Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSHANAK ROSHANDEL; VAFA GHAZI-MOGHADDAM; HAWO AHMED; and LIN HUANG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary, United States Department of Homeland Security; EMILIO GONZALEZ, Director, United States Citizenship and Immigration Services; ANN CORSANO, Director, District 20, United States Citizenship and Immigration Services; JULIA HARRISON, Director, Seattle Field Office, United States Citizenship and Immigration Services; Michael B. Mukasey, Attorney General, United States Department of Justice[1]; ROBERT MUELLER III, Director, Federal Bureau of lnvestigation; and the UNITED STATES OF AMERICA,

Defendants.

Case No. C07-1739-MJP

GOVERNMENT'S MOTION TO DISMISS AND/OR REMAND TO USCIS

Noted on motion calendar: February 22, 2007

[1] In accordance with Federal Rule of Civil Procedure 25(d), Attorney General Michael B. Mukasey is hereby substituted for Peter D. Keisler as Defendant in this Case.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

TABLE OF CONTENTS

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

TABLE OF AUTHORITIES

CASES

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

DOCKETED CASES

STATUTES

Immigration and Nationality Act of 1952; as amended:

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

Federal Rules of Procedure

Homeland Security Act

Immigration Act of 1990

Intelligence Reform and Terrorism Prevention Act

REGULATIONS

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

OTHER STATUTES

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

COME NOW the Defendants ("Government") by and through their attorneys, Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, Rebecca S. Cohen, Assistant United States Attorney for said District, and Nancy N. Safavi, Trial Attorney for the U.S. Department of Justice, Civil Division, Office of Immigration Litigation; and hereby respectfully move this Court for an order remanding Plaintiffs' N-400 Petitions for Naturalization to the United States Citizenship and Immigration Services ("USCIS") and dismissing Plaintiffs' remaining claims. This motion is supported by the declaration of Susan Walk ("Walk Decl.") submitted herewith, and the declaration of Michael Cannon ("Cannon Decl.") attached hereto as Exhibit A.

I. FACTS

Plaintiff Roshanak Roshandel, a citizen of Iran, filed an N-400 Petition for Naturalization with USCIS in March of 2004. *See* Petition, (Dkt. No. 1) at 2. USCIS conducted a naturalization interview of Roshandel in July of 2004. *Id.* Roshandel's application was not adjudicated at that time because Roshandel's background checks were not yet complete. *Id.* Plaintiff Vafa Ghazi-Moghaddam, a citizen of Iran, filed an N-400 Petition for Naturalization on March 15, 2004. *Id.* USCIS conducted a naturalization interview of Ghazi-Moghaddam in October of 2004. *Id.* Ghazi-Moghaddam's application was not adjudicated at that time because Ghazi-Moghaddam's background checks were not yet complete. *Id.* Plaintiff Hawo Ahmed, a citizen of Somalia, filed an N-400 Petition for Naturalization with USCIS in July of 2005. *Id.* at 3. USCIS conducted a naturalization interview of Ahmed in November of 2005. *Id.* Ahmed's application was not adjudicated at that time because Ahmed's background checks were not yet complete. *Id.* Plaintiff Lin Huang, a citizen of China, filed an N-400 Petition for Naturalization with USCIS in March of 2005. *Id.* USCIS conducted a naturalization interview of Huang in September of 2005. *Id.* Huang's application was not adjudicated at that time because Huang's background checks were not yet complete. *Id.*

On October 29, 2007, Plaintiffs filed the instant action under 8 U.S.C. § 1447(b),

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

asking the Court to grant Plaintiffs' applications for naturalization and naturalize them, or remand the matters, with appropriate instructions including a time schedule, to USCIS to determine the matter. Petition ¶¶ 3-4. Plaintiffs claim this Court has jurisdiction over their citizenship applications because USCIS had not adjudicated their applications within 120 days after their citizenship interviews. Petition ¶ 6 (Dkt. No. 1). Plaintiffs make this argument despite the fact that their required background checks were not complete at the time the case was filed.

Plaintiffs' FBI name checks were recently completed. Accordingly, USCIS is now prepared to adjudicate Plaintiffs' N-400 applications as soon as they are remanded to USCIS and the agency regains jurisdiction over them. *See* Walk Decl. ¶¶ 3-6.

