lillbask ex rel. Mauclore v. State of Conn. Dep’t of Educ.*, 397 F.3d 77, 87 (2d Cir. 2005).

Likewise, the record does not suggest that Chen continues to suffer any adverse effects from the length of time taken by USCIS to approve his application. Chen contends that “there is a very real possibility” that USCIS’s slow adjudication of his I-601A “has put into jeopardy [his] ability to ultimately obtain the visa that he seeks.” Appellant’s Br. at 66. But he offers no explanation of *how* the passage of time may have affected his ability to acquire a visa. Vague speculation is not enough. *See, e.g., Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th

439, 445 (2d Cir. 2021) (“The unsupported, speculative assertion in plaintiffs’ brief on appeal is insufficient to foreclose mootness.”).

We are also unpersuaded by Chen’s contention that the possibility he could obtain attorney’s fees and costs pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1)(A), saves this case from mootness. The Supreme Court has explained that an “interest in attorney’s fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.” *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *see also Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 378 (2d Cir. 2004) (“Lamar’s potential receipt of attorney’ fees, were it to be a ‘prevailing party’ . . . is in itself not enough to keep the controversy alive.”).

Finally, Chen argues that this case meets the “capable of repetition, yet evading review” exception to mootness. “For this exception to apply, (1) [Chen] must have a reasonable expectation that [he] will be subject to the same challenged action again, and (2) the challenged conduct must be of too short a duration to be fully litigated before its cessation.” *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 395 (2d Cir. 2022). We have already explained it is purely speculative that Chen might again be subjected to the delayed adjudication of an I-601A application.

* * *

We have considered Chen’s remaining arguments and find them to be unpersuasive. Typically, “[w]hen a civil case becomes moot on appeal from a federal district court, the appropriate disposition is to dismiss the appeal, reverse or vacate the district court judgment, and remand the case to the district court with instructions to dismiss

the complaint.” *N.Y.C. Emps.’ Ret. Sys. v. Dole Food Co., Inc.*, 969 F.2d 1430, 1433 (2d Cir. 1992). Accordingly, the appeal is **DISMISSED** as moot, the June 6, 2024, judgment of the district court is **VACATED**, and the case is **REMANDED** with instructions to dismiss the complaint for lack of subject matter jurisdiction.

FOR THE COURT:

Catherine O’Hagan Wolfe
Clerk of Court

[SEAL]

/s/ Catherine O’Hagan Wolfe

APPENDIX B

[FILED: JUNE 5, 2024]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

BAOMING CHEN,

Plaintiff,

23-CV-1357 (PKC) (VMS)

- against -

ALEJANDRO MAYORKAS, *in his official
capacity as Secretary of Department of
Homeland Security*, UR M. JADDOU, *in her
official capacity as Director of U.S. Citizenship
& Immigration Services*,

Defendants.

-----X

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge:

On February 21, 2023, Plaintiff Baoming Chen (“Plaintiff”) commenced this action seeking relief under the Mandamus Act, 28 U.S.C. § 1361, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, in the form of the Court directing Defendants Alejandro Mayorkas, Secretary of the Department of Homeland Security, and Ur M. Jaddou, Director of U.S. Citizenship and Immigration Services (collectively, “Defendants” or “USCIS”) to adjudicate Plaintiff’s I-601A petition seeking a waiver of his current unlawful presence in the United States. Defendants move to dismiss Plaintiff’s complaint under Federal Rule of Civil Procedure (“Rule”) 12(b)(1), arguing that the Court lacks subject matter jurisdiction

over Plaintiff's mandamus claim, and, in the alternative, move to dismiss both his mandamus and APA claims under Rule 12(b)(6) for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), 12(b)(6). For the reasons that follow, the Court grants Defendants' motion to dismiss under Rule 12(b)(6).

BACKGROUND

Plaintiff is a native and citizen of the People's Republic of China ("China") who has been living in the United States since 2002. (Compl., Dkt. 2 ¶¶ 8–9.) He arrived in the United States without inspection through the Mexican border. (*Id.* ¶ 9.) An immigration judge granted Plaintiff withholding of removal on November 1, 2006. (*Id.* ¶ 10.) In addition, Plaintiff's sister—a U.S. citizen—filed an I-130 Petition for Alien Relative for Plaintiff and his wife and two children, which was approved on January 11, 2010. (*See id.* ¶ 11.) Plaintiff's wife and two children still reside in China. (*Id.* ¶ 13.)

