

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DANIEL TARTAKOVSKY, MOHAMMAD
11 HASHIM NASEEM, ZAHRA JAMSHIDI,
12 MEHDI HORMOZAN,

13 Plaintiffs,

14 vs.

15 PAUL M. PIERRE, District Director, U.S.
16 Department of Homeland Security, Bureau of
Citizenship and Immigration Services, San
Diego District, et al.

17 Defendants.

Case No.: 07cv1667-BEN (CAB)

ORDER REMANDING
ADJUDICATION OF
NATURALIZATION
APPLICATIONS

[Dkt. No. 9]

18 **I. INTRODUCTION**

19 Plaintiffs filed claims under 8 U.S.C. § 1447(b) requesting this Court adjudicate and grant
20 Plaintiffs' naturalization applications. Plaintiffs additionally included claims for violations of the
21 Administrative Procedures Act ("APA") and Due Process. Defendants move to remand or dismiss
22 all claims. Plaintiffs oppose the motion. For the reasons that follow, Plaintiffs' claims for
23 adjudication of their naturalization applications are **REMANDED** and Plaintiffs' additional claims
24 are **DISMISSED** without prejudice.

25 **II. BACKGROUND**

26 Plaintiffs, Daniel Tartakovsky, native of Russia, Mohammad Hashim Naseem, native of
27 Iraq, Zahra Jamshidi, native of Iran, and Mehdi Hormozan, native of Iran ("Plaintiffs"), are
28 permanent residents of the United States awaiting naturalization to United States citizenship.

1 Plaintiffs claim Defendants, Paul M. Pierre, District Director, U.S. Department of Homeland
 2 Security, Bureau of Citizenship and Immigration Services, San Diego District, Emilo T. Gonzalez,
 3 Director, U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services
 4 (“USCIS”), Micheal Chertoff, Secretary of Homeland Security, Robert S. Mueller III, Director of
 5 the Federal Bureau of Investigation (“FBI”), Michael Mukasey, Attorney General of the United
 6 States (collectively “Defendants”) have failed to timely adjudicate Plaintiffs’ naturalization
 7 applications. Each Plaintiff has filed an application for naturalization and each received an initial
 8 interview from USCIS. Each Plaintiff’s interview occurred before completion of a full criminal
 9 background check required under 8 C.F.R. § 335.2 which includes a “FBI name check.” Each
 10 Plaintiff has claimed some delay in processing their applications to adjudication.

11 On August 22, 2007, Plaintiffs filed this action pursuant to 8 U.S.C. § 1447(b). Plaintiffs
 12 seek to be naturalized by this Court and allege violations of the APA and Due Process. On
 13 October 29, 2007, Defendants filed a motion to remand or dismiss Plaintiffs’ claims.

14 **III. DISCUSSION**

15 **A. Determination of Naturalization Under § 1447(b)**

16 **1. Subject Matter Jurisdiction**

17 This Court has subject matter jurisdiction of Plaintiffs’ claim for naturalization under 8
 18 U.S.C. § 1447(b). A lawful permanent resident alien is only eligible for naturalization as a U.S.
 19 citizen if he or she: (1) satisfies a five-year statutory residency requirement; (2) has resided
 20 continuously in the United States from the date of his or her application to the time of his or her
 21 admission as a citizen; and (3) is of good moral character. 8 U.S.C § 1427. If USCIS fails to
 22 make a determination on an applicant’s naturalization within 120 days of that applicant’s
 23 “examination,” the applicant may seek a hearing on the matter from the United States District
 24 Court in the district in which the applicant resides. 8 U.S.C. 1447(b). The statute specifically
 25 grants the District Court jurisdiction to “determine the matter or remand the matter, with
 26 appropriate instructions” to USCIS for determination. *Id.*

27 Plaintiffs’ Complaint alleges that each Plaintiff’s examination was completed more than
 28 120 days ago and none of the Plaintiffs’ applications for naturalization have been granted or

1 denied. Under Ninth Circuit precedent, the 120-day period under § 1447(b) begins to run with the
2 initial interview of the applicant. *U.S. v. Hovsepien*, 359 F.3d 1144, 1161 (9th Cir. 2004).
3 Plaintiff Tartakovsky's examination was conducted on June 4, 2003. Plaintiff Naseem's
4 examination was conducted on March 15, 2005. Plaintiff Jamshidi's examination was conducted
5 on February 4, 2004. Plaintiff Hormozan's examination was conducted on September 4, 2003.

