



PRACTICE ADVISORY¹

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MANDAMUS LITIGATION AGAINST DOL TO ADDRESS DELAYS IN PREVAILING WAGE DETERMINATIONS AND LABOR CERTIFICATIONS

This practice advisory addresses how to file a mandamus action in federal district court when the Department of Labor (DOL) has unreasonably delayed issuing a Prevailing Wage Determination (PWD) or adjudicating a labor certification application filed pursuant to the PERM (Program Electronic Review Management) regulations.

In recent years, practitioners have become adept at filing mandamus actions to compel the United States Citizenship and Immigration Services (USCIS) to make decisions on applications pending beyond reasonable processing times. Many of these actions met with success and courts have granted mandamus actions over long-delayed adjustment and naturalization applications.² Through the hard work of local practitioners, there now is a body of case law addressing USCIS's duty to adjudicate applications filed pursuant to the INA.

Despite this record of success with USCIS, there is little record of mandamus filings against the DOL in the context of either prevailing wage determinations (DOL Form ETA 9141) or labor certifications for permanent resident applications (DOL Form ETA 9089). Mandamus can be as effective a tool to remedy delays by DOL as it has been for delays by USCIS. This practice advisory outlines basic information about mandamus actions and suggests strategies and practice tips for bringing a mandamus action against DOL.

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² See the Council's Practice Advisories [Mandamus Actions: Avoiding Dismissal and Proving the Case](#) (updated Nov. 2015) (hereafter referred to as "Mandamus Actions") and [How to Get Judicial Relief Under 8 U.S.C. § 1447\(b\) for a Stalled Naturalization Application](#) (updated Oct. 23, 2013) for a more in-depth discussion of remedies for stalled adjustment and naturalization applications.

What is a mandamus action?

The federal mandamus statute allows a court to compel a federal agency or officer to perform a nondiscretionary duty that it owes to a plaintiff.³ A mandamus plaintiff must demonstrate that: (1) he or she has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available.⁴ Under the mandamus statute, the court may compel the government to take action, but cannot compel that discretion be exercised in a particular manner, nor grant the result the plaintiff seeks.⁵

In the DOL context, a mandamus action would assert that: 1) the employer or the noncitizen being sponsored (the beneficiary of the labor certification application), or both, have a right to a decision on the prevailing wage request or the labor certification application within a reasonable period of time; 2) the DOL has a duty to issue a PWD or to adjudicate the labor certification application and this duty to the parties is ministerial and clearly prescribed; and 3) as with DHS/USCIS applications, there is no other adequate remedy available when the DOL delays in issuing a PWD or adjudicating a labor certification application.

What is the need for mandamus actions against DOL?

- Prevailing Wage Determinations

Based on reports by AILA members, DOL has been relatively consistent in issuing PWDs within 60-70 days for the year to date.⁶ Delayed issuance can be highly disruptive as the PWD is necessary for the recruitment phase of the labor certification process and in order to file the application.⁷ For example, where an employer has already begun recruitment, a delay by DOL in issuing the PWD can invalidate the recruitment and the employer will have to start the recruitment process again—unnecessarily increasing an already substantial expense.⁸

³ The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361.

⁴ *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002).

⁵ For a more detailed discussion of the mandamus requirements, see *Mandamus Actions*, *supra* n.2.

⁶ See AILA Message Center “thread:”[Anyone received a PW determination back from national center yet?](#) DOL’s current posted processing time on the iCERT portal (<https://www.icert.doleta.gov>) for prevailing wage determinations is 60 days (as of Oct. 13, 2015).

⁷ See 20 C.F.R. § 656.40; ETA Form 9089, § F, Prevailing Wage Information.

⁸ The labor certification application must be filed within 6 months (180 days) of recruitment. See 20 C.F.R. § 656.17(e). For recruitment to be valid, either the recruitment process must begin or the application must be filed within the PWD validity period. See *In re Karl Storz Endoscopy-America*, 2011-PER-00040 (Dec. 1, 2011) (en banc). The PWD validity period cannot be less than 90 days or more than 1 year. 20 C.F.R. § 656.40(c). Employers could find themselves unable to comply with this

Delay in PWD issuance also can result in serious and irreversible consequences for the beneficiary, namely when he or she stands to lose eligibility for a 7th year H-1B extension,⁹ or has derivative children that are approaching the age of 21.¹⁰ These two situations present particularly compelling cases for a mandamus action against the DOL.

