UNREASONABLE DELAYS IN EB-5: *FIGHTING FOR NEW NORMS*

BRAD BANIAS
PARTNER, WASDEN BANIAS LLC

For years, the EB-5 litigation bar advised clients to wait to file "mandamus" suits until after the delays exceeded published processing times. These cases would invariably settle as they were (by definition) some of the longest pending petitions at the Immigrant Investor Program Office (IPO) at U.S. Citizenship & Immigration Services (USCIS). Motions to dismiss submitted by the U.S. government in response to federal complaints filed by frustrated investor plaintiffs were rare, and settlements were the rule. This was the norm. But this norm backfired because it allowed the IPO, not the plaintiffs, to define what was a "reasonable" amount of time to adjudicate a Form I-526. The results were predictable.

The IPO has started publishing ever-increasing processing times and, implicitly, extending "reasonable" delays for adjudication. The IPO now claims that it takes between three and six years[1] to adjudicate a Form I-526. And over the first six months of Fiscal Year 2020, the IPO adjudicated only 1,359 Forms I-526.[2] If the EB-5 litigation bar continues its past practice, "reasonable" processing times will continue to grow. Now is the time to use litigation to set new norms.

Practically, the EB-5 litigation bar must divorce processing times from what constitutes a reasonable amount of time to adjudicate an EB5 petition. Afterall, "[a]lthough [USCIS processing times] provide context, they don't prove that the delays at issue are reasonable as a matter of law."[3] Processing times are not wholly irrelevant, but they are not dispositive. Other guideposts are more relevant to determine what is a reasonable processing time.

First, congressional intent is paramount. Twenty years ago, Congress expressed concern about the excessive backlogs in processing immigration benefit applications, which it defined, among other things, as including petitions to confer status under the INA.[4] To address the problem of agency delay, Congress authorized the appropriation of funds to eliminate the backlog of petitions pending for more than 180 days.[5] Consistent with that directive, Congress stated that "the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application[.]"[6] Again in 2003, when Congress created the Department of Homeland Security, it amended the prior backlog elimination statute by directing the agency to eliminate immigration application backlogs within one year.[7]

Second, actual IPO metrics are crucial to identifying the workload the IPO can actually handle. As of 2019, the IPO had 212 adjudicators.[8] USCIS states that it takes an adjudicator at the IPO 8.65 hours to adjudicate an I-526 petition.[9] If we assume half of the IPO adjudicators are working on Forms I-526—106 adjudicators—and each of those adjudicators works 40 hours a week for 50 weeks a year,

1 The Agency's published processing times on September 25, 2020 were 37 to 74 months for a Form I-526.

2 https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2020Q2.pdf

3 Raju v. Cuccinelli, No. 20-cv-01386-AGT, 2020 U.S. Dist. LEXIS 153269, at *6 (N.D. Cal. Aug. 14, 2020) (available at www.wasden-banias.com/eb5decisions).

4 See Pub. Law No. 106-313, Title II, § 202(a)(1)-(2), 203(2) (Oct. 17, 2000).

5 Id. §§ 203(1) (defining backlog), 204(a)(1) (funds to reduce backlogs), 204(b)(1) (appropriation of funds). Congress also directed the Attorney General to "make such other improvements in the processing of immigration benefit applications as may be necessary to ensure that a backlog does not develop" in the future. Id. § 204(a)(2).

6 Id. § 202(b).

7 See Homeland Security Act of 2002, Pub. Law No. 107-296, § 458 (Nov. 2, 2002).

8 Modernization Stakeholder Call – Talking Points 3 (Sept. 9, 2019) Available at: www.uscis.gov/sites/default/files/document/outreach-engagements/EB-5_Modernization_Stakeholder_Call.pdf.

9 See 84 Fed. Reg. 62280, 62292 (Nov. 14, 2019).

Continued On Page 8

Continued From Page 7

this means there are approximately 212,000 work hours associated with adjudicating Forms I-526. If we assume then divide the reported "touch time" for a Form I-526—8.65 hours—this would mean the IPO easily has the capacity to adjudicate approximately 24,500 Forms I-526 each year. The actual adjudication numbers are a fraction of this number.

Finally, every case is unique, and individual factors must be considered. USCIS interprets the statutory authorization for the regional center program as granting the agency authority to give priority to individual foreign investor petitions filed through regional centers.[10] Second, USCIS gives deference to project fundamentals where there is an approved exemplar application.[11] If a regional center project, it is exceedingly relevant whether the particular investor's new commercial enterprise has received other approvals and when those approvals were issued. Finally, IPO has begun prioritizing petitions for investors from countries where visas are currently available.

Unfortunately, there is no black and white answer to the key question of "how long do I have to wait before I file a 'mandamus'?" Every case is different. Every delay is different. A client who invested in a new commercial enterprise with an approved exemplar with a dozen approvals has a very different delay claim than a direct investment with a lone investor, even if they've waited the same amount of time. The reasons for this disparate outcome are congressional intent, regulatory deference, and the particular factors that courts review when considering whether a delay is reasonable.

Rest assured, USCIS will fight back. It hides behind its published processing times. It uses them as a shield and a sword. By arguing that published processing times do not dictate what is reasonable, you should expect motions to dismiss. It has already demonstrated a proclivity to file motions to dismiss as litigators challenge delays of 18 or 24 months. You should be ready to defend against them. And you should prepare your client's expectations accordingly. These motions increase the risk, stress, and cost of these cases.

This is why innovation in this litigation is paramount. For example, there appears to be a common belief that the District of Columbia is the best place to file these cases, or even the only place to file them. A quick review of the venue statute at 28 U.S.C. § 1391(e) reveals that you can bring these suits where the investor lives. And a bit more legal research will reveal that venue is proper against a federal agency in a multi-plaintiff suit if venue is proper for even a single plaintiff. Rather than brining a suit for one individual in the District of Columbia, there may be strategic advantages to bringing a group suit in a smaller jurisdiction. In certain jurisdictions, it may be wise to pursue discovery immediately while in others moving to compel production of an administrative record.

To impact the processing times, the EB-5 litigation bar must try new and different tactics. Some will win. Others will lose. That is the nature of litigation. But if we continue to do the same old, same old, we can only expect the same old. Now is the time to fight on our terms in new and creative ways to protect the EB-5 program and our clients.

10 ee 84 Fed. Reg. 35750, 35756 (final rule) (July 24, 2019).
11 See USCIS, 6 Policy Manual, Part G, Chapter 3, Section B. (Available at: www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.