Because Plaintiff was ineligible to adjust his status in the United States at the time his I-130 petition was approved, Plaintiff must travel back to China to obtain an immigration visa for himself and his eligible family members. (*See id.* ¶ 16.) However, because Plaintiff is currently "inadmissible" to the United States due to his previous unlawful entry, if he travels back to China to obtain the immigration visa that he has been approved for, he will not be able to re-enter the United States lawfully for up to 10 years unless he is granted an unlawful presence waiver. (*Id.* ¶¶ 14, 16); *see also Calderon v. Sessions*, 330 F. Supp. 3d 944, 957 (S.D.N.Y. 2018) (laying out the process to obtain an unlawful presence waiver); 8 U.S.C. § 1182(a)(9)(B).

To obtain this waiver, Plaintiff was first required to submit a Form I-212 Application for Permission to

Reapply for Admission into the United States. *See* 8 C.F.R. § 212.7(e)(4)(iv). Plaintiff did so, and his Form I-212 was approved on December 11, 2020. (Compl., Dkt. 2 ¶ 14.) Then, Plaintiff submitted his application for a provisional unlawful presence waiver, also known as a Form I-601A, to USCIS on April 12, 2021. (*Id.* ¶ 15.) If Plaintiff receives the waiver, he will be able to travel to China for an immigration interview at a U.S. consulate without fear of being barred from re-entry to the United States after his interview. *See* 8 C.F.R. § 212.7(e)(3).

Because USCIS has yet to take action on Plaintiff's I-601A waiver application, he filed the instant lawsuit on February 1, 2023. (*See generally* Compl., Dkt. 2.) He brings two claims: (1) a mandamus claim alleging that Defendants have “unlawfully failed to perform their duty” under 28 U.S.C. § 1361 to adjudicate Plaintiff's I-601A application, (*id.* ¶ 22); and (2) a claim alleging that Defendants have failed to adjudicate Plaintiff's I-601A application in violation of the APA, (*id.* ¶ 24 (citing 5 U.S.C. § 706(1))). Plaintiff alleges that “delay or denial” in the processing of his applications “will cause extreme hardship to his parents[,] who are lawful permanent residents in the U.S.[,] . . . due to [Plaintiff's] unsettled immigration status.” (*Id.* ¶ 17.)

LEGAL STANDARD

“A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). “The standard for reviewing a 12(b)(1) motion to dismiss is essentially identical to the 12(b)(6) standard,” *Allstate Ins. Co. v. Elzanaty*, 916 F. Supp. 2d 273, 286 (E.D.N.Y. 2013), except that “[a] plaintiff asserting subject matter jurisdiction has the burden of

proving by a preponderance of evidence that it exists[.]” *Makarova*, 201 F.3d at 113. When considering a motion to dismiss under Rule 12(b)(1), the Court takes as true the factual allegations in the complaint but does not draw inferences favorable to the party asserting jurisdiction. *See J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004).

Once a court has determined the threshold issue of subject matter jurisdiction, it may turn to the question of whether the plaintiff has stated a claim. To survive a motion to dismiss pursuant to Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Determining whether a complaint states a plausible claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. Similar to the standard applicable to a Rule 12(b)(1) motion, “[i]n addressing the sufficiency of a complaint [under Rule 12(b)(6)], [the Court] accept[s] as true all factual allegations and draw[s] from them all reasonable inferences; but [the Court is] not required to credit conclusory allegations or legal conclusions couched as factual allegations.” *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013), *superseded by statute as stated in Twitter, Inc. v. Taamneh*, 598 U.S. 471, 483 (2023). When

considering a Rule 12(b)(6) motion, the court must “test, in a streamlined fashion, the formal sufficiency of the plaintiff’s statement of a claim for relief *without* resolving a contest regarding its substantive merits.” *Glob. Network Commc’ns, Inc. v. City of N.Y.*, 458 F.3d 150, 155 (2d Cir. 2006). As such, courts typically “do not consider matters outside the pleadings in deciding a motion to dismiss for failure to state a claim.” *Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 202 (2d Cir. 2013) (citing *Glob. Network Commc’ns, Inc.*, 458 F.3d at 154–55).

DISCUSSION

I. Plaintiff’s APA Claim

A. Subject Matter Jurisdiction

The APA permits federal courts to compel agency action that has been “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), unless another “statute[] preclude[s] judicial review,” 5 U.S.C. § 701(a)(1). The parties dispute in this case whether another statute—namely, 8 U.S.C. § 1182—precludes federal courts from exercising jurisdiction over a delay in adjudicating an I-601A waiver as alleged here. Notably, no court in this Circuit has yet reached this question, and there is a nationwide split among the district courts that have reached this issue. *See Candido v. Miller*, No. 23-CV-11196, 2024 WL 710660, at *3–4 (D. Mass. Feb. 21, 2024) (describing conflict among courts and collecting cases).¹ The statute at issue, 8 U.S.C. § 1182(a)(9)(B)(v), provides:

¹ As of this writing, no court of appeals has yet ruled on this issue, though several relevant appeals are pending. *See Lovo v. Miller*, No. 22-CV-67, 2023 WL 3550167 (W.D. Va. May 18, 2023), *argued*, No. 23-1571 (4th Cir. Jan. 25, 2024); *Lopez Juarez v. Mayorkas*, No. 23-CV-

The Attorney General has sole discretion to [grant a waiver] . . . if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. *No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.*

8 U.S.C. § 1182(a)(9)(B)(v) (emphasis added).

A majority of courts to address this issue find that this statute precludes federal courts from exercising jurisdiction over USCIS delays in adjudicating I-601A waivers. *Candido*, 2024 WL 710660, at *3. While the logic of the majority decisions varies slightly, most look to the definitions of the words “action” and “regarding,” since the statute prevents courts from reviewing “action[s]” by the Attorney General “regarding” waivers. *See, e.g., Mafundu v. Mayorkas*, No. 23-CV-60611, 2023 WL 5036142, at *4–5 (S.D. Fla. Aug. 8, 2023); *Candido*, 2024

463, 2024 WL 497150 (M.D. La. Feb. 8, 2024), *appeal docketed*, No. 24-30188 (5th Cir. Mar. 27, 2024); *Singh v. Mayorkas*, No. 23-CV-527, 2024 WL 420124 (M.D. Tenn. Feb. 5, 2024), *appeal docketed*, No. 24-5260 (6th Cir. Mar. 21, 2024); *Soni v. Jaddou*, No. 23-CV-50061, 2023 WL 8004292 (N.D. Ill. Sept. 27, 2023), *argued*, No. 23-3220 (7th Cir. May 29, 2024); *Grajales Cortez v. Miller*, No. 23-CV-3073, 2023 WL 9500788 (D. Neb. Oct. 20, 2023), *argued*, No. 23-3379 (8th Cir. May 9, 2024); *Mercado v. Miller*, No. 22-CV-2182, 2023 WL 4406292 (D. Nev. July 7, 2023), *argued*, No. 23-16007 (9th Cir. Nov. 6, 2023). Notably, however, several appeals on this issue have been mooted before the relevant circuit court was able to rule on the appeal. *See, e.g., Beltran v. Miller*, No. 23-CV-3053, 2023 WL 6958622 (D. Neb. Oct. 20, 2023), *appeal dismissed per stipulation*, No. 23-3378 (8th Cir. 2024); *Reyes Silva v. Miller*, No. 23-CV-3038, 2023 WL 7042347 (D. Neb. Oct. 26, 2023), *appeal dismissed per stipulation*, No. 23-3397 (8th Cir. 2024). As such, this split is purely among the district courts at this moment.

WL 710660, at *3; *Gonzalez v. Moran*, No. 23-CV-3166, 2024 WL 1181885, at *4 (E.D. Wash. Mar. 19, 2024). “Section 1182 does not define . . . [‘]action.” *Gonzalez*, 2024 WL 1181885, at *4. Black’s Law Dictionary, however, defines the term as “[t]he process of doing something; conduct or behavior.” *Action*, Black’s Law Dictionary (11th ed. 2019). Similarly, while § 1182 does not define “regarding,” “in a legal context[, it] generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject.” *Patel v. Garland*, 596 U.S. 328, 339 (2022) (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717 (2018)). Given this broad and undefined language in § 1182’s subject-matter bar, the majority of district courts that have ruled on this issue conclude that “even though no ‘decision’ has been made [by USCIS] on the pending I-601A application, the plain meaning of the at-issue statutory language” bars judicial review because the alleged inaction (i.e., delay, or a decision not to act) in making a decision constitutes a form of “action” by the Attorney General “regarding” a waiver under § 1182. *Gonzalez*, 2024 WL 1181885, at *4.² Based on this reasoning, these courts have found that the federal judiciary does not have subject matter jurisdiction over undue delay claims such as the one at issue here.

Conversely, courts on the other side of the split hold that § 1182(a)(9)(B)(v)’s language does not prevent

² The APA’s definition of “agency action” explicitly includes an agency’s “failure to act.” 5 U.S.C. § 551(13). In addition to relying on the dictionary definition of the word “action,” some courts on this side of the split also look to the APA definition of “agency action” in reasoning that the word “action” includes “inaction.” *See, e.g., Mafundu*, 2023 WL 5036142, at *4; *Echeverri v. U.S. Citizenship & Immigr. Servs.*, No. 23-CV-21711, 2023 WL 5350810, at *4 (S.D. Fla. Aug. 21, 2023).

