

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF  
CALIFORNIA

Nijati Maimaitiyiming v. Merrick Garland

Nijati Maimaitiyiming v. Garland, No. 8:24-cv-02001-ODW (ADSx) (C.D. Cal. Apr. 9, 2025) · No. 8:24-cv-02001-ODW (ADSx) · Decided April 9, 2025

SUMMARY

The United States District Court for the Central District of California partially granted and partially denied defendants’ motion to dismiss an action seeking to compel USCIS to adjudicate an asylum application. The court held that it had jurisdiction over the plaintiff’s APA unreasonable-delay claim, but dismissed any claim under 5 U.S.C. § 706(2) and dismissed the Mandamus Act claim because the APA provided an adequate remedy. The court also dismissed the request for EAJA fees and costs as premature, without prejudice, and directed defendants to answer the remaining APA claim.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                              |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Central District of California                                                                                                                                                                                                                                                                                          |
| WRITING FOR THE COURT | Otis D. Wright, II                                                                                                                                                                                                                                                                                                                                           |
| JURISDICTION          | United States District Court for the Central District of California                                                                                                                                                                                                                                                                                          |
| DECIDED               | April 9, 2025                                                                                                                                                                                                                                                                                                                                                |
| DOCKET                | 8:24-cv-02001-ODW (ADSx)                                                                                                                                                                                                                                                                                                                                     |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                                                                        |
| PROCEDURAL POSTURE    | Defendants moved to dismiss an action seeking to compel USCIS to schedule an asylum interview and adjudicate an asylum application, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).                                                                                                                                                            |
| STANDARD OF REVIEW    | On a Rule 12(b)(1) motion, the plaintiff bears the burden of establishing jurisdiction; a facial jurisdictional attack accepts the truth of the allegations, while a factual attack contests them. On a Rule 12(b)(6) motion, the court accepts well-pleaded factual allegations as true and asks whether the complaint states a plausible claim for relief. |
| PRECEDENTIAL VALUE    | unpublished_nonprecedential                                                                                                                                                                                                                                                                                                                                  |

TOPICS

mandamus immigration

immigration

administrative procedure act

judicial review of agency action

motions to dismiss

## PRACTICE AREAS

immigration

administrative law

civil procedure

remedies

statutory interpretation

## QUESTIONS PRESENTED

1. Whether the INA's bar on a private right of action to enforce asylum-processing time requirements deprived the district court of subject matter jurisdiction over an APA claim challenging unreasonable delay.
2. Whether the plaintiff alleged a reviewable discrete agency action despite USCIS's statutory discretion to delay action in exceptional circumstances.
3. Whether the complaint stated an APA claim under 5 U.S.C. § 706(1) for unreasonable delay.
4. Whether an unreasonable-delay claim could proceed under 5 U.S.C. § 706(2) absent a final agency action.
5. Whether the plaintiff stated a Mandamus Act claim when the APA provided an adequate remedy.
6. Whether the request for EAJA attorney fees and costs was premature.

## HOLDINGS

1. The INA's prohibition on a private right of action to enforce the timing requirements in 8 U.S.C. § 1158(d)(5)(A) does not strip the district court of jurisdiction over an APA claim challenging unreasonable agency delay rather than seeking enforcement of those statutory deadlines.
2. USCIS's duty to schedule an asylum interview and adjudicate the application is a discrete and mandatory agency duty reviewable under APA § 706(1), notwithstanding discretion to delay in exceptional circumstances.
3. An unreasonable-delay claim based on agency inaction must proceed under APA § 706(1), not § 706(2), because § 706(2) addresses setting aside final agency action and the plaintiff alleged no final agency action.
4. The complaint plausibly alleged unreasonable delay under APA § 706(1) and survived Rule 12(b)(6) dismissal.
5. The Mandamus Act claim was properly dismissed because the surviving APA claim supplied an adequate remedy.

