

1 **II. BACKGROUND**

2 Plaintiff is a citizen of Pakistan. On September 24, 2001,
3 the Board of Immigration Appeals ("BIA") granted Plaintiff asylum.
4 First Am. Compl. ("FAC"), Docket No. 31, Ex. A. On January 10,
5 2003, Plaintiff applied for an adjustment of status to become a
6 lawful permanent resident. FAC ¶ 5, Ex. B. On his application
7 for adjustment of status, Plaintiff indicated that he had been an
8 active member in the 1990's of Jamaat-i-Islami, a "democratic
9 opposition party in Pakistan." Id. Ex. B. During the subsequent
10 four years, the United States Citizenship and Immigration Services
11 ("USCIS") took no action on Plaintiff's application. In April
12 2007, Plaintiff brought suit in this Court seeking an injunction
13 to compel adjudication of his adjustment application. See Khan v.
14 Gonzalez ("Khan I"), No. 08-1398 SC, Docket No. 1.

15 On August 13, 2007, USCIS issued its notice of intent to deny
16 Plaintiff's application for adjustment of status. FAC ¶ 7, Ex. D.
17 Plaintiff timely responded to the notice, challenging certain of
18 the factual allegations on which USCIS had relied. Id. Ex. D. In
19 December 2007, USCIS again issued a notice of intent to deny
20 Plaintiff's application, and Plaintiff again responded. Id. ¶ 8,
21 Ex. E.

22 On March 3, 2008, USCIS denied Plaintiff's application. Id.
23 Ex. F. In the denial, USCIS described the violent activities of a
24 group called Hizbul Mujahadeen, alleged to be a subgroup of the
25 Jamaat-i-Islami party. Id. Due to the activities of Hizbul
26 Mujahadeen, USCIS concluded that Jamaat-i-Islami met the
27 definition of an undesignated terrorist organization (also known
28

1 as a "Tier III" organization) under 8 U.S.C. §
2 1182(a)(3)(b)(vi)(III). Id. The letter went on to explain why
3 Plaintiff was not admissible:

4 You stated on your Form I-589 (the attachment)
5 "I had attended numerous JI meetings while I
6 was in high school, and was familiar with the
7 party's goals and aspirations". Upon joining
8 the JI I assumed the role of an active worker
9 in the Mardaan College chapter of the JI".
10 "My primary duty was to paste JI posters in
11 the areas surrounding the collehe and on the
12 collehe campus itself."

13 Due to the activities of the Jamaat-i-Islami
14 meets the current definition of an
15 undesignated terrorist organization at INA
16 section 212(a)(3)(B)(vi)(III). The violent
17 activities of the Jamaat-i-Islami match those
18 described in section 212(a)(3)(B)(iv) and
19 212(a)(3)(B)(iii). Because your act(s) of
20 material support of the Jamaat-i-Islami was
21 voluntary, you are inadmissible under INA
22 section 212(a)(3)(B)(i)(I).

23 Accordingly, your application must be and
24 hereby is denied. The regulations do not
25 provide for an appeal to this decision.

26 Id.¹ The Court dismissed Plaintiff's first suit shortly after
27 USCIS adjudicated his application. Khan I, Docket No. 17.
28 Plaintiff then filed the instant action, alleging that the finding
by USCIS regarding Plaintiff's eligibility to adjust his status
was arbitrary, capricious, and contrary to law. Compl., Docket
No. 1, ¶ 9.

On March 26, 2008, Defendant issued a USCIS-internal
memorandum ordering review of certain cases decided after December
26, 2007, the date of the Consolidated Appropriations Act of 2008,

¹ The text of the letter is reproduced here verbatim,
including the spelling and punctuation found in the original.