II. STATUTORY FRAMEWORK AND BACKGROUND

A. Statutory Requirement to Conduct Background Investigations.

Plaintiffs are all lawful permanent residents of the United States who have applied to be naturalized as United States citizens. Petition ¶ 1. As part of the application review process, USCIS conducts background checks of each applicant. These background checks include: (a) a Federal Bureau of Investigation ("FBI") fingerprint check; (b) a search of the Interagency Border Inspection System ("IBIS"), which contains records information from more than twenty (20) federal law enforcement agencies; and (c) an FBI name check, which is run against FBI investigative databases containing information that is not necessarily revealed by the FBI's fingerprint check or IBIS. *See* Declaration of Michael Cannon, attached hereto as Exhibit A, at ¶ 5.

In all petitions or applications for immigration services or benefits, USCIS conducts security checks in order to enhance national security, public safety, and to ensure the integrity of the immigration process. In 1997, Congress mandated that the former INS "receiv[e] confirmation from the FBI that a full criminal background check has been completed, except for those excepted by regulation as of January 1, 1997," before adjudicating a naturalization application. Pub. L. No. 105-119, Title I, 111 Stat. 2448 (Nov. 26, 1997). Thus, before USCIS is permitted to adjudicate any naturalization

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

application, a full background investigation of the applicant must be completed.

Consistent with this congressional mandate, USCIS is required to thoroughly investigate the background of every applicant for citizenship in order to determine whether that applicant is eligible to be naturalized. *See* 8 U.S.C. § 1446(a), (b) (2007); *see also* 8 C.F.R. § 335.1 (2004). These regulations provide that:

> Subsequent to the filing of an application for naturalization, the Service shall conduct an investigation of the applicant. The investigation shall consist, at a minimum, of a review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and has been employed, or engaged in business, for at least the five years immediately preceding the filing of the application . . . .

8 C.F.R. § 335.1 (2004). The regulations also specify that citizenship applicants are to be interviewed only after a full background check has been completed. *See* 8 C.F.R. § 335.2(b) (2006). While Defendants acknowledge that the interviews for each of the named Plaintiffs preceded the completion of a full background check, the statute and USCIS regulations still require that the FBI criminal background check be completed before a naturalization application may be adjudicated. *See* Pub. L. No. 105-119, 11 Stat. 2448; 8 C.F.R. § 335.2(b).

A full and complete background check is part of the inquiry into whether an applicant possesses good moral character. *See* 8 U.S.C. § 1427(a)(3). The existence of a criminal background check is one of the primary means to appraise an alien's moral character. For example, an alien cannot establish good moral character if he or she was convicted of certain criminal offenses, including crimes involving moral turpitude. *See* 8 U.S.C. § 1101(f). Often, various law enforcement checks reveal significant derogatory information pertaining to applicants for immigration benefits, including applicants seeking naturalization, which result in the aliens being found ineligible for naturalization and other benefits. *See* 8 U.S.C. § 1101(f); Cannon Decl. ¶ 17.

At this time, FBI name checks have been completed for the naturalization applications of all of the named Plaintiffs. Cannon Decl. ¶¶ 41-44. USCIS cannot adjudicate Plaintiffs' applications for naturalization until USCIS has completed its investigations because USCIS must verify that each Plaintiff has established the good moral character requirement of

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

naturalization, that he or she is not statutorily barred from naturalization, and that he or she has not committed or been convicted of certain criminal offenses, including crimes involving moral turpitude, which would also bar naturalization.

B. Authority To Naturalize Aliens.

Until 1990, United States District Courts sat as naturalization courts and were vested with exclusive jurisdiction to review the qualifications of an applicant for naturalization and to naturalize aliens as citizens of the United States. *See* 8 U.S.C. §§ 1101(a)(24), 1421(a) (repealed 1990). The applicant submitted a preliminary naturalization application to the former Immigration and Naturalization Service ("INS"), which conducted a preliminary investigation of the applicant, and made a non-binding recommendation to the district court as to whether the application should be approved or denied. *See* 8 U.S.C. §§ 1445(b), 1446(b)&(d) (repealed 1990); 8 C.F.R. §§ 334.11, 335.11-335.13 (1990). The actual decision to approve or deny the naturalization application was vested solely with the federal court, which took jurisdiction based on a petition filed by the applicant and administered the oath of allegiance. *See* 8 U.S.C. §§ 1421, 1445, 1447, 1448 (repealed 1990). In 1990, Congress overhauled the naturalization process in favor of a one-tier administrative procedure. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 401, 104 Stat. 4978 ("IMMACT").

Under IMMACT, Congress transferred the power to naturalize from the district courts and vested the Attorney General – now the Secretary of the Department of Homeland Security ("DHS")[2] – with "sole authority to naturalize persons as citizens of the United States." *See* 8 U.S.C. § 1421(a). Under the administrative naturalization process, USCIS is responsible for adjudicating naturalization applications, including rendering a preliminary investigation of the applicant, interviewing and if necessary subpoenaing witnesses, conducting an examination, and making a determination as to whether to grant or deny the application. *See* 8 U.S.C.

