UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SD 6041/ES 2663

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RAISA YAKUBOVA, EMMA UNGURYAN, BELLA VESNOVSKAYA, DAVID VESNOVSKIY, VYACHESLAV VOLOSIKOV, and SHEHATA AWAD IBRAHIM, on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

- against -

MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security, EMILIO GONZALEZ, in his official capacity as the Director of the United States Citizenship and Immigration Services, MARY ANN GANTNER, in her official capacity as the District Director of the New York City District of the United States Citizenship and Immigration Services, ALBERTO GONZALES, in his official capacity as the Attorney General of the United States, and ROBERT S. MUELLER, in his official capacity as Director of the Federal Bureau of Investigation,

Defendants.

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Civil Action
No. CV-06-3203

(Korman, C.J.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PRELIMINARY STATEMENT

Defendants submit this memorandum in support of their motion to dismiss this action under Federal Rules of Civil Procedure 12 & 20. Plaintiffs are individuals who have been granted the privileges of permanent resident status in the United States, including, for many, a safe haven from persecution and various welfare-related benefits. Now seeking the privilege of naturalization, plaintiffs allege that their applications have been pending over 120 days after their naturalization interview, and seek declaratory relief and a permanent injunction from this Court.

This Court lacks jurisdiction over certain of plaintiffs' claims because the statutory requisites for jurisdiction have not been met, making this case unripe for review. In addition, the remainder of the claims in Plaintiffs' complaint fail to state claims upon which the relief that they seek may be granted. Moreover, the relief under 8 U.S.C. § 1447(b) that the individual plaintiffs seek requires an individualized adjudication for each plaintiff, and thus plaintiffs are misjoined.

Finally, class certification is neither necessary nor appropriate. As naturalization applications remain pending final adjudication for many different reasons, and each case has its own unique set of facts, plaintiffs have failed to demonstrate the commonality of interests required for certification of a plaintiff class. Plaintiffs also fail to demonstrate that they are typical

of the class, or adequately represent the class that they seek to represent.

BACKGROUND

I. THE NATURALIZATION PROCESS

The sole authority to naturalize persons as citizens of the United States lies with the Secretary of Homeland Security. 8 U.S.C. §§ 1103(a) & 1421(a). During fiscal year 2005, the USCIS New York District Office completed 102,461 naturalization cases. Declaration of Mary Ann Gantner (Gantner Decl.), at ¶ 26. During fiscal year 2006, as of August 31, 2006, the New York Office completed 106,179 cases. Declaration of Gwynne K. MacPherson (MacPherson Decl.), at ¶ 5. The New York Office currently processes naturalization applications within five to six months. Gantner Decl. at ¶ 27.

A lawful permanent resident seeking naturalization bears the burden of proving his eligibility to receive the privilege of United States citizenship by establishing the requisites for naturalization which include residency, good moral character,[1] and an understanding of the English language and the history,

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[1] During the naturalization process, the review of an applicant's USCIS record, police record, and information concerning the applicant in other law enforcement databases is critical in confirming that the applicant has established good moral character and is eligible for naturalization. See 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1. Neither the Immigration and Nationality Act ("INA") nor the regulations mandate a time period within which this investigation must be completed.

principles and form of government of the United States. See 8 U.S.C. § 1423; 8 U.S.C. § 1427(a), (e); 8 U.S.C. § 1429; 8 C.F.R. §§ 316.5, 316.10.

Under the INA, the applicant completes and submits a naturalization application (N-400) and the requisite fee. 8 U.S.C. §§ 1427(a), 1445(a); 8 C.F.R. §§ 316.4, 334.2. With the application, an applicant must provide supporting information pertaining to the applicant's good moral character, and must provide a complete account of any criminal background.[2]

When USCIS receives an application at a service center, it keys specific information into its computer systems. The computer system makes a fingerprint appointment for the applicant at an Application Support Center, and initiates an examination of the applicant, including but not limited to review of all pertinent USCIS records and a full background check, which includes inquiries run by both USCIS and the FBI.[3] Gantner Decl. at ¶¶ 4, 6, 10.

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[2] Naturalization applicants are no longer required to attach a fingerprint form with their naturalization application; rather, USCIS schedules the applicant for an appointment to get fingerprinted directly by USCIS. See Gantner Decl. at ¶ 8.

[3] In 1997, in response to heightened national security concerns, Congress required completion of a full criminal background investigation of the applicant before citizenship by naturalization could be conferred. Pub. L. 105-119, Tit. I, Nov. 26, 1997, 111 Stat. 2448; Complaint, ¶ 36. To give effect to Congress' statutory requirement, USCIS adopted a regulation in 1998 requiring that no naturalization examination can begin until after USCIS has received the FBI's final report of its full criminal background check. 8 C.F.R. § 335.2(b). Under this regulation, USCIS may not complete its adjudication of a naturalization application until a complete

The FBI portions of the background checks consist of the fingerprint check and the name check. 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1. See Gantner Decl. at ¶ 10. The name check is requested from the FBI once the applicant's information is keyed into the USCIS database. See Gantner Decl. at ¶¶ 6, 7. Once the fingerprints are received, USCIS requests the fingerprint checks. See id. at 8.

The gamut of background checks, performed by USCIS and the FBI, have in many cases revealed significant derogatory information about naturalization applicants – information which resulted in the denial of the applications, or in the applicants' being arrested, or in the applicants' being charged with removability from the United States. Gantner Decl. at ¶ 11. If any of the checks reveal derogatory information, USCIS investigates that information. Gantner Decl. at ¶ 12.

As part of the examination, once USCIS receives results from the background checks,[4] the applicant is scheduled for a

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background check is done.

[4] In an effort to more expeditiously adjudicate naturalization applications, some USCIS offices, including the New York District Office, began scheduling interviews with applicants after receipt of the fingerprint check results but before the FBI had completed its name checks (but after receiving the initial name check results from the FBI. USCIS assumed that the name check would be completed by the time of the interview date. See, e.g., Damra v. Chertoff, 2006 WL 1786246, at * 3 (N.D. Ohio June 23, 2006). While this approach served to speed the processing time for more than ninety percent of nationwide applicants, see infra at p. 7, it also resulted in cases such as this, in which a final response from the

naturalization interview and then interviewed by a designated USCIS officer (a naturalization officer), who has discretion to grant or deny the application, once USCIS receives the results of the various background checks. 8 U.S.C. § 1446(b), (d); 8 C.F.R. § 335.3. The interview encompasses all factors relating to the naturalization application, but centers primarily on proficiency in the English language and knowledge of American government and history. See 8 C.F.R. §§ 312.1-312.5, 335.2(a). The officer may require the applicant to provide additional documentation or return for additional interviews and/or proficiency tests. Once all of the investigations are complete, the examination phase ends.

Next, the application is decided.[5] If denied, an applicant may, within 180 days, request an administrative hearing before a senior immigration officer. 8 U.S.C. § 1447(a); 8 C.F.R. § 336.2. If denied again, the applicant, if he has exhausted his administrative remedies, may file for judicial review of the denial of his naturalization application in United States District Court, which then exercises *de novo* review over the denial of the naturalization application. 8 U.S.C. § 1410(c); 8 C.F.R.

FBI was not received before the interview, and thus individuals left those interviews with their applications still pending. This practice has now ended. Gantner Dec. at ¶ 25.

[5] Pursuant to 8 U.S.C. § 1447(b), see infra at p. 22, if USCIS fails to adjudicate the application within 120 days after the examination under 8 U.S.C. § 1446, the applicant may seek a hearing in district court.

§ 336.9(b), (c), (d). If approved, the applicant is required to take the oath of allegiance to become a United States citizen. 8 U.S.C. § 1447(a); 8 C.F.R. § 337.1-337.10.

II. FBI BACKGOUND CHECKS

The FBI's National Name Check Program (NNCP) is responsible for disseminating information from the FBI's Central Records System (CRS) in response to requests from federal agencies, congressional committees, the federal judiciary, friendly foreign police, intelligence agencies, and state and local criminal justice agencies. Declaration of Michael A. Cannon dated July 20, 2006 (Cannon Decl.) at ¶ 4.

In recent years, the NNCP has grown exponentially, with more "customers" seeking background information from FBI files on individuals before bestowing a privilege -- whether that privilege is government employment; appointment; security clearance; attendance at a White House function; naturalization; admission to the bar; or a visa to our country. Cannon Decl. at ¶ 4. More than 70 federal, state, and local agencies regularly request FBI name searches. Id. In addition to serving its regular government customers, the FBI conducts numerous name searches for the FBI's counterintelligence, counterterrorism, and homeland security efforts. Id.

The FBI's system of records includes the Universal Index ("UNI"), an index of approximately 94.6 million records of

investigative and administrative cases. Id. at ¶ 9(c). The first stage of the name check process, Batch Processing, consists of a fully computerized search of the UNI for all mentions of the individual's name, a close date of birth, and social security number. Id. at ¶ 11; Supplemental Declaration of Michael A. Cannon dated August 31, 2006 (Supp. Cannon Decl.) at ¶ 12. Each name is searched in a number of different permutations, switching the order of first, last, and middle names, as well as permutations with just the first and last, first and middle, et cetera. Id. Approximately 68% of name checks are returned to USCIS as having "No Record" within 48 hours. Supp. Cannon Decl. at ¶ 12. A "No Record" result indicates that the UNI database contains no identifiable information regarding a particular individual. Id.