1 Pub. L. 110-161, 121 Stat. 1844 ("CAA"). Mot. Ex. B. According
2 to the memorandum, the CAA expanded the authority of the Secretary
3 of Homeland Security to make exemptions to certain terrorism-
4 related grounds for inadmissibility as they relate to Tier III
5 organizations or to an individual alien. Id. As a result, USCIS
6 decided to place certain cases on hold and to reopen certain
7 denials where it appeared the case might benefit from an exercise
8 of the Secretary's expanded discretion. Id. On April 23, 2008,
9 USCIS notified Plaintiff that it had reopened his case:

10 In accordance with 8 C.F.R. 103.5(a), USCIS
11 determined that sufficient circumstances
12 warrant reopening and/or reconsideration of
13 the case, thereby vacating the previous denial
14 decision. However, at this time the record is
15 not sufficient to establish eligibility for
16 the benefit sought. Therefore, the case has
17 been reopened and placed on hold. No further
18 adjudicative action will be taken at this
19 time.

20 FAC ¶ 11, Ex. H.

21 On August 12, 2008, the Court issued its Order Denying
22 Defendant's Motion to Dismiss and Granting Plaintiff's Cross-
23 Motion for Leave to Filed First Amended Complaint ("First MTD
24 Order"). Docket No. 30. Plaintiff then filed the First Amended
25 Complaint, challenging the decision to place his application for
26 adjustment on hold, rather than the final denial of his
27 application. See FAC.

28 **III. JURISDICTION**

The Government moves to dismiss Plaintiff's suit pursuant to
Federal Rule of Civil Procedure 12(b)(1), asserting that the Court

1 lacks jurisdiction.

2 **A. Legal Standard**

3 The Court may dismiss a complaint for lack of subject-matter
4 jurisdiction where the action (1) "does not 'arise under' the
5 Federal Constitution, laws or treaties (or fall within one of the
6 other enumerated categories of Art. III, § 2);" (2) "is not a
7 'case or controversy' within the meaning of that section;" or (3)
8 "is not one described by any jurisdictional statute." Baker v.
9 Carr, 369 U.S. 186, 198 (1962); see also Fed. R. Civ. P. 12(h)(3)
10 ("If the court determines at any time that it lacks subject-matter
11 jurisdiction, the court must dismiss the action.").

12 "Federal courts are courts of limited jurisdiction." United
13 States v. Marks, 530 F.3d 799, 810 (9th Cir. 2008). Plaintiff, as
14 the party seeking to invoke the jurisdiction of the Court, has
15 "the burden of proving the actual existence of subject matter
16 jurisdiction." Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir.
17 1996) (per curiam). Plaintiff asserts that jurisdiction is
18 appropriate under the Administrative Procedure Act ("APA"), 5
19 U.S.C. § 701 et seq. FAC ¶ 1.

20 "A Rule 12(b)(1) jurisdictional attack may be facial or
21 factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039
22 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005). "In a facial
23 attack, the challenger asserts that the allegations contained in a
24 complaint are insufficient on their face to invoke federal
25 jurisdiction. By contrast, in a factual attack, the challenger
26 disputes the truth of the allegations that, by themselves, would
27 otherwise invoke federal jurisdiction." Id. In a factual

1 challenge, the Court "need not presume the truthfulness of the
2 plaintiffs' allegations." White v. Lee, 227 F.3d 1214, 1242 (9th
3 Cir. 2000). "Once the moving party has converted the motion to
4 dismiss into a factual motion by presenting affidavits or other
5 evidence properly brought before the court, the party opposing the
6 motion must furnish affidavits or other evidence necessary to
7 satisfy its burden of establishing subject matter jurisdiction."
8 Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036,
9 1039 n.2 (9th Cir. 2003). The instant challenge to the Court's
10 jurisdiction is factual, as the Government has submitted documents
11 and affidavits in support of its Motion.

12 **B. Discussion**

13 The Government raises several challenges to the Court's
14 jurisdiction, all based on different provisions of the Immigration
15 and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq.

16 1. 8 U.S.C. § 1252(g)

17 First, the Government argues that judicial review in this
18 matter is precluded by 8 U.S.C. § 1252(g). Section 1252 provides
19 as follows:

20 (g) Exclusive jurisdiction. Except as provided
21 in this section and notwithstanding any other
22 provision of law (statutory or nonstatutory),
23 including section 2241 of title 28, United
24 States Code, or any other habeas corpus
25 provision, and sections 1361 and 1651 of such
26 title, no court shall have jurisdiction to
27 hear any cause or claim by or on behalf of any
28 alien arising from the decision or action by
the Attorney General to commence proceedings,
adjudicate cases, or execute removal orders
against any alien under this Act.