[2] The transfer of the former INS's naturalization functions to the newly-created DHS included the transfer of the authority to naturalize from the Attorney General to the Secretary of DHS. *See* Homeland Security Act of 2002, Pub. L. No.107-296, § 1512(d), 116 Stat. 2135, 2310.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

§ 1446(a)-(c).[3]

Although vesting the primary naturalization authority with the Secretary of DHS, Congress did not completely eliminate district court jurisdiction over the naturalization application process. District courts may still administer the citizenship oath of allegiance, *see* 8 U.S.C. § 1421(b)(1), and have jurisdiction to review *de novo* applications for naturalization denied after full administrative review under 8 U.S.C. § 1447(a). *See* 8 U.S.C. § 1421(c).

Finally, under 8 U.S.C. § 1447(b), the provision at issue here, the applicant may apply to the appropriate district court for a hearing on the naturalization application if USCIS does not grant or deny the application by "the end of the 120-day period after the date on which the examination is conducted under such section." 8 U.S.C. § 1447(b). In such a case, the court "may either determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter." *Id.*

III. ARGUMENT

A. Plaintiffs' FBI Name Checks Are Complete; Therefore, The Court Should Remand Plaintiffs' First Cause Of Action Back To USCIS For Adjudication Under 8 U.S.C. § 1447(b).

1. The District Court Has Exclusive Jurisdiction.

This Court is in the jurisdiction of the Ninth Circuit Court of Appeals, which has indicated that once a plaintiff has filed a petition for a naturalization hearing under INA § 336(b), 8 U.S.C. § 1447(b), the District Court assumes exclusive jurisdiction over the naturalization application. *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004). Therefore, this Court's jurisdiction over Plaintiff's applications is exclusive, and USCIS cannot adjudicate the applications without an order of remand.

USCIS is prepared to adjudicate Plaintiffs' naturalization applications because their FBI name checks are now complete, and this Court should remand Plaintiffs' individual applications to USCIS for further processing in light of the need to review the results of the

---

[3] If USCIS initially denies a naturalization application, the applicant may seek administrative review of the denial by requesting a hearing before a supervisory immigration officer. 8 U.S.C. § 1447(a); 8 C.F.R. § 336.2(b).

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

background checks before they can be adjudicated. Under the holding of *Hovsepian*, USCIS cannot do so until the Court remands the applications. Accordingly, it is respectfully submitted that this Court should remand this Plaintiffs' N-400 applications to USCIS so that the agency can assume jurisdiction and, thereafter, adjudicate Plaintiffs' naturalization applications.

2. An Order Of Remand Is The Most Expeditious And Appropriate Means Of Resolving This Case.

Remanding this case to USCIS for adjudication is the simplest and most expeditious means of resolving Plaintiffs' claims for the following three reasons. First, there is nothing in 8 U.S.C. § 1447(b) that compels USCIS to adjudicate a naturalization petition within 120 days. Rather, when USCIS fails to do so, the district court may either determine the matter or "remand the matter, with appropriate instructions, to the Service to determine the matter." 8 U.S.C. § 1447(b); *see also Lecky v. Gonzales*, No. C07-0007, 2007 WL 1813644, *1 (N.D. Cal. June 22, 2007); *Deng v. Chertoff,* No. C 06-7697, 2007 WL 1501736, *1 (N.D. Cal. May 22, 2007); *El-Daour v. Chertoff*, 417 F. Supp. 2d 679, 681-83 (W.D. Pa. 2005). Thus, a remand to the agency to "determine the matter" is a means expressly provided for under the statute, and a remand is one of the forms of relief that Plaintiffs specifically requested in their Petition. *See* Petition ¶ 68 (Dkt. No. 1) (asking the Court to "remand proposed plaintiff class members' naturalization applications to CIS pursuant to 8 U.S.C. 1447(b) with instructions to render a decision on each proposed plaintiff class members' naturalization application within 90 days.").