6 The passage of 120 days since the "date on which the examination [was] conducted" allows
7 Plaintiffs to apply to this Court for a hearing on the matter, giving this Court jurisdiction over
8 Plaintiffs' claims for adjudication of naturalization.

9 **2. Determination of Application for Naturalization - § 1447(b)**

10 USCIS is responsible for investigating applicants for naturalization. 8 U.S.C. § 1446. The
11 naturalization decision rests in part on the results of an investigation by the FBI. In 1997,
12 Congress prohibited USCIS from using any appropriation to adjudicate an application for
13 naturalization until USCIS received confirmation of completion of an FBI investigation of the
14 applicant. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies
15 Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2448-49 (1997).

16 In addition to this restriction, under 8 C.F.R. § 335.2, USCIS cannot adjudicate an
17 applicant's application until the agency receives confirmation from the FBI that a full criminal
18 background check has been completed. The in-person initial examination of the applicant required
19 for naturalization should only occur after USCIS receives confirmation of completion of the full
20 criminal background check on the applicant. 8 C.F.R. § 335.2. This limitation precludes
21 naturalization by USCIS prior to completion of the FBI's full criminal background check. In the
22 case of the four named Plaintiffs, USCIS conducted the applicant's interviews before completion
23 of the FBI background checks.

24 **3. District Court's Options**

25 In filing this action, Plaintiffs have invoked the exclusive jurisdiction of this Court for
26 adjudication of their naturalization. *Hovsepien*, 359 F.3d at 1164 (finding the courts have
27 exclusive jurisdiction over naturalization applications properly before the court under § 1447(b)).
28 USCIS may not make a decision on Plaintiffs' naturalization applications while this Court retains

jurisdiction. This is the case, even if the FBI has completed the name checks on all Plaintiffs, as Defendants have asserted in their motion. This Court has two options. The Court may conduct a hearing and adjudicate Plaintiffs' naturalization applications on its own, or the Court may remand the matter to USCIS with instructions, thus returning jurisdiction to USCIS. 8 U.S.C. § 1447(b); *Hovsepian*, 359 F.3d at 1164.

4. Remanding to USCIS

This Court remands adjudication of Plaintiffs' naturalization to USCIS with instructions. The requirements within statutes and regulations to complete investigation and a full criminal background check before decision on an application for naturalization evidences the importance of this check to any proper determination of naturalization. This Court declines to make a determination of naturalization absent completion of the full criminal background check and required investigation.

Even with investigation and a background check completed, USCIS is in a much better position to interpret those results for determination of naturalization. *See Khelifa v. Chertoff*, 843-44 (E.D. Mich. 2006) (finding the USCIS has the expertise and experience to make an appropriate assessment). Generally, Courts should remand cases for agency determination of matters that "statutes place primarily in agency hands." *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002). While this Court may be empowered to make this decision under § 1447(b), it is a decision that generally falls to USCIS.

USCIS is in a better position because it brings its expertise to the matter. *Ventura*, 537 U.S. at 16 (discussing how an "agency can bring its expertise to bear upon the matter" and its role evaluating the evidence). The statutory and regulatory schemes established to process citizenship applications evidence the deference accorded the executive branch in immigration matters. 8 U.S.C. § 1446; 8 U.S.C. § 1421. USCIS has greater expertise than this Court in identifying problems in the background checks and resolving any problems identified.

There may be circumstances which justify this Court making a naturalization determination under § 1447(b). For instance, if the agency's conduct becomes extreme or abusive. But here, the Complaint alleges USCIS has failed to grant or deny Plaintiffs' applications for naturalization due

1 to delays in processing background checks. This Court's jurisdiction is invoked under § 1447(b)
2 because USCIS conducted the Plaintiffs' initial interviews before completion of the full criminal
3 background check, resulting in passage of 120 days while awaiting completion of those checks. 8
4 C.F.R. 335.2(b). This conduct does not raise serious concerns about the agency's ability to
5 complete the investigation process or grant or deny Plaintiffs' applications, nor does it suggest the
6 agency is acting in an extreme or abusive manner.

7 Under 8 U.S.C. § 1447(b), if the adjudication decision is remanded to USCIS, the order is
8 made with "appropriate instructions." The Court will not impose a definitive time line for the
9 completion of a full criminal background check or a decision on Plaintiffs' applications for
10 naturalization. While the Court notes that a significant amount of time has passed in processing
11 Plaintiffs' applications, this appears to be a result of USCIS awaiting completion of the full
12 criminal background checks, a required part of the naturalization determination.

