

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[REDACTED],)
)
Plaintiff,)
)
v.)
)
Jeh Johnson, SECRETARY) Case No. 5:16-cv-00383
DEPARTMENT OF HOMELAND)
SECURITY; Leon Rodriguez, DIRECTOR)
OF U.S. CITIZENSHIP AND)
IMMIGRATION SERVICES; Michael)
Paul, FIELD OFFICE DIRECTOR FOR)
THE VERMONT SERVICE CENTER;)
)
Defendants.)
_____)

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The Plaintiff, [REDACTED], respectfully brings this action seeking an order mandating the Defendants to immediately adjudicate visa petitions he filed for his spouse and his step-child, which have been unlawfully delayed for more than two years. The Defendants are subjecting [REDACTED] to an illegal federal security checks for incidents that the State of Texas long ago exonerated him from committing. [REDACTED] spent approximately 17 years in prison for his wrongful convictions before being exonerated and has suffered more than enough without his family with him in the United States. This Court should end the illegal federal security check and order the Defendants to immediately approve the visa petitions.

I. INTRODUCTION

1. [REDACTED] was wrongly convicted twice. His 1982 conviction for indecency with a child was set aside and dismissed by a Texas District Court in October 2003, after the court determined that his guilty plea was involuntary. [REDACTED]'s 1985 conviction for aggravated sexual assault was dismissed after DNA evidence completely exonerated him of committing the offense. Based upon these wrongful convictions, [REDACTED] was incarcerated for approximately 17 years.

2. After his exoneration and release from prison, [REDACTED] subsequently became a naturalized citizen of the United States. He filed visa petitions to immigrate his spouse and minor step-child from Mexico. Since [REDACTED] is a citizen of the United States, his spouse and minor step-child are considered his "immediate relatives." As such, they are eligible to immigrate immediately following the approval of the visa petitions. 8 U.S.C. § 1151(b)(2)(A)(i).

3. In violation of law, the Defendants have wholly failed to adjudicate the petitions and are instead subjecting [REDACTED] to a prolonged and illegal federal security check based upon their misinterpretation or misapplication of the Adam Walsh Act.

4. The Adam Walsh Act provides, in pertinent part, that United States citizens convicted of certain sex offenses are prohibited from petitioning for a relative. *See* 8 U.S.C. § 1154(a)(1)(A)(viii). This is the only conceivable "security" check applicable to [REDACTED]'s petitions.

5. The Adam Walsh Act has no applicability to the petitions filed by [REDACTED] because he does not have a conviction relating to a sex offense. His prior “convictions” were vacated by a Texas district court.

6. Since the security check is unlawful, this Court should enter an order mandating the Defendants to immediately decide [REDACTED]’s visa petitions.

II. PARTIES

7. Plaintiff [REDACTED] is a 65-year old citizen of the United States who currently resides in the [REDACTED], Texas area. He is married to [REDACTED], who is a citizen of Mexico. [REDACTED], a citizen of Mexico, is [REDACTED]’s 15-year old son and [REDACTED]’s step-son. [REDACTED] and [REDACTED] are the beneficiaries of the visa petitions filed by [REDACTED].

8. Defendant Leon Rodriguez is the Director of United States Citizenship and Immigration Services (USCIS) and is generally charged with the administration of benefits governed by the Immigration and Nationality Act. In this capacity, he directs the Vermont Field Office (VFO), a subgroup of USCIS. He is being sued in his official capacity.

9. Defendant Michael Paul is the Field Office Director of the VFO. In this capacity, he directs and oversees the VFO where [REDACTED]’s petitions are pending. He is being sued in his official capacity.

10. Defendant Jeh Johnson is the Secretary of the Department of Homeland Security (DHS). He is charged with overseeing USCIS and is being sued in his official capacity.

III. JURISDICTION AND VENUE

11. This Court has jurisdiction over Plaintiffs' claim under 28 U.S.C. § 1361 (Mandamus Act), and 5 U.S.C. § 701 *et seq.*, (Administrative Procedures Act), in conjunction with 28 U.S.C. § 1331 (Federal Question Jurisdiction).

12. The Mandamus Act vests the Court with original jurisdiction over “any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361.

13. Under the APA, a person suffering legal wrong because of agency action, or adversely aggrieved by agency action within the meaning of a relevant statute, is entitled to review thereof. 5 U.S.C. § 702. This includes judicial review to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The Court has jurisdiction to consider an APA cause of action under 28 U.S.C. § 1331.