- PERM labor certification applications

The DOL has been inconsistent in its ability to timely adjudicate labor certification applications. The inception of the PERM program in 2005 marked the end of the original labor certification system, in which processing delays of several years were not uncommon. Those delays rendered employment-based immigration impossible for many noncitizens who could not maintain lawful status and continue to work in the United States.¹¹ The PERM program initially sped up adjudication times radically, resulting in labor certification application adjudication within 2 to 3 months of filing and oftentimes within a few days, or sometimes as little as a week.

Following the centralization of the PERM program, however, PERM processing slowed significantly. In 2009, adjudication times sometimes averaged up to 10 months for unaudited cases and over two years for audited cases. Accordingly, a few AILA practitioners turned to the federal courts for assistance, on the basis that the DOL has a plainly prescribed duty to adjudicate labor certification applications on behalf of US employers and their beneficiaries.

requirement if they began recruitment before PWD issuance, in expectation of a roughly 60 day processing time, but PWD issuance was delayed to the point where the 180 days has expired or the PWD was issued with only a 90-day validity period and the employer could not complete the recruitment in time.

⁹ To qualify for a 7th year extension based on a pending labor certification application, the application must be filed at least 365 days before the beneficiary reaches the end of the 6th year. *See* §§ 106(a)(1), (b), American Competitiveness in the Twenty-First Century Act, Pub. L. No. 106-313, *as amended by* Pub. L. No. 107-273.

¹⁰ Note that where time is of the essence and the mandamus action will not be decided by the district court in time to prevent an irreparable injury (such as a child aging out), at least one court was willing to grant an emergency motion for a temporary restraining order, filed as part of a pending mandamus action, and order DOL to adjudicate the application. *See Kumykov. v. Carlson*, No. 1:09-CV-1217-CAP (N.D. Ga., June 4, 2009), [AILA Doc. No. 09071661](#).

¹¹ While Congress authorized extensions of H-1B status for individuals in the green card process who meet certain requirements, and USCIS recently authorized their H-4 spouses to apply for work authorization, there are no comparable provisions for individuals in other employment-based nonimmigrant classifications who reach the normal limit on their authorized period of stay.

As of October 2015, DOL has a posted processing time of roughly 7 months for unaudited cases, but roughly 15 months for audited cases.¹² Given DOL's history, including the outright suspension of PWD issuance in 2011, without regard to the consequences for employers and beneficiaries, practitioners must remain vigilant and prepared to use mandamus as a remedy when processing times become unreasonable.

What are the steps to a successful mandamus action against the DOL?

Generally, a mandamus suit over the delayed issuance of a PWD or adjudication of a labor certification application will be similar to any other mandamus suit.¹³ Here are some additional tips:

1. Build your facts and administrative record prior to filing a mandamus action.

Given DOL's long-standing policy against expediting labor certification applications, an expedite request in advance of filing suit would appear to be an exercise in futility.¹⁴ However, you should follow DOL's procedure for submitting a case status inquiry for pending applications.¹⁵ Since DOL has not issued a "no-expedite" policy with regard to issuing PWDs, an email request for an expedite as far in advance of filing in federal court as possible, may be helpful.¹⁶ Your email request(s) and DOL's response(s) can be used to show that your client has attempted to use non-judicial means to have the labor certification application adjudicated or PWD issued in a reasonable period of time and, as applicable, in an expeditious manner.

¹² The posted processing times, as of Oct. 5, 2015, are March 2015 for analyst review, but July 2014 for applications in the audit process. DOL also acknowledges that for "various reasons, we may be completing the processing of applications filed prior to the month posted on iCERT." Recent reports by AILA members reflect an average of 6 to 7 months for unaudited cases, with a few longer, but less than 1 year. See AILA Message Center "thread:" [Atlanta PERM processing time](#). The audited cases reported by AILA members reflect an average processing time of 15 months, with an outlier of 17 months. See AILA Message Center "thread:" [PERM Audits—Response Times](#).

¹³ See [Mandamus Actions](#), *supra* n.2.