federal courts from exercising jurisdiction over claims stemming from a *lack* of action by USCIS. These courts emphasize the long-settled strong presumption in favor of judicial review of administrative action, noting that only “clear and convincing evidence of congressional intent to preclude judicial review can overcome the presumption” in favor of judicial review. *Saavedra Estrada v. Mayorkas*, No. 23-2110, 2023 WL 8096897, at *5 (E.D. Pa. Nov. 21, 2023) (quoting *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020)) (internal quotation marks omitted). These courts reason that “action” means “doing something” as opposed to “inaction or a failure to act.” *Lara-Esperanza v. Mayorkas*, No. 23-CV-1415, 2023 WL 7003418, at *5 (D. Colo. Oct. 24, 2023) (quoting *Bamba v. Jaddou*, No. 23-CV-357, 2023 WL 5839593, at *2 (E.D. Va. Aug. 18, 2023)). Consequently, 8 U.S.C. § 1182’s jurisdictional bar—which prevents federal courts from “review[ing] a decision or action by the Attorney General regarding [] waiver[s]”—does not apply where there has been only inaction. *See, e.g., id.; Bamba*, 2023 WL 5839593, at *2; *Saavedra Estrada*, 2023 WL 8096897, at *5–6.

This Court finds the logic of the minority decisions more persuasive: by its plain language, § 1182(a)(9)(B)(v) bars judicial review of “action by the Attorney General,” not inaction. After all, “statutory terms are generally interpreted in accordance with their ordinary meaning.” *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)) (internal quotation marks omitted). The definition of action—“[t]he process of doing something”—“infer[s] some affirmative action, not inaction or a failure to act.” *Bamba*, 2023 WL 5839593, at *2. This interpretation is reinforced by the provision’s use of the term “decision” as a companion and alternative to “action.” *See* 8 U.S.C. § 1182(a)(9)(B)(v).

Moreover, when interpreting statutes, “courts seek to ‘avoid readings that render statutory language surplusage’ or redundant.” *Yoo v. United States*, 43 F.4th 64, 72 (2d Cir. 2022) (quoting *Sacirbey v. Guccione*, 589 F.3d 52, 66 (2d Cir. 2009)). If the word “action” encompassed failures to act, then the “unreasonable delay” language in § 706 of the APA would be meaningless: if “fail[ing] to act every moment between the time an application was submitted and the time it was adjudicated” constituted action, then “no delay would be unreasonable (in fact, no delay would even be a *delay* in the ordinary sense).” *Saavedra Estrada*, 2023 WL 8096897, at *5. This buttresses the conclusion that § 1182(a)(9)(B)(v) bars only judicial review of affirmative agency actions or decisions.

In addition, in *Patel*, the Supreme Court admonished statutory interpretations that “read like elaborate efforts to avoid the most natural meaning of the text.” *Patel*, 596 U.S. at 340. The most natural meaning of the statute in question here is that it bars judicial review of agency decisions and actions regarding waivers, not agency *inactions*. As such, this Court has jurisdiction over Plaintiff’s undue delay claim. *See Bamba*, 2023 WL 5839593, at *2; *Saavedra Estrada*, 2023 WL 8096897, at *5–6; *Lara-Esperanza*, 2023 WL 7003418, at *5; *Novack v. Miller*, No. 23-CV-10635, 2024 WL 1346430, at *4–5 (D. Mass. Mar. 29, 2024); *Segovia v. Garland*, No. 23-CV-1478, 2024 WL 1223481, at *6–10 (N.D. Ga. Mar. 21, 2024); *Guevara v. Miller*, No. 23-CV-397, 2024 WL 83504, at *2–4 (E.D. Va. Jan. 8, 2024); *Granados v. United States*, No. 23-CV-250, 2023 WL 5831515, at *3–5 (D. Colo. Aug. 23, 2023).

B. The Merits of Plaintiff's Undue Delay Claim Under the APA

“[T]he APA requires that ‘within a reasonable time, each agency shall proceed to conclude a matter presented to it,’ and that courts shall ‘compel agency action unlawfully withheld or unreasonably delayed.’” *Zhang v. Wolf*, No. 19-CV-5370, 2020 WL 5878255, at *3 (E.D.N.Y. Sept. 30, 2020) (quoting 5 U.S.C. §§ 555(b), 706(1)). To determine whether Plaintiff has stated a claim under the APA, the Court looks to the factors enunciated in *Telecommunications Research & Action Center v. Federal Communications Commission*, 750 F.2d 70, 80 (D.C. Cir. 1984), which, as interpreted by the Second Circuit, “set[s] forth [a] test for determining if agency action is unreasonably delayed,” *Mu v. U.S. Citizenship & Immigr. Servs.*, No. 23-CV-02067, 2023 WL 4687077, at *4 (E.D.N.Y. July 22, 2023) (alterations in original) (quoting *Nat. Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013)). The so-called “TRAC” factors provide the framework that courts in this circuit use to determine whether an agency has unreasonably delayed action on immigration applications. *See, e.g., De Oliveira v. Barr*, No. 19-CV-1508, 2020 WL 1941231, at *4 (E.D.N.Y. Apr. 22, 2020).³ The TRAC factors are:

- (1) [T]he time agencies take to make decisions must be governed by a rule of reason . . . ;

³ “[S]ome courts have declined to apply the TRAC analysis on a motion to dismiss.” *Kaur v. Mayorkas*, No. 22-CV-4514, 2023 WL 4899083, at *5 n.6 (S.D.N.Y. Aug. 1, 2023). However, “[t]he weight of authority appears to cut in favor of deciding unreasonable-delay claims at the motion-to-dismiss stage before discovery.” *Id.* (quoting *Sheiner v. Mayorkas*, 21-CV-5272, 2023 WL 2691580, at *5 n.12 (S.D.N.Y. Mar. 29, 2023)); *see also Sheiner*, 2023 WL 2691580, at *5 n.12 (collecting cases).

- (2) [W]here Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason . . . ;
- (3) [D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; . . .
- (4) [T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority . . . ;
- (5) [T]he court should also take into account the nature and extent of the interests prejudiced by delay . . . ; and
- (6) [T]he court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecomms. Rsch. & Action Ctr., 750 F.2d at 80 (internal quotation marks omitted). A plaintiff need not “demonstrat[e] that all of these factors weigh in that party’s favor” to prevail on an undue delay claim. *Mu*, 2023 WL 4687077, at *4. Instead, the factors are “intended to provide ‘useful guidance in assessing claims of agency delay.’” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 79). For instance, “a court may ‘refuse[] to grant relief, even though all the other factors considered in *TRAC* favor[] it, where a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain.’” *Zhang*, 2020 WL 5878255, at *6 (quoting *L.M. v. Johnson*, 150 F. Supp. 3d 202, 213 (E.D.N.Y. 2015)).

1. The First TRAC Factor

The first *TRAC* factor is the “most important.” *In re Core Commc’ns, Inc.*, 531 F.3d at 855. That factor asks whether “the time agencies take to make decisions [is] governed by a ‘rule of reason.’” *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 80. Defendants assert that USCIS “generally adjudicates I-601A applications on a first-in-first-out basis,” which is a sufficient rule of reason under the *TRAC* analysis. (Defs.’ Br. Supp. Mot. to Dismiss (“Defs.’ Br.”), Dkt. 16 at 15; *see also* USCIS, *Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> (last visited June 5, 2024) (explaining that USCIS “generally process[es] cases in the order [it] receive[s] them”)). Plaintiff responds that “given the unbounded growth in processing times,” there is not a governing rule of reason. (Pl.’s 5/10/23 Ltr., Dkt. 8 at 3.) Plaintiff’s unsupported assertion on this point is unavailing; numerous courts have held that a “first in, first out” policy is a rule of reason. *See, e.g., Aydemir v. Garland*, No. 22-CV-100, 2022 WL 4085846, at *4 (S.D.N.Y. Sept. 6, 2022); *N-N v. Mayorkas*, 540 F. Supp. 3d 240, 261 (E.D.N.Y. 2021) (collecting cases). Consequently, this factor weighs in favor of Defendants.

2. The Fourth TRAC Factor

In addition to the first factor, the parties also focus on the fourth factor, “the effect of expediting delayed action on agency activities of a higher or competing priority.” *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 80. “[W]here a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain,” courts may “refuse[] to grant relief,” even if all of the other *TRAC* factors militate in favor of relief. *L.M.*, 150 F. Supp. 3d at 213 (alteration in original) (quoting *Mashpee Wampanoag Tribal Council*,

Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003)). Indeed, courts in this District have dismissed undue delay claims where the sought-after relief would “simply jump[] one plaintiff to the front of the line and push[] everyone else further back.” *Yang v. Houghton*, 21-CV-5485, 2021 WL 5879033, at *1 (E.D.N.Y. Dec. 13, 2021); *see also, e.g., Almakalani v. McAleenan*, 527 F. Supp. 3d 205, 224–25 (E.D.N.Y. 2021); *Lu v. Sessions*, 18-CV-1713, 2018 WL 2376304, at *2 (E.D.N.Y. May 25, 2018); *Chen v. Nielsen*, No. 17-CV-7157, 2018 WL 1221130, at *2 (E.D.N.Y. Mar. 8, 2018).