8 U.S.C. § 1252(g). The Government says this provision applies to

1 the decision to place Plaintiff's application on hold, as that was
2 an exercise of the Attorney General's discretion. See Mot. at 4-
3 7. Plaintiff contends that the statute must be construed
4 narrowly, and that the decision to put his application on hold is
5 not the commencement of proceedings, the adjudication of his case,
6 or the execution of a removal order against him, and therefore is
7 not covered. Opp'n at 3-4.

8 The Supreme Court has held that section 1252(g) must be
9 interpreted narrowly. See Reno v. American-Arab Anti-
10 Discrimination Comm., 525 U.S. 471 (1999) ("American-Arab"). In
11 American-Arab, the Court ruled that section 1252(g) "applies only
12 to three discrete actions that the Attorney General may take: her
13 'decision or action' to 'commence proceedings, 'adjudicate cases,
14 or 'execute removal orders.'" Id. at 482 (quoting 8 U.S.C. §
15 1252(g) (emphasis in American-Arab). In discussing the
16 legislative history of the statute, the Court declared that, "It
17 is implausible that the mention of three discrete events along the
18 road to deportation was a shorthand way of referring to all claims
19 arising from deportation proceedings." Id. The Court further
20 noted that the three discrete actions in question "represent the
21 initiation or prosecution of various stages in the deportation
22 process." Id. at 483. Following American-Arab, the Ninth Circuit
23 has construed section 1252(g) narrowly. See Wong v. U.S.
24 Immigration & Naturalization Serv., 373 F.3d 952, 964 (9th Cir.
25 2004).

26 With that narrow construction in mind, the Court turns to the
27 question of whether section 1252(g) precludes judicial review in
28

1 this instance. The Court concludes that it does not. The
2 Government has not taken any action towards removing Plaintiff.
3 In fact, in arguing judicial involvement at this stage is
4 premature, the Government asserts that Plaintiff may renew his
5 application for adjustment of status in future removal proceedings
6 pursuant to 12 C.F.R. § 1209.2(f). Mot. at 6. At present,
7 however, Plaintiff is not subject to removal, and the Government
8 has not initiated removal proceedings against him. As Plaintiff
9 is a lawful asylee, the Government cannot initiate removal
10 proceedings at this time. See 8 U.S.C. § 1158(c)(1)(A) (where an
11 alien is granted asylum, the Attorney General shall not remove the
12 alien to his or her country of origin). On the existing record,
13 removal is not an issue, and section 1252(g) is therefore not a
14 bar to this Court's jurisdiction. See Wong 373 F.3d at 965
15 (Plaintiff "is correct that § 1252(g) does not bar review of the
16 actions that occurred prior to any decision to 'commence
17 proceedings,' if any, against her or to execute the removal
18 order"); see also Mitondo v. Mukasey, 523 F.3d 784, 787 (7th Cir.
19 2008) (statute precluding judicial review of removal
20 determinations was inapplicable to an "asylum-only" proceeding);
21 Liu v. Novak, 509 F. Supp. 2d 1, 7-8 (D.D.C. 2007) (section
22 1252(g) does not bar suit to compel adjudication of application to
23 adjust status because suit does not involve any of the
24 discretionary acts explicitly enumerated in the statute).

25 2. 8 U.S.C. § 1252(a)(2)(B)(ii)

26 The Government next argues that because final determinations
27 on applications for adjustment of status are not subject to
28

1 judicial review, the Court lacks jurisdiction here. See Mot. at
2 7-9. Section 1252(a)(2)(B)(ii) provides in part:

3 (B) Denials of discretionary relief.
4 Notwithstanding any other provision of law
(statutory or nonstatutory), . . . and
5 regardless of whether the judgment, decision,
6 or action is made in removal proceedings, no
7 court shall have jurisdiction to review--

8 . . .