## KEY QUOTATIONS

*“Thus, while Maimaitiyiming has no private right of action to enforce the time requirements set forth in § 1158(d)(5)(A), the Court possesses jurisdiction to hear his claims under the APA.”* (at 3)

*“Although USCIS has some discretion to delay an interview or adjudication of an asylum application under “exceptional circumstances,” that does not negate the discrete and mandatory nature of USCIS’s duty to*

*schedule the interview and to adjudicate the application.” (at 3)*

*“Viewing these facts in the light most favorable to Maimaitiyiming, the Court finds the allegations raise a plausible inference that the delay is unreasonable and declines to apply the TRAC test at this stage.” (at 4)*

## FACTUAL BACKGROUND

Maimaitiyiming, a Chinese citizen and Uighur Muslim, filed a Form I-589 affirmative asylum application with USCIS on March 2, 2020. Despite repeated inquiries to USCIS and assistance sought from his local congressman, he had not received an interview date or meaningful status information. USCIS allegedly reported a backlog exceeding 300,000 affirmative asylum cases and used a last-in, first-out scheduling policy, leaving older applications without a reliable scheduling timeframe.

## PROCEDURAL HISTORY

Maimaitiyiming filed an affirmative asylum application with USCIS on March 2, 2020, and later filed this action on September 17, 2024, alleging unreasonable agency delay under the APA and seeking mandamus relief. Defendants moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, and premature attorney-fee and cost requests. The court denied dismissal of the surviving APA unreasonable-delay claim, dismissed any APA claim under § 706(2), dismissed the Mandamus Act claim, and dismissed the EAJA request without prejudice.

## DISPOSITION

other

## REMAND INSTRUCTIONS

No remand. Defendants were ordered to answer the remaining APA unreasonable-delay cause of action within twenty-one days of the order.

## CASES CITED

- Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)
- Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)
- Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)
- Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014)
- Sopcak v. N. Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995)
- Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990)
- Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003)
- Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)
- Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001)
- Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)
- Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)

- Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)
- Carrico v. City & County of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011)
- Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998)
- Plaskett v. Wormuth, 18 F.4th 1072, 1081 (9th Cir. 2021)
- Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004)
- Karapetyan v. Mayorkas, No. 2:24-cv-05838-SPG (AGRx), 2025 WL 665651, at \*2, \*5 & n.4 (C.D. Cal. Feb. 5, 2025)
- Teymouri v. U.S. Citizenship & Immigr. Servs., No. 2:22-cv-07689-PA (JCx), 2022 WL 18717560, at \*3 (C.D. Cal. Jan. 31, 2022)
- Liuqing Zhu v. Cissna, No. 2:18-cv-09698-PA (JPRx), 2019 WL 3064458, at \*3 (C.D. Cal. Apr. 22, 2019)
- Tailawal v. Mayorkas, No. 2:22-cv-01515-SPG (RAOx), 2022 WL 4493725, at \*3 (C.D. Cal. Aug. 18, 2022)
- Hui Dong v. Cuccinelli, No. 2:20-cv-10030-CBM (PLAx), 2021 WL 1214512, at \*2 (C.D. Cal. Mar. 2, 2021)
- Viet. Veterans of Am. v. Cent. Intel. Agency, 811 F.3d 1068, 1079, 1081 (9th Cir. 2016)
- Varol v. Radel, 420 F. Supp. 3d 1089, 1096 (S.D. Cal. 2019)
- Telecomm. Rsch. & Action Ctr. v. F.C.C., 750 F.2d 70, 79-80 (D.C. Cir. 1984)
- Varzaghani v. Mayorkas, No. 2:23-cv-01876-DMG (KESx), 2024 WL 2952141, at \*3-4 (C.D. Cal. June 5, 2024)
- Baizakova v. Jaddou, No. 8:24-cv-00201-JFW (DFMx), 2024 WL 30632227, at \*5 (C.D. Cal. June 14, 2024)
- Zhou v. Mayorkas, No. 2:24-cv-05096-CBM (MRWx), 2024 WL 5047475, at \*2, \*4 (C.D. Cal. Oct. 25, 2024)
- Davtyan v. Jaddou, No. 2:24-cv-01929-CBM (PDx), 2024 WL 3740096, at \*4 (C.D. Cal. July 9, 2024)
- Johnson v. Reilly, 349 F.3d 1149, 1154 (9th Cir. 2003)
- Chen v. Jaddou, 2024 WL 5411391, at \*9 (C.D. Cal. Nov. 27, 2024)
- Heraldez v. Bayview Loan Servicing, LLC, No. 2:16-cv-1978-R, 2016 WL 10834101, at \*2 (C.D. Cal. Dec. 15, 2016), *aff'd*, 719 F. App'x 663 (9th Cir. 2018)