Here, Defendants argue that in granting Plaintiff the requested relief, the Court would be doing just that: “put[ting Plaintiff] at the front of the adjudication line, ahead of all other applicants, each of whom would be moved back one place in that line.” (Defs.’ Br., Dkt. 16 at 14.) In response, Plaintiff implies that it might “benefit [USCIS] for Plaintiff to ‘jump the line[.]’” (Pl.’s Mem. Opp’n Defs.’ Mot. to Dismiss (“Pl.’s Opp’n”), Dkt. 19 at 19.) Plaintiff does not explain how leap-frogging him to the front of the adjudication queue would be beneficial to USCIS, (*id.*), and the Court cannot fathom why it would be so. As such, this factor also militates in favor of Defendants.

3. The Third and Fifth *TRAC* Factors

Plaintiff argues that the third and fifth *TRAC* factors permit courts to consider “the goals of ensuring family unity and humanitarian results.” (Pl.’s Opp’n, Dkt. 19 at 21.) Specifically, the third factor counsels that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake” and the fifth factor permits courts to “take into account the nature and extent of the interests

prejudiced by delay.” *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 80.

Here, human welfare is undoubtedly at stake. That said, “[t]here is no question that USCIS is overstressed and under-resourced in processing all categories of immigration petitions and applications.” *Yang*, 2021 WL 5879033, at *1. And of course, “USCIS can only deploy the resources that it has.” *Id.* As a result of USCIS’s limited resources and drastic increases in the number of immigration-related documents that it must process, there are significant delays. *See, e.g., USCIS, Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> (last visited June 5, 2024) (indicating that 80% of I-601A waivers are currently being processed within 43 months (a little over three and a half years)). Because of these long waits, the federal courts have been “flooded with cases in which applicants understandably seek to compel faster action.” *Yang*, 2021 WL 5879033, at *1.

The Court does not wish to minimize the harm that Plaintiff and Plaintiff’s family are experiencing due to family separation and the uncertainty of Plaintiff’s immigration status while he waits for USCIS to adjudicate his waiver. Still, many others waiting for their I-601A waivers to be adjudicated are likely in the same position. *See id.* at *2 (noting that asylum applicant’s family separation “unfortunately cannot be uncommon”).⁴ This is the regrettable reality that our immigration system—“overstressed” and “under-resourced” as it is—

⁴ The government argues that Plaintiff’s claim is especially non-urgent because Plaintiff has not filed an “expedite request.” (Defs.’ Br., Dkt. 16 at 10–11.) Plaintiff, however, indicates that he attempted to file an expedite request, but that USCIS’s system malfunctioned and, as a result, he was unable to do so. (*See* Pl.’s 5/10/23 Ltr., Dkt. 8 at 2.) Regardless, Plaintiff need not file an expedite request to bring an undue delay suit under the APA.

has wrought for many families. *Id.* at *1. As the court observed in *Novack*, “[i]f the Court were to grant the relief Plaintiff requests, it would simply move [his] application ahead of others who have waited longer for the same relief.” *Novack*, 2024 WL 1346430, at *6. Plaintiff does not allege that he has waited longer than other applicants, or that USCIS has chosen not to adjudicate his application in particular. (*See generally* Compl., Dkt. 2.) At the time of this writing, Plaintiff has been waiting approximately three years for his I-601A waiver to be adjudicated. (*See id.* ¶ 1.) While this is certainly unfortunate, many courts have found such a delay—or even longer ones—not to be “unreasonable” in this context. *See, e.g., Novack*, 2024 WL 1346430, at *6 (dismissing an undue delay claim seeking adjudication of I-601A waiver that had been pending for over three years); *Echeverri*, 2023 WL 5350810, at *1, 7 (similar); *see also Almakalani*, 527 F. Supp. 3d at 225 (“[C]ourts in this circuit have repeatedly found that delays of as long as five years in USCIS’s adjudication of immigration benefits are not unreasonable.”). With that in mind, and taking into account the above-discussed factors, this Court grants Defendants’ motion to dismiss Plaintiff’s undue delay claim under the APA.

II. Plaintiff’s Mandamus Claim

Turning to Plaintiff’s mandamus claim, that claim is moot given that the Court finds it has jurisdiction over Plaintiff’s APA claim. “The Mandamus Act empowers district courts to exercise ‘original jurisdiction to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.’” *De Oliveira*, 2020 WL 1941231, at *2 (quoting 8 U.S.C. § 1361). To be entitled to relief under § 1361, a plaintiff must establish: “(1) a clear right . . . to the relief sought; (2) a plainly defined and peremptory duty on the part of the

defendant to do the act in question; and (3) [that] no other adequate remedy [is] available.” *Anderson v. Bowen*, 881 F.2d 1, 5 (2d Cir. 1989).