The remaining 32% of name checks require additional investigation, and so they are moved to the second stage of the name check process, "Name Searching". Id. at ¶ 13. In Name Searching, the remaining names undergo a secondary, manual name search of the computerized databases, which results in the return within 30 to sixty days of an additional 22% of the name check requests as having a "No Record". Id. Thus, a total of 90% of all name check requests result in a final response of "No Record" in less than three months. See id.

The remaining 10% of name check requests is identified as the probable subject of an FBI record, and moved to File Review. Id.

at ¶ 14. In File Review, the FBI's paper records are located and retrieved from one, or more, of the 56 FBI field offices. Paper records exist for all documents pre-dating the implementation of the FBI's Automated Case Support system on or about October 16, 1995. Id. at ¶ 14, 25. If the paper records are responsive to a particular name check, these records are currently scanned. Id. at 30. Once all of the identified files are gathered, the remaining name check requests are then forwarded to "Dissemination". Id. at ¶ 14. In Dissemination, FBI analysts review the various records to verify the information linked to the individual's name, to ascertain whether the information both pertains to the individual and whether any information is potentially derogatory. Id. Where derogatory information is identified, if appropriate, the FBI forwards a summary of the derogatory information to USCIS. Id.

Prior to September 11, 2001, the FBI processed approximately 2.5 million name check requests per year from all sources. Id. at ¶ 16. As a result of the government's post-September 11 counter-terrorism efforts, the number of FBI name checks has grown steadily. Id. at ¶¶ 16, 33. For fiscal year 2005, the FBI processed in excess of 3.7 million name checks. Id. at ¶¶ 16, 35. In fiscal year 2006, as of August 23, 2006, the FBI has processed over 3.1 million name checks. Id. at ¶ 36.

Due to heightened national security concerns, a review of the background check procedures employed by the then-INS was conducted

in November 2002. Cannon Decl. at ¶ 17. It was determined that, to better protect our country, a more intensive clearance procedure was required. Id. One of these procedures involved the name check clearance performed by the FBI.[6] Id. At that time, only those "main" files that could be positively identified with an individual were considered responsive. Id. The risk of missing possible derogatory information by restricting the search scope was too great, and therefore the search scope was expanded to include references.[7] Id. at ¶ 17. Accordingly, additional time was required for processing because many more files were required to be reviewed for each individual. Id.

In December 2002 and January 2003, the then-INS resubmitted 2.7 million name check requests to the FBI under the expanded search scope. Id. at ¶ 18. The 2.7 million requests were in addition to the regular submissions by all entities. Id.; see id. at ¶ 4. Approximately sixteen percent of these resubmitted name checks (over 440,000) indicated that the FBI might have information that related to the subject of the inquiry. Id. at 18. These 440,000 requests are still in the process of resolution, but the

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[6] Completion of an FBI background check as part of the full criminal background check prior to adjudication of an application for naturalization has been included in the naturalization adjudication process for decades. The scope of the search has been adjusted occasionally, due to national security/public safety considerations.

[7] References are those instances where an individual or an organization appears in another individual's or organization's main file. See Cannon Decl. at ¶ 8(b).

number pending is now under 13,000. See Supp. Cannon Decl. at ¶ 19. These pending requests remain the oldest USCIS name check requests in the system.

The FBI's processing in Dissemination of the more than 440,000 resubmissions has delayed the processing of regular submissions from USCIS. Id. at ¶ 20. To reduce these delays, the FBI created a team dedicated to completing the remaining resubmissions, which permits other staff to process regular name check requests on a first-in, first-out basis. Id. at ¶¶ 20, 21. The FBI also permits USCIS to request expedited treatment for a limited number of pending requests. Id. at ¶ 26.[8]

Various circumstances impact the amount of time necessary to complete a single name check request in File Review and Dissemination. Files must be requested from field offices located across the country, and records could be located at one of 265 possible locations. Id. at ¶ 25. Common names (such as Mohammed, Singh, or Smith) may result in hundreds of potential matches. Id. at ¶ 24. Many potential file matches are ruled out in the Name Check process, but others require analysis in Dissemination.

The sheer volume of the requests has also resulted in delays. See Supp. Cannon Decl. at ¶¶ 21, 33. To meet the expanding workload, the NNCP continues to look for ways to improve its

[8] A case can be expedited if the applicant files an action in federal court, will lose SSI benefits, or for other compelling reasons. See MacPherson Decl. at ¶ 4.

processes and expand its resource base. Id. at ¶¶ 27, 31,32. It is developing partnerships with other agencies to provide contractors and personnel for various portions of the name check process. Id. at ¶ 28. To speed replacement of personnel due to turnover, it has implemented an employee development program to streamline training of new employees, reducing the necessary training period. Id. at ¶ 29. All newly accessed paper files are being scanned to build an electronic records system, speeding up future access to those records, allowing for easier transmission of the data to the analysts in dissemination, and allowing for future automation of portions of the final process. Id. at ¶¶ 27, 30, 32.

III. FACTS

Prior to the commencement of this action, plaintiffs submitted a list of 49 names to defendants, asking for assistance in securing the adjudication of their cases. See Macpherson Decl. at ¶ 3. Defendants completed the processing of approximately 40 of these cases prior to the filing of this action and have since adjudicated four more cases. Id. The remaining cases all have issues that need to be resolved prior to USCIS's adjudication of their naturalization applications. Id.

Four of the named plaintiffs, Raisa Yakubova, Emma Unguryan, David Vesnovskiy and Vyacheslav Volosikov, have been naturalized. Gantner Decl. at ¶ 28; see also MacPherson Decl. at ¶ 3. USCIS is waiting for plaintiff Bella Vesnovskaya to appear for fingerprints,

as her fingerprint clearance has expired. See MacPherson Decl. at ¶ 3; see also Gantner Decl. at ¶ 16. The background checks for plaintiff Shehata Awad Ibrahim revealed a duplicate file in another USCIS district, which has been requested. Gantner Decl. at ¶ 28. The FBI name checks on all of the named plaintiffs have been completed. Declaration of Glenn Andrew Scott (Scott Decl.) at ¶ 6.

Of the 118 putative class members referenced in the Complaint, Complaint at ¶ 65, approximately 109 have had their cases adjudicated with most being naturalized or scheduled for naturalization. Gantner Decl. at ¶ 29; MacPherson Decl. at ¶ 3. Of the remaining 9 individuals, the examinations of the applicants remain to be resolved, including issues relating to fraud and inadequate documentation. Gantner Decl. at ¶ 29; MacPherson Decl. at ¶ 3.

Independent of this case, a number of individuals have filed actions in this district under 8 U.S.C. § 1447(b), seeking adjudication of their naturalization applications. Since the beginning of the 2006 fiscal year, approximately 43 such actions have been filed, and approximately 22 have already been adjudicated and the cases dismissed upon stipulation. Interestingly, of 22 cases adjudicated and dismissed by stipulation, 14 were filed by plaintiffs' counsel. See Tsitron v. Gonzales, 05-CV-3661(JG) (dismissed by stipulation December 1, 2005); Osepyan v. Ashcroft, 05-CV-3659 (NGG) (dismissed by stipulation March 7, 2006); Kolesova

v. Gonzales, 05-CV-3657(RJD) (dismissed by stipulation November 30, 2005); Yezerets v. Gonzales, 05-CV-3656(SJ) (dismissed by stipulation January 27, 2006); Reym v. Gonzales, 05-CV-3654(CBA) (dismissed by stipulation December 6, 2005); Bobrovsya v. Gonzales, 05-CV-3653(SJF) (dismissed by stipulation November 16, 2005); Reym v. Gonzales, 05-CV-3652(DLI) (dismissed by stipulation November 29, 2005); Rubin v. Gonzales, 05-CV-3651(RJD) (dismissed by stipulation December 8, 2005); Arutyunyants v. Gonzales, 05-3650(JG) (dismissed by stipulation December 1, 2005); Kompaneyets v. Gonzales, 05-CV-3646(ARR) (dismissed by stipulation December 13, 2005); Badalova v. Gonzales, 05-CV-3645 (dismissed by stipulation January 31, 2006); Kholopkina v. Gonzales, 05-CV-3644 (DLI) (dismissed by stipulation November 29, 2005); Smirnovskaya v. Gonzales, 05-CV-3643(ERK) (dismissed by stipulation December 9, 2005); Kostanets v. Gonzalez, 05-CV-3642(RJD) (dismissed by stipulation April 28, 2006).

Lastly, USCIS has a process in place whereby individuals who claim they will lose benefits if the adjudication of their applications is delayed, or have other compelling reasons, can receive an expedited adjudication of their applications. See MacPherson Decl. at ¶ 4. USCIS has always demonstrated its willingness to assist naturalization applicants who face difficulties relating to SSI benefits. See Gantner Decl. at ¶ 30.

ARGUMENT

In reviewing a motion raising a facial attack to jurisdiction,

the Court must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Dangler v. New York City Off Track Betting Corp., 193 F.3d 130, 138 (2d Cir. 1999) (citations omitted). However, when presented with a factual attack to jurisdiction, the court may look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists. See Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976) (discussing differences between Rule 12(b)(1) and Rule 12(b)(6) motions).

A complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) if it appears "that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief". Gmurzynska v. Hutton, 355 F.3d 206, 209 (2d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding a Rule 12(b)(6) motion, the Court accepts as true all factual allegations in the complaint and draws all inferences in favor of the plaintiff. Cargo Partner AG v. Albatrans Inc., 352 F.3d 41, 44 (2d Cir. 2003). However, this is limited to factual allegations, and does not include allegations which are statements of legal conclusions.

I. Plaintiffs Have Failed To Establish Entitlement To The Relief They Seek.

Plaintiffs have moved this Court for a permanent injunction[9] requiring USCIS to identify all naturalization applicants residing in this district whose applications are pending 120 days after initial interview, implement a plan of correction to grant or deny the applications of these individuals within 90 days, grant or deny the applications of all naturalization applicants residing within this district within 120 days of interview, requiring the FBI to complete all background checks within a reasonable time, and requiring USCIS and the FBI to complete all steps necessary to adjudicate the naturalization applications of individuals residing in this district within a reasonable time. Complaint, ¶ 73. As this Court lacks jurisdiction over plaintiffs' claims, plaintiffs are improperly joined, and plaintiffs fail to state a claim upon which their requests for relief may be granted, this Court should dismiss the complaint. Indeed, neither 8 U.S.C. § 1447(b) nor the Administrative Procedure Act (APA), cited by plaintiffs, serves as a basis for permitting the type of broad-based relief plaintiffs seek, namely an across-the-board order that their background investigations be completed, and their applications adjudicated, within specific limited time frames.

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[9] Plaintiffs originally filed a motion for a preliminary injunction, but subsequently withdrew it.

A. Plaintiffs Have Not Established The Prerequisites For A Mandatory, Permanent Injunction.

An injunction is a drastic remedy, and it should only be granted in extraordinary circumstances. Silverstein v. Penguin Putnam, Inc. 368 F.3d 77, 84 (2d Cir. 2004), cert. den., 543 U.S. 1039 (2004). A party seeking permanent injunctive relief ordinarily must show that, in the absence of an injunction, it will suffer irreparable harm. Cablevision Systems Corp. v. Town of East Hampton, 862 F. Supp. 875, 888 (E.D.N.Y. 1994). The party must also succeed on the merits. Id. However, where, as here, a party seeks relief that will alter the status quo a "greater showing" is applied. See Vaughn v. Consumer Mortg. 293 F. Supp. 2d 206, 214 (E.D.N.Y. 2003). Further, because injunctive relief is equitable in nature, a plaintiff must establish that no adequate remedy at law exists. Carlos v. Santos, 123 F. 3d 61, 67 (2d Cir. 1997). Moreover, the public interest is always a factor to be considered in the granting of a mandatory, permanent injunction. Carpenter Technology Corp. v. City of Bridgeport, 180 F.3d 93, 98 (2d Cir. 1999).

An award of an injunction is not something that a plaintiff is entitled to as a matter of right, Ticor Title Ins. Co v. Cohen, 173 F.3d 63, 68 (2d Cir. 1999), and a federal judge is not obligated to issue an injunction for every violation of law. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 192 (2000). Moreover, in determining whether injunctive relief is

appropriate, courts are restrained by respect for the integrity of an institution to mange its own affairs. See generally, Knox v. Salins, 193 F.3d 123, 130 (2d Cir. 1999). In addition, a court should avoid issuing an injunction which would involve continuous duties of supervision. See 8600 Assoc. v. Wearguard, 737 F. Supp. 44, 46 (E.D. Mich. 1998). Finally, as injunctive relief is an extraordinary remedy, the movant must unequivocally show the need for its issuance. Valley v. Rapides Parish School Bd., 118 F.3d 1047, 1050 (5th Cir. 1997). Here, plaintiffs have failed to establish any of the prerequisites for the issuance of a permanent, mandatory injunction.

As a threshold matter, an adequate remedy at law already exists. 8 U.S.C. § 1447(b) provides a remedy for those whose applications have been allegedly been pending for over 120 days after completion of the naturalization examination. In this district alone, over 175 individuals have secured adjudication of their naturalization applications. Moreover, this remedy at law, repeatedly and successfully used by plaintiffs and their counsel, is readily available and accessible to others and, as shown, has been regularly used in this district by others. Instructions on how to bring such actions are readily available on the internet and provide, with clear and concise detail, instructions on seeking relief, including instructions on how to proceed in forma pauperis. These instructions also indicate the ease in which a suit can be

filed and indicate that the process can be completed within two to three months. See e.g., http//en.wikibooks.org/wiki/FBI_name_check.

Moreover, because an adequate remedy at law does exist, plaintiffs have failed to establish irreparable harm. In addition, even prior to the commencement of this action, USCIS has a process in place where individuals may obtain expedited processing of their applications, where those individuals are in danger of losing benefits or have other emergencies. MacPherson Decl. at ¶ 4; Gantner Decl. at ¶ 30.

Furthermore, it should be understood that, independent of these claims relating to loss of benefits, plaintiffs are lawful permanent residents and possess the benefits of that status, including the right to work and travel. See Saxbe v. Bustos, 419 U.S. 65, 72 (1974). Accordingly, plaintiffs have failed to establish that they are being harmed, much less that the harm is irreparable, if their applications remain pending adjudication.

Finally, the public interest is always a factor to be considered in the granting of a mandatory, permanent injunction. Carpenter Technology, 180 F.3d at 98. Here, particularly in light of heightened security concerns in the post-September 11, 2001, world, as well as the importance of the benefit sought, it would not be in the public interest to order the FBI or USCIS at this point to rush through these applications or to limit their investigations to a specific duration. Limiting the time to

conduct an FBI investigation may require the FBI to cut short a promising lead in an ongoing investigation relating to a terrorist or criminal group, and may require the FBI to channel resources in a way that limits its ability to conduct other investigations. The weight of plaintiffs' arguments regarding public interest are lessened by the fact that they have the benefits of lawful permanent resident status, including the ability to work and travel. Thus, the public interest clearly weighs against plaintiffs' request for an mandatory permanent injunction.

B. The Court Should Dismiss The Complaint For Lack of Jurisdiction.

Plaintiffs cannot prevail on the merits of their claims. Asserting jurisdiction under 8 U.S.C. § 1447(b) and the APA, plaintiffs request that this Court order USCIS to adjudicate their applications within 90 days, adjudicate all naturalization applications within 120 days of the date of the initial examination, that the FBI complete background checks within a reasonable time and that USCIS and the FBI adjudicate their naturalization applications within a reasonable time. Complaint ¶ 73. In addition, plaintiffs seek a declaratory judgment stating that defendants' policies and practices violate 5 U.S.C. § 555(b), 8 U.S.C. § 1447(b), and 8 C.F.R. § 335.3(a); and certification of a class, comprised of naturalization applicants residing in this District whose applications have been pending 120 days after their initial naturalization interview.

However, plaintiffs have wholly failed to establish entitlement to such relief under any theory.

1. Plaintiffs Are Not Properly Joined

Rule 20 of the Federal Rule of Civil Procedure provides in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

If the test for joinder is not satisfied, a court, in its discretion, may, under F.R.C.P. 21, sever the misjoined parties so long as no substantial right will be prejudiced. See Coughlin v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997). In determining whether severance is appropriate, a court considers: (1)whether the claims arise out of the same transaction or occurrence; (2)whether the claims present common questions of law or fact; (3)whether settlement of the claims or judicial economy would be facilitated; 4)whether prejudice would be avoided if severance was granted; and 5)whether different witnesses and documentary proof are required for the separate claims. See Morris v. Northrop Grumman Corp., 37 F. Supp. 2d 556, 580 (E.D.N.Y. 1999). Here, as a threshold matter, plaintiffs' claims do not arise out of the same transaction or occurrence. Rather, each application is filed separately and is independent from another. Coughlin, 130 F.3d at 1351 (finding that

joinder inappropriate due to unique nature of each application); see also Abbas v. Gonzales, No 06-4553 (N.D. Ill. August 24, 2006) (unpublished) (attached).

Moreover, what constitutes a delay in adjudication of one case (the very issue here) may not constitute the delay in another, and therefore the claims do not involve common questions of law or fact. Id. Indeed, as evidenced at the time this lawsuit was filed, plaintiffs Yakubova and Unguyran had already completed the name check process and were awaiting the oath ceremony. Cannon Decl. at ¶¶ 24-25; Gantner Decl. at ¶ 28. Plaintiff Ibrahim also had already completed the name check process, but issues remained regarding a duplicate benefits file at another district office. Gantner Decl. at ¶ 28; MacPherson Decl. at ¶ 3. The name checks for plaintiffs Volosikov and Vesnovskiy were completed after the institution of this action and they have been naturalized. Cannon Decl. at ¶¶ 27-28; MacPherson Decl. at ¶ 3. Finally, the name check for plaintiff Vesnovskaya has been completed, but USCIS has no record that she has appeared to be fingerprinted to update her (now expired) fingerprint checks. MacPherson Decl. at ¶ 3.

Furthermore, judicial economy would not be facilitated due to the often diverse nature of the claims. Different witnesses and documentary evidence are needed to defend against different claims.

Plaintiffs would not be prejudiced by severance. Indeed, as described supra at pp. 12-13, 17, a highly successful and adequate

remedy exists for the treatment of their claims under 8 U.S.C. § 1447(b). On the other hand, defendants are prejudiced if plaintiffs' cases are not severed, because lumping all of plaintiffs' claims into one undermines their ability to provide defenses relevant to particular individual cases.