¹⁴ "The Office of Foreign Labor Certification (OFLC), as a matter of long standing policy, does not expedite the processing of applications due to the particular circumstances of any individual employer, foreign worker, or a family member." [PERM FAQs](#), Filing—How to File, FAQ #1.

¹⁵ As of the date of this Practice Advisory, DOL has stated as part of the processing times chart that a status inquiry can be submitted for a labor certification application filed more than three months prior to the date posted. The current email address is plc.atlanta@dol.gov.

¹⁶ The current email address is flc.pwd@dol.gov. Although not specifically referenced on DOL's processing times chart, a status inquiry by email would be appropriate if the request has been pending longer than the posted processing time.

2. Assess whether your case is appropriate for judicial review.

Under the mandamus statute, the court may order DOL to issue a decision, but cannot compel a favorable decision for your client. A negative outcome would be the DOL's swift denial of your client's labor certification application¹⁷ or issuance of an unfavorable PWD.¹⁸ Since the only relief you are seeking in a mandamus action is that the agency issue the PWD or decide the application, either of these actions would moot the mandamus action, after which the government would move to dismiss. An adverse decision in a mandamus case also has the potential to create bad law in your district. Thus, this is a remedy that should be reserved for seriously delayed cases, particularly those that are sympathetic and clearly approvable.

3. Prepare your argument, emphasizing your client's legal right to have the prevailing wage determination made or the labor certification application adjudicated and DOL's legal duty to make these decisions.
- Employer and/or beneficiary's legal right to PWD or decision on a labor certification application: The statutory and regulatory scheme makes clear that employers may petition for immigrant visas for foreign workers.¹⁹ A labor certification is an essential first step in this process for most employment-based immigrant visa categories and the PWD is a mandatory part of the labor certification process.²⁰ Moreover, the adjustment of status provision requires that an adjustment applicant must be admissible and that a visa must be immediately available.²¹ Without a labor certification, the foreign worker will be inadmissible

¹⁷ Although outside the scope of this Practice Advisory, be aware that DOL requires a denial by the Certifying Officer to include advice that "failure to request review within 30 days of the date of determination, as specified in § 656.26(a), constitutes a failure to exhaust administrative remedies." 20 C.F.R. § 656.24(e)(3). Therefore, an employer who filed suit in federal court over a denial without complying with DOL's administrative review process would likely find its case dismissed unless the employer met one of the exceptions to the exhaustion doctrine, such as where seeking administrative review would be futile. For a list of the exceptions, *see Iddir*, 301 F.3d at 498 (citations omitted). When a beneficiary has sued to overturn the denial, without the employer's participation, some courts have refused to apply the exhaustion doctrine, but have dismissed for lack of subject matter jurisdiction because no relief can be granted if the employer is not pursuing the application. *See DeJesus Ramirez v. Reich*, 156 F.3d 1273, 1277-78 (D.C. Cir. 1998) (pre-PERM application).

¹⁸ While not specifically referencing exhaustion, DOL also has a mandatory review and appeal process for employers seeking to contest a PWD. *See* 20 C.F.R. §§ 656.40(h), 656.41; [Prevailing Wage FAQs](#).

¹⁹ *See, e.g.*, 8 U.S.C. §§ 1153(b), 1154(a)(1)(F).

²⁰ *See, e.g.*, 8 U.S.C. § 1153(b)(2) (members of the professions holding advanced degrees) and 8 U.S.C. § 1153(b)(3) (skilled workers, professionals and other (unskilled) workers). *See also supra* n.7.

²¹ 8 U.S.C. § 1255(a).

in most employment-based immigrant visa categories, and no visa will be issued. Without a PWD, the labor certification cannot be filed in the first place.