## OPINION

O 1 2 3 4 5 6 7 8 United States District Court 9 Central District of California 10 11 NIJATI  
 MAIMAITIYIMING, Case № 8:24-cv-02001-ODW (ADSx) 12 Plaintiff, ORDER GRANTING  
 IN PART AND 13 v. 14 M ERRICK GARLAND et al., DENYING IN PART DEFENDANTS' 15  
 MOTION TO DISMISS [11] Defendants. 16 17 I. INTRODUCTION 18 Plaintiff Nijati  
 Maimaitiyiming brings this action to compel Defendants 19 Merrick Garland as U.S. Attorney  
 General, Alejandro Mayorkas as Secretary of the 20 U.S. Department of Homeland Security, Ur  
 Mendoza Jaddou as Director of U.S. 21 Citizenship and Immigration Services ("USCIS"), Ted H.  
 Kim as Director of USCIS 22 Refugee, Asylum, and International Operations Directorate, and  
 George Mihalko as 23 Director of USCIS, Tustin Asylum Office (collectively, "Defendants") to  
 adjudicate 24 his asylum application.

(Compl., ECF No. 1.) Defendants move to dismiss the 25 Complaint. (Mot. Dismiss (“Motion” or “Mot.”), ECF No. 11.) For the following 26 reasons, the Court GRANTS IN PART and DENIES IN PART the Motion.<sup>1</sup> 27 28 1 Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument.

Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. 1 II. BACKGROUND<sup>2</sup> 2 Maimaitiyiming is a citizen of China and a Uighur Muslim. (Compl. ¶ 9.) 3 Since the early 2010’s, the Chinese government has targeted the Uighur population 4 through mass internment, surveillance, cultural suppression. (Id.)

On March 2, 2020, 5 Maimaitiyiming filed a Form I-589, application for asylum with the USCIS. (Id. 6 ¶ 15.) Thereafter, Maimaitiyiming contacted the USCIS multiple times regarding the 7 status of his application, and the USCIS responded that it was facing “a significant 8 backlog of more than 300,000 pending affirmative asylum cases” and would schedule 9 interviews using a “last in, first out” (“LIFO”) approach—scheduling interviews for 10 more recently filed asylum applications ahead of older filings.

(Id. ¶ 18.) In addition 11 to his multiple requests with the USCIS, Maimaitiyiming also contacted his local 12 congressman for assistance, to no avail. (Id. ¶ 26.) Despite exhausting administrative 13 remedies, Maimaitiyiming has yet to receive an interview date or information 14 regarding the status of his application from the USCIS. (Id. ¶ 9.) 15 On September 17, 2024, Maimaitiyiming filed this action, alleging that 16 Defendants unreasonably delayed scheduling his interview and adjudicating his 17 application, and seeking to compel USCIS to act on his application.

(Id. ¶¶ 27–47.) 18 Maimaitiyiming asserts two causes of action against Defendants: (1) violation of the 19 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 555(b), 706(1); and (2) violation 20 of the Mandamus Act, 28 U.S.C. §§ 1361, 1651. (Id.) Defendants move to dismiss 21 the Complaint for lack of subject matter jurisdiction and failure to state a claim under 22 Federal Rules of Civil Procedure (“Rule” or “Rules”) 12(b)(1) and 12(b)(6).