Finally, the statute referenced by plaintiffs in support of their claim, 8 U.S.C. § 1447(b), supports the conclusion that joinder of these individual cases is inappropriate. Indeed, that statute requires that the "applicant" have a "hearing", thereby reinforcing the individual nature of these claims.

2. Plaintiffs Are Not Entitled to Relief Under The INA.

In any event, plaintiffs claims under 8 U.S.C § 1447(b) are not ripe for adjudication, and this Court must dismiss the 1447(b) claim for lack of jurisdiction.

Pursuant to 8 U.S.C. § 1447(b),

> if there is a failure to make a determination under § 1446 [(investigation and examination of naturalization applicants] . . . before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

Here, plaintiffs ask that this Court order USCIS to complete the adjudicatory process within 90 days for those plaintiffs whose applications have been pending over 120 days after an initial

interview. However, the Court cannot order this relief, because USCIS cannot, by law, adjudicate these applications until a background check has been completed. See supra at p. 3, fn. 3.[10] Indeed, with a single exception, courts which have found jurisdiction for claims such as this one, brought under 8 U.S.C. § 1447(b), have refused to require time limitations on the immigration adjudication authorities upon remand of naturalization applications. See Daami v. Gonzales, No. 05-3667, 2006 WL 1457862 (D.N.J. May 22, 2006); Essa v. USCIS, No. Civ 051449, 2005 WL 3440827(D. Minn. Dec. 14, 2005); El Dour v. Chertoff, 417 F. Supp. 2d 679 (W.D. Pa. 2005). See also Plaintiffs' Memorandum at pp. 20-21 (cases cited). And the one court that did provide a time limitation, Al-Kudsi v. Gonzales, No. 05-1584, 2006 WL 752556 (D. Or. Mar 22, 2006), did so only after an individual hearing, concluding that Al-Kudsi had satisfied all the requirements for naturalization. Id. at * 3. Accordingly, with this single exception,[11] if courts find it inappropriate to remand with time restrictions when dealing with a single plaintiff, a fortiori, it would be inappropriate to remand with a time restriction in a case

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[10] In this regard, the Court cannot find that the USCIS "unreasonably delayed" adjudication of these applications, as it cannot adjudicate the application until the FBI name check process is complete. See supra at p. 3, fn. 3.

[11] This decision serves to reinforce the individualized nature of claims under 8 U.S.C. § 1447(b). Indeed, the statute states "the applicant may apply . . . for a hearing on the matter," which is exactly what occurred.

like this one, where plaintiffs seek a broad-based remand affecting numerous aliens.[12]

Other courts have found that 8 U.S.C. § 1447(b) is not available to naturalization applicants until later in the adjudicative process. Danilov v. Aquirre, 370 F. Supp. 2d 441, 443 (E.D. Va. 2005); Campbell v. Hudson, No. H-06-0339 (S.D. Tex. Aug. 23, 2006) (unpublished) (copy of decision attached); Damra, 2006 WL 1786246; Abdelkhaleq v. BCIS Director, 2006 U.S. Dist. LEXIS 50949 (N.D. Ind. July 26, 2006). The interview is part of the examination process. See Johnny N. Williams Nov. 13, 2002 Memorandum (attached); William R. Yates Apr. 5, 2004 Memorandum (attached); William R. Yates Aug. 4, 2004 Memorandum (attached). Under Chevron v. NRDC, 467 U.S. 837 (1984), a court must defer to an agency's reasonable interpretation of an ambiguous statute that the agency is charged with enforcing. Because USCIS has made a reasonable interpretation of ambiguous terms in the statute regarding the examination process, that interpretation is entitled to deference.

The term "examination" in 8 U.S.C. §§ 1446(b) & 1447(a)&(b) is ambiguous, as it does not require that the "exam" be a discrete event. See 8 U.S.C. §§ 1446(b) & 1447(a)&(b). Instead, it describes a process of examining the applicant and background

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[12] Independent of the above, 8 U.S.C. § 1447(b), by its very terms, only allows for a remand with instructions to the USCIS and does not allow for any order relating to the FBI.

materials to determine whether the applicant has met the standards of naturalization. The ambiguity of the term "examination" is reinforced due to the lack of a discussion of the relationship between the "investigation" in § 1446(a) and the "examination" in § 1446(b). The "examination" could be one aspect of the "investigation" (the "examination" could turn up information about the applicant's residence and employment history over the past five years); the "examination" and "investigation" could overlap; or the "investigation" and "examination" could cover two different areas completely. Therefore, the INA creates an ambiguity as to the extent and process under which an "examination" may be conducted. Cf. Forbes v. Napolitano, 236 F.3d 1009, 1011 (9th Cir. 2000) (finding that terms such as "investigation" and "routine examination" were inherently ambiguous in upholding vagueness challenge). Because the term "examination" is ambiguous, under Chevron, the agency is entitled to provide a reasonable interpretation of the term.[13]

The argument that the initial interview constitutes the "examination" is at most one of several competing interpretations,

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[13] Deference to USCIS is particularly appropriate in this circumstance because of the national security and international relationship aspects of immigration. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). In addition, absent constitutional constraints or compelling circumstances, an agency must be permitted to fashion its own procedures to optimize its resources to most effectively discharge its multitude of administrative responsibilities. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978).

but it is not compelled by the terms of the statute. It is not enough for this Court to determine that another interpretation of the relevant statute and regulations is a better interpretation than that offered by defendants; this Court must determine simply whether the interpretation offered by defendants is reasonable. USCIS has taken the reasonable view that the examination is a process and that process cannot be complete without a finalized background check. The "'examination' is a process, not an isolated event, which necessarily may include one or more in-person interviews, as well as other activities." Danilov v. Aquirre, 370 F. Supp. 2d 441, 443 (E.D. Va. 2005). Indeed, USCIS's interpretation of "examination" is reasonable because Congress does not allow that process to be completed until a full background check has occurred. See Pub. L. 105-119, Tit. I, Nov. 26, 1997, 111 Stat. 2448. As the required security check that is without a statutory time restriction has not been completed, the time allowed by law for USCIS to adjudicate an application has not yet expired. 8 C.F.R. § 336.9(d); Danilov, 370 F. Supp. 2d at 443.

3. Plaintiffs' APA Claims Fail.

a. The Statute Does Not Impose A Deadline For the Discretionary Determination At Issue.

Plaintiffs also seek an order from this Court requiring the FBI and USCIS to adjudicate their background clearances within a reasonable time. As a threshold matter, plaintiffs have failed to include any claim for relief under APA § 706(1) in their complaint.

See Complaint at ¶ 66-69. Thus, plaintiffs cannot prevail on their APA argument (in their motion for class certification) that defendants have "unlawfully withheld" or "unreasonably delayed" adjudication of their applications or completion of their background checks.[14]

Moreover, the only statute under which a claim such as this can be asserted is 8 U.S.C. § 1447(b), which deals specifically with naturalization applications and delay. See U.S. v. Fausto, 484 U.S. 439, 448-49 (1988) (general grants of jurisdiction cannot be relied upon in the face of a specific statute that confers and conditions jurisdiction); Danilov, 370 F. Supp. 2d at 445 (finding APA inapplicable to claim that naturalization adjudication delayed in light of 8 U.S.C. § 1447(b)). Accordingly, the APA is not available to plaintiffs.

In addition, a grant of naturalization is discretionary, as "[n]o alien has the slightest right to naturalization unless all the statutory rights are complied with." U.S. v. Ginsberg, 243 U.S. 472, 474 (1917). "[American citizenship] is, appropriately, a goal that is not easily attained; the path is often long and arduous." Laryea v. United States, 300 F. Supp. 2d 404, 405 (E.D. Va. 2004). Any doubts concerning the alien's naturalization

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[14] Strictly speaking, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., does not, itself, grant subject matter jurisdiction in any controversy. See Califano v. Sanders, 430 U.S. 99, 107-08 (1977). Rather, 28 U.S.C.A. § 1331 serves as the jurisdictional basis for federal courts "to review agency action." Id. at 105.

application are resolved against the applicant and in favor of the government. See INS v. Pangilinan, 486 U.S. 875, 876 (1988). Here, although plaintiffs have fulfilled many of the requirements for naturalization, the issue of good moral character remains, pending resolution of the inquiries into plaintiffs' backgrounds. As a result, there is no discrete ministerial action, but rather the discretionary determination of whether plaintiffs have satisfied the good moral conduct portion of the naturalization prerequisites.

In any event, plaintiffs' legal arguments under APA § 706 also must fail because any delays in adjudication are not "agency action unlawfully withheld or unreasonably delayed". Many courts have refused to grant relief under the APA, even when naturalization or other immigration applications were pending for significant time periods. See Saleh v. Ridge, 367 F. Supp. 2d 508, 513 (S.D.N.Y. 2005) (finding 5-year delay not in violation of APA in part in light of volume of applications); Espin v. Gantner, 381 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (over 3-year delay not unreasonable because of government's limited resources and substantial caseload); Alkenani v. Barrows 356 F. Supp. 2d. 652, 656-57 (N.D. Tex. 2005) (no unreasonable delay found in naturalization context because of need to wait for completion of FBI investigation).