13 USCIS is in the best position to determine when an application or background check
14 warrants expedited treatment to achieve completion on a particular date. Ordering USCIS to
15 complete background checks or make decisions by a date certain does not take into account
16 practical considerations. This Court is not in a position to evaluate these four applications in
17 relation to others and deem a particular Plaintiff a priority in the completion of background checks
18 over other needed background checks.

19 The Court is not insensitive to the position of the Plaintiffs who have patiently waited
20 through this lengthy process to become naturalized citizens. USCIS shall, as it must under statutes
21 and regulations, await completion of the FBI's full criminal background check. But, the Court
22 instructs USCIS to complete Plaintiffs' naturalization applications without unreasonable delay.

23 Therefore, Plaintiffs' claims for naturalization adjudication are **REMANDED** to USCIS
24 with instruction to complete processing of Plaintiffs' naturalization applications without
25 unreasonable delay.

26 **B. Administrative Procedures Act - Unreasonable Delay**

27 Having remanded Plaintiffs' claims under 8 U.S.C. 1447(b), Plaintiffs' additional claims
28 must invoke the subject matter jurisdiction of this Court. Plaintiffs' seek declaratory and

1 injunctive relief for unreasonable delay in adjudicating Plaintiffs' naturalization applications.
2 Plaintiff asserts this delay is in violation of 8 U.S.C. § 1446(d) and 8 C.F.R. § 335 which, in turn,
3 violates the APA, 5 U.S.C. § 555. Plaintiffs request this court compel USCIS to act under 5
4 U.S.C. § 706(1), hold the agency's conduct unlawful, and set it aside under 5 U.S.C. § 706(2).

5 Federal courts are courts of limited jurisdiction. *Kokken v. Guardian Life Ins. Co. of*
6 *America*, 511 U.S. 375, 377 (1994). The APA alone does not provide subject matter jurisdiction
7 to this Court. *California v. Sanders*, 430 U.S. 99, 107 (1977). Jurisdiction is only present under
8 the APA when combined with 28 U.S.C. § 1331, providing that "the district courts shall have
9 jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United
10 States."

11 Plaintiffs are only entitled to the jurisdiction of this Court under the APA if they allege
12 they are: (1) suffering a wrong because of the agency's failure to act; (2) there is no other adequate
13 remedy in a court; (3) the action Plaintiffs seek to compel is discrete; and (4) the action Plaintiffs
14 seek to compel is legally required. Agencies "shall proceed to conclude a matter presented to it."
15 5 U.S.C. 555(b). A Plaintiff "suffering legal wrong because of agency action, or adversely
16 affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to
17 judicial relief." 5 U.S.C. § 702; *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62
18 (2004). Final agency actions are subject to judicial review only if "there is no other adequate
19 remedy in a court." 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 161-62 (1997). Agency
20 action includes an agency's failure to act which is "the omission of an action without formally
21 rejecting a request." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). A
22 court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §
23 706(1); *Norton*, 542 U.S. at 62.. "A claim under § 706(1) can proceed only where a plaintiff
24 asserts that an agency failed to take a discrete agency action that it is required to take." *Norton*,
25 542 U.S. at 64.

26 Plaintiffs' Complaint includes an allegation that they suffered a wrong because USCIS
27 failed to adjudicate their naturalization applications and a discrete act. However, Plaintiffs have
28 an adequate remedy in this Court and the action they seek to compel is not currently legally

1 required. Therefore, their claim for relief under the APA lacks jurisdiction.

2 **1. Adequate Legal Remedy**

3 First, Plaintiffs have an adequate remedy in this Court under 8 U.S.C. § 1447(b). As
 4 previously discussed, this Court has jurisdiction to adjudicate or remand Plaintiffs' naturalization
 5 applications, the remedy available through 8 U.S.C. § 1447(b). In opposing the motion, Plaintiffs
 6 have argued that because they allege a systemic problem in USCIS processing, § 1447(b) is
 7 inadequate. However, the review process outlined in § 1447(b) provides a remedy to each
 8 Plaintiff in this case and any applicant facing the same situation as the Plaintiffs in this case. Any
 9 applicant can seek relief from the District Court in the form of review and potentially adjudication
 10 of naturalization under § 1447(b) if the facts of that Plaintiff's case warrant such action. Plaintiffs
 11 accurately note that resolution of all individual claims brought under § 1447(b) may be time
 12 consuming for the courts, but that is the process outlined in the statutory scheme and it is adequate
 13 to resolve the claims of these Plaintiffs and any other applicants facing the same situation. 8
 14 U.S.C. § 1447(b).