9 (ii) any other decision or action of the
10 Attorney General or the Secretary of Homeland
11 Security the authority for which is specified
12 under this title to be in the discretion of
13 the Attorney General or the Secretary of
14 Homeland Security, other than the granting of
15 relief under section 208(a).

16 8 U.S.C. § 1252(a)(2)(B)(ii). The Government contends that
17 because the ultimate authority to grant adjustment of status is
18 discretionary, its decision to place Plaintiff's application on
19 hold is insulated from review. Mot. at 8. The Ninth Circuit has
20 identified two conditions that must be satisfied in order for an
21 action to be shielded from judicial review under section
22 1252(a)(2)(B)(ii). "First, the language of § 1252(a)(2)(B)(ii)
23 requires that the discretionary authority be 'specified' under the
24 INA. . . . [T]hat is, the language of the statute in question must
25 provide the discretionary authority." Spencer Enters. v. United
26 States, 345 F.3d 683, 690 (9th Cir. 2003). Second, the authority
27 for the action in question must be in the discretion of the
28 Attorney General. "If the authority for a particular act is in
the discretion of the Attorney General, therefore, the right or
power to act is entirely within his or her judgment or conscience.
Such acts are matters of pure discretion, rather than discretion

1 guided by legal standards." Id. Only if both of those conditions
2 are satisfied will review of the Attorney General's actions fall
3 outside of the Court's jurisdiction.

4 The Government maintains that the decision to place
5 Plaintiff's application on hold satisfies both conditions. The
6 authority to grant or deny an adjustment of status is clearly
7 discretionary. See Dong v. Chertoff, 513 F. Supp. 2d 1158, 1165
8 (N.D. Cal. 2007). Moreover, this discretionary authority is
9 clearly designated to the Attorney General by statute:

10 The Secretary of Homeland Security or the
11 Attorney General, in the Secretary's or the
12 Attorney General's discretion and under such
13 regulations as the Secretary or the Attorney
14 General may prescribe, may adjust to the
status of an alien lawfully admitted for
permanent residence the status of any alien
granted asylum

15 8 U.S.C. § 1159(b). The decision to grant an application for
16 adjustment of status therefore satisfies the conditions of section
17 1252(a)(2)(B)(ii). However, the decision Plaintiff asks the Court
18 to review is not the grant or denial of his application for
19 adjustment; rather, it is the refusal to take any action on that
20 application. The Government's own authority recognizes this
21 distinction:

22 Based on the narrow construction to be given
23 the jurisdiction-stripping provision of the
24 statute, and its language precisely limiting
25 the discretion granted, the Court therefore
finds that 8 U.S.C. § 1252(a)(2)(B)(ii) does
not deprive the Court of jurisdiction to hear
an allegation that the determination of an
application for adjustment of status has been
unlawfully withheld. While the ultimate
26 decision to grant or deny an application for
27 adjustment of status is unquestionably

1 discretionary, there exists a
2 non-discretionary duty to act on and process
the application.

3 Dong, 513 F. Supp. 2d at 1165 (emphasis added). Moreover, the
4 Government explicitly concedes that it has a nondiscretionary duty
5 to adjudicate Plaintiff's application within a reasonable amount
6 of time. See Reply at 5 n.1.

7 Despite this concession, the Government proceeds to argue
8 that the Ninth Circuit's recent decision in Hassan v. Chertoff,
9 543 F.3d 564 (9th Cir. 2008), compels the application of section
10 1252(a)(2)(B)(ii) here. Mot. at 7-8; Reply at 5-6. The
11 Government relies heavily on the Hassan ruling that, "Because the
12 government denied Hassan's application for adjustment, in part, as
13 a matter of discretion, the district court lacked jurisdiction to
14 review that claim." 534 F.3d at 566 (emphasis added). The
15 reliance is misplaced, as Hassan dealt with the denial of an
16 application for adjustment, an action which satisfies the Spencer
17 Enterprises conditions for preclusion of review, not the decision
18 to take no action. Nothing in Hassan expands the scope of
19 discretionary actions protected by section 1252(a)(2)(B)(ii). The
20 Government's reliance on Hassan was recently rejected in a nearly
21 identical case in this district:

22 The government seems to suggest that Hassan
23 set forth a rule that the courts have no
24 jurisdiction over any decision which is
25 discretionary even in part. Hassan does not
26 control, because the plaintiff in that case
27 was challenging not a delay in acting on his
28 adjustment of status application, but rather
the denial of his application itself. See
[Hassan, 534 F.3d] at 565. Hassan sought an
opportunity to respond to the reasons for the
denial, and it is this over which the court

1 found it did not have jurisdiction.
2 Ahmed v. Scharfen, No. 08-1680, 2009 U.S. Dist LEXIS 591, at *18
3 (N.D. Cal. Jan. 7, 2009). The Court agrees with the conclusion in
4 Ahmed.

5 3. 8 U.S.C. § 1159(b)

6 The Government also argues that the statute requiring
7 adjudication of applications for adjustment does not specify a
8 period of time in which the adjudication must occur. Mot. at 10-
9 11. The Court has previously rejected this precise argument both
10 in this case and in prior cases.² See First MTD Order at 3;
11 Soneji v. U.S. Dep't of Homeland Sec., 525 F. Supp. 2d 1151, 1155-
12 56 (N.D. Cal. 2007); Chen v. U.S. Citizenship & Immigration Serv.,
13 No. 07-2462, 2007 U.S. Dist. LEXIS 95409, at *3 (N.D. Cal. Dec.
14 18, 2007). The courts in this district have resoundingly agreed
15 with that conclusion. See, e.g., Ahmed, 2009 U.S. Dist LEXIS 591,
16 at *19-20; Dong, 513 F. Supp. 2d at 1167-68; Singh v. Still, 470
17 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007); Aboushaban v. Mueller,
18 No. 06-1280, 2006 U.S. Dist. LEXIS 81076, at *5 (N.D. Cal. Oct.
19 24, 2006); see also Dong, 513 F. Supp. 2d at 1163 n.7 (collecting
20 authority).

21 4. 8 U.S.C. § 1182(a)(3)(B)(i)

22 Finally, the Government contends that its decision, or
23 possible future decision, to exempt Plaintiff from inadmissibility

24
25 ² The Government acknowledges the Court's prior ruling, but
26 suggests that Hassan, which was decided after the Court ruled,
27 should alter the Court's analysis. See Reply at 5 n.1. The Court
28 has already rejected the Government's argument on that issue. The
Government wishes to preserve this issue for appeal. See Mot. at
10 n.7. The record on appeal will speak for itself.

1 under 8 U.S.C. § 1182(a)(3)(B)(i) is a discretionary act which is
2 not subject to judicial review. Aliens who have engaged in
3 terrorist activity are deemed inadmissible and ineligible to
4 receive visas to enter the United States. See 8 U.S.C. §
5 1182(a)(3)(B)(i)(I). However, the Attorney General may make
6 exceptions to this rule:

7 The Secretary of State, after consultation
8 with the Attorney General and the Secretary of
9 Homeland Security, or the Secretary of
10 Homeland Security, after consultation with the
11 Secretary of State and the Attorney General,
12 may determine in such Secretary's sole
13 unreviewable discretion that subsection
14 (a)(3)(B) shall not apply with respect to an
15 alien within the scope of that subsection or
16 that subsection (a)(3)(B)(vi)(III) shall not
17 apply to a group within the scope of that
18 subsection. . . . Notwithstanding any other
19 provision of law (statutory or nonstatutory),
20 including section 2241 of title 28, or any
21 other habeas corpus provision, and sections
22 1361 and 1651 of such title, no court shall
23 have jurisdiction to review such a
24 determination or revocation except in a
25 proceeding for review of a final order of
26 removal pursuant to section 1252 of this
27 title, and review shall be limited to the
28 extent provided in section 1252(a)(2)(D).

19 Id. § 1182(d)(3)(B)(i). The Government asserts that because the
20 decision whether or not to grant an exemption either for Jamaat-i-
21 Islami as a group, or for Plaintiff as an individual, is beyond
22 judicial review, the Court has no jurisdiction. The only
23 authority the Government provides for this argument is section
24 1182(d)(3)(B)(i) itself. By its own language, the statute in
25 question only precludes judicial review of exemptions to
26 terrorism-related inadmissibility. Plaintiff does not challenge
27 such an exemption. Plaintiff challenges the express decision of
28

1 USCIS to place his application on hold. Despite the Government's
2 assertion to the contrary, nothing in the statute governing
3 adjustment of an asylee's status, 8 U.S.C. § 1159(b), or the
4 statute governing exemptions for terrorism-related
5 inadmissibility, 8 U.S.C. § 1182(d)(3)(B)(i), vests the Secretary
6 of Homeland Security or the Attorney General with the discretion
7 to place applications for adjustment on indefinite hold without
8 being subjected to judicial review. That the decision whether or
9 not to make an exemption for a terrorism-related inadmissibility
10 determination is complicated and may involve significant national
11 security concerns does not strip this Court of jurisdiction.

12 Because each of the jurisdictional challenges raised by the
13 Government fails, the Court concludes that it has subject-matter
14 jurisdiction and therefore DENIES the Government's Motion to
15 Dismiss.

16
17 **IV. SUMMARY JUDGMENT**

18 Having found subject-matter jurisdiction, the Court now turns
19 to the merits of the parties' cross-motions for summary judgment.
20 The Government contends that there are no material issues of fact
21 in dispute and that the delays in adjudicating Plaintiff's
22 application are reasonable. See Mot. at 15. Plaintiff asserts
23 that the delay is unfounded and unreasonable, and asks the Court
24 to order USCIS to adjudicate his application promptly.

25 **A. Legal Standard**

26 Entry of summary judgment is proper "if the pleadings, the
27 discovery and disclosure materials on file, and any affidavits
28

1 show that there is no genuine issue as to any material fact and
2 that the movant is entitled to judgment as a matter of law." Fed.
3 R. Civ. P. 56(c). "Summary judgment should be granted where the
4 evidence is such that it would require a directed verdict for the
5 moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250
6 (1986). Thus, "Rule 56(c) mandates the entry of summary judgment
7 . . . against a party who fails to make a showing sufficient to
8 establish the existence of an element essential to that party's
9 case, and on which that party will bear the burden of proof at
10 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In
11 addition, entry of summary judgment in a party's favor is
12 appropriate when there are no material issues of fact as to the
13 essential elements of the party's claim. Anderson, 477 U.S. at
14 247-49.

15 **B. Discussion**

16 Plaintiff brought this suit under the APA. The APA "permits
17 a citizen suit against an agency when an individual has suffered
18 'a legal wrong because of agency action' or has been 'adversely
19 affected or aggrieved by agency action within the meaning of a
20 relevant statute.'" Rattlesnake Coalition v. U. S. Env'tl. Prot.
21 Agency, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting 5 U.S.C. §
22 702). The Court is authorized to "compel agency action unlawfully
23 withheld or unreasonably delayed." 5 U.S.C. § 706(1). A
24 plaintiff seeking relief under section 706(1) must first show that
25 an agency delayed or withheld a discrete action that the agency
26 was legally required to take. See Norton v. S. Utah Wilderness
27 Alliance, 542 U.S. 55, 64 (2004) ("a claim under § 706(1) can

1 proceed only where a plaintiff asserts that an agency failed to
2 take a discrete agency action that it is required to take")
3 (emphasis in original). Second, a plaintiff invoking the APA must
4 also show that the agency unreasonably delayed or unlawfully
5 withheld processing its decision. See 5 U.S.C. § 555(b) ("with
6 due regard for the convenience and necessity of the parties or
7 their representatives and within a reasonable time, each agency
8 shall proceed to conclude a matter presented to it"); 5 U.S.C. §
9 706(1).

10 Here, the parties do not dispute that USCIS has delayed
11 processing Plaintiff's application for adjustment of status. The
12 Court has already concluded, as the Government conceded, that
13 USCIS has a nondiscretionary duty to adjudicate Plaintiff's
14 application within a reasonable period of time. See supra Section
15 III.B.2; Reply at 5 n.1. The only question that remains for the
16 Court, then, is whether the delay to date in adjudicating
17 Plaintiff's application is reasonable.

18 The Court's determination of whether the delay is reasonable
19 is guided by what are known as the "TRAC factors":

20 (1) the time agencies take to make decisions
21 must be governed by a "rule of reason" [;] (2)
22 where Congress has provided a timetable or other
23 indication of the speed with which it expects
24 the agency to proceed in the enabling statute,
25 that statutory scheme may supply content for
26 this rule of reason [;] (3) delays that might be
27 reasonable in the sphere of economic regulation
28 are less tolerable when human health and welfare
are at stake [;] (4) the court should consider
the effect of expediting delayed action on
agency activities of a higher or competing
priority [;] (5) the court should also take into
account the nature and extent of the interests
prejudiced by the delay [;] and (6) the court

1 need not "find any impropriety lurking behind
2 agency lassitude in order to hold that agency
3 action is unreasonably delayed."

4 Independence Mining Co., Inc. v. Babbitt, 105 F.3d 502, 507 n.7
5 (9th Cir. 1997) (quoting Telecomms. Research & Action v. F.C.C.,
6 750 F.2d 70, 79-80 (D.C. Cir. 1984)) (modifications in original).
7 It is also relevant to "look to the source of the delay--e.g., the
8 complexity of the investigation as well as the extent to which the
9 defendant participated in delaying the proceeding." Singh, 470 F.
10 Supp. 2d at 1068 (internal modifications omitted).

11 Application of the TRAC factors leads the Court to conclude
12 that the delay in processing Plaintiff's application is not
13 unreasonable. The statute governing applications for adjustment
14 of status for asylees does not give any indication of the
15 appropriate amount of time to process an application. See 8
16 U.S.C. § 1159(b). Nor does the statute authorizing the Secretary
17 of Homeland Security to make exemptions to the terrorism-related
18 inadmissibility rules. See 8 U.S.C. § 1182(d)(3)(B)(i). Thus,
19 USCIS must process Plaintiff's application in a reasonable amount
20 of time. See 5 U.S.C. § 555(b) ("With due regard for the
21 convenience and necessity of the parties or their representatives
22 and within a reasonable time, each agency shall proceed to
23 conclude a matter presented to it.").

24 "What constitutes an unreasonable delay in the context of
25 immigration applications depends to a great extent on the facts of
26 the particular case." Gelfer v. Chertoff, No. 06-6724, 2007 U.S.
27 Dist. LEXIS 26466, at *5 (N.D. Cal. Mar. 27, 2007) (internal
28 quotation marks omitted). Here, as the Government notes, the

1 situation is distinguishable from the now-typical case involving a
2 delay in processing an applicant's FBI background check. In many
3 of those cases, there are no facts specific to the applicant which
4 are causing the delay, or which implicate national security
5 concerns. See, e.g., Kousar v. Mueller, 549 F. Supp. 2d 1194,
6 1199 (N.D. Cal. 2008) ("Although national security certainly
7 justifies a thorough name check process, there is no contention
8 that Plaintiff's application is particularly complex or any
9 evidence as to why the name check caused the application
10 processing to take far longer than the 180 days suggested by
11 Congress."); Chen v. Chertoff, No. 07-2816, 2008 U.S. Dist. LEXIS
12 4891, at *8-9 (N.D. Cal. Jan. 23, 2008) ("National security
13 interests and the complexity of the background check process can
14 only excuse reasonable delay. Defendants have provided no
15 particularized facts to suggest that these concerns apply with
16 special force to Plaintiff's application or that her name check is
17 otherwise subject to special circumstances.").

18 Plaintiff has admitted to providing material support for
19 Jamaat-i-Islami, an organization that may qualify as a Tier III
20 terrorist organization.³ If the Government determines that

21
22 ³ Plaintiff argues that there has been no formal designation
23 of Jamaat-i-Islami as a Tier III organization, and that absent such
24 a designation, there is no basis for delaying his application. The
25 Court disagrees. While Tier I and Tier II organizations must be
26 designated as such by the Government, the plain language of the
27 governing statute makes clear that no such designation is required
28 for Tier III status. Compare 8 U.S.C. § 1182(a)(3)(B)(vi)(I) with
8 U.S.C. § 1182(a)(3)(B)(vi)(III). Moreover, the question of
whether Jamaat-i-Islami actually qualifies as a Tier III
organization is not before the Court and need not be answered for
the Court to address the reasonableness of the delay.

1 Jamaat-i-Islami is a Tier III organization, Plaintiff may face
2 removal unless either he or Jamaat-i-Islami is granted an
3 exemption by the Secretary of Homeland Security.⁴ The Government
4 contends that the determination of whether to grant such an
5 exemption is a complicated process, involving inter-agency
6 consultation. One would hope such a determination is not made
7 lightly, and the Court recognizes that it may be time-consuming.

8 To date, Plaintiff's application has only been on hold for
9 approximately one year. Plaintiff would have the Court consider
10 the entire time since he first applied for adjustment in 2003. As
11 the Government already processed his original application,
12 however, the Court need only look at the time since the Government
13 reopened Plaintiff's case and put adjudication on hold. In
14 reaching the original decision on Plaintiff's application, the
15 Secretary did not have the authority to make a terrorism-related
16 exemption. As the exemption is the basis for the current hold
17 status on Plaintiff's application, it is reasonable for the Court
18 to focus on the period of time since the CAA was passed and the
19 possibility of exemption first arose.

20 Moreover, the delay in adjudication appears to favor
21 Plaintiff. The Government previously determined that he was
22 inadmissible. While it did not revoke his asylum, it could have
23 done so based on that determination, or based on the facts

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25 ⁴ Plaintiff is correct that he does not currently face
26 removal, as his asylum has not been revoked. See supra Section
27 III.B.1. While that was sufficient for a determination regarding
28 the Court's subject-matter jurisdiction, it carries less weight in
 consideration of the reasonableness of the delay at issue.

1 underlying that determination. See 8 U.S.C. § 1158(b)(2)(A)(v),
2 (c)(2)(B). The facts supporting Plaintiff's application for
3 adjustment of status have not changed. The only thing that has
4 changed since Plaintiff first applied for adjustment is the CAA's
5 grant of exemption authority to the Secretary of Homeland
6 Security. Absent that change, Plaintiff would have a final and
7 unreviewable determination that he is inadmissible and not
8 eligible for adjustment of status. His arguments that further
9 delay is a greater prejudice than that determination are
10 unpersuasive. The administrative hurdles Plaintiff may face in
11 acquiring work and travel permits during the adjudication are
12 minimal when the alternative is removal and termination of his
13 asylum.

14 Finally, the Court finds no impropriety on the part of the
15 Government here. To the contrary, the reopening of Plaintiff's
16 application in consideration of a possible exemption from
17 terrorism-related inadmissibility appears to be an act of good
18 faith.

19 For all of the foregoing reasons, the Court concludes that
20 the delay in adjudication of Plaintiff's application for
21 adjustment of status is reasonable. The Court therefore GRANTS
22 the Government's Motion and DENIES Plaintiff's Cross-Motion.

23
24 **V. CONCLUSION**

25 For the foregoing reasons the Court finds that it has
26 jurisdiction over this matter, and therefore DENIES the
27 Government's Motion to Dismiss. Having jurisdiction, the Court

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considers the merits of the dispute and concludes that the delay in processing Plaintiff's application for adjustment of status is not unreasonable. The Court therefore GRANTS the Government's Motion for Summary Judgment and DENIES Plaintiff's Cross-Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: April 06, 2009



UNITED STATES DISTRICT JUDGE