Plaintiffs assert, however, that 8 U.S.C. § 1447(b), which references a 120-day time period after interview, provides a clear

deadline for USCIS to meet, and therefore that failure to adjudicate an application within that time frame means that action has been "unlawfully withheld" under the APA. Pl. Mem. at 22. Plaintiffs also claim, that, at the least, the statute forms a guide by which to judge reasonableness. Pl. Mem. at 25. Plaintiffs are incorrect. Rather, much like 28 U.S.C. § 2675, the statute merely provides a jurisdictional basis through which an individual can secure judicial review, but does not speak to any issues of a mandatory adjudicatory time period or reasonableness. Moreover, USCIS is acting reasonably, in that it has adjudicated over 100,000 applications to date in 2006, processing most applications in a timely fashion, and has established a procedure to expedite cases where an applicant indicates a need, by filing a lawsuit, showing a potential loss of benefits or for other compelling reasons. MacPherson Decl. at ¶ 4-5; Gantner Decl. at ¶ 24. And, as shown, this system is clearly working.

Finally, given that Congress has precluded adjudication until the FBI name checks are complete, Pub. L. 105-119, 111 Stat. 2448, Tit. I (Nov. 26, 1997), it is clear that USCIS is not unlawfully withholding adjudication of the application or acting unreasonably in failing to adjudicate the application. Alkenani, 356 F. Supp. 2d at 657 (not unreasonable for USCIS to await results of the name check).

As for the FBI, as explained previously, the backlog of name checks applies to only a small number of the overall applications for naturalization (less than 10 percent). Cannon Decl. at ¶ 14. Over 90 percent of all USCIS requests for FBI background checks are completed within 60 days; to date in 2006, the FBI has completed over 1.3 million of such requests. Supp. Cannon Decl. at ¶ 36. Delays in the system occur for many legitimate reasons. Id. at ¶¶ 20-26. In addition, defendants must use limited resources to complete the name checks required, not only for plaintiffs, but also for other naturalization applicants and for other agencies. Cannon Decl. at ¶ 4 (name checks are performed for "Federal agencies, congressional committees, the Federal judiciary, friendly foreign police and intelligence agencies, and state and local criminal justice agencies"). Because background checks are required in a broader range of circumstances post-9/11, a resource strain has been placed on defendants. "[W]here resource allocation is the source of delay, courts have declined to expedite action because of the impact of competing priorities." Liberty Fund, Inc. v. Chao, 394 F. Supp. 2d 105, 117 (D.D.C. 2005). Even with a statutory deadline, which is not the case here, moving some individuals to the front of the queue has not been authorized by the courts because granting such relief for one group would simply move that group ahead of others who had also been waiting, resulting in no net gain in processing. See In re Barr Lab., 930

F.2d 72, 75 (D.C. Cir. 1991); Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1101 (D.C. Cir. 2003).

Plaintiffs argue that when Congress sets a specific deadline by which an agency must comply, that the agency's failure to adhere to the deadline constitutes action "unlawfully withheld" or "unreasonably delayed".[15] Pl. Mem. at 22-23 (citing Forest Guardians v. Babbit, 164 F.3d 1261 (10th Cir. 1998)). Forest Guardians, however, is inapposite. As a threshold matter, here, unlike in Forest Guardians, there is no statutory deadline that an agency must meet. Rather, as stated, there is a statute which gives a district court jurisdiction under certain circumstances to address unadjudicated naturalization applications. Moreover, and most important, in this case, there is no statute that requires the FBI to complete its investigation by any time period. Thus, APA § 706(1) is not available to plaintiffs.

b. Defendants Have Not Unreasonably Delayed Action on Plaintiffs' Applications.

Similarly, plaintiffs' allegations that defendants' actions violate 5 U.S.C. § 555(b) also fail. 5 U.S.C. § 555(b) provides that, [w]ith due regard for the convenience and necessities of the parties or their representatives and within a reasonable time, each

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[15] Plaintiffs also refer to 8 U.S.C. § 1571, which provides that it is the "sense" of Congress that immigration benefit applications be completed within 6 months of filing, in support of the claim that defendants have unreasonably delayed adjudication of their naturalization applications. Of course, such non-binding language has no legal effect.

agency should proceed to conclude a matter presented to it." However, contrary to plaintiffs' pleadings, the existence of administrative delays does not mean that such delays are unreasonable. "[T]he reasonableness of such delays must be judged in light of the resources that Congress has supplied to the agency for the exercise of its functions, as well as the impact of the delays on the applicants interests." Fraga v. Smith, 607 F. Supp. 517, 521 (D. Or. 1985) (citing Wright v. Califano, 587 F.2d 345, 353 (7th Cir. 1978)). "The passage of time alone is rarely enough to justify a court's intervention in the administrative process." Id.

Moreover, the courts have been cautioned against "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee, 435 U.S. at 525. Here, where "there are no allegations of bad faith, a dilatory attitude, or a lack of evenhandedness on the part of the agenc[ies], the reasonableness of the delays in terms of the legislatively imposed 'reasonable dispatch' duty must be judged in light of the resources that Congress has supplied, as well as the impact of the delays on the applicants' interests." Wright, 587 F.2d at 353. The complexity of agency investigations, as well as the extent that the individual applicants contributed to delays, also enter into the court's deliberations. Saleh, 367 F. Supp. 2d at 512. An agency's good faith efforts to address delays militate

against a finding of unreasonableness. See Wright, 587 F.2d at 345.

As also stated, a number of factors contribute to the backlog. Supp. Cannon Decl. at ¶¶ 20-26. As a threshold matter, to date, the FBI has completed over 1.3 million USCIS name checks in fiscal year 2006, and the backlog applies to only those name check requests that end up in Dissemination (10% of the total number of requests received). Supp. Cannon Decl. at ¶¶ 14, 36. The FBI continues to address the backlog of background checks and have generally been processing the backlog on a first-in, first-out basis. Cannon Decl. at ¶¶ 18-19. Under such circumstances, courts have been reluctant to find that such a process violates the undue delay standard. Liberty Fund, 394 F. Supp. 2d at 116-17 (denying such a claim against the Department of Labor for backlog processing of employer applications for permanent labor certifications on behalf of aliens). Further, the FBI has been diligently working to ameliorate the problem, despite resource constraints. See Supp. Cannon Decl. at ¶¶ 19-32. The background check delays are not the result of a refusal to complete the investigation; rather, individuals must wait their turn in line while the request works its way through the process. Supp. Cannon Decl. At ¶¶ 23-25. However, further highlighting the reasonableness of the process is the fact that when a request is made by USCIS to expedite the process, the request is accommodated. Id.

Finally, any requirement that defendant FBI process plaintiffs' cases within a particular time limit will have the unfortunate side effect of slowing the processing for other applicants nationwide who are also awaiting final action in the Dissemination stage of the FBI process. It may also divert resources from processing in important and critical terrorism related investigations.

As for defendant USCIS, USCIS is not acting unreasonably, because they have adjudicated over 100,000 cases this year alone, but cannot adjudicate applications prior to completion of the FBI name check. Moreover, as shown, USCIS will request expedited name check processing upon a showing of need, by filing a lawsuit, showing a potential loss of benefits or for other compelling reasons. MacPherson Decl. at ¶ 4. Further, not all of the plaintiffs' cases remain unadjudicated because of the FBI name check backlog. While the time required to complete the FBI name check is the primary reason that some of the plaintiffs' cases have not been adjudicated, a myriad of reasons exist as to why other cases remain pending final adjudication, including fraud investigations and pending evidence requests. Gantner Decl. at ¶ 29; MacPherson Decl. at ¶ 3. Moreover, plaintiffs have not shown that USCIS will refuse to adjudicate the applications once the information gathering phase, the examination, is complete. See Saleh, 367 F. Supp. 2d at 513.

Ultimately, without an individual hearing, evaluating the particular facts of each case, including the length of the delay, plaintiffs cannot possibly make out a claim on these cases. For that matter, without an individual hearing, they cannot make out a claim on any of their claims, including those relating to delays because of the name check process, much less establish the higher standard for the issuance of a mandatory permanent injunction. Accordingly, plaintiffs fail to establish that they are entitled to the relief sought, whether under 8 U.S.C. § 1447(b) or under the APA.

II. The Motion for Class Certification

Plaintiffs request that the following class be certified:

> All persons residing in Kings, Nassau, Queens, Richmond, and Suffolk counties in New York state, who have properly submitted or will properly submit applications to be naturalized as U.S. Citizens whose naturalization applications are not adjudicated within one hundred and twenty days after the date of initial examinations.

Complaint, ¶ 23.

A party seeking class certification must prove that the proposed class meets the four requirements of Federal Rule of Civil Procedure 23(a): (1) the class is so numerous that the joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. In re Visa Check/Master Money

Antitrust Litig. 280 F.3d 124, 133 (2d Cir. 2001). In addition, the party seeking class certification must show that the proposed class action falls within one of the types of class actions maintainable under Rule 23(b). For the proposed class to be certified, plaintiffs must satisfy all of these requirements. Marisol A. v. Guiliani, 126 F.3d 372, 375-76 (2d Cir. 1997).

In evaluating whether class certification is appropriate, the Supreme Court has held that a court must make a "rigorous analysis" to determine if the requirements of Rule 23 have been met. Gen Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982). The party seeking class certification bears the burden of establishing the requirements of Rule 23. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 614 (1997). Finally, the determination of whether an action can be maintained as a class action, and particularly whether a class action is the superior method of resolving the controversy, is one which is peculiarly within the discretion of the trial judge. Becker v. Shenley Indus., 557 F.2d 346, 348 (2d Cir. 1977).

For the reasons set forth above, it is neither necessary nor appropriate to certify a class in this matter. Indeed, Congress has established a mechanism to deal with delays in the naturalization process, 8 U.S.C. § 1447(b), which, as evidenced by the number of cases already adjudicated, is readily available to plaintiffs for adjudication of their cases. Gantner Decl. at

¶¶ 28-29. In this regard, certifying a class would be as inappropriate as certifying a class of individuals whose administrative tort claims have not been processed within 6 months. In both instances, here under 8 U.S.C. § 1447(b), and in a tort case under 28 U.S.C. § 2675, the method for remedying the delay, is specifically provided for by statute, and the decision on whether to sue is an individual one and thus should be left up to the individual.[16]

Second, and consistent with 8 U.S.C. § 1447(b), classwide relief is inappropriate in this case. As reflected by the courts adjudicating cases under the statute, the statute calls for an individual hearing to determine what action a court will follow with regard to each naturalization applicant, based on the particular facts of that case. Accordingly, classwide relief is inappropriate. See Coughlin, 131 F.3d 1451 (joinder inappropriate in adjudicating action based on delay as each case requires individualized attention by the Court).

Third, while there are some common issues of law and fact, ultimately, as set forth in the Cannon and Gantner declarations, the nature of the wait for final adjudication depends on the facts of each individual case. Indeed, the wait could be because of the backlog, or because of the need for further evidence, or because of

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[16] Moreover, USCIS will no longer conduct an interview prior to the completion of the background checks, making this class unnecessary for the future. Gantner Decl. at ¶ 25.

a fraud investigation, or for any number of reasons. Even if the wait had been solely because of the backlog, the case could still remain with the FBI because of an ongoing FBI investigation, or with the USCIS for further investigation or processing. Finally, the length of the wait will vary in each case; a 121-day wait is different from a three-year wait. Indeed, at the time this lawsuit was instituted, name checks for approximately 40 of the referenced plaintiffs were complete, and the applications were in various stages of the process. MacPherson Decl. at ¶ 3.

That diverse reasons exist for the "delays" is amply shown by two cases brought by plaintiffs' counsel, Kurkin v. Gonzales, 05-3641(NGG), and Kurkina v. Gonzales, 05-3640(JG). Both of these cases were brought under 8 U.S.C. § 1447(b) and both individuals cleared the FBI name check. However, in the case of plaintiff Kurkin, a warrant for his arrest has been issued by a foreign country and the subsequent investigation has prevented adjudication of the application. In the case of plaintiff Kurkina, an issue has arisen as to whether she was lawfully admitted to the United States as a lawful permanent resident, and that issue is being investigated.

Ultimately, "[what] constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." Saleh, 367 F. Supp. 2d at 512. Accordingly, where individual issues predominate over the common

ones, class action relief is not appropriate. See Continental Orthopedic Appliances v. Health Ins. Plan of Greater New York, 198 F.R.D. 41, 47-48 (E.D.N.Y. 2000); Coughlin, 131 F. 3d at 1351 (no common questions of law or fact regarding claims of delay, as what constitutes delay in one case may not be in another).

Plaintiffs also cannot show that their claims are typical and that they are adequate representatives of the class they purport to represent. See Fed. R. Civ. P. 23(a) (3) and (4). A showing of typicality and adequate representation requires named plaintiffs to demonstrate that their claims and the class claims are interrelated and that the interests of the class members will be fairly and adequately protected in the class members' absence. Falcon, 457 U.S. at 158 n.13. Moreover, plaintiffs must demonstrate that they do not have interests that are antagonistic to those of the class. See Achem Products, Inc., 521 U.S. at 625-26.

First, plaintiffs for the most part, appear to raise harms relating to SSI benefits. See Order to Show Cause, affidavits. There is no reason to believe that these harms are typical of the class at large. Indeed, most naturalization applicants are under 65. MacPherson Decl. at ¶ 5. Moreover, there is already a system in place to handle these types of emergency situations. Id. at ¶ 4.

Additionally, plaintiffs are not typical of the class they seek to represent, in that they comprise a group who wishes to sue

the government. As evidenced by the limited number of lawsuits brought in this district, most naturalization applicants in plaintiffs' position do not wish to sue the government over their naturalization applications and therefore plaintiffs' claims are not typical of the class that they wish to represent. In this regard, neither are they adequate representatives in that their action is antagonistic to the general wishes of the class they seek to represent. Indeed, most naturalization applicants would have little interest in beginning their relationship as a citizen of this country by suing it, and this prospective has real effects in all aspects of representing the putative plaintiff class, including the settlement of this action.

As a result, plaintiffs have failed to demonstrate that they meet all of the required elements for class certification under Rule 23(a).

Finally, Plaintiffs have also failed to demonstrate that the proposed class is maintainable under one of the subsections of Rule 23(b). Here, Plaintiffs assert that their class is maintainable under subsection (b)(2), which applies if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2); In re Visa Check/Master Money Antitrust Litig., 280 F.3d at 146. Plaintiffs assert that

defendants have failed to act by failing to take action on their naturalization applications within 120 days of the interview and within a reasonable time. Defendants contend, however, that they have not "refused" to act. In fact, they have taken various steps to adjudicate plaintiffs' applications, and, in fact, have adjudicated applications. Accordingly, as plaintiffs fail to demonstrate that they meet the additional requirements of Rule 23(b), the Court should deny class certification.

CONCLUSION

For the reasons set forth above, plaintiffs' Complaint should be dismissed for lack of jurisdiction in part and for failure to state a claim upon which relief may be granted in part, and plaintiffs' motion for class certification should be denied.

Dated: Brooklyn, New York
September 1, 2006

Respectfully submitted,

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AE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOHAMED ABBAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 06 C 4553
	)	
ALBERTO R. GONZALES, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

This Court has just received by random assignment this action in which each of 11 plaintiffs, all asserting that they are lawful permanent residents of the United States whose applications for naturalization have been pending for extended periods of time, seek immediate naturalization. Although it thus seems likely that the several claims may present one or more common questions of law, and although it is possible that common questions of fact may be involved as well, it does not appear that plaintiffs' rights to relief "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" within the meaning of Fed. R. Civ. P. ("Rule") 20(a):

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.[1]

[1] [Footnote by this Court] It is of course obvious that the individual claims here do not fit under the compulsory

What that means is that each of the plaintiffs, although he advances a claim similar to the others, ought to have brought his own lawsuit. If after such individual filings the plaintiffs with higher-numbered cases believe that they may qualify for reassignment of those cases to this Court's calendar on grounds of relatedness under this District Court's LR 40.4, they may of course file motions seeking such treatment--not at all a guaranteed matter, for the hurdle of LR 40.4(b)(4)(an issue on which the present Complaint is not sufficiently informative) would have to be overcome.

Accordingly plaintiffs' counsel is granted until September 5, 2006 to elect which plaintiff is to remain in the case and, having done so, to dismiss the other plaintiffs without prejudice. In the meantime this Court is contemporaneously issuing its customary initial scheduling order and is also bringing this action to the attention of the Assistant United States Attorney who handles such immigration and naturalization matter.

Milton I. Shadur
Senior United States District Judge

Date: August 24, 2006

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joinder rubric of Rule 19.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANJAY GUPTA,	§	
	§	
Plaintiff,	§	
VS.	§	MISCELLANEOUS NO. H-06-0349
	§	
MICHAEL CHERTOFF, *et al*,	§	
	§	
Defendant.	§	

ORDER FOR REMAND

Before the Court is the petitioner, Sanjay Gupta's, petition for a hearing on his naturalization application pursuant to 8 U.S.C. § 1447(b). After review of the application, and before issues are joined, the Court determines that the case should *sua sponte* be remanded to the Director, U. S. Citizenship and Immigration Service.

The petitioner's application was filed, according to pleadings, on or about March 22, 2005. Since that time, the petitioner has completed an interview. At the conclusion of the interview, the plaintiff was informed that the sole impediment to approval was an FBI or G-325 name check. The plaintiff was told that the name Sanjay Gupta had not cleared.

Title 8 U.S.C. § 1447(b) permits a petitioner under § 1446 to seek examination of his application by a district court on the end of an 120-day period after an examination where the application has not been approved or denied. Thus, the petitioner's application is properly before the Court in respect to § 1446. However, a district court lacks jurisdiction under 1447(b) to accept such a petition where the 120-day period has not been triggered. *See United States v. Ginsberg* , 243 U.S. 472, 475 (1917).

In the case at bar, the mandatory national security FBI name check process has not been completed. Hence, exhaustion of the administrative process has not been completed and the 120-day period has not been triggered. It is, therefore,

Ordered that the case is REMANDED to the United States Citizenship and Immigration Service, pursuant to FRCP, Rule 12(b)(1) and § 1447(b).

SIGNED and ENTERED this 24th day of August, 2006.

Kenneth M. Hoyt
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Sanjay GUPTA,
Plaintiff,

v.

