IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

[redacted]

Plaintiff,

v.

MICHAEL CHERTOFF; EMILIO GONZALEZ; WILLIAM McNAMEE; ALBERTO GONZALEZ; ROBERT S. MUELLER, III,

Defendants.

CV-06-1682-ST

FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate Judge:

BACKGROUND

Plaintiff, [redacted], is an alien from the People's Republic of China currently residing in Portland, Oregon, in a valid non-immigrant status as a temporary H-1B worker. [redacted] filed a Complaint for Mandamus and Injunctive Relief on November 20, 2006, alleging that defendants have delayed processing his I-485 Application to Register Permanent Resident or Adjust Status filed on or about August 2, 2004, pursuant to Section 245 of the Immigration and

Naturalization Act ("INA"), 8 USC § 1255. [redacted] seeks an order from this court directing defendants to adjudicate his I-485 application to completion.

Defendants include: (1) Michael Chertoff, the Secretary of the Department of Homeland Security; (2) Emilio T. Gonzalez, the Director of the United States Citizenship and Immigration Service ("USCIS"); (3) William McNamee, the Oregon District Director of USCIS; (4) Alberto Gonzales, the Attorney General of the United States Department of Justice; and (5) Robert S. Mueller, Director of the Federal Bureau of Investigation ("FBI").[1] The USCIS is a subdivision of the Department of Homeland Security. Although 8 USC § 1255(a) refers to the Attorney General as the official who may grant adjustment of status in his discretion, the authority over such adjudications was transferred in early January 2004 to the Secretary of Homeland Security and the USCIS. *See* 6 USC § 271(b)(5).

Now before the court are defendants' Motion to Dismiss (docket #12) and [redacted] Motion for Summary Judgment (docket #23). For the reasons that follow, defendants' Motion to Dismiss (docket #12) should be denied and [redacted] Motion for Summary Judgment (docket #23) should be granted.

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[1] Although the parties have not raised this issue, it is arguable that this court has no jurisdiction over Mueller. *See Konchitsky v. Chertoff*, 2007 WL 2070325 (ND Cal July 13, 2007) (discussing cases and concluding that the court had jurisdiction over DHS and USCIS, but not over the FBI).

FACTS

The following undisputed facts are gleaned from the parties' fact statements submitted in connection with the summary judgment motion (dockets ## 25, 30, 34):

I. [redacted] Background and Entry Into The United States

[redacted] was born in 1975 in Shaanxi Province, People's Republic of China. In 1989, [redacted] family moved to Hainan Province, an island located in the South China Sea. [redacted] graduated from high school in 1992. He received a bachelor's degree in bioengineering in 1996 from Shanghai Jiao Tong University. On September 9, 1998, at age 23, [redacted] entered the United States on a valid F-1 visa in order to attend Oregon Graduate Institute where he earned a master's degree in computer science engineering.

Since entering the United States on September 9, 1998, [redacted] has been out of the United States only four times to visit his family for two to three weeks on each visit. Accordingly, [redacted] has spent almost a third of his life in the United States. [redacted] has never been arrested, convicted of a crime or belonged, or had any intent to belong, to any terrorist organization. He voluntarily chose the United States as his home with the intention of seeking United States citizenship after accumulating the five years as a permanent resident necessary to apply for citizenship.

II. Work History, Labor Certification, Visa Petitions

In July 2000, [redacted] previous employer, Micron Tech, Inc. ("Micron Tech"), filed an application for permanent employment certification for [redacted] as a computer science/advanced degree professional. That position was certified. Thereafter, on October 19, 2000, based on the approved labor certification, Micron Tech filed an I-140 immigrant visa petition for [redacted] which

was approved on November 15, 2000. The goal of the I-140 and I-485 filings is to obtain lawful permanent resident ("green card") status for [redacted] through his employer.

[redacted] has worked for Grass Valley, Inc.,[2] as a software design engineer since February 2001. That employer filed another I-140 visa petition for [redacted] on August 2, 2004, which was approved on July 30, 2005. This new visa petition enjoys the July 14, 2000 priority date of the earlier labor certification filing.

[redacted] had a valid H-1B nonimmigrant temporary worker status until February 14, 2007. On February 9, 2007, Grass Valley, Inc. filed on his behalf a new I-129 nonimmigrant petition which is pending.