(Mot.) 23 The Motion is fully briefed. (Opp’n, ECF No. 12; Reply, ECF No. 13.) 24 III. LEGAL STANDARD 25 Defendants move to dismiss the Complaint pursuant to Rule 12(b)(1) for lack of 26 subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. 27 2 All factual references derive from Maimaitiyiming’s Complaint or attached exhibits, unless 28 otherwise noted, and well-pleaded factual allegations are accepted as true for purposes of this Motion.

See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). 1 A. Rule 12(b)(1)—Lack of Subject Matter Jurisdiction 2 “Federal courts are courts of limited jurisdiction,” possessing “only that power 3 authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 4 511 U.S. 375, 377 (1994). Pursuant to Rule 12(b)(1), a party may move to dismiss 5 based on a court’s lack of subject matter jurisdiction.

See Fed. R. Civ. P. 12(b)(1). 6 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack “accepts the truth of 8 the plaintiff’s allegations but asserts that they are insufficient on their face to invoke 9 federal jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir.

2014) 10 (internal quotation marks omitted). Conversely, a factual attack “contests the truth of 11 the plaintiff’s factual allegations, usually by introducing evidence outside the 12 pleadings.” *Id.* The party attempting to invoke a court’s jurisdiction bears the burden 13 of proof for establishing jurisdiction. See *Sopcak v. N. Mountain Helicopter Serv.*, 14 52 F.3d 817, 818 (9th Cir.

1995). 15 B. Rule 12(b)(6)—Failure to State a Claim 16 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable 17 legal theory or insufficient facts pleaded to support an otherwise cognizable legal 18 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

To 19 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading 20 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v. 21 Jones*, 319 F.3d 483, 494 (9th Cir. 2003).

The factual “allegations must be enough to 22 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 23 550 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual 24 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 25 556 U.S. at 678 (internal quotation marks omitted).

26 The determination of whether a complaint satisfies the plausibility standard is a 27 “context-specific task that requires the reviewing court to draw on its judicial 28 experience and common sense.” *Id.* at 679. A court is generally limited to the 1 pleadings and must construe all “factual allegations set forth in the complaint... as 2 true and... in the light most favorable” to the plaintiff.

*Lee v. City of Los Angeles*, 3 250 F.3d 668, 679 (9th Cir. 2001). However, a court need not blindly accept 4 conclusory allegations, unwarranted deductions of fact, and unreasonable inferences. 5 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). 6 Where a district court grants a motion to dismiss, it should generally provide 7 leave to amend unless it is clear the complaint could not be saved by any amendment.

8 See Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 9 1025, 1031 (9th Cir. 2008). Leave to amend may be denied when “the court 10 determines that the allegation of other facts consistent with the challenged pleading 11 could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture 12 Co.*, 806 F.2d 1393, 1401 (9th Cir.

1986). Thus, leave to amend “is properly 13 denied... if amendment would be futile.” *Carrico v. City & County of San 14 Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011). 15 IV. DISCUSSION 16

First, Defendants move to dismiss the first cause of action on the grounds that the Court lacks subject matter jurisdiction under the APA. (Mot. 9.)

Second, Defendants argue that, even if the Court has subject matter jurisdiction, Maimaitiyiming fails to state an APA and Mandamus claim. (Id. at 11–20.) Third, Defendants seek dismissal of Maimaitiyiming’s request for attorneys’ fees and costs under the Equal Access to Justice Act (“EAJA”). (Id. at 20.)

The Court addresses each argument in turn. A. Subject Matter Jurisdiction Defendants argue that this Court lacks subject matter jurisdiction under the APA because (1) the INA precludes judicial review, and (2) the agency action at issue is committed to agency discretion by law. (Id. at 9.) Generally, “the APA does not provide an independent basis for subject matter jurisdiction in the district courts.” See *Tucson Airport Auth. v. Gen.*

*Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). However, “the APA expressly authorizes a court to ‘compel agency action unlawfully withheld or unreasonably delayed.’” *Plaskett v. Wormuth*, 18 F.4th 1072, 1081 (9th Cir. 2021) (quoting 5 U.S.C. § 706(1)). A court may compel an agency to act only if “a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness All.*, 654 U.S. 55, 64 (2004) (emphasis in original).