Michael **CHERTOFF**
Secretary of Department
of Homeland Security,

Alberto GONZALES,
United States Attorney General,
and

Sharon HUDSON,
District Director - U.S.
Citizenship & Immigration Services,

Defendants

Civil Action No. MC-06-349

A 76-428-339

PLAINTIFF'S ORIGINAL COMPLAINT
FOR WRIT IN THE NATURE OF MANDAMUS, AND/OR
FOR HEARING ON APPLICATION FOR NATURALIZATION

COMES NOW, Sanjay GUPTA, Plaintiff in the above-styled case, and for cause of action would show unto the Court the following:

1. This action is brought against the Defendants to compel action on an application for naturalization properly filed by the Plaintiff. The petition and application were filed with and remain within the jurisdiction of the Defendants, who have improperly withheld action on said application to the detriment of the Plaintiff.

PARTIES

2. Plaintiff, Sanjay GUPTA, is a 33 year old native and citizen of India. He was granted status as a lawful permanent resident ("LPR") of the United States on February 23, 2000. He applied for United States citizenship by filing an application for naturalization on December 9, 2004 with the Houston, Texas district office of the U.S. Bureau of Citizenship and Immigration Services. He currently lives at 9200 Westheimer Road,#204, Houston, Texas 77063.

3. Defendant Michael CHERTOFF is the Secretary of the Department of Homeland Security, and this action is brought against him in his official capacity. Effective March 1, 2003, the Department of Homeland Security assumed responsibility for the functions of the agency formerly known as the "Immigration and Naturalization Service." The Secretary of the Department of Homeland Security ("DHS") is now vested with "[a]ll authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws." 8 C.F.R. §2.1(a).

4. Defendant Alberto GONZALES is the Attorney General of the United States, and this action is brought against him in his official capacity. The Federal Bureau of Investigation ("FBI"), which is housed within the Department of Justice and subject to the authority of the Attorney General, is responsible for certain background checks required for naturalization.

5. Defendant Sharon HUDSON is the Director of the Houston, Texas district office of the U.S. Citizenship and Immigration Services ("CIS"), a bureau within the Department of Homeland

Security responsible for accepting and adjudicating applications for naturalization, and is generally delegated by the Secretary of the DHS with supervisory authority over all operations of the CIS within their district. 8 C.F.R. §§1.1(o), 2.1. As will be shown, Defendant Sharon HUDSON is the official with whom Plaintiff's application for naturalization was properly filed and remains pending.

JURISDICTION

6. Jurisdiction in this case is proper under 28 U.S.C. §1331 because the application for United States citizenship is a "federal question." Further, jurisdiction exists under 28 U.S.C. §1361 because the Plaintiff seeks relief in the form of mandamus to compel an agent or agents of the United States government to perform a duty owed to Plaintiff. The requested relief is further authorized under 5 U.S.C. §706(1), which empowers the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," and 28 U.S.C. §2201. Relief is requested pursuant to all of the said statutes.

7. More specifically, jurisdiction also clearly exists pursuant to §336(b) of the Immigration and Naturalization Act, 8 U.S.C. §1447(b), which provides jurisdiction for this Court to conduct a naturalization hearing "[i]f there is a failure to make a determination...before the end of the 120-day period after the date on which the examination is conducted. . . ." INA §336(b), 8 U.S.C. §1447(b). As will be shown, Plaintiff's application for naturalization has remained pending far beyond the 120 days following his statutory examination, and all attempts to secure a decision have proven futile.

VENUE

8. Venue is proper in this Court, pursuant to 28 U.S.C. §1391(e), in that this is an action against officers and agencies of the United States in their official capacities, and is brought in the district were a Defendant resides and where a substantial part of the events giving rise to Plaintiff's claim occurred. Specifically, Plaintiff's naturalization application for citizenship was properly filed with, and to Plaintiff's knowledge, remains pending with the Houston, Texas CIS District Director, a defendant herein.

FACTS

9. Mr. GUPTA applied to become a United States citizen under 8 U.S.C. §1427(a)(1) by filing Form N–400 with the USCIS on December 9, 2004. Pursuant to the background checks required for naturalization, he appeared as scheduled and submitted his fingerprints to the USCIS on or about February 8, 2005. Plaintiff was then interviewed for naturalization on March 22, 2005 by Officer Walter Skinner. At the conclusion of the interview, he was advised by the examining officer that he had passed the required tests of proficiency in English, U.S. history and government. *See* Exhibit A. However, Plaintiff was advised that a decision could not yet be made on his application for naturalization because the necessary FBI background clearance check was still pending.

10. After several months without any notice, Plaintiff requested through his attorney that a case status inquiry be sent. On June 22, 2005, Plaintiff's counsel at the time submitted an inquiry to the Houston USCIS district office. *See* Exhibit B. After no response was received,

Plaintiff's counsel sent a second inquiry on January 2, 2006, over six (6) months later (and over a year from the time of the initial application). *Id.* On January 11, 2006, Plaintiff's counsel received a reply stating, "Sanjay Gupta's case is pending due to Security Clearances." *Id.* This reply also included a copy of "A Note To Our Applicants Regarding National Security Checks" from District Director Sharon Hudson stating that "it is not unusual for the checks to take well over six months." *Id.* On April 4, 2006, Plaintiff's counsel again sent an inquiry requesting an update on the status of security check. *Id.* Despite the fact that the security check had been pending well over a year, no response was provided to Plaintiff's counsel. Finally, on June 14, 2006, Plaintiff himself sent a letter to his interviewing officer, Walter Skinner, inquiring about the status of the background checks. *Id.* No response has been received to date by Plaintiff. Plaintiff has exhausted his administrative remedies as formal requests and inquiries to the agency have not been effective.

CAUSE OF ACTION

11. Plaintiff's application for naturalization has now remained unadjudicated for over one and a half years. Defendants have sufficient information to determine Mr. Gupta's eligibility pursuant to the applicable requirements. To date, his application remains unadjudicated.

12. Plaintiff's application for naturalization has remained pending for over one year and eight months since its initial filing in December 2004, over 18 months since Plaintiff submitted his fingerprints for the required clearances in February 2005, and over 16 months since his interview and compliance with all the legal eligibility requirements for naturalization were

met in March 2005. This amount of time is extremely excessive, and is far beyond normal processing times for a naturalization application in the Houston USCIS district. Despite numerous attempts to obtain a decision following the interview, Defendants have failed to complete the processing of the naturalization application.

13. As a result of Defendants' unreasonable delays, Plaintiff has been unable to register to vote in elections, and has been otherwise denied the various benefits of United States citizenship that are often taken for granted.

14. Defendants' refusal to act in this case is, as a matter of law, arbitrary and not in accordance with the law. Defendants have willfully and unreasonably delayed and refused to adjudicate Plaintiff's application for well over 18 months, thereby depriving Plaintiff of the right to a decision on his immigration status, as well as the peace of mind to which Plaintiff is entitled.

15. The Defendants, by unlawfully withholding or unreasonably delaying action on Plaintiff's application and by their failure to carry out the adjudicative functions delegated to them by law with respect to his case, are in clear violation of the Administrative Procedures Act, codified at 5 U.S.C. §706(1).

16. Alternatively, Plaintiff is entitled pursuant to §336 of the Immigration and Nationality Act to seek a hearing in the United States district court if a determination on an application for naturalization is not made within 120 days following the examination, and the U.S. district court has jurisdiction and may either determine the matter or remand the matter along with appropriate instructions to the USCIS to determine the matter. INA §336, 8 U.S.C. §1447.

Defendants have clearly not made a determination within the allowable time-frame, thereby creating the stated cause of action seeking a determination on the application.

17. The Defendants' failure to act on Plaintiff's application for naturalization is not substantially justified, and has resulted in his being forced to retain the services of an attorney to pursue the instant action. Accordingly, Plaintiff is entitled to attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d).

PRAYER

WHEREFORE, PREMISES CONSIDERED, in light of the arguments and authorities noted herein, Plaintiff Sanjay GUPTA respectfully requests that Defendants be cited to appear herein and that, upon due consideration, this Court will enter an order:

(a) Compelling Defendants and those acting under them to immediately perform their legal duty to complete all remaining processes of Plaintiff's application for naturalization, including processing Plaintiff's fingerprints and issuing the Plaintiff his certificate of citizenship;

(b) Declaring that there are no just grounds to suspend issuance of all appropriate documents to Plaintiff;

(c) In the alternative, scheduling a hearing before the Court on Plaintiff's naturalization application pursuant to 8 U.S.C. §1447(b); and

(d) Granting attorneys' fees and costs of court to Plaintiff pursuant to the Equal Access to Justice Act.

Plaintiff further prays for any such other and further relief to which he may be entitled at law or in equity as justice may require.

Respectfully submitted,

QUAN, BURDETTE & PEREZ, P.C.

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COUNSEL FOR PLAINTIFF

LIST OF ATTACHMENTS

Exhibit	*Description of Exhibit*
A	Form N–652 "Naturalization Interview Results," dated 3/22/2005
B	Status Inquiries/Responses since March 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LINDA TWUMASI CAMPBELL,	§	
	§	
Plaintiff,	§	
VS.	§	MISCELLANEOUS NO. H-06-0339
	§	
SHARON HUDSON, *et al*,	§	
	§	
Defendant.	§	

ORDER FOR REMAND

Before the Court is the petitioner, Linda Twumasi Campbell's, petition for a hearing on her naturalization application pursuant to 8 U.S.C. § 1447(b). After review of the application, and before issues are joined, the Court determines that the case should *sua sponte* be remanded to the Director, U. S. Citizenship and Immigration Service.