Because Plaintiff can—and does—bring an undue delay claim under the APA, “[t]he Court need not even consider whether Plaintiff has satisfied the first two requirements” for mandamus relief. *Mu*, 2023 WL 4687077, at *3. “[T]he availability of a cause of action under [the APA], authorizing a court to ‘compel agency action unlawfully withheld or unreasonably delayed,’ means that Plaintiff has an adequate alternative remedy,” and therefore cannot state a mandamus claim. *Id.* (quoting *Liu v. Wolf*, No. 19-CV-410, 2020 WL 2836426, at *6 (S.D.N.Y. May 30, 2020)).⁵ Therefore, Defendants’ motion to dismiss Plaintiff’s mandamus claim is granted.

CONCLUSION

While the Court sympathizes with Plaintiff’s predicament, it finds that relief is not warranted at this time. For the reasons set forth above, Defendants’ motion to dismiss is granted, and Plaintiff’s complaint is dismissed without prejudice. If circumstances change, Plaintiff may bring a subsequent action based on those changed circumstances.

⁵ If the Court had found that it lacked jurisdiction on the APA claim, it might have reached a different conclusion with respect to whether a mandamus claim is available. But given that the Court finds that an APA claim—which constitutes an adequate alternative remedy—is available here, Plaintiff cannot state a mandamus claim. *See Mu*, 2023 WL 4687077, at *3.

25a

SO ORDERED.

/s/ Pamela K. Chen

Pamela K. Chen

United States District Judge

Dated: June 5, 2024
Brooklyn, New York

APPENDIX C

[FILED: JUNE 5, 2024]

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall
United States Courthouse, 40 Foley Square, in the City
of New York, on the 10th day of September, two
thousand twenty-five.

Baoming Chen,
Plaintiff - Appellant,

ORDER

v.

Docket No. 24-2058

Kristi Noem, in her official capacity as Secretary of the
Department of Homeland Security, and Ur M. Jaddou, in
her official capacity as Director of U.S. Citizenship &
Immigration Services,

Defendants - Appellees.

Appellant, Baoming Chen, filed a petition for panel
rehearing, or, in the alternative, for rehearing *en banc*.
The panel that determined the appeal has considered the
request for panel rehearing, and the active members of
the Court have considered the request for rehearing *en
banc*.

IT IS HEREBY ORDERED that the petition is
denied.

27a

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
/s/ Catherine O'Hagan Wolfe

APPENDIX D

5 U.S.C. § 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

APPENDIX E

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX F

[FILED: FEBRUARY 21, 2023]

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

Baoming Chen)	
(A097-152-695),)	Civil Action
)	
Plaintiff,)	
)	
v.)	Case No.: 1:23-cv
Alejandro Mayorkas, in his)	01357
official capacity as)	
Secretary of Department of)	
Homeland Security,)	
3801 Nebraska Ave., NW)	
Washington, D.C. 20016;)	
)	
Ur M. Jaddou, in her)	
official capacity as Director)	
of U.S. Citizenship &)	
Immigration Services,)	
20 Massachusetts Ave., NW)	
Washington, D.C. 20001)	
)	
)	
Defendants.)	

COMPLAINT

1. Plaintiff Baoming Chen (“Mr. Chen”) through his attorney, Jan Potemkin, Esq., presents this mandamus action seeking an order that Defendants adjudicate Plaintiff’s I-601A Application for Provisional Unlawful Presence Waiver, which has been pending since April 12, 2021 (see attached I-601A Receipt, Exhibit A).

NATURE OF THE ACTION

2. Plaintiff brings the instant action to request an order compelling Defendants to promptly adjudicate Plaintiff's I-601A Application.

PARTIES

3. Plaintiff Mr. Chen is a native and citizen of the People's Republic of China. He was born on June 9, 1968. He resides at 5607 6th Avenue, Apt 1L, Brooklyn, NY 11220.

4. Defendant Alejandro Mayorkas is the Secretary of the Department of Homeland Security. The Secretary has “control, direction, and supervision of all employees and of all the files and records of the [Immigration] Service.” 8 U.S.C. § 1103(a)(2). Mr. Mayorkas is sued in his official capacity.

5. Defendant Ur Jaddou is the Director of the USCIS. The Director is delegated the “authority to administer and enforce the Immigration and Nationality Act and all other laws relating to immigration, naturalization, and nationality . . .” 8 C.F.R. § 100.2(a). Ms. Jaddou is sued in her official capacity.

JURISDICTION

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361. The Court has the authority to grant relief under 28 U.S.C. § 1361 (mandamus), 28 U.S.C. §§ 2201, 2202 (declaratory judgment and further relief), and 5 U.S.C. § 706 (Administrative Procedure Act).

VENUE

7. Venue is proper in this court pursuant to 28 U.S.C. § 1391(e), in that this is an action against officers and agencies of the United States in their official capacities, brought in the district where a plaintiff resides and no real property is involved in the action. Plaintiff Mr. Chen resides at 5607 6th Avenue, Apt 1L, Brooklyn, NY 11220.

FACTUAL ALLEGATIONS

8. Mr. Chen was born on June 9, 1968 and is a native and citizen of the People's Republic of China.

9. Mr. Chen entered the U.S. on July 20, 2002 through the Mexican border without inspection.

10. Mr. Chen was granted withholding of removal by the immigration judge on November 1, 2006 as an alien who entered the U.S. without inspection (EWI).

11. Mr. Chen's citizen sister filed an I-130, Immigration Petition for Relative for him and it was approved on January 11, 2010 (Exhibit B). His spouse and children are included in this petition.

12. Fee payments were already made with the Department of State for visa processing (See attached Payment Receipts, Exhibit C).

13. Mr. Chen has a spouse and two children in China who can be derivative beneficiaries. The two children who "age out" are protected by the Child Status Protection Act for a limited period of time.

14. Since Mr. Chen was inadmissible under INA section 212(a)(9)(A) or (C), he needs to obtain consent to reapply for admission to the United States under INA section 212(a)(9)(A)(iii) or (C)(ii). The I-212, Application to Reapply for Admission After Deportation or Removal was

filed and approved on December 11, 2020 (See attached I-212 Approval Notice, Exhibit D).

15. The I-601A, Provisional Unlawful Presence Waiver was then filed and received by USCIS on April 12, 2021 (See attached Receipt Notice, Exhibit A).

16. The I-601A waiver is necessary for Mr. Chen to go to China and complete his visa processing to become a Lawful Permanent Resident, along with eligible family members. It is a waiver of the bar to his visa that would otherwise be imposed based upon him because of unlawful presence in the United States.

17. The delay or denial in Mr. Chen's processing will cause extreme hardship to his parents who are lawful permanent residents in the U.S. They have consulted a psychologist for evaluations. Mr. Chen's parents were both diagnosed to suffer from "major depressive disorder, recurrent, severe without psychotic features and anxiety disorder, NOS" due to Mr. Chen's unsettled immigration status. The psychological evaluation reports for them are attached (Exhibit E).

18. To this date, there has been no adjudication of the I-601A.

COUNT ONE

19. Plaintiff repeats, alleges, and incorporates the foregoing paragraphs as if fully set forth herein.

20. 28 U.S.C. § 1361 provides that "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."

21. Defendants have a non-discretionary duty to process Mr. Chen's I-601A application.

22. Mr. Chen's I-601A application has been delayed for almost two years. Defendants have thus unlawfully failed to perform their duty to Plaintiff to adjudicate his application.

COUNT TWO

23. Plaintiff repeats, alleges, and incorporates the foregoing paragraphs as if fully set forth herein.

24. The APA allows "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review of that action. 5 U.S.C. § 702. The definition of "agency action" explicitly includes "failure to act." 5 U.S.C. § 551(13). The reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The APA also states that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b).

25. Plaintiff has been aggrieved by agency action under the Administrative Procedure Act, 5 U.S.C. §§701 et seq.

26. Defendants' failure to adjudicate Mr. Chen's I-601A for almost two years constitutes "agency action" that has been "unlawfully withheld or unreasonably delayed," violating the APA, 5 U.S.C. §706(2)(A).

27. A reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." 5. U.S.C. §706(2)(A).

28. Plaintiff has exhausted all administrative remedies available to him as of right.

29. Plaintiff has no other recourse to judicial review other than by this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Declare that Defendants "failed to perform a duty owed to the Plaintiff by failing to process Mr. Chen's application for almost two years;

B. Declare Defendants' failure to process Mr. Chen's application for over almost two years to be "agency action unlawfully withheld or unreasonably delayed" in violation of the Administrative Procedure Act, 5 U.S.C. §§701 et seq;

C. Compel Defendants to act on Mr. Chen's I-601A application within 30 days by approving the I-601A.

D. Grant attorneys' fees and costs pursuant to 28 U.S.C. §2412, 28 U.S.C. §1920, Fed. R. Civ. P. 54(d) and other authority; and

E. Grant any other relief the Court deems appropriate and just.

Respectfully submitted,

This 21st day of February 2023

/s/ Jan Potemkin

Jan Potemkin, Esq.

7-8 Chatham Square-

Suite 208

New York, NY 10038

Tel.: (212) 226-1965

Fax.: (212) 226-3835

jpotemkin@yahoo.com