The presumption in favor of review is overcome in two narrow circumstances: “when statutory preclusion exists” or “when ‘agency action is committed to agency discretion by law.’” *Karapetyan v. Mayorkas*, 9 No. 2:24-cv-05838-SPG (AGR<sub>x</sub>), 2025 WL 665651, at \*2 (C.D. Cal. Feb. 5, 2025). Pursuant to the INA, “in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed.” 8 U.S.C. § 1158(d)(5)(A)(ii).

Additionally, “in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.” *Id.* § 1158(d)(5)(A)(iii).

However, the INA also bars any private right of action to enforce those timing requirements. See *id.* § 1158(d)(7) (“Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”).

Thus, courts in this district have “routinely held that asylum applicants lack a private right of action to enforce the timing requirements of § 1158(d)(5)(A).” *Teymouri v. U.S. Citizenship & Immigr. Servs.*, No. 2:22-cv-07689-PA (JC<sub>x</sub>), 2022 WL 18717560, at \*3 (C.D. Cal. 23 Jan. 31, 2022) (quoting *Liuqing Zhu v. Cissna*, No. 2:18-cv-09698-PA (JPR<sub>x</sub>), 2019 WL 3064458, at \*3 (C.D.

Cal. Apr. 22, 2019) (collecting cases)). 25 Defendants first argue that the INA precludes judicial review to enforce the 26 timing guidelines laid out in Section 1158(d)(5)(A). (Mot. 10.) While that may be 27 true, Maimaitiyiming does not seek to enforce time requirements. Rather, he 28 “challenges only the reasonableness of Defendants’ delay or inaction in the scheduling 1 of his asylum interview and adjudication of his I-589 application.” (Compl. ¶ 33.)

2 Where, as here, the plaintiff seeks a determination of unreasonable delay and does not 3 seek to enforce the timing requirements set forth in § 1158(d)(5)(A), the Court has 4 subject matter jurisdiction. See *Zhou v. Mayorkas*, No. 2:24-cv-05096-CBM 5 (MRWx), 2024 WL 5047475, at \*2 (C.D. Cal. Oct. 25, 2024) (collecting cases). 6 First, the prohibition against a private right of action articulated in § 1158(d)(7) 7 does not preclude judicial review of USCIS’s inaction under the APA.

*Tailawal v. 8 Mayorkas*, No. 2:22-cv-01515-SPG (RAOx), 2022 WL 4493725, at \*3 (C.D. Cal. 9 Aug. 18, 2022). Instead, it provides only that there is no private right of action to 10 enforce certain timing requirements in the INA. See 8 U.S.C. § 1158(d)(7). 11 Moreover, § 1158(d)(7) does not include the jurisdiction-stripping language 12 found elsewhere in the INA.

See, e.g., 8 U.S.C. § 1158(a)(3) (providing “[n]o court 13 shall have jurisdiction to review any determination of the Attorney General under 14 paragraph (2)”); see also *id.* § 1158(b)(2)(D) (providing “[t]here shall be no judicial 15 review of a determination of the Attorney General under subparagraph (A)(v)”). “Had 16 Congress intended § 1158(d)(7) to be a jurisdiction-stripping provision, it would have 17 adopted the express language found in § 1158(a)(3) and § 1158(b)(2) (D).” *Varol v. 18 Radel*, 420 F. Supp. 3d 1089, 1096 (S.D.

Cal. 2019). But Congress did not do so, and 19 “[w]hen a statute is ‘reasonably susceptible to divergent interpretation,’” courts apply 20 “the presumption favoring judicial review of administrative action.” *Kucana v. 21 Holder*, 558 U.S. 233, 251 (2010). 22 Thus, the Court finds that § 1158(d)(7) does not deprive the Court of subject 23 matter jurisdiction here.