- DOL's duty to adjudicate the labor certification and make prevailing wage determinations: Congress gave the Secretary of DOL the responsibility to determine and certify the factual questions underlying a labor certification.²² DOL's own regulations make clear that its statutory responsibility imposes a mandatory duty to decide applications and issue PWDs.²³
- Time frame for adjudicating cases: Some courts have held that for a mandamus to be granted a plaintiff must show either that 1) the right that is owed to the plaintiff is the right to have an application decided within a certain time frame; or 2) that the agency's duty must require it to act within a certain time frame.²⁴ The INA does not impose a specific time period on DOL to process PWDs or labor certification applications, just as it does not impose on USCIS a time frame for deciding adjustment and naturalization applications. However, some courts have held that because § 555(b) of the Administrative Procedure Act (APA) mandates that an agency act within a reasonable time, the underlying statute and regulations do not need to contain time frames; a reasonable period of time is presumed.²⁵ Courts frequently apply the factors enumerated in the leading case of *Telecommunications Res. and Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), to determine whether an agency's delay is so unreasonable that the court should grant mandamus relief. You should develop your case with these factors in mind.

²² 8 U.S.C. § 1182(a)(5); *see also Yasin v. Bartlett*, No. 04-994, 2004 U.S. Dist. LEXIS 28638, *4-5 (S.D. Tex. Oct. 25, 2004) (concluding that the only way DOL can carry out its statutory responsibility is to process applications and that this duty is mandatory).

²³ *See, e.g.*, 20 C.F.R. §§ 656.17(b), 656.24.

²⁴ *See, e.g., Lake Michigan College v. DOL*, No. 1:09-327, 2009 U.S. Dist. LEXIS 37184, *12-13 (W.D. Mich. May 1, 2009) (finding that, because the INA does not contain a mandatory time frame for a decision, the plaintiffs did not establish a "clear and certain claim to an 'immediate' adjudication of their labor certification.").

²⁵ *See, e.g., Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 114 (D.D.C. 2005) (Relying on APA as the basis for a reasonable time requirement, but concluding on the "intertwined" merits that delay was reasonable based on DOL's explanation and "good faith efforts" to reduce the delay); *Yasin*, 2004 U.S. Dist. LEXIS 28638 at *5 (Also relying on APA, but finding DOL delay unreasonable and directing adjudication of pre-PERM labor certifications). *But see Lake Michigan College*, 2009 U.S. Dist. LEXIS 37184 at *14-16 (dismissing mandamus and APA claims after finding that neither the INA nor the APA provide any guidelines for determining when a delay in processing a labor certification becomes unreasonable).

4. Research DOL policy regarding PERM cases and PWDs for factual support for your claim that DOL has unreasonably delayed deciding your client's labor certification application or PWD.²⁶
- Look to aspirational language regarding the amount of time required to adjudicate cases under the PERM system. In the Supplementary Information to the PERM regulations published in December 2004, DOL stated that "an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed." 69 Fed. Reg. 77326, 77328 (Dec. 27, 2004). Contrast with the processing times that are posted on the DOL iCERT website and with how much longer your client's application has been pending than either of these measures. Statements made by DOL in recent Stakeholder Meetings or during AILA/DOL Liaison Committee Teleconferences regarding current processing times also may help you demonstrate the unreasonableness of the delay in adjudicating your client's application. If helpful, you can append the minutes of the meetings or teleconferences provided by AILA as an exhibit to your case and highlight the relevant language. .
5. Marshal your client's most compelling facts.

What is the harm to the employer and to the beneficiary if DOL does not issue a decision? Also look to the impact of the delay on the beneficiary's family members and on the community where the employer is located or the beneficiary resides. Including evidence of all of the adverse impact factors, even on those who are not parties to the suit, will increase the likelihood of success in your case.

6. Draft your complaint, telling your client's story clearly and persuasively.

The complaint will be the first document read by the local Assistant U.S. Attorney (AUSA), who is assigned your case. As with other federal court litigation, your "Plan A" is to persuade the AUSA, ideally even before the first status hearing, that the government should resolve the case internally. This saves your client – as well as the agency and the court – time and money. Therefore, draft the complaint as though it will be the first and last substantive pleading in your case, since you hope it will be.

The complaint also will serve as the point of reference when you pick up the telephone and call the AUSA assigned to your case. The complaint containing a real story is more likely to be remembered.

