

WANG v. Johnson (USCIS-IPO) et al., No. 16-02446 (D. DC 12-15-2016) EB-5 Mandamus Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

Peihua WANG

Plaintiff,

Jeh Charles JOHNSON, Secretary of
Department of Homeland Security, in his
official capacity;

3801 Nebraska Ave NW,
Washington, DC 20016

Leon RODRIGUEZ, Director, U.S.
Citizenship and Immigration Services, in his
official capacity;

20 Massachusetts Ave. N.W., Room 4210
Washington, DC 20529-2120

Nicholas COLUCCI, as Chief of the
Immigrant Investor Program Office, U.S.
Citizenship and Immigration Services, in his
official capacity;

Julia HARRISON, as Deputy Chief of the
Immigrant Investor Program Office, U.S.
Citizenship and Immigration Services, in her
official capacity, Immigrant Investor Program
U.S. Citizenship and Immigration Services

131 M Street NE
Washington, DC 20529

Defendants.

Civil Case No:

COMPLAINT FOR WRIT OF MANDAMUS

Plaintiff, by and through undersigned counsel, allege as follows:

1. This action seeks to remedy the unreasonable and unjustifiable delay by the U.S. Citizenship and Immigration Services (“USCIS” or “the agency”) in adjudicating the Form I-526, “Immigrant Petition by Alien Entrepreneur” (“I-526 Petition” or “Petition”), filed by Plaintiff Peihua Wang, a Citizen of the People’s Republic of China, nearly three years ago. The agency’s continuing and inexcusable delay in acting on Mr. Wang’s I-526 Petition is contrary to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 555(b), 706(1), 706(2)(A), (C), (D), and, accordingly, this Court should exercise its mandamus power under the Mandamus and Venue Act (“Mandamus Act”), 28 U.S.C. § 1361 to grant Mr. Wang relief. Adjudication of the Petition is a nondiscretionary ministerial duty owed to Mr. Wang, and Mr. Wang’s I-526 Petition meets all the requirements for approval. Mr. Wang has no other adequate remedy to obtain that right other than by way of this complaint.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 because Plaintiff’s claims arise under the laws of the United States, specifically the Immigration and Naturalization Act, 8 U.S.C. § 1101, et seq. (“INA”) and its implementing regulations. Further, Court has subject-matter jurisdiction over this mandamus action is provided by 28 U.S.C. §§ 1361 and 1331. Finally, this Court has jurisdiction over the instant matter pursuant to the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 555(b) and 706(b).

3. Venue is proper in the District Court of the District of Columbia under 28 U.S.C. §§ 1391(b) and (e), as a substantial part of the events giving rise to the instant claim occurred in this district. Defendants Colucci, Harrison, Rodriguez and Johnson are officers of the United States sued in their official capacity who work in the District of Columbia.

PARTIES

4. Mr. Wang is a Citizen of the People's Republic of China. Mr. Wang filed his I-526

Petition on January 24, 2014.

5. Defendant Jeh Johnson is sued in his official capacity as the Secretary of the Department of Homeland Security. In this capacity he has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103 and routinely does and transacts business in the District of Columbia.

6. Defendant León Rodríguez is sued in his official capacity as the Director of U.S. Citizenship and Immigration Services (hereafter "USCIS"), a bureau of the Department of Homeland Security. In this capacity he has responsibility for the administration of the immigration laws and routinely does and transacts business in the District of Columbia. Defendant USCIS is responsible for the adjudication of I-526 petitions. See generally 8 C.F.R. § 204.6.

7. Defendant Nicholas Colucci is sued in his official capacity as the Director of the Immigrant Investor Program Office ("IIPO"), U.S. Citizenship and Immigration Services ("USCIS"), and is named in his official capacity. The IPO is located in Washington, D.C. The IPO is the division within USCIS responsible for approving I-526 petitions for EB-5 visas. As Director of the IPO, Defendant Colucci presumptively oversees the entire EB-5 Program.

8. Defendant Julia Harrison is the Deputy Director of the IIPO, and is named in her official capacity. As Deputy Director of the IPO, Defendant Harrison presumptively oversees the entire EB-5 Program.

STATEMENT OF FACTS

The EB-5 Program

9. The EB-5 Program was created to stimulate the U.S. economy through job creation and capital investment by foreign investors. If a foreign citizen invests \$500,000 and creates of at least ten full-time jobs as part of a new business venture, the investor may obtain permanent resident status. See 8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6(f)(2).