III. [redacted] I-485 Application

When an alien applies for adjustment of status, the USCIS conducts several forms of security and background checks to ensure that the alien is eligible for the immigration benefit and that he or she is not a risk to national security or public safety. Christian Decl, ¶ 10. Those checks include an FBI fingerprint check for a past criminal background in the United States, a check against the DHS-managed Interagency Border Inspection System ("IBIS"), and an FBI name check. *Id*. These checks have revealed significant derogatory information on various alien applicants for immigration benefits, including applicants seeking permanent residency, which has resulted in the alien being found ineligible for the benefit and the USCIS's denial of the application. *Id* at ¶ 11. In many instances, the disqualifying information on the alien has been

[2] Some inconsistency is evident regarding the name of this employer. Defendants identify the employer as Thomson Broadcast and Media. Christian Decl, ¶ 5. [redacted] identifies the employer's former name as Thomson Grass Valley, Inc [redacted] ¶ 9. However, no dispute exists over the filing and approval dates of the visa application submitted by that employer.

discovered as a result of the IBIS or FBI name checks, but was not revealed by a fingerprint check alone. *Id*.

In conjunction with his I-485 application filed on August 2, 2004, [redacted] submitted fingerprints to the USCIS in September 2004 and again in January 2006. *Id* at ¶ 14. Since the fingerprint check must be less than 15 months old at the time any application is adjudicated, [redacted] will be rescheduled for new fingerprints if his application remains pending. *Id*. [redacted] preliminary IBIS check has been completed, with any remaining IBIS checks performed by the officer at the time of final adjudication, if deemed necessary. *Id*. [redacted] name check was submitted to the FBI on August 11, 2004, and received by the FBI on August 18, 2004. *Id* at ¶ 16.

On August 9, 2006, [redacted] attorney was told that [redacted] case was assigned to an officer on August 7, 2006. On October 11, 2006, [redacted] attorney learned that [redacted] case was pre-adjudicated on August 25, 2006. [redacted] is *prima facie* eligible for adjustment of status except for completion of the FBI name check. *Id* at ¶ 8.

On October 24, 2006, officials in the USCIS's Portland District Office told [redacted] that the FBI name check process was still pending and could take months or years until it was complete. In March 2007, the Nebraska Service Center (which handles [redacted] application) had approximately 55,826 employment based I-485 adjustment of status cases pending, of which about 14,491 were awaiting completion of FBI name checks. *Id*.

While his I-485 application is pending, [redacted] must apply for an advance parole document on an annual basis in order to travel abroad and must also apply for a work authorization document on an annual basis in order to work. [redacted] is not a lawful permanent resident and is

unable to accrue time in that immigration status until and unless his I-485 application is approved.

IV. FBI Name Check Process and Workload

More than 70 federal, state, and local agencies regularly request FBI name searches. In addition to serving its regular government customers, the FBI conducts numerous name searches in direct support of the FBI's counterintelligence, counterterrorism, and homeland security efforts. Cannon Decl, ¶ 4. Prior to September 11, 2001, the FBI processed approximately 2.5 million name check requests per year. *Id* at ¶ 16. As a result of the FBI's post-9/11 counterterrorism efforts, the number of FBI name checks has grown. *Id*. For fiscal year 2006, the FBI processed in excess of 3.4 million name checks. *Id*.

The initial FBI name check is done electronically. *Id* at ¶ 13. If a record is found for a particular individual, then a secondary manual name search is required. *Id* at ¶ 14. Of the name checks submitted by USCIS to the FBI, approximately 68% are checked and returned to USCIS within 48-72 hours and another 22% within 30-60 days as having "No Record." *Id*. The remaining 10% are identified as possibly being the subject of an FBI record. *Id*. At that point, the FBI electronic or paper record must be retrieved and reviewed for possible derogatory information. *Id*. Less than 1% of the USCIS's requests are identified with a file containing possible derogatory information which the FBI summarizes and forwards to the USCIS. *Id* at ¶ 15. As of April 2006, the USCIS advised that the results of the FBI name check were available within a few weeks for 82% of applicants and within six months for 99% of applicants. Chen Aff (docket #21), ¶ 4 & Exhibit C.

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Before November 2002, only those "main" files that could be positively identified with an individual were considered responsive to the immigration authorities name check requests. Cannon Decl, ¶ 17. Because that approach ran a risk of missing a match to a possible derogatory record, the FBI altered its search criteria in November 2002 to include "reference" files, as well. *Id*. From a processing standpoint, this meant the FBI was required to review many more files in response to each individual background check request. *Id*.