See *Varol*, 420 F. Supp. 3d at 1096 (finding the court 24 possessed subject matter jurisdiction but plaintiff did not have a private right of action 25 under the INA); *Tailawal*, 2022 WL 4493725, at \*3 (same); *Hui Dong v. Cuccinelli*, 26 No. 2:20-cv-10030-CBM (PLAx), 2021 WL 1214512, at \*2 (C.D. Cal. Mar. 2, 2021) 27 (same). 28 1 Next, Defendants argue that the statutory timing requirements are not 2 mandatory and that § 1158(d)(5)(A)(ii) vests some degree of agency discretion such 3 that failure to meet the timing requirements is not subject to judicial review.

4 (Mot. 10.) But the agency action that Maimaitiyiming asks the Court to review is not 5 a discretionary act for which the Court lacks subject matter jurisdiction under the 6 APA. Section 1158(d)(5)(A) provides that, absent exceptional circumstances, USCIS 7 “shall” conduct an



interview or hearing on an asylum application within 45 days and 8 “shall” adjudicate an asylum application within 180 days.

8 U.S.C. 9 § 1158(d)(5)(A)(ii), (iii). “The term ‘shall’ is usually regarded as making a provision 10 mandatory, and the rules of statutory construction presume that the term is used in its 11 ordinary sense unless there is clear evidence to the contrary.” *Viet. Veterans of Am. v. 12 Cent. Intel. Agency*, 811 F.3d 1068, 1081 (9th Cir. 2016).

Although USCIS has some 13 discretion to delay an interview or adjudication of an asylum application under 14 “exceptional circumstances,” that does not negate the discrete and mandatory nature 15 of USCIS’s duty to schedule the interview and to adjudicate the application. See 16 *Tailawal*, 2022 WL 4493725, at \*3 (“[D]iscretion in the manner in which the duty 17 may be carried out does not mean that the [agency] does not have a duty to perform a 18 ‘discrete action’ within the meaning of § 706(a).” (quoting *Viet.*

*Veterans*, 811 F.3d 19 at 1079)). 20 Accordingly, while Maimaitiyiming has no private right of action to enforce the 21 time requirements set forth in § 1158(d)(5)(A), the Court possesses jurisdiction to hear 22 his claims under the APA.

The Court DENIES Defendants’ Motion to Dismiss the 23 first cause of action for lack of subject matter jurisdiction. 24 B. Failure to State a Claim 25 Next, Defendants move to dismiss the Complaint for failure to state a claim 26 under the APA and the Mandamus Act. (Mot. 11–20.) 27 28 1 1. 5 U.S.C. §§ 706(1), 706(2) 2 As a preliminary matter, it appears Maimaitiyiming asserts his APA claim under 3 both 5 U.S.C. §§ 706(1) and 706(2).

(See Compl. ¶¶ 1, 3, 29.) Defendants argue 4 these allegations are duplicative and that, to the extent Maimaitiyiming asserts his 5 APA claim under § 706(2), such claims should be dismissed for failure to allege a 6 “final agency action.” (Mot. 19–20.) Defendants are correct. 7 Section 706(1) allows a court to “compel agency action unlawfully withheld or 8 unreasonably delayed,” while § 706(2) allows a court to “hold unlawful and set aside 9 agency action, findings, and conclusion.” *Durham v. Blinken*, No. 2:24-cv-02868- 10 PSG (MRWx), 2024 WL 3811146, at \*4 (C.D.

Cal. Aug. 8, 2024). Where, as here, 11 Maimaitiyiming does not allege a final agency action and only challenges USCIS’s 12 unreasonable delay, § 706(2) is “not the proper vehicle for [him] to allege [his] 13 unreasonable delay claim.” *Karapetyan*, 2025 WL 665651, at \*5 n.4. Instead, “[a] 14 challenge to an agency’s alleged failure to act is more appropriately channeled through 15 Section 706(1).” *Durham*, 2024 WL 3811146, at \*4.

The Court therefore evaluates 16 the APA claim under § 706(1), not § 706(2). 17 Accordingly, the Court GRANTS Defendants’ Motion to Dismiss the first 18 cause of action to the extent any claims are based on 5 U.S.C. § 706(2), WITHOUT 19 LEAVE TO AMEND. 20 2.

The Administrative Procedure Act 21 Defendants argue that Maimaitiyiming's first cause of action, his APA claim, is 22 inadequately pleaded because he fails to allege facts sufficient to establish an 23 unreasonable delay. (Mot. 11–18.) Maimaitiyiming contends that determining the 24 unreasonableness of the delay at the motion to dismiss stage is premature.

(Opp'n 8.) 25 To determine whether delay in administrative action is unreasonable under the 26 APA, courts generally consider the following factors (commonly referred to as the 27 "TRAC factors"): 28 (1) the time agencies take to make decisions must be governed by a 1 rule of reason; 2 (2) where Congress has provided a timetable or other indication of the 3 speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of 4 reason; 5 (3) delays that might be reasonable in the sphere of economic 6 regulation are less tolerable when human health and welfare are at stake; 7 (4) the court should consider the effect of expediting delayed action on 8 agency activities of a higher or competing priority; 9 (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and 10 (6) the court need not find any impropriety lurking behind agency 11 lassitude in order to hold that agency action is unreasonably 12 delayed.

13 *Telecomm. Rsch. & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 79–80 (D.C. Cir. 14 1984) (internal citations and quotation marks omitted). 15 Courts in this district "disagree as to whether it is appropriate to analyze the 16 TRAC factors at the motion to dismiss stage because of their 'fact-intensive' nature." 17 *Varzaghani v. Mayorkas*, No. 2:23-cv-01876-DMG (KESx), 2024 WL 2952141, at \*3 18 (C.D.

Cal. June 5, 2024). District courts have analyzed the TRAC factors at the 19 motion to dismiss stage "when the plaintiff has not alleged any fact—other than the 20 length of the delay—that undermines USCIS's claim of reasonableness." *Id.* at \*4 21 (applying the TRAC factors because the plaintiff's unreasonableness argument was 22 based solely on the length of the agency's delay); see also *Baizakova v. Jaddou*, 23 No. 8:24-cv-00201-JFW (DFMx), 2024 WL 30632227, at \*5 (C.D.

Cal. June 14, 24 2024) (applying the TRAC factors because the plaintiff did "not allege facts, beyond 25 the submission of her [a]sylum [a]pplication"). 26 Maimaitiyiming alleges that (1) his application has been pending since 27 March 2, 2020, (Compl. ¶ 15), (2) "USCIS is unable to provide estimated interview 28 dates for the backlogged cases at this time, or to provide a reliable timeframe for when 1 backlogged cases will be scheduled," (*id.* ¶ 18), and (3) USCIS's LIFO policy causes 2 him to have "no way to obtain any idea when he will be interviewed and thus he 3 remains in multi-year limbo," (*id.* ¶ 19).

Here, the allegations do not rely solely on 4 the length of the delay but also USCIS's inability to provide Maimaitiyiming with any 5 timeline as to when it will schedule his interview and adjudicate his application. 6 Viewing these facts in the light most favorable to Maimaitiyiming, the

Court finds the 7 allegations raise a plausible inference that the delay is unreasonable and declines to 8 apply the TRAC test at this stage.

See e.g., Zhou, 2024 WL 5047475, at \*4 (declining 9 to apply the TRAC factors because plaintiff's complaint was based on the length of the 10 delay as well as "USCIS's failure to provide her with any timeframe of when the 11 interview and adjudication will take place"); Davtyan v. Jaddou, No. 2:24-cv-01929- 12 CBM (PDx), 2024 WL 3740096, at \*4 (C.D. Cal. July 9, 2024) (declining to apply the 13 TRAC factors when plaintiff alleged, in addition to length of time, that defendants 14 provided no timeline as to when she will be scheduled for an interview or when her 15 application will be adjudicated).

16 Accordingly, the Court DENIES Defendants' Motion to Dismiss the first cause 17 of action. 18 3. The Mandamus Act 19 Defendants next argue that Maimaitiyiming fails to state a claim under the 20 Mandamus Act, 28 U.S.C. § 1361, because "8 U.S.C. § 1158(d)(7) specifically 21 forecloses the possibility of a private right of action based the timeframes set forth in 22 8 U.S.C. § 1158(d)(5)(A)." (Mot.