14. Venue is proper in this district because the Plaintiff resides in Austin, Texas. 28 U.S.C. § 1391(e).

IV. FACTUAL BACKGROUND

15. [REDACTED] is a native and citizen of [REDACTED] who migrated to the United States in 1980.

16. On or around June 24, 1982, he pleaded guilty to indecency with a child and was sentenced to ten-years of community supervision by the 167th District Court in Travis County, Texas.

17. On or around June 2, 1983, [REDACTED] was charged with aggravated sexual assault. He pleaded not guilty and was convicted by a jury on or around January 21, 1985

in the 167th District Court in Travis County, Texas. He was sentenced to 99 years in imprisonment.

18. As a result of the conviction in the aggravated sexual assault conviction, his probation was revoked in the indecency with a child case and he was sentenced to ten years imprisonment. The sentences were concurrent.

19. In 2000, after [REDACTED] was imprisoned for approximately 17 years, new DNA evidence completely exonerated him from committing aggravated sexual assault. As a result, the conviction was vacated.

20. On October 2003, the Texas district court entered an order finding that [REDACTED]'s guilty plea in the indecency with a child case was "involuntary and in violation of the due process clauses of the Texas and United States Constitution." Consequently, the conviction was vacated and the case dismissed.

21. On or around March 16, 2002, [REDACTED] obtained lawful permanent resident (LPR) status under the Cuban Adjustment Act. By granting [REDACTED]'s application for lawful permanent resident status, the government necessarily conducted a background check, which [REDACTED] passed.

22. On September 12, 2005, [REDACTED] married his current spouse [REDACTED].

23. On September 9, 2013, [REDACTED] filed for naturalization.

24. On March 13, 2014, over two years ago, [REDACTED] filed a visa petition for his wife [REDACTED]. USCIS failed to timely adjudicate this petition.

25. On March 13, 2014, over two years ago, [REDACTED] filed a visa petition for his step-son [REDACTED] USCIS failed to timely adjudicate this petition.

26. As part of the naturalization process, USCIS was required to conduct an examination into [REDACTED]'s criminal history and his good moral character. *See* 8 U.S.C. § 1446. Furthermore, if USCIS concluded that [REDACTED] was convicted of an aggravated felony after November 1, 1990, then it was required to deny him naturalization.

27. After conducting the requisite background check and determining that he was not convicted of an aggravated felony, USCIS granted [REDACTED]'s naturalization application.

28. On April 16, 2015, after taking an oath of allegiance to the United States, [REDACTED] became a naturalized citizen.

29. After becoming a citizen, [REDACTED] requested USCIS to upgrade the petitions he filed to show he is a citizen. As a U.S. citizen, [REDACTED]'s spouse and minor step-child are entitled to an immigrant visa without undue delay.

30. On August 6, 2015, USCIS mailed [REDACTED] a notice indicating that it updated the petition he filed for [REDACTED]. Although USCIS conceded that since [REDACTED] is a citizen, "a visa is immediately available [for his wife] from the U.S. Department of State," they claimed his petition was on hold pending "required security checks."

31. On August 7, 2015, USCIS mailed [REDACTED] a notice indicating that it updated the petition he filed for [REDACTED]. USCIS, however, claimed to be unable to adjudicate the petition "because the required security checks remain pending."

32. On March 2, 2016, [REDACTED]'s attorney requested status on the petitions [REDACTED] filed since they were outside of the normal processing times.

33. On March 8, 2016, USCIS mailed [REDACTED] a notice relating to the petition filed for his stepson [REDACTED]. They stated: “We have placed your case on a processing hold because the required security checks remain pending. Until we receive the results of these security checks, we cannot move forward on your case. We require the results of security checks before we make a decision on any pending case. We cannot predict when we will receive the results of these security checks.”

34. On March 22, 2016, USCIS mailed [REDACTED] another notice advising him that “security checks” are also causing them to delay adjudicating the visa petition he filed for his wife.

35. In the March 22, 2016 notice, USCIS claimed, without citation to any legal authority, that “[b]ecause of the security checks required in your specific case, normal processing times do not apply.” They also stated that [REDACTED] might be contacted for fingerprinting. To date, USCIS has not sent [REDACTED] notice of a fingerprint appointment. Finally, USCIS wrote that it “cannot predict when we will receive the results of these security checks.”

36. USCIS failed to explain the nature of the “required security checks.” The only “security check” conceivable are those under the Adam Walsh Act relating to individuals convicted of certain sex crimes. Such a background check is not applicable to [REDACTED]’s visa petitions because his convictions were vacated.