The petitioner's application was filed, according to pleadings, on or about May 8, 2003. Since that time, the petitioner has completed an interview. At the conclusion of the interview, the plaintiff was informed that the sole impediment to approval was an FBI or G-325 name check. The plaintiff was told that the name Linda Twumasi Campbell had not cleared.

Title 8 U.S.C. § 1447(b) permits a petitioner under § 1446 to seek examination of her application by a district court on the end of an 120-day period after an examination where the application has not been approved or denied. Thus, the petitioner's application is properly before the Court in respect to § 1446. However, a district court lacks jurisdiction under 1447(b) to accept such a petition where the 120-day period has not been triggered. *See United States v. Ginsberg*, 243 U.S. 472, 475 (1917).

In the case at bar, the mandatory national security FBI name check process has not been completed. Hence, exhaustion of the administrative process has not been completed and the 120-day period has not been triggered. It is, therefore,

Ordered that the case is REMANDED to the United States Citizenship and Immigration Service, pursuant to FRCP, Rule 12(b)(1) and § 1447(b).

SIGNED and ENTERED this 23rd day of August, 2006.

Kenneth M. Hoyt
United States District Judge

U.S. Department of Justice
Immigration and Naturalization Service

HQISD70

Office of the Executive Associate Commissioner

425 J Street NW
Washington, DC 20536

NOV 13 2002

MEMO RANDUM FOR DISTRIBUTION LIST

FROM: Johnny N. Williams
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Responsibilities of Adjudicators

Over the past several years we have instituted processes to identify law enforcement interest in persons who apply for immigration benefits. The purpose of this memorandum is to reiterate and stress the importance of these processes and to refine, these processes to ensure that benefits are not granted to ineligible applicants. The instructions in this memorandum apply to the adjudication of all applications and petitions for benefits and to all officers who adjudicate those applications and petitions.

District Directors and Service Center Directors must take steps to ensure that all employees assigned to adjudications responsibilities have received a copy of this memorandum. Supervisors should take immediate action to explain the contents of this memorandum to all employees assigned to the adjudication of applications and petitions for benefits. A record bearing the signature of each employee must be maintained.

General Requirements

There is substantial information available to our adjudicators. This includes a system of national checks such as electronic fingerprinting, automated background checks, etc. It remains, however, the responsibility of each and every officer to determine eligibility for a benefit. In arriving at that determination officers are required to obtain and review any and all information

provided through national or local background checks. It also is a responsibility of adjudicators to review the full contents of the A-file or petition for any potentially disqualifying information or evidence that such information may exist.

1. Officers reviewing the results of IBIS checks must determine whether the file contains aliases and must initiate further checks of IBIS if aliases are present in the file.
2. if, in response to a name check, the FBI indicates to the INS that a record may possibly exist (referred to in Service guidance as "IP" or "indices popular") the application may not be decided until the adjudicator obtains and reviews the information or receives a specific determination from the FBI that the record does not relate to the applicant. The disposition of the IP response must be documented in the file.

Adjudicating applications and petitions from a Temporary A-file

Extra care must be taken in adjudicating applications and petitions from a Temporary A-file. Applications that are adjudicated from a Temporary A-file must undergo all the normally required background checks, and must include the following additional steps. These additional requirements amplify the current guidelines contained in the N-400 NQP, and create new guidelines for other adjudications.

1. The Central Index System (CIS) printout must be reviewed to determine if records exist in other INS systems. If so, the adjudicator must obtain, review, and attach to the file that information prior to adjudicating the application.
2. If background checks are negative (no record), this fact and the data checks that were made/reviewed must be noted on a processing sheet that is attached to the file. A supervisory adjudications officer must review and approve the adjudication of that application on the temporary A-file.
3. If background checks are positive (a record or possible record exists), this fact and the data checks that were made must be recorded on the processing sheet. In any instance where a check is positive the information must be obtained, resolved and made a part of the record. In addition, the adjudication may not proceed until the Assistant District Director for Adjudications, or the Assistant Service Center Director, or the Officer in Charge having jurisdiction over the adjudication has reviewed and approved the decision. This authority may not be delegated.
4. Because special precautions must be taken in adjudicating applications on a Temporary A-file, and to permit supervisors adequate time to review records, no same-day oath ceremony may take place if the adjudication involves a Temporary A-file. The Assistant Director for Adjudications, or the Assistant Service Center Director, or the Officer in Charge may waive this requirement in appropriate cases. Such waivers shall be in writing and placed in the file.

DISTRIBUTION LIST

Regional Directors
District Directors
Service Center Directors
Officers in Charge
Acting Director, Office of International Affairs
Director, Immigration Officer Academy EAC,
Office of Policy and Planning
General Counsel
DEAC, Immigration Services Division

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

April 05, 2004

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFITS CENTER DIRECTOR
FRAUD DETECTION AND NATIONAL SECURITY DIRECTOR
OFFICE OF REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTOR

From: William R. Yates
Associate Director for Operations

Re: Closing of Cases with Pending Law Enforcement Checks

Citizenship and Immigration Services (CIS) conducts law enforcement checks on all pending applications and petitions for two purposes—to enhance public safety by initiating appropriate law enforcement action, in those cases that warrant it, and to obtain information that may be relevant to the adjudication of the application. It is important that CIS continues to ensure both purposes are met in all cases.

This memorandum supercedes the Johnny Williams Memorandum of November 13, 2002, Responsibilities of Adjudicators, as it relates to FBI name checks, and any other similar instructions.

Effective with this memorandum, applications warranting denial may be adjudicated prior to obtaining the final results of all required law enforcement checks. Offices denying an application, without the results from the law enforcement checks, will be responsible for monitoring the final results when they become available, and taking appropriate action if public safety concerns are identified. Offices will be required to develop a post-audit system to receive, review and forward referrals to the appropriate law enforcement entity after an application has been denied. This post-audit system is also required for all cases where an NTA has been issued in accordance with the William R. Yates Memorandum of March 2, 2004, entitled Security Check Requirements Preceding Notice to Appear Issuance.

If preferred, offices may continue to withhold final adjudication until all required law enforcement check results are received. Offices continuing to follow the guidance outlined in the above-referenced Johnny Williams Memorandum relating to FBI name checks will complete final adjudication and law enforcement referrals at the same time, with no post-audit system required.

If you have any questions regarding this memorandum, please contact Patricia Nolin, Field Operations, at 202/514-2982.

U.S. Department of Homeland Security
Street Address
City, State Zip

U.S. Citizenship and Immigration Services

August 4, 2004

Interoffice Memorandum

To: REGIONAL DIRECTORS
DISTRICT DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFITS CENTER DIRECTOR

From: William R. Yates
Associate Director of Operations

Re: Required Security Checks

This memorandum updates and explains existing policy regarding required security checks. Field Offices are reminded that prior to issuing documentation evidencing or resulting from a grant of lawful permanent resident (LPR) status or asylum, including an I-551 Alien Documentation Identification Technology Stamp (ADIT), an asylee-endorsed Arrival/Departure Record (I-94), or an Employment Authorization Document (EAD) based upon 8 CFR 274a.12(a)(5), all of the security checks listed below must be completed. These checks must be accomplished in all circumstances, whether the final grant of LPR status or asylum has been given by U.S. Citizenship and Immigration Service (USCIS) or the Executive Office for Immigration Review (EOIR) as a form of relief from removal. In those instances when USCIS is unsure whether the appropriate Security Checks have been conducted, the following checks must be completed by USCIS.

Interagency Border Inspection System (IBIS). IBIS is a multi-agency effort started by the Immigration and Naturalization Service, Department of Agriculture, US Customs Service, and the Department of State. Twenty-four individual agencies have contributed information to this lookout system. An IBIS query also includes a check of the National Crime Information Center (NCIC), managed by the Federal Bureau of Investigation (FBI) for federal, state, and local law enforcement entities to share data concerning wanted persons, criminals, persons of interest, and routine legal administrative matters.

Ten-print fingerprint. This check is completed through the taking of fingerprints at the local Application Support Center (ASC). The Criminal Justice Information Services (CJIS) Division of the FBI conducts Fingerprint Background Checks through the submission of fingerprints and a search of the FBI's Criminal History Master File. The Fingerprint Background Check will include only information that has been submitted to the FBI by local, state, federal, or international criminal justice agencies. In addition to the fingerprint search, a name search only is conducted against the NCIC Gang and Terrorist Organization File.

FBI Name Check. This check is conducted against two separate databases. A Main Index search matches the applicant's name against the name of people who are, or have been, the subject of an investigation; a

Reference search matches the applicant's name against names that appear in investigative reports, even though s/he may not be the subject of the investigation.

Following the attacks of September 11, 2001, law enforcement and intelligence agencies have increased information sharing. An IBIS check performed today provides information from numerous enforcement and intelligence agencies. As a result of these efforts, it is no longer necessary for USCIS to conduct a separate Central Intelligence Agency (CIA) Check. Effective immediately field offices may discontinue the practice of waiting 60 days for a response from the CIA.

If you have any questions regarding this memorandum, please contact Patricia Nolin, Field Operations, at 202/514-2982.