19.) 23 The Mandamus Act provides that "[t]he district courts shall have original 24 jurisdiction of any action in the nature of the mandamus to compel an officer or 25 employee of the United States or any agency thereof to perform a duty owed to the 26 plaintiff." 28 U.S.C. § 1361. "For mandamus relief, three elements must be satisfied: 27 (1) the plaintiff's claim is clear and certain; (2) the defendant official's duty is 28 ministerial and so plainly described as to be free from doubt; and (3) no other 1 adequate remedy is available." Johnson v. Reilly, 349 F.3d 1149, 1154 (9th Cir.

2003) 2 (cleaned up). However, "[m]andamus is an extraordinary remedy," and "[e]ven if the 3 test is met, the district court still retains the discretion to deny relief." Id. 4 In his opposition, Maimaitiyiming argues that he is not asserting a claim based 5 on the statutory timing requirements; rather, he seeks to compel Defendants to 6 schedule his interview without unreasonable delay.

(Opp'n 12.) Based on this 7 argument, Maimaitiyiming's Mandamus claim fails to satisfy the third element as it 8 overlaps with his unreasonable delay claim under the APA. See Chen v. Jaddou, 9 2024 WL 5411391, at \*9 (C.D. Cal. Nov. 27, 2024) (finding plaintiff failed to 10 demonstrate that no other adequate remedy was available when her Mandamus claim 11 overlapped with her APA claim).

12 Accordingly, the Court GRANTS Defendants' Motion to Dismiss the second 13 cause of action. Because Maimaitiyiming's surviving APA claim provides an 14 adequate remedy to compel adjudication of his asylum application, the dismissal is 15 WITHOUT LEAVE TO AMEND. See Karapetyan, 2025 WL 665651, at \*5 16 (dismissing plaintiffs' Mandamus claim without leave to amend because plaintiffs' 17 APA claim provided an adequate remedy).

18 4. EAJA Fees 19 Lastly, Defendants move to dismiss Maimaitiyiming's request for attorney's  
20 fees and costs pursuant to EAJA as premature. (Mot. 20.) Maimaitiyiming does not 21 oppose  
or even respond to this argument. (See generally Opp'n.) "Failure to oppose 22 constitutes a  
waiver or abandonment of the issue." *Heraldez v. Bayview Loan 23 Servicing, LLC*, No. 2:16-cv-  
1978-R, 2016 WL 10834101, at \*2 (C.D.

Cal. Dec. 15, 24 2016), aff'd, 719 F. App'x 663 (9th Cir. 2018). Accordingly, the Court GRANTS  
25 Defendants' Motion and DISMISSES Maimaitiyiming's request for attorneys' fees 26 and costs  
as premature, without prejudice to any future motion for EAJA fees and 27 costs, as future  
circumstances may warrant. 28 1 Vv. CONCLUSION 2 For the reasons discussed above, the Court  
GRANTS IN PART and DENIES 3 || IN PART Defendants' Motion to Dismiss, (ECF No. 11).

The Court DISMISSES 4 || (1) the first cause of action to the extent any claims are based on  
violation of 5 U.S.C. 5 || § 706(2) and (2) the second cause of action in its entirety, WITHOUT  
LEAVE TO 6 || AMEND. The Court DISMISSES the request for attorneys' fees and costs pursuant  
to EAJA as premature, without prejudice to any future motion for EAJA fees and 8 | costs, as  
future circumstances may warrant.

Defendants shall answer the Complaint as 9 || to the remaining cause of action within twenty-one  
days of the date of this order. 10 11 IT IS SO ORDERED. 12 yg 3 April 9, 2025 Le Tt oS Cekigt  
15 16 OTIS D. WRIGHT, I 4 UNITED STATES DISTRICT JUDGE 18 19 20 21 22 23 24 25 26  
27 28