15 **2. Legally Required Agency Action**

16 Second, the action Plaintiffs seek to compel is not currently legally required. USCIS is
 17 required to grant or deny an applicant's petition for naturalization, but not until the statutory
 18 requirements to reach that decision have been met.

19 The time lines specified within the statutory scheme are only implicated when certain
 20 criteria have been met. The criteria implicating a time line for USCIS have not been met. USCIS
 21 is required to make "a decision to grant or deny the application . . . at the time of the initial
 22 examination or within 120-days after the date of the initial examination of the applicant for
 23 naturalization *under* § 335.2." 8 C.F.R. 335.3 (emphasis added). However, the section referenced
 24 in § 335.3 with this mandate, 8 C.F.R. § 335.2, has not been satisfied. The examination specified
 25 under § 335.2, that triggers the 120-day time line, should only occur following "a definitive
 26 response from the Federal Bureau of Investigation that a full criminal background check of an
 27 applicant has been completed." 8 C.F.R. 335.2. Additionally, Pub. L. No. 105-119, 111 Stat.
 28 2448-49 specifies that USCIS cannot process an application for naturalization until USCIS

1 receives confirmation of completion of an FBI investigation of the applicant. These provisions
2 indicate that a full criminal background investigation is a prerequisite for USCIS to conduct the
3 applicants' interviews **and** to grant or deny applicants' applications for naturalization. That
4 USCIS conducted Plaintiffs' interviews before completion of a full criminal background
5 investigation, does not negate the necessity of a complete full criminal background check before
6 USCIS is required to grant or deny the applications. Until the full criminal background checks are
7 complete, USCIS is not legally required to grant or deny Plaintiffs' applications for naturalization.

8 The only other time lines potentially implicated are found in 8 U.S.C. 1447(b) and 8 U.S.C.
9 § 1571. These time lines also do not compel a legally required action. As previously discussed,
10 the 120-day time frame dictated in 8 U.S.C. § 1447(b) provides this Court with jurisdiction to take
11 appropriate action on Plaintiffs' applications. That time line does not legally require any action by
12 USCIS, rather it is a mechanism for frustrated applicants to seek the review of the District Court.

13 Congress' expression of their desire that immigration applications be processed in 180 days
14 is not a mandatory time line sufficient to legally require agency action. In 2000, Congress
15 expressed "its sense that the processing of an immigration benefit application should be completed
16 not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571(b). Under Ninth
17 Circuit precedent, provisions using the language "should" and "sense of the Congress" yield the
18 conclusion that the "provision is precatory" and does not bestow a right. *Yang v. Cal. Dep't of*
19 *Soc. Servs.*, 183 F.3d 953, 958 (9th Cir. 1999). The Court went on to note that the heading
20 "Congressional Statement" describes the provision as a "*policy* statement that does not create
21 positive, enforceable law." *Id.* at 959 (emphasis added). Similarly, 8 U.S.C. § 1571 falls under the
22 heading "Policy," further indicating it is not an enforceable time line, but rather the desire of the
23 Congress to improve the speed of immigration services.

24 In conclusion, Plaintiffs have an adequate legal remedy in this Court under 8 U.S.C.
25 1447(b) and neither USCIS nor the FBI are required to take action because Plaintiffs' full criminal
26 background checks are not complete. In the absence of these elements, this Court does not have
27 jurisdiction to review Plaintiffs' claim under the APA. This claim is **DISMISSED** for lack of
28 subject matter jurisdiction.

C. Administrative Procedures Act - Notice and Comment

Plaintiffs claim Defendants' use of the "FBI name check" constitutes a substantive rule that was implemented without giving notice and providing a period for public comment in violation of 5 U.S.C. § 553. Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Defendants assert the notice and comment procedures are not required because inclusion of the "FBI name check" is only an interpretive rule.