Second, the Government respectfully submits that the Court should remand each named Plaintiff's naturalization application to USCIS in deference to the agency's expertise with respect to adjudicating the issues inherent in such applications. USCIS is in the best position to render a decision on Plaintiffs' applications because it is the designated agency responsible for and qualified to determine the issuance of immigration benefits. Even in cases in which background checks have been completed during the course of the litigation, many district courts have still allowed USCIS to adjudicate the applications for this reason. *See, e.g., Al Gazawi v. Gonzales, et al.,* W.D. Wash. Case No. C06-1696-RSM (October 18, 2007 Order of

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

Remand, at Dkt. No. 20) ("The Court agrees with defendants' alternative argument that USCIS, as the designated agency responsible for reviewing such applications, is in the best position to determine plaintiff's naturalization application."); *Karsch v. Chertoff*, 2007 WL 3228104 (W.D. Wash. 2007) (Case No. 07-0957-RSL) ("the agency is in the best position to render a decision on plaintiff's application because it is the designated agency responsible for determining the issuance of immigration benefits. A remand would serve the interests of judicial economy."); *see also Ibrahim v. Still*, 2007 WL 841790, *3 (N.D. Cal. Mar. 30, 2007) (discussing process of adjudicating such petitions); *Khan v. Chertoff*, 2006 U.S. Dist. LEXIS 48937, at *6 (D. Az. July 14, 2006); *Khelifa v. Chertoff*, 433 F. Supp. 2d 836, 845 (E.D. Mich. 2006). The Supreme Court has recognized that "judicial deference to the Executive Branch is especially appropriate in the immigration context." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). In this case, deference should result in the Court's remanding the N-400 applications and giving USCIS the opportunity to utilize its expertise.

Third, even if this Court were to review the merits of Plaintiffs' naturalization applications and issue decisions on them, it would not have the benefit of discovery by USCIS or a recommendation by USCIS. *See, e.g., Al Gazawi v. Gonzales, et al.,* W.D. Wash. Case No. C06-1696-RSM (October 18, 2007 Order of Remand, at Dkt. No. 20) ("It would be premature for this Court to decide whether plaintiff's application should be granted without any information before it, or a recommendation by the USCIS.").

Now that Plaintiffs' FBI name checks are complete, USCIS is prepared to adjudicate their citizenship applications within thirty days of remand. Should Plaintiffs be dissatisfied with the resulting USCIS decisions, they may individually return to the Court for a *de novo* determination, after first exhausting their administrative remedies through the review process. *See* 8 U.S.C. § 1421(c). In that event, the Court will have the benefit of a reasoned adjudication based upon a complete record, including the results of the required background investigations. In other words, the Court should permit USCIS to complete the required investigations to create records on which any review of its decisions, if necessary, could be based, and to adjudicate the individual Plaintiffs' applications. For the reasons discussed

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

above, it is respectfully submitted that a remand to USCIS for adjudication is the most appropriate manner in which to proceed, and thus the Government respectfully asks the Court to grant its Motion.[4]

B. Plaintiffs' Second Cause Of Action, Which Arises Under the Administrative Procedures Act, Must Be Dismissed Due To Plaintiffs' Failure To State A Claim For Which Relief Can Be Granted.

As the Court has jurisdiction under Section 1447(b), none of Plaintiffs' claims are amenable to resolution under the Administrative Procedures Act ("APA"), and Plaintiffs fail to state a claim for which relief may be granted with respect to their APA claims. The APA, by its terms, provides a right to judicial review of all "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, there is an adequate remedy at law under 8 U.S.C. § 1447(b). Even if the Court finds that Section 1447(b) is inapplicable or does not provide an adequate remedy, judicial review under the APA is unavailable because there is no legally required deadline for the completion of name checks or naturalization adjudications by the FBI or USCIS.[5]

---

[4] Plaintiffs have filed a motion for class certification that remains pending and is noted for consideration on February 22, 2008. Defendants will oppose that motion. If the Court denies class certification and does not remand the individual matters to USCIS for completion of the individual examinations and adjudication, the Court must hold individual hearings for each named Plaintiff. If the Court determines that such individual hearings are necessary, the Court should sever the individual plaintiffs under Fed. R. Civ. P. 21. *See Shamdeen, et al. v. Gonzales, et al.*, No. 07-0164-MJP (W.D. Wash.), Dkt. No. 11; *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997) (finding joinder inappropriate due to unique nature of each application). 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; and (3) whether prejudice to a substantial right would be avoided if severance was granted. *Id.* (finding severance appropriate where each Plaintiff suffered a different duration of alleged delay, there might have been numerous reasons for the alleged delay, where Plaintiffs did not allege that Defendants engaged in a policy of delay, and where undue delay in one case may not have been undue delay in another case.). Here, no substantial rights of the Plaintiffs would be prejudiced by severance. Like the claims in *Coughlin* and *Shamdeen*, Plaintiffs' claims do not arise out of the same transaction or occurrence. Rather, each application is filed separately and is independent from another. Moreover, the reasons for the time necessary to complete adjudication in one case may be different in another case, and therefore the claims do not involve common questions of law or fact. *Id.* Plaintiffs would not be prejudiced by severance, as they would continue to receive the individual hearing envisioned under 8 U.S.C. § 1447(b).