7. Name all of the appropriate parties in your complaint.

²⁶ For further discussion on when a mandamus action is appropriate, see Jeff Joseph, et al., *Thinking Outside the Bureaucratic Box: Using the Federal Court to Challenge Unlawful Agency Action*, Immigration & Nationality Law Handbook 409, 413-18 (AILA 2009-10 ed.).

a. Plaintiffs

The employer, and arguably the beneficiary, would have standing to sue over the delayed adjudication of the labor certification application, as both would be harmed by the delay. With respect to visa petitions and pre-PERM labor certification applications, the government has argued that the beneficiary does not have standing to sue because he or she does not have an interest in the filing. Several courts of appeals have rejected the government's position in visa petition²⁷ and pre-PERM labor certification cases.²⁸ Moreover, it is only necessary for one plaintiff to have standing.²⁹ Thus, where both the employer and the beneficiary appear as plaintiffs, it is immaterial whether the beneficiary has standing since the employer unquestionably does.

b. Defendants

In a mandamus action, you need to name an agency officer or employee who can perform the nonministerial duty.³⁰ As of the writing of this practice advisory, the following are the relevant offices at DOL and DOJ:

- Secretary, U.S. Department of Labor;
- Administrator and National Certifying Officer, Office of Foreign Labor Certification, U.S. Department of Labor, Employment & Training Administration (for labor certification application mandamus);
- Center Director, Foreign Labor Certification, Atlanta National Processing Center;
- Director, Division of Prevailing Wage and Helpdesk Assistance (for PWD mandamus); and

²⁷ See, e.g., *Kurapati v. USCIS*, 775 F.3d 1255, 1260-61 (11th Cir. 2014) (employment-based visa petition); *Patel v. USCIS*, 732 F.3d 633, 638 (6th Cir. 2013) (same); *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (family-based petition); *Ghaly v. INS*, 48 F.3d 1426, 1434 n. 6 (7th Cir. 1995) (employment-based petition); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986) (same).

²⁸ See, e.g., *DeJesus Ramirez*, 156 F.3d at 1276 (pre-PERM labor certification); *Reddy, Inc. v. DOL*, 492 F.2d 538, 543 (5th Cir. 1974) (same); *Stenographic Machines, Inc. v. Regional Administrator*, 577 F.2d 521, 527-28 (7th Cir. 1978) (same). *But see supra* n.17, concerning the lack of a remedy if the employer is not pursuing the application.

²⁹ See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (“[T]he presence of one party with standing is sufficient to satisfy Article III’s case or controversy requirement.”) (citation omitted).

³⁰ To determine who should be named as defendants and who must be served with the complaint, see the Council/National Immigration Project’s Practice Advisory, [Whom to Sue and Whom to Serve](#) (updated May 13, 2010).

- U.S. Attorney General.
8. Determine the correct federal district court in which to file the action and carefully follow the court's procedure in the filing of your complaint

A mandamus action can be brought in one of three judicial districts: the district in which a defendant “resides;” the district in which a substantial part of the events or omissions giving rise to the claim occurred; or a district in which a plaintiff resides. 28 U.S.C. § 1391(e).

If you have never filed an action in district court before, start by reviewing the court’s website. All of the district courts have comprehensive websites, often with step-by-step guides on local procedures. District court actions are filed electronically (e-filed), so you should set up an account and review the e-filing procedures.³¹ The clerks generally are helpful in providing orientation for first-time users.

9. Work with the AUSA assigned to your case.

Keep in mind that an AUSA may be willing to settle the case. Be cooperative, within reason, to a request for an extension of time as the AUSA may be exploring whether a non-judicial solution is possible. At the same time, be mindful that delay is the reason for the lawsuit and consider the impact that the further delay may have on your client. If the DOL approves the labor certification application or issues the prevailing wage while your case is pending, be prompt about filing a motion to voluntarily dismiss the complaint. However, do not dismiss your complaint until you have received the labor certification Final Determination or the PWD.

10. Long-term practice pointer: Establish a sterling reputation and build long-term professional relationships with your local AUSAs.

From your first filing in federal court onwards, be prepared to support any case you file with thoroughness and hard work. In addition, extend mutual professional courtesy when extensions or the like are requested, provided that such an extension would not adversely impact your client’s case. Many U.S. Attorney Offices will routinely assign immigration cases to the same AUSA or a small group of AUSAs. The development of a healthy and mutually respectful professional relationship with them can prove to be invaluable.

³¹ See also the Council’s Practice Advisory, [*Electronic Filing and Access to Electronic Federal Court Documents*](#) (April 13, 2009).