

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 03

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Indre SIMAITE,

Plaintiff,

COMPLAINT

-against -

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

U.S. CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.
SEP 28 2003
BROOKLYN OFFICE

Civil Action No.

Defendants.

X

CHREIN, J.

Plaintiff Indre Simaite, 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 Lithuania, presently living at 147-14 84th Road, Briarwood, New York, 11435, 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. Defendant Department of State ("DOS"), is a department organized and existing under the laws of the United States of America. The DOS, among other thing, has the responsibility for the of allocation of visas, and specifically, the allocation of visas under the diversity visa program.
7. 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 pction pursuant to 8 U.S.C. §1154, and Plaintiff Indre Simaite is the beneficiary of a winning lottery application entitling her to apply for lawful permanent residence in the United States.
8. Under 8 U.S.C. §1255, an alien such as Ms. Simaite 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 September 2, 2003, Ms. Simaite 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."

9. On September 10, 2003, the Plaintiff was interviewed by DAO Marshall. Though Plaintiff fully satisfied the criteria for adjustment of status pursuant to the DV-2003 Lottery, DAO Marshall failed to adjudicate the Plaintiff's application, and refused to inform Plaintiff, and Plaintiff's counsel, why Plaintiff's adjustment of status application was not being adjudicated. Additionally, DAO Marshall refused to indicate whether the Plaintiff's fingerprints and name check were cleared by the FBI.
10. On September 16, 2003, Plaintiff's counsel wrote to Supervisor Steve Rosina requesting a decision from BCIS. A copy of this letter is annexed hereto as Exhibit "B."
11. Ms. Simaite 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 not told why her application for adjustment of status was not being approved, nor was she given a request for additional information.
12. Apparently, on September 10, 2003, the BCIS wrongfully denied the Plaintiff's application for adjustment of status. However, Plaintiff did not receive the denial until September 20, 2003, by certified mail. A copy of the denial is annexed hereto as Exhibit "C."
13. On September 22, 2003, the Plaintiff filed a Motion for Reopening and Reconsideration of the erroneous decision issued by the BCIS. A copy of the motion, without exhibits, is annexed hereto as Exhibit "D."
14. On September 23, 2003, the BCIS notified Plaintiff's counsel that the motion was granted and that the Plaintiff's case was approvable, pending only name check clearances by the FBI.

As the DV-2003 lottery ends on September 30, 2003, and the 50,000 allotted visas expire, the immediate adjudication of this application is imperative.

COUNT ONE

15. The allegations in paragraphs 1 through 14 above are repeated and realleged as though fully set forth herein.
16. 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.
17. 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

18. The allegations contained in paragraphs 1 through 14 above are repeated and realleged as though fully set forth herein.
19. 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

20. The allegations contained in paragraph 1 through 14 above are repeated and realleged as though fully set forth herein.

21. 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.

WHEREFORE, Plaintiff demands judgment against defendant as follows:

- a. 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;
- b. In the alternative, declaring that BCIS is estopped from treating Plaintiff's eligibility for the DV-2003 lottery as expiring after September 30, 2003;
- c. 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;
- d. Ordering the Department of State to immediately issue a visa for the Plaintiff, thereby alleviating the necessity for BCIS to have the application fully adjudicated by September 30, 2003, and allowing the DOS to issue the visa by September 30, 2003;

- c. 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 26, 2003
Melville, New York

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