As directed by the USCIS, the FBI processes name check requests on a "first-in, first-out" basis unless the USCIS directs that a particular name check be expedited. *Id* at 19. The processing of name checks depends upon a number of factors, including where in the processing queue the name check lies; the workload of the analyst processing the name check; the volume of priority checks the analyst must process for, among others, military call-ups, medical emergencies, "age-outs," or immigration "lottery" winners; the number of "Hits," (*i.e.*, possible matches) that must be retrieved, reviewed and resolved; the number of records from various Field Offices that must be retrieved, reviewed and resolved; and, more generally, the staff and resources available to conduct the checks. *Id*. The USCIS has formulated procedures to request expedited name checks, such as "significant and compelling" reasons, but issued a notice on February 20, 2007, that it will no longer request expedited FBI name checks "when the only reason for the request is that a mandamus (or other federal court petition) is filed in the case." Chen Aff (docket #35), Exhibit B (84 NO. 9 Interpreter Releases 448, Feb. 26, 2007).

A media report dated July 6, 2007, indicates that the USCIS recently approved 25,000 green card applications in 48 hours, even though the FBI clearances were not entirely completed in some of those cases. Chen Aff (docket #35), Exhibit A.

ANALYSIS

I. Defendants' Motion to Dismiss

Defendants move to dismiss for lack of subject matter jurisdiction. [redacted] invokes this court's jurisdiction on three statutory bases: the Mandamus Act (28 USC § 1361),[3] the Declaratory Judgment Act (28 USC §§ 2201 *et seq*), and 28 USC § 1331 (granting jurisdiction over civil actions "arising under the Constitution, laws or treaties of the United States) in combination with the Administrative Procedures Act ("APA"), 5 USC §§ 701 *et seq*. Complaint, ¶ 8.

A. Declaratory Judgment Act and Federal Question Jurisdiction

Both the Declaratory Judgment Act and federal question jurisdiction under 28 USC § 1331 must be supported by an underlying question of federal law. *Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F3d 750, 753 (9th Cir 1996) ("The Declaratory Judgment Act does not itself confer federal subject matter jurisdiction. There must be an independent basis for such jurisdiction.") (internal citations omitted); *Adelt v. Richmond Sch. Dist.*, 439 F2d 718, 718 (9th Cir 1971) (affirming dismissal on jurisdictional grounds where "the asserted errors are not of Constitutional dimension and present no federal question.").

However, a claim under the APA is sufficient to provide that independent basis for federal question jurisdiction. *Bowen v. Massachusetts*, 487 US 879, 891 n16 (1988) ("[I]t is common ground that if review is proper under the APA, [there is] jurisdiction under 28 U.S.C. § 1331."); *Gallo Cattle Co. v. U.S. Dept. of Agriculture*, 159 F3d 1194, 1198 (9th Cir 1998)

[3] Under 28 USC § 1361, a court has original jurisdiction over "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."

("[W]hile beyond dispute that the APA does not provide an independent basis for subject matter jurisdiction, a federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review."); *Parola v. Weinberger*, 848 F2d 956, 958 (9th Cir 1988) ("[The APA] does not itself grant subject matter jurisdiction . . . . Unless a statute expressly precludes review, however, a federal district court has jurisdiction over APA challenges to agency actions as claims 'arising under' federal law pursuant to 28 U.S.C. § 1331."). Thus, if [redacted] has a claim under the APA, then this court has jurisdiction under 28 USC § 1331.

B. Mandamus Act

The Mandamus Act vests a district court with jurisdiction over "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." 28 USC § 1361. "Relief under the mandamus act and the APA are virtually equivalent when a petitioner seeks to compel an agency to act on a nondiscretionary duty." *Independence Mining Co., Inc. v. Babbitt*, 105 F3d 502, 507 (9th Cir 1997). However, the Mandamus Act "is intended to provide a remedy only if the plaintiff has exhausted all other avenues of relief and only if the defendant owes him a nondiscretionary duty." *Heckler v. Ringer*, 466 US 602, 603-04 (1984). Thus, the starting point for the jurisdictional inquiry is whether [redacted] has a remedy under the APA, which would obviate the need to consider the jurisdictional question posed under the Mandamus Act. *See R.T. Vanderbilt Co. v. Babbitt*, 113 F3d 1061, 1065 (9th Cir 1997); *Independence Mining Co.*, 105 F3d at 507; *Gelfer v. Chertoff*, 2007 WL 902382 *3 (ND Cal March 22, 2007) (declining to address existence or

lack of mandamus jurisdiction due to availability of relief under APA). If [redacted] may proceed under the APA, then this court need not address the question of jurisdiction under the Mandamus Act.