10. To apply for a EB-5 visa, a foreign entrepreneur must submit a Form I-526 petition and supporting documentation demonstrating that the required capital has been committed and is actually at risk; that the investment is made from the entrepreneur's own lawfully acquired funds; and the existence of a comprehensive business plan demonstrating that ten full-time jobs will be created by the investment. 8 C.F.R. § 204.6(j).

11. An investor may make the investment by contributing to a USCIS-approved "regional center." For an investment through an approved regional center, the petition must be accompanied by evidence that the requisite investment will create ten full-time positions either directly or indirectly for no fewer than 10 individuals. Id. § 204.6(j)(4)(iii)

Mr. Wang's Petition

12. Nearly three years ago, on January 24, 2014, Mr. Wang submitted his I-526 Petition and supporting documentation for U.S. permanent resident status based on the following facts. See Ex. A.

13. As stated, Mr. Wang is a Citizen of the People's Republic of China who currently resides in Shanghai. He is an investor in Invest in USA Fund, LLC, a Delaware limited liability company ("Invest in USA Fund"), which is a subsidiary of Chicagoland Foreign Investment Group (CFIG), a USCIS-approved Regional Center (ID1031910114). Invest in USA Fund was

created to extend a business loan of up to \$5,000,000 to **WELkins, LLC**, to develop an internal manufacturing division to create jobs in the U.S. WELkins makes liquid cooling technology health care products for governmental, medial, military, industrial, and athletic entities.

14. Invest in USA Fund and WELkins are located **Wheaton, Illinois**, a targeted employment area (**"TEA"**) under INA 203(b)(5). Wheaton is an area of high unemployment as defined by 8 C.F.R. 204.6(i), which is an area that has an **unemployment rate of over 150%** of the national rate. At the time of Mr. Wang's investment, Wheaton's unemployment rate was **17.2%**, or 212% of the national rate of **8.1%**.

15. Mr. Wang appended Invest in USA Fund's comprehensive business plan to his I-526 Petition.

16. In consideration for his investment, Mr. Wang will become an equity member of Invest in USA Fund upon the approval of his I-526 Petition. Under Immigration and Nationality Act 203(b)(5), investors are required to have invested the full amount of \$500,000 prior to filing their Petition, together with an administration fee of \$40,000. Mr. Wang paid the full amount of \$540,025 on November 6, 2013 to cover the investment, administration fees, and wire fees to an escrow account held by Invest in USA Fund. The release of Mr. Wang's investment in escrow to Invest USA Fund is contingent on the approval of Mr. Wang's I-526 Petition.

17. Mr. Wang lawfully obtained the funds for his investment from mortgage financing based on the value of two parcels of real estate owned by Mr. Wang in Shanghai.

18. Mr. Wang has two dependents listed on his I-526 Petition, his spouse Yiping Zhu and his minor son Z. W.

19. Defendants received Mr. Wang's application on the same day it was submitted, January 24, 2014, and issued the petition Receipt No. WAC1490115192. *See* Ex. B.

Mr. Wang's Exhaustive Efforts

20. The I-526 Petition has been pending within the Washington, D.C. District office of USCIS for approximately 35 months, since January 24, 2014.

21. Defendant USCIS is responsible for the adjudication of I-526 petitions. *See generally* 8 C.F.R. §§ 103.1(a), 103.2(a)(6). The average processing time of such applications is currently 14.7 months, according to USCIS.

22. Mr. Wang has undergone exhaustive efforts to determine the status of his application. He has on multiple occasions:

- a. Visited "My Case Status" at www.uscis.gov;
- b. Contacted the National Customer Service Center;
- c. Contacted a Congressional Representative (U.S. Congressman Peter Roskam)

23. On January 22, 2016, two years after Mr. Wang's Petition had been filed, counsel for Mr. Wang contacted USCIS to obtain a status update on the processing of Mr. Wang's Petition.

24. On April 22, 2016, Mr. Wang, through counsel, submitted to DHS a Case Assistance Form (Ombudsman Form DHS-7001) to determine the status of Mr. Wang's immigration Petition.

25. On August 11, 2016, the DHS Ombudsman noted that Mr. Wang's inquiry had been forwarded to USCIS, and it would notify Mr. Wang when it had received a response. To date, neither Mr. Wang nor his attorney has received a response from USCIS or the DHS Ombudsman.

26. Despite further requests from Mr. Wang and his counsel for a specific and reasonable timeline for adjudication of his Petition, USCIS has refused to provide any additional information.

27. In sum, USCIS has: (1) not requested additional information or evidence for Mr. Wang's Petition; (2) never explained the reason for the processing delay; (3) ignored requests from Mr. Wang asking when the review might be completed.

28. Mr. Wang's I-526 Petition has been outstanding for nearly three years, a period that, upon information and belief, is significantly longer than the average processing time for such petitions.

29. Despite repeated requests—including a request from a U.S. Representative—USCIS has not explained the reason for its lengthy delay or refusal to adjudicate Mr. Wang's I-526 Petition. Upon information and belief, USCIS has no valid justification for delaying its adjudication of Mr. Wang's I-526 Petition for nearly three years.

CLAIM ONE

(Unreasonable Delay and Failure to Perform Nondiscretionary Duties under APA)

30. Mr. Wang realleges and incorporate by reference paragraphs 1 through 29 of this Complaint as if fully stated herein.

31. USCIS, acting through Defendants, has a clear, non-discretionary duty to adjudicate petitions from immigrant investors like Mr. Wang and issue visas when the requirements have been satisfied. See 8 U.S.C. § 1153(b)(5)(A); 8 U.S.C. § 1154(b). Adjudication of the Petition is a ministerial act, as Mr. Wang has satisfied all of the requirements of obtaining an EB-5 Visa. Section 555 of the APA commands administrative agencies to conclude matters presented to the agency for decision "within a reasonable time." See 5 U.S.C. § 555(b).

32. The APA explicitly provides a right of judicial review to a person “adversely affected or aggrieved” by an agency’s “fail[ure] to act” or other such agency action. 5 U.S.C. § 702. When, as here, a proper showing is made, “[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The court must also “hold unlawful and set aside agency action” that is: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”; or “without observance of procedure required by law.” *Id.* § 706(2)(A), (C), (D).

33. Mr. Wang complied with all the requirements for approval of his I-526 Petition when it was filed in January 2014. *See* 8 C.F.R. § 204.6.

34. Since that time, USCIS has unreasonably withheld, and unlawfully and unreasonably delayed, acting on Mr. Wang’s Petition in violation of the INA and APA.

35. USCIS has abused its discretion and acted in an arbitrary and capricious manner by failing to adjudicate Mr. Wang’s I-526 Petition within a reasonable time, contrary to Congress’s explicit mandate to the agency set forth in the INA and APA.

COUNT TWO
(Writ of Mandamus)

36. Mr. Wang realleges and incorporate by reference paragraphs 1 through 35 of this Complaint as if fully stated herein.

37. Mr. Wang seeks a writ of mandamus to compel Defendants officer(s) and/or employee(s) of the United States “to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361.

38. USCIS, acting through Defendants, has a mandatory duty to adjudicate Mr. Wang’s I-526 Petition within a “reasonable time” under the INA and APA.

39. USCIS has unlawfully and unreasonably delayed in adjudicating Mr. Wang's I-526 Petition despite Mr. Wang's Petition being in a condition supporting immediate approval.

40. Mr. Wang therefore seeks an order compelling USCIS to adjudicate his I- 526 Petition without further delay and within 15 days.

PRAYER FOR RELIEF

WHEREFORE, and in light of the foregoing, Mr. Wang prays that the Court:

- A. Assume jurisdiction over this matter;
- B. Issue a writ of mandamus to compel Defendants to perform their duty or duties to complete processing of the I-526 Petition filed by Mr. Wang;
- C. Enter a judgment declaring Defendants' unreasonable delay and failure to adjudicate Mr. Wang's I-526 Petition to be in direct violation of the Administrative Procedures Act and the Immigration Nationality Act;
- D. Award Mr. Wang attorney's fees and costs pursuant to 28 U.S.C. § 2412 and any other applicable statutory, common law, or Constitutional provision; and
- E. Grant Mr. Wang any other relief that this Court deems just and proper at law and in equity.

Dated: December 15, 2016

Respectfully submitted,

/s/Michael R. Sklaire
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