37. USCIS’ unlawful failure to timely process the petitions filed by [REDACTED] is causing him profound emotional distress and hardship. But for USCIS’ unlawful failure to adjudicate the petitions, [REDACTED] is forced to live apart from his wife and minor stepson. USCIS’ unlawful focus on [REDACTED]’s past criminal history also forces him

to recall incidents when he was wrongfully convicted and wrongly imprisoned causing him extreme pain and suffering. USCIS' unlawful refusal to timely decide the petitions is also causing [REDACTED] financial suffering as he is forced to maintain two households instead of one.

V. EXHAUSTION OF REMEDIES

38. [REDACTED] exhausted his administrative remedies. He complied with all of the Defendants' requests for information and has made numerous inquiries into the status of his case – all to no avail.

VI. CLAIMS FOR RELIEF

39. [REDACTED] re-alleges sections I-V as if fully set forth herein.

A. RELIEF UNDER THE MANDAMUS ACT

40. [REDACTED] requests the Court to order the Defendants to immediately adjudicate his petitions pursuant to the Mandamus Act, 28 U.S.C. § 1361.

41. [REDACTED] has a clear and certain right to the relief requested.

42. [REDACTED] is within the zone of interests that are protected by the Immigration and Nationality Act and its implementing regulations. *Clarke v. Security Industries, Ass'n*, 479 U.S. 388, 399 (1987); 8 U.S.C. § 1151(b).

43. The Defendants have a certain, mandatory, and ministerial duty to adjudicate the petitions [REDACTED] filed.

44. Federal regulations provide that the Defendants *shall* notify [REDACTED] about the decision made concerning the petitions he filed. *See* 8 C.F.R. § 204.2(a)(1)(iii)(6)(D) and 8 C.F.R. § 103.2(b)(19). Their duty to timely notify [REDACTED] about their decisions on the petitions is mandatory and non-discretionary.

45. The Defendants have not performed the duties owed to [REDACTED] in a reasonable time period. The withholding of adjudication on petitions is not in compliance with federal regulations or the government's own internal memorandums.

46. [REDACTED] has no administrative remedy available to him.

47. [REDACTED] contacted the Defendants in an attempt to have the Defendants perform the duties owed to him. The Defendants, nevertheless, unreasonably failed to perform their mandatory, non-discretionary duty.

B. RELIEF UNDER THE ADMINISTRATIVE PROCEDURES ACT

48. [REDACTED] re-alleges all preceding paragraphs.

49. Pursuant to the APA, 5 U.S.C. § 706, 5 U.S.C. § 702 and 28 U.S.C. § 1331, [REDACTED] requests the Court to compel agency action unreasonably withheld and order the Defendants to immediately adjudicate the petitions he filed.

50. [REDACTED] has standing to bring this cause of action under the APA because the Defendants' inaction to perform their mandatory duties is causing him to suffer a legal wrong. The "security check" is an unreasonable use of agency authority, which is causing an unlawful delay in processing [REDACTED]'s petitions. [REDACTED]'s convictions were vacated and, therefore, he should not be subject to a prolonged security check.

51. [REDACTED]'s claim falls under the "zone of interests" protected by the Immigration & Nationality Act." His claim is specifically under the zone of interests protected by 8 U.S.C. § 1151(b).

52. The Defendants have a duty to adjudicate [REDACTED]'s petitions in a reasonable time period.

53. The Defendants' duty to adjudicate [REDACTED]'s petitions in a reasonable time period is a discrete agency action that they are required to take.

54. In violation of this duty, the Defendants have wholly failed to provide a decision.

55. [REDACTED] has no administrative remedy available to him.

C. RELIEF UNDER THE EQUAL ACCESS TO JUSTICE ACT

56. [REDACTED] seeks and is entitled to recover reasonable attorney fees, expenses and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

VII. PRAYER FOR RELIEF

For the foregoing reasons, [REDACTED] requests that the Court enter an order:

- a. mandating the Defendants to adjudicate [REDACTED]'s petitions within thirty (30) days under the Mandamus Act and the APA;
- b. awarding him reasonable attorney's fees, expenses and costs; and
- c. granting him such other and further relief as the Court may deem just and proper.

Respectfully submitted,

DE MOTT, MCCHESENEY, CURTRIGHT &
ASSOCIATES, LLP

/s/ Lance Curtright

LANCE CURTRIGHT

De Mott, McChesney, Curtright, & Armendariz

Texas Bar No. 24032109

800 Dolorosa, Ste. 100

San Antonio, Texas 78207

(210)354-1844 (*telephone*)
(210)212-2116 (*facsimile*)

ATTORNEY FOR PLAINTIFF