

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Wei Leng Ching,

Plaintiff,

-against -

BUREAU OF CITIZENSHIP AND IMMIGRATION
SERVICES; and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

COMPLAINT

Civil Action No.

CHREIN, J.

BRONX, N.Y. 10463
MAY 10 2003
MORRISON, J.

X

Plaintiff Wei Leng Ching, by her undersigned attorney, alleges as follows:

1. This is an action for declaratory and injunctive relief and in the nature of mandamus to compel agency action that has been unlawfully withheld and threatens to destroy the ability of Plaintiff to adjust her status in the United States through the Diversity Visa Lottery Program for 2003 ("DV-2003 lottery") which ends on September 30, 2003.
2. The action arises under the Immigration and Nationality Act of 1952, as amended (the "Act"), 8 U.S.C. §§1101 *et seq.*, the Administrative Procedure act ("APA"), 5 U.S.C. §§551 *et seq.*, and the mandamus statute, 28 U.S.C. §1361. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331, §1337 and §1361; and may grant relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 *et seq.*, the APA, and 28 U.S.C. §1361.
3. Plaintiff is a native and citizen of Malaysia, presently living at 45-25 Smart Street, Flushing, New York, within the Eastern District of New York. Plaintiff won the DV-2003 lottery and this program ends on September 30, 2003.

4. Defendant Bureau of Citizenship and Immigration Services ("BCIS"), formerly Immigration & Naturalization Service ("INS"), is an agency organized and existing under the laws of the United States of America. The BCIS has responsibility for adjudicating applications under the Act, and maintains offices in the District of New York located 26 Federal Plaza, New York, New York.
5. Defendant Department of Justice, Federal Bureau of Investigation ("FBI") is also an agency organized and existing under the laws of the United States of America. The FBI, among other things, has the responsibility of performing timely background checks on those persons applying for various immigration benefits, including adjustment of status under 8 U.S.C. § 1255.
6. In 8 U.S.C. §1153 Congress has created preferences for admission into the United States as lawful permanent residents. Entitlement to such a preference is established by filing a petition pursuant to 8 U.S.C. §1154, and Plaintiff Woi Leng Ching is the beneficiary of a winning lottery application entitling her to apply for lawful permanent residence in the United States.
7. Under 8 U.S.C. §1255, an alien such as Ms. Ching who is present in the United States, may adjust her status to lawful permanent residence by filing an Application for Adjustment of Status, Form I-485, with the BCIS. Accordingly, on June 13, 2003, over 3 months ago, Ms. Ching filed an application to adjust her status with the BCIS New York District Office. A copy of Form I-485, is annexed hereto as Exhibit "A."
8. On July 23, 2003, the Plaintiff was interviewed by District Adjudications Officer ("DAO") Albert Newton. At that time, DAO Newton explained that Ms. Ching's fingerprints had

cleared with the FBI, but the name check was still pending and the case could not be approved until the name check was complete. A copy of the interview notice is annexed hereto as Exhibit "B."

9. Having had no response from BCIS regarding the Plaintiff's adjustment of status application, Plaintiff's former counsel wrote to Supervisor Steve Rosina in a letter dated August 12, 2003 requesting a decision from BCIS. A copy of this letter is annexed hereto as Exhibit "C."
10. On August 26, 2003, Plaintiff's former counsel wrote to Head Supervisor of Section 245 Alan Atkinson, again requesting the completion of Ms. Ching's adjustment of status application. BCIS did not respond to this letter and took no action on the Plaintiff's adjustment of status application. A copy of the second inquiry is annexed hereto as Exhibit "D."
11. Ms. Ching submitted all of the required documentation at the time of filing her Adjustment of Status Application, Form I-485. At the time of her interview, she was told that her name check was still pending, preventing the adjudication of her application. As the DV-2003 lottery ends on September 30, 2003, and the 55,000 allotted visas expire, the immediate adjudication of this application is imperative.
12. On September 5, 2003, Plaintiff's former counsel, Marcela Bermudez Esq., from the Law Office of Stephanie Yutkin, attended an "Open House" at the invitation of the BCIS to inquire into the status of DV-2003 Lottery cases which are presently pending in the New York District Office. Ms. Bermudez met with Supervisory District Adjudications Officer Gilles, who again informed her that the FBI name check was not completed and that she had no idea if the would be completed by the September 30th deadline for the DV-2003 Lottery

program.

COUNT ONE

13. The allegations in paragraphs 1 through 12 above are repeated and realleged as though fully set forth herein.
14. Under the APA, 5 U.S.C. §555(a), agencies are required to proceed with reasonable dispatch to conclude matters presented to them. Under the APA, 5 U.S.C. §706(1), this Court has the power to compel agency action which has unlawfully been withheld or unreasonably delayed.
15. The continuing failure of the BCIS to adjudicate the Plaintiff's application for adjustment of status before she loses her eligibility on September 30, 2003, violates the APA requirement that agencies proceed with reasonable dispatch to adjudicate the matters presented to them.

COUNT TWO

16. The allegations contained in paragraphs 1 through 12 above are repeated and realleged as though fully set forth herein.
17. The continuing failure of the BCIS to adjudicate Plaintiff's application for adjustment of status before she loses her eligibility on September 30, 2003, is subject to correction by mandamus under 28 U.S.C. §1361.

COUNT THREE

18. The allegations contained in paragraph 1 through 12 above are repeated and realleged as though fully set forth herein.

19. The actions of BCIS in failing to adjudicate Plaintiff's adjustment of status application deprives Plaintiff of a protected interest contrary to the due process clause of the Fifth Amendment to the U.S. Constitution.

COUNT FOUR

20. The allegations in paragraphs 1 through 12 above are repeated and realleged as though fully set forth herein.
21. Under the APA, 5 U.S.C. §555(a), agencies are required to proceed with reasonable dispatch to conclude matters presented to them. Under the APA, 5 U.S.C. §706(1), this Court has the power to compel agency action which has unlawfully been withheld or unreasonably delayed.
22. The continuing failure of the FBI to process Plaintiff's background clearance, violates the APA requirement that agencies proceed with reasonable dispatch to adjudicate the matters presented to them.

COUNT FIVE

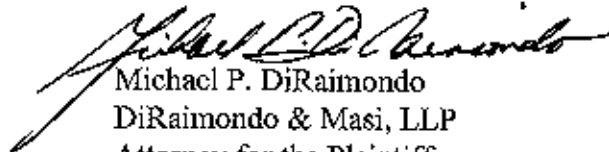
23. The allegations contained in paragraphs 1 through 12 above are repeated and realleged as though fully set forth herein.
24. The continuing failure of the FBI to process Plaintiff's background clearance is subject to correction by mandamus under 28 U.S.C. §1361.

WHEREFORE, Plaintiff demands judgment against defendant as follows:

- a. Declaring the failure of the FBI to timely provide background clearance to the Bureau of Citizenship and Immigration Services to be unlawful, and ordering the FBI to immediately issue the background clearance to the BCIS;

- b. Declaring the failure of the BCIS to adjudicate Plaintiff's adjustment of status application before September 30, 2003, to be unlawful, and ordering the BCIS to adjudicate the application forthwith;
- c. In the alternative, declaring that BCIS is estopped from treating Plaintiff's eligibility for the DV-2003 lottery as expiring after September 30, 2003;
- d. Issuing a temporary restraining order and/or preliminary injunction directing BCIS to adjudicate Plaintiff's adjustment of status application forthwith, or in alternative directing BCIS to adjudicate the application *nunc pro tunc* to a date before September 30, 2003, or enjoining BCIS from considering Plaintiff ineligible for adjustment of status after September 30, 2003;
- e. Granting Plaintiff costs and attorney's fees;
- f. Expediting consideration of this matter as provided in the accompanying Order to Show Cause; and
- g. Granting such other and further relief as the Court deems just and proper.

Dated: September 15, 2003
Melville, New York


Michael P. DiRaimondo
DiRaimondo & Masi, LLP
Attorney for the Plaintiff
401 Broadhollow Road, Suite 302
Melville, New York 11747
(631) 777-5557