[5] To the extent that Plaintiffs claim jurisdiction on the basis of the Declaratory Judgment Act, 28 U.S.C. § 2201, that statute does not provide an independent basis for subject-matter jurisdiction; it only creates a particular kind of remedy available in actions where the district

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

1. Plaintiffs Cannot Seek Judicial Review Under The APA Because 8 U.S.C. § 1447(b) Is The Only Statute Under Which Such A Claim Can Be Asserted, And It Provides An Adequate Remedy.

Plaintiffs cannot prevail on their APA claim alleging that Defendants have unlawfully withheld or unreasonably delayed adjudication of their applications because 8 U.S.C. § 1447(b), which deals specifically with naturalization applications and the time necessary to complete adjudication, is the only statute under which such a claim can be asserted. *See United States 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). The statute provides that the applicant may apply to the appropriate district court for a hearing on the naturalization application if USCIS does not grant or deny the application by "the end of the 120-day period after the date on which the examination is conducted under such section." 8 U.S.C. § 1447(b). In such a case, the court "may either determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter." *Id*. Where Congress specifically provides for district court jurisdiction over naturalization applications 120-days after the completion of USCIS's examination, assertion of any other basis of jurisdiction contradicts Congressional intent.

---

court already has jurisdiction to entertain a suit. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671-72 (1950); *Jarrett v. Roser,* 426 F.2d 213, 216 (9th Cir. 1970). Thus, to be eligible for declaratory relief, Plaintiffs must first establish jurisdiction under an independent statute. *Skelly Oil Co.,* 339 U.S. at 671-672 As discussed above, Plaintiffs have failed to otherwise establish jurisdiction; accordingly, the Declaratory Judgment Act is not applicable.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

2. Plaintiffs Cannot Seek Judicial Review Under The APA Where Defendants' Actions Are Not Legally Required.

Where there is no legally required deadline for the completion of the adjudication, nor any specific requirements regarding the tracking of cases, this Court should dismiss Plaintiffs' unreasonable delay claim. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("SUWA"); *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006) (holding that "a 'failure to regulate' claim must be based upon a clearly imposed duty to take some discrete action.").

In *SUWA*, the Supreme Court examined, among other things, the "limits the APA places on judicial review of agency inaction." *SUWA*, 524 U.S. at 61. Discussing 5 U.S.C. § 706(1), the Court held that "the APA does not provide federal courts with oversight over the manner and pace of agency compliance with congressional mandates." *Id.* at 67. The Court also specifically noted that "a delay cannot be unreasonable with respect to action that is not required." *Id*. at 64, n.1; *see also San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885-86 (9th Cir. 2002) (finding there could be no "unreasonable delay" under the APA where EPA did not have a present statutory duty to act). The Court thus held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*[,]" and, further, that "[t]he limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law." *Id*. at 64-65.

Plaintiffs incorrectly rely on 8 U.S.C. §§ 1447(b) and 1571(b) as establishing deadlines for agency action. The time periods mentioned in those statutes are not expressed as commands to the agency, and neither statute creates a mandatory deadline. *See* 8 U.S.C. §§ 1447(b), 1571(b). Section 1447(b), for example, merely provides a jurisdictional basis through which an individual can secure district court review. Section 1571(b), by providing only the "sense" of Congress, provides no legally binding effect. *See Yang v. California Dep't of Social Serv's*, 183 F.3d 953, 961-62 (9th Cir. 1999) ("the sense of Congress provision amounts to no more than non-binding, legislative dicta"); *Monahan v. Dorchester Counseling Center, Inc*., 961 F.2d 987 (1st Cir. 1992) (holding "sense of Congress" language is clearly precatory

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

and creates no enforceable federal rights); *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.3d 903, 909 (3d Cir. 1990) (characterizing sense of Congress provision as persuasive appeal rather than mandatory preemption of state law). None of the relevant statutes and regulations mandate how Defendants should manage the complete criminal background check process nor the greater adjudicatory process for naturalization applications.

With specific regard to Defendant FBI, Plaintiffs have not, and indeed cannot, identify any statute that imposes a mandatory duty upon the FBI to conduct background investigations in relation to Plaintiffs' applications for naturalization, let alone to complete such investigations within any particular time frame. *See*, *e.g., Shalabