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Attorney for Plaintiff

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO/OAKLAND DIVISION**

Kevin M. Crabtree,

Plaintiff,

v.

Alejandro Mayorkas, Secretary of Homeland  
Security,

Defendant.  
*(Official Capacity)*

No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF UNDER  
THE FREEDOM OF INFORMATION  
ACT**



**INTRODUCTION AND BACKGROUND**

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4 1. Plaintiff brings this action to compel Defendant to release information Plaintiff  
5 sought through a FOIA request filed with U.S. Citizenship and Immigration Services (“USCIS”)  
6 on July 30, 2019. Plaintiff, an attorney who practices immigration removal defense, sought policy  
7 and training documents from Defendant relating to its processing of applications for employment  
8 authorization documents (“EADs”) for noncitizens who have applied for cancellation of removal  
9 before the Immigration Court. Plaintiff filed this FOIA request to disseminate to the immigration  
10 bar and public information relating to perceived arbitrary conduct by USCIS in processing EADs  
11 for applicants for this relief whose removal matter has been administratively closed as a matter of  
prosecutorial discretion during the Obama Administration.

12 2. Pursuant to 8 U.S.C. § 1229a(b)(1), the Attorney General may cancel removal and  
13 grant lawful permanent resident status to removable noncitizens who demonstrate (among other  
14 things), a qualifying relative would suffer an exceptional and extremely unusual hardship if such  
15 person was removed from the United States. While an application for relief is pending, applicants  
16 are eligible for temporary employment authorization pursuant to 8 C.F.R. § 1274a.12(c)(10) and  
17 such EADs are routinely granted by USCIS—and renewed in one-year increments.

18 3. On information and belief, many thousands of individuals sought applications for  
19 cancellation of removal and later had their removal proceedings administratively closed in this  
20 manner. USCIS routinely finds that where a person has filed for relief in this way, their application  
21 is “pending” and thus qualifies them for EAD renewal—even though under one view no  
22 application remains pending.

23 4. A related controversy concerning when an application for cancellation of removal  
24 is deemed “filed” has resulted in the denial of EADs to a portion of cancellation applicants with  
25 administratively closed removal proceedings. During adjudication of a cancellation of removal  
26 application, although the Immigration Judge determines the elements for relief, the applicant must  
27 initiate a biometrics and security check process by filing the EOIR-42 application and  
28 corresponding filing and biometrics fee with USCIS. 8 C.F.R. 1003.47(d)-(e). Upon completing



1 this step, USCIS creates an application for adjustment of status in its internal system and  
2 coordinates the biometrics processing and security checks on behalf of the United States  
3 government. Subsequently, the applicant is required to ensure the application is filed with the  
4 Immigration Court along with a copy of the USCIS-generated fee receipt. For many years, USCIS  
5 deemed a cancellation of removal application to have been “filed” once it was filed with USCIS  
6 in this way—without regard to whether or on what date the application was received by the  
7 Immigration Court. At some point in approximately 2016, USCIS abruptly changed its  
8 interpretation. From then until now, USCIS has deemed an application for cancellation pending  
9 only if the applicant can show that it was actually filed with an Immigration Judge.

10 5. The reason any of this matters is because of the way this policy shift impacted those  
11 noncitizens whose removal matters were administratively closed. Many removal matters were  
12 administratively closed early in the case and practitioners may not have yet filed the application  
13 form with the Immigration Judge. Having no reason to suspect USCIS would change its policy,  
14 they may not have ensured the application forms were filed with the IJ.

15 6. The arbitrariness of this scenario under the prior administration was especially  
16 pronounced, but it remains agency policy under the present administration. During a period of  
17 years, Immigration Judges were prohibited from administratively closing proceedings. *Matter of*  
18 *Castro-Tum*, \*. Thus, those noncitizens deemed to be a nonenforcement priority, who had *prima*  
19 *facie* eligibility for cancellation of removal, had paid the filing fee for said application, and filed  
20 the application with USCIS (but not with the Immigration Judge) could not seek employment  
21 authorization. To pursue authorization, they would be required to move to recalendar their removal  
22 proceeding (so as to be able to file the cancellation of removal application with the Immigration  
23 Judge—which would otherwise be rejected by the clerk). However, the Immigration Judge would  
24 thereafter have no authority to administratively close the matter again due *Castro-Tum*. This  
25 scenario resulted in a complete deprivation of employment authorization for numerous noncitizens  
26 and a denial of renewal to many others.

27 7. While present EOIR policy now permits for administrative closure, such that there  
28 is a procedural mechanism to correct this unfair result, USCIS is still denying employment

1 authorization to a cohort of individuals it previous considered to be eligible for EADs—all in the  
2 context of an acute national labor shortage.

3 8. The records requested are of potential significant public interest and Defendant has  
4 approved Plaintiff’s request for a fee waiver on that basis. Defendant’s over 3.5-delay in  
5 processing the FOIA request is unlawful under the FOIA.

6 **JURISDICTION AND VENUE**  
7

8 9. This Court has jurisdiction under 5 U.S.C. § 552, et seq. (FOIA statute), U.S.C. §  
9 1331 (federal question), and 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act).

10 10. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1) because  
11 this is a civil action in which Defendant is an officer of the United States and Plaintiff, Plaintiff  
12 resides in San Francisco, California, and there is no real property involved in this action.

13 11. Defendant’s failure to make determinations concerning Plaintiffs’ requests for A-  
14 Files within the statutory time period constitutes a constructive denial of Plaintiffs’ requests. Thus,  
15 Plaintiff is deemed to have exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).  
16

17 **INTRADISTRICT ASSIGNMENT STATEMENT**  
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19 12. Pursuant to Civil L.R. 3-2(c), assignment of this action to the San Francisco or  
20 Oakland Division is appropriate because a substantial portion of the events giving rise to the action  
21 occurred in Oakland, California. Plaintiff’s principal place of business is Oakland, California, and  
22 the FOIA request sought that records be provided by mail to Plaintiff at that location.

23 **PARTIES**  
24

25 13. Plaintiff Kevin M. Crabtree is a member of the State Bar of California (and of the  
26 bar of this Court). He has exclusively practiced immigration and nationality law since 2005 and  
27 has been certified as a specialist in this area by the State Bar of California since 2015. His practice  
28



1 focuses on representing unlawfully present noncitizens in removal defense, humanitarian relief,  
2 family-based immigration, and criminal-immigration matters.

3 14. Defendant Alejandro Mayorkas is Secretary of the Department of Homeland  
4 Security. In this capacity, he has ultimate supervisory authority over the Department and  
5 responsibility to ensure its compliance with all provisions of the FOIA. Secretary Mayorkas is  
6 sued in his official capacity.

7 **FACTS AND PROCEDURAL HISTORY**

8  
9 15. Plaintiff filed a request under the FOIA on July 30, 2019, with USCIS, seeking:

10  
11 Information regarding what evidence establishes the underlying benefit application (EOIR-  
12 42B<sup>1</sup>) is "pending" in the Immigration Court, information regarding the impact of  
13 administrative closure of the removal proceeding on the "pending" nature of the application,  
14 and information regarding the need for evidence that the filing fee for the EOIR-42B  
15 application has been filed.

16 This request is time-limited to documents created on or after January 1, 2009.

17 The documents include but are not limited to:

- 18 •Training manuals
- 19 •Instructional materials
- 20 •Policy and/or procedure manuals
- 21 •Agency memoranda
- 22 •Emails

23 *See* Letter from USCIS of August 9, 2022.

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<sup>1</sup> Form EOIR-42B is an Application for Cancellation of Removal and Adjustment of Status for Certain Non-  
28 Permanent Residents, adjudicated by the Immigration Courts within the Executive Office for Immigration Review.

1 16. In this initial acknowledgment, USCIS granted Plaintiff’s request for a public  
2 interest fee waiver. It also invoked the 10-day extension for a response due to unusual  
3 circumstances.

4 17. On July 25, 2020, Plaintiff sent a notice of change of address to the USCIS FOIA  
5 office as well as an inquiry regarding the status of the request. On July 27, 2020, USCIS  
6 acknowledged receipt of the communication and stated:

7 Good afternoon,

8 Thank you for your email. Your address has been updated in our system for your case in  
9 COW2019500894.

10 Here is a link to check your status online. You may check the status of your FOIA request  
11 at: <https://first.uscis.gov/#/check-status>

12 By checking your status online, this frees up our staff to process pending requests. We are  
13 currently experiencing a high volume of incoming requests. FOIA operates on a first in, first  
14 out basis.

15 Your request is currently 812 of 1459 pending requests in Track 2.

16 Thank you.

17 USCIS Email (July 27,2020), Exhibit.

18 18. On July 8, 2022, USCIS allegedly sent a letter to Plaintiff at the updated address,  
19 informing him that due to the passage of time the FOIA request would be administratively closed  
20 unless Plaintiff responded in writing in 30 days. Plaintiff has no record or recollection of this  
21 communication. In any event, on August 23, 2022, USCIS sent a follow up email again inquiring  
22 and Plaintiff responded by email in confirmation that same day. Defendant provided no further  
23 confirmation to Plaintiff that processing is continuing. However, as of the filing of this complaint,  
24 the USCIS online system reports that FOIA request COW2019500894 is in queue for a response  
25 and is number 197 in line of 1417 requests.<sup>2</sup>

26  
27  
28 <sup>2</sup> <https://first.uscis.gov/#/check-status>

**SOLE CAUSE OF ACTION**

**VIOLATION OF THE FREEDOM OF INFORMATION ACT**

19. Defendant is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records in response to Plaintiff’s FOIA request and to make a determination concerning the request within the time period set forth in 5 U.S.C. § 552(a)(6).

20. Because Defendant has not responded to the FOIA request within the statutorily mandated 30-day period, Plaintiff is deemed to have exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C).

21. There is no legal basis existing (or even asserted by Defendant for the failure to complete processing of the FOIA request.

**CONCLUSION AND REQUEST FOR RELIEF**

WHEREFORE, Plaintiff requests that this Court grant the following relief:

- (1) Assume jurisdiction over this matter;
- (2) Declare that Defendant’s failure to respond to the FOIA request within the statutory time frame violates the FOIA.
- (3) Order Defendant to complete processing of the FOIA request as mandated by the FOIA.
- (4) Award costs and reasonable attorney fees incurred under 5 U.S.C. § 552(a)(4)(E).
- (5) Grant such other and further relief that the Court deems just and proper.

Dated: February 18, 2023

Respectfully submitted,

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