A court may dismiss a case for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under this standard, the Court accepts as true the factual allegations of Plaintiffs' Complaint. *Church of Scientology of California v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). Plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

Federal agencies are generally required to provide notice of proposed rules and consider comments about those rules. 5 U.S.C. § 553. However, "interpretive" rules are exempt from this process. 5 U.S.C. 553(b)(3)(A); *Gunderson v. Hood*, 268 F.3d 1149, 1155 (9th Cir. 2001). Interpretive rules generally clarify or explain, but cannot be inconsistent with or amend an existing rule. *Gunderson*, 268 F.3d at 1155. The question before this Court is whether the "FBI name check" is an interpretive rule, encompassed by existing regulations and exempt from the notice and comment procedures.

USCIS is required to investigate applicants for naturalization. The "minimum" investigation shall include "a review of all pertinent records." 8 C.F.R. § 335.1. The "full criminal background check" includes the applicants "administrative" record, in addition to the applicant's "criminal" record. 8 C.F.R. § 335.2.

The requirement that USCIS investigate, at a minimum, all pertinent records and the separate listing of criminal and administrative records indicates that the "FBI name check" is an interpretive rule. The search is both consistent with and encompassed by the mandates of these regulations. An FBI record on an applicant or connected to an applicant is surely "pertinent" to investigation of that applicant. Even if these records were not pertinent, the regulation only requires review of pertinent records at a "minimum," suggesting that even broader investigations

are acceptable under the regulation. Additionally, the inclusion of “administrative” records in addition to “criminal” records within 8 C.F.R. § 335.2 indicates more than the applicant’s specific criminal history is encompassed in the full criminal background check mandated by the regulation.

Use of the “FBI name check” as part of the required “full criminal background check” is an interpretation of the investigations required under 8 C.F.R. § 335.1 & 335.2 and is consistent with these regulations. Plaintiffs’ claim for violation of the notice and comment procedures of the APA is **DISMISSED** for failure to state a claim.

D. Due Process

Plaintiffs claim Defendants have violated Plaintiffs’ rights under the Due Process Clause of the Fifth Amendment by depriving them of their liberty interest in adjudication of their naturalization applications. Although not stated in the Complaint, Plaintiffs are presumed to assert a procedural due process claim based on Plaintiffs’ use of the *Valdez* rule articulated by the Ninth Circuit in reviewing a procedural due process claim. Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Specifically, Defendants assert that Plaintiffs do not have a protected interest.

Plaintiffs must have a protected liberty or property interest to sustain a due process claim. The Fifth Amendment’s Due Process Clause prohibits the deprivation of “life, liberty, or property, without due process of law.” U.S. Const. amend. V. A statute or regulation only creates the liberty interest necessary for a due process violation if it meets two requirements. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1044 (9th Cir. 2002). “First, the law must set forth ‘substantive predicates’ to govern official decisionmaking and, second, it must contain ‘explicitly mandatory language’ i.e., a specific directive to the decisionmaker that *mandates* a particular outcome if the substantive predicates have been met.” *Id* (emphasis added).

As previously discussed, with regard to Plaintiffs’ claim of unreasonable delay under the APA, Plaintiffs do not have a legal right to the adjudication of their naturalization applications at this point. The 120-day time line under 8 U.S.C. 1447(b) invokes the right to review by this Court. Plaintiffs have exercised this right. Other time lines within the regulations are not of a mandatory nature as required for a due process violation because those time lines are dependent on

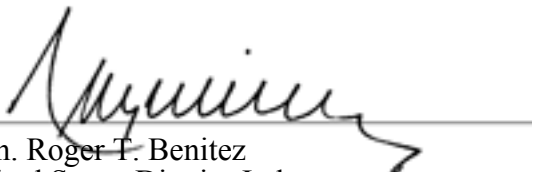
1 completion of Plaintiffs' full criminal background checks. The required protected interest
2 necessary to sustain a due process claim is not present. Plaintiffs' Due Process Claim is
3 **DISMISSED** for failure to state a claim.

4 **IV. CONCLUSION**

5 Therefore, for the reasons discussed above, determination of Plaintiffs' application for
6 naturalization is **REMANDED** to USCIS, with instructions that USCIS adjudicate Plaintiffs'
7 naturalization without unreasonable delay. Plaintiffs' claim of unreasonable delay in violation of
8 the APA is **DISMISSED WITHOUT PREJUDICE**. Plaintiffs' claim for violation of the notice
9 and comment provisions of the APA is **DISMISSED WITHOUT PREJUDICE**. Plaintiffs'
10 claim for violation of due process is **DISMISSED WITHOUT PREJUDICE**.

11
12 **IT IS SO ORDERED.**

13
14 DATED: March 11, 2008

15 
16 Hon. Roger T. Benitez
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28