C. APA Claim

Under the APA, judicial review is available except when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 USC § 701(a). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC § 702. "Agency action" is defined to include a "failure to act." 5 USC § 551(13). An agency must complete its action "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 USC § 555(b). When judicial review is not precluded, the APA gives courts the power to:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful or set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; . . . .

5 USC § 706.

1. Whether Delay is Non-discretionary

Defendants argue that this court has no jurisdiction over [redacted] complaint because 8 USC § 1252(a)(2)(b) commits the matter of adjudicating I-485 applications to the discretion of the Attorney General who oversees both the USCIS and the FBI. That statute provides, in pertinent part, that a court is without jurisdiction to review "any . . . decision or action . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the

Secretary of Homeland Security."[4] An alien's status "may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe." 8 USC § 1255(a). Because the USCIS has full discretion over whether to grant or deny an adjustment of status application, defendants contend that any delay in that adjudication process is not subject to judicial review.

It appears that no federal appellate court has yet directly addressed whether jurisdiction exists to force the USCIS to accelerate the speed at which it processes individual applications for adjustment of status,[5] and the district courts "are very much split on this matter." *Sharif v. Chertoff*, 2007 WL 2045489, **2-5 (ND Ill July 18, 2007) (discussing cases). After carefully considering the opposing points of view, this court is persuaded, based on two recent well-reasoned decisions by the Northern District of California with striking similarities to this case, to reject defendants' argument.

In *Toor v. Still*, 2007 WL 2028407 (ND Cal July 10, 2007), the plaintiff applied for an adjustment of status on October 15, 2003, and the USCIS requested a name check on December 31, 2003. Three and a half years later, the plaintiff's I-485 application was still pending, with the USCIS asserting that it is unable to complete processing it because it had not yet received the results of the FBI's name check. The plaintiff requested review, alleging

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[4] 8 USC § 1252(a)(b)(B) reads in full as follows: "Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review – (i) any judgment regarding the granting of relief under section . . . 1255 of this title, or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title."

[5] With respect by the FBI's delay in completing a background investigation, the Fifth Circuit has held that the 120-day period for the USCIS to rule on an application for naturalization begins to run, not from the date of the premature initial examination, but from when the USCIS receives a response from the FBI. *Walji v. Gonzales*, 2007 WL 1747911 (5th Cir June 19, 2007). However, that case was interpreting a regulation which does not apply to I-485 applications and the opinion (published in the advance sheet at 489 F3d 738) has now been withdrawn from publication in a bound volume at the request of the court.

jurisdiction under the Mandamus Act, the APA, and 28 USC § 1331, as does [redacted] in this case. The defendants argued that the court lacked subject matter jurisdiction because adjudication of an I-485 application is left to the discretion of the USCIS. The court disagreed, finding that the "statutory text and code regulations, in conjunction with the APA, establish a non-discretionary duty to adjudicate the I-485 application within a reasonable time." *Id* (citations omitted). The court also flatly rejected the defendants' argument "that 8 USC § 1252(a)(2)(B) strips courts of jurisdiction to hear challenges to the pacing of the adjustment application," finding that the "plain language of section 1252(a)(2)(B) addresses only judgments, decisions or actions committed to the discretion of defendant – not inaction or delay." *Id* at *2 (citations omitted).

Two weeks prior to *Toor*, the same court decided another case involving delay in processing an I-485 application premised upon the lack of an FBI name check. In *Qui v. Chertoff*, 2007 WL 1831130 (ND Cal June 25, 2007), the plaintiff has been in the United States since August 1999, first as a graduate student and subsequently as a software engineer. He and his wife submitted I-485 applications to the USCIS on September 24, 2004, seeking adjustment of status to permanent residents. The USCIS sent the plaintiff's fingerprints to the FBI for processing in September 2004. However, as of June 25, 2007, the USCIS had not processed his application because it had not yet received the results of the FBI's name check inquiry. The defendants argued that the court lacked subject matter jurisdiction under 8 USC § 1252(a)(2)(B). The court rejected that argument, noting the lack of binding Supreme Court or Ninth Circuit authority, the internal inconsistency of the cases taking the opposite tack, and the unanimity among judges in that district that 8 USC § 1252(a)(2)(B) does not bar relief in materially indistinguishable cases.

> No Supreme Court or Ninth Circuit authority answers the jurisdictional question raised by Defendants. Several district courts have agreed with Defendants that the timeliness of the government's actions in adjudicating an I-485 application is not subject to district court review because such actions are discretionary. However, some of these courts' decisions are internally inconsistent in that they conclude that courts do not have jurisdiction to review the reasonableness of the pace of processing I-485 applications as long as the agency "is making reasonable efforts," thereby implying that a court does have some authority to review the reasonableness of the agency's efforts. Moreover, other district courts have rejected Defendants' position, including all ten judges in this district who have considered the question in citable decisions – the vast majority of which involved allegations materially indistinguishable from Qiu's: namely, that an I-485 application remained unadjudicated due to a pending FBI name check.

Id at *2, citing *Li v. Chertoff,* 482 F Supp 2d, 1172, 1178 (SD Cal 2007), and *Safadi v. Howard,* 466 F Supp 2d 696, 700 (ED Va 2006) (footnotes and remaining citations omitted).

The court concluded that because the plaintiff was not seeking review of a discretionary decision or judgment regarding his I-485 application, 8 USC § 1252(a)(2)(B) was inapplicable:

> This Court now joins its sister courts in this district in rejecting Defendants' jurisdictional challenge. Although Defendants have discretion over whether to grant or deny Qiu's application for adjustment of status under I-485, they have a non-discretionary duty to act on that application within a reasonable time. Defendants' reliance on 8 U.S.C. § 1252(a)(2)(B) is misplaced because that provision, by its use of the terms "judgment" and "decision or action," only bars review of actual discretionary decisions to grant or deny relief under the enumerated sections, including section 1255. Here, Qui does not challenge a discretionary decision or judgment regarding his I-485 application, and 8 U.S.C. § 1252(a)(2)(B) is therefore inapplicable. In addition, asserting that the USCIS is awaiting the results of an FBI name check does not explain why Qui's application has been stagnant for the past three years and this assertion is therefore insufficient to show that the delay of Qui's application is reasonable as a matter of law. . . .

Id at *3 (internal quote marks, punctuation, and citations omitted).

Toor and *Qui* are materially indistinguishable from this case. As did the court in those cases, this court concludes that the plain text of 8 USC § 1252(a)(2)(B), which applies to any discretionary "judgment . . . decision or action by the Attorney General or Secretary of Homeland Security," simply does not apply to *in*decision and *in*action premised solely upon delays by another federal agency. *See Toor*, 2007 WL 2028407 at *2. This court agrees that "to read section 1252(a)(2)(B)(ii) as broadly as defendants would render toothless all timing restraints, including those imposed by the APA which would amount to a grant of permission for inaction. Such an outcome does not find support in the statutory text and, considering the fact that most applicants will be physically present in the United States, seems antithetical to national security interests." *Id* (internal quote marks and citations omitted).

Similarly, this court concludes that 8 USC § 1252(a)(2)(B) does not bar an APA claim against the USCIS for violating its non-discretionary duty to adjudicate the I-485 application within a reasonable time. Otherwise, there would be no limit to the length of time the USCIS may take processing applications. *Tang v. Chertoff*, 493 F Supp2d 148, 150 (D Mass 2007) ("The duty to act is no duty at all if the deadline is eternity"); *Kim v. Ashcroft*, 340 F Supp2d 384, 393 (SDNY 2004) ("the CIS simply does not possess unfettered discretion to relegate aliens to a state of 'limbo,' leaving them to languish there indefinitely").

Defendant also argue that because no statutes or regulations provide a meaningful standard against which to measure the adjudicatory process, judicial review is unavailable. Because federal courts routinely assess the "reasonableness" of the pace of agency action under the APA, this court believes a meaningful standard exists against which to judge defendants'

action, or lack thereof. *See Forest Guardians v. Babbitt,* 174 F3d 1178, 1190 (10th Cir1998) (explaining that "when an agency is required to act – either by organic statute or by the APA – within [a] . . . reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable").

2. Whether the Delay is Reasonable

To obtain relief pursuant to 28 USC § 1331 and the APA, [redacted] also must demonstrate that defendants have unreasonably delayed processing his I-485 application. "[T]here is no bright line rule as to when a delay on an application slips into the realm of unreasonableness." *Elmalky v. Upchurch,* 2007 WL 944330 *6 (ND Tex March 28, 2007). "What constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." *Fraga v. Smith,* 607 F Supp 517 522 (D Or 1985). Among the various tests used by courts to assess unreasonable delay under the APA are the following six factors:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where 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 content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecommunications Research and Action Center v. F.C.C., 750 F2d 70, 80 (DC Cir 1984) ("*TRAC*") (internal citations and quotation marks omitted).

While *TRAC* was decided in the context of the APA, 5 USC § 706(1), it serves as a helpful tool for deciding what constitutes unreasonable delay. "The reasonableness of administrative delays also must be judged in light of the resources that Congress has supplied to the agency" and the "impact of the delays on the applicants' interests." *Fraga*, 607 F Supp at 521.

While the INA contains no timetable for adjudication of applications for adjustment of status, Congress sets a normative expectation and standard in "The Immigration Services and Infrastructure Improvements Act of 2000" of a reasonable processing time for an immigrant benefit application as no more than 180 days after initial application. 8 USC § 1571 ("It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application . . . ."). Additionally, the fingerprint check and IBIS database query for [redacted] have already revealed no domestic criminal or security related issues in his background that affect his eligibility for immigration benefits. Furthermore, as of June 8, 2007, the USCIS's Nebraska Service Center was processing employment-based I-485 applications filed on September 26, 2006, meaning that applications submitted some 19 months after [redacted] application were then being processed. Chen Aff (docket #21), ¶ 2 & Exhibit A.

The only reason given for the delay is the "millions of name check requests" submitted by the USCIS to the FBI since 9/11, "thus taxing that agency's resources and creating a backlog in FBI's performance of complet[ing] security checks." Christian Decl, ¶ 16. While "[t]he passage of time alone is rarely enough to justify a court's intervention in the administrative process" (*id* (citation omitted)), significant delays "may not be justified merely by assertions of overwork,"

especially where "the interests involved are personal, not economic." *Dabone v. Thornburgh*, 734 F Supp 195, 203 (ED Penn 1990). Here, the interest involved here is personal, not economic.

The FBI's ability to process adjustment of status applications may well be compromised due to the post-9/11 increase in requests and complexity of the name check process. Yet defendants have offered no specific reason for the more than three year delay in completing [redacted] name check, well beyond the 180 days recommended by Congress and, more importantly, well beyond the norm for the USCIS. "[D]elays of a significant magnitude, particularly when they occur over uncomplicated matters of great importance to the individuals involved, may not be justified merely by assertions of overwork." *Yu v. Brown,* 36 F Supp2d 922, 934 (D NM 1999) (citations omitted). Likewise, "mere invocation of national security is not enough to render agency delay reasonable per se." *Singh v. Still,* 470 F Supp2d 1064, 1069 (ND Cal 2007).

Defendants provide no reason why [redacted] application requires such an extended delay and point to no single action that has been taken to further [redacted] particular application. [redacted] educational and employment history is not particularly complicated. Perhaps the FBI's initial search revealed some record that needs to be reviewed that is difficult to retrieve. Perhaps [redacted] name is sufficiently common that many records need to be reviewed. Perhaps the FBI has encountered some other difficulty in determining whether possible derogatory information exists. However, the FBI has not deigned to enlighten either [redacted] or the court as to what has placed him in the 1% of name check requests that cannot be completed within 60 days. Furthermore, the record is devoid of any attempt by the USCIS to reduce the amount of delay by making an expedited request to the FBI. Since February 2007, that request presumably has not been made

in accordance with the new policy not to make any expedited requests simply because a lawsuit is filed, regardless of the length of the delay. However, no explanation is given as to why the USCIS made no expedited request before February 2007 or why the new policy was instituted.

Various courts have found that the USCIS has unreasonably delayed in failing to act on adjustment of status applications. In *Mazouchi v. Still*, 2007 WL 2070324 (ND Cal July 13, 2007), a four year delay in completing a FBI name check and adjudicating an I-485 adjustment of status application was held unreasonable as a matter of law. *See also Han Cao v. Upchurch*, 2007 WL 2071900 (ED Pa July 16, 2007) (same); *Elkhatib v. Butler*, 2005 WL 5226742 (SD Fla June 6, 2005) (same). In *Yu*, 36 F Supp2d at 932, the court held that a two and a half year delay by the USCIS to adjudicate an application for special immigrant status and adjustment of status was "on its face an unreasonable amount of time to process a routine application" and sufficient to establish a *prima facie* case of unreasonable delay. In *Paunescu v. INS,* 76 F Supp2d 896, 902 (ND Ill 1999),[6] the court ordered the USCIS to process the adjustment of status applications of diversity visa holders whose applications had been pending for over two years since they were first filed, for 19 months since the principal applicant refiled his fingerprint card, and for over a year since that applicant's fingerprints cleared.

In accord with these decisions, this court concludes that jurisdiction is proper under the APA and 28 USC § 1331 to compel the USCIS to adjudicate an application for adjustment to permanent status which has been pending for over three years. *See Quan v. Chertoff*, 2007 WL

[6] One factor present in *Paunescu* is not at issue here: the applicants' diversity visas were only valid for one year, a valid diversity visa was required for adjustment of status eligibility, and the diversity visas expired while the adjustment of status applications were pending. The court found that the delay was unreasonable and ordered defendants to adjudicate the adjustment of status applications despite the expiration of the diversity visas.

1655601 *2 (ND Cal June 7, 2007) (citing cases). Therefore, defendants' motion to dismiss should be denied.

II. [redacted] Summary Judgment Motion

[redacted] seeks summary judgment to compel defendants to adjudicate his I-485 application to adjust to permanent resident status. Defendants contend that a material issue of fact exists as to the reasonableness of the delay. However, the underlying facts are undisputed and, as discussed above, defendants have offered no particularized explanation for the delay in this case.

Most cases involving delays in adjudicating adjustment of status applications have decided motions to dismiss for lack of jurisdiction or failure to state a claim. However, some cases have granted summary judgment based on similar circumstances. In *Han Cao*, the court rejected defendants' argument that either 8 USC § 1252(a)(2)(B) or § 1252(g) stripped the court of jurisdiction to consider a claim of unreasonable delay in adjudicating adjustment of status applications. The court then found that "a four-year delay in the review of an application for legal permanent residence is presumptively unreasonable," granted summary judgment to plaintiffs, and ordered adjudication by August 17, 2007. *Han Cao,* 2007 WL 2071900 at *6. Three months earlier, the same court found a found a violation of the APA based on a nearly two year delay in adjudicating adjustment of status applications, remanded the case to the USCIS, and ordered adjudication of plaintiffs' I-485 petitions within 30 days. *Song v. Klapakas*, 2007 WL 1101283 (ED Pa April 12, 2007).[7] In *Singh*, 470 F Supp2d at 1069, the court granted summary judgment to a plaintiff who filed an 1-485 adjustment of status application in 1999 which was

[7] Although the court in *Song* was faced with an uncontested motion to dismiss by the USCIS, the court remanded the case to the USCIS and ordered adjudication within 30 days, effectively granting the relief the plaintiffs sought. *Song*, 2007 WL 1101283 at *5.

still pending in 2006 due to a delay in completing the FBI name check which had begun in August 2002. Similarly, in *Paunescu*, 76 F Supp2d at 902, the court granted summary judgment to the plaintiff seeking an adjustment of status who sent fingerprint cards in November 1997, in February 1998 and again in September 1998, yet whose application was still not processed by the end of the 1998 fiscal year.

Based on the absence of a genuine dispute as to any material fact and given no reason for the delay relating specifically to [redacted] this court finds that the more than three year delay in adjudicating [redacted] I-485 adjustment of status application is unreasonable. As a result [redacted] should be granted summary judgment, and defendants should be ordered to complete adjudication of his I-485 application in no more than 30 days.

RECOMMENDATIONS

For the reasons stated above, defendants' Motion to Dismiss (docket #12) should be DENIED and [redacted] Motion for Summary Judgment (docket #23) should be GRANTED. As a result, defendants should be ordered to adjudicate [redacted] I-485 application in no more than 30 days.

SCHEDULING ORDER

Objections to the Findings and Recommendations, if any, are due September 17, 2007. If no objections are filed, then the Findings and Recommendation will be referred to a district judge and go under advisement on that date.

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If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district judge and go under advisement.

DATED this 29th day of August, 2007.

__/s/ Janice M. Stewart _____
Janice M. Stewart
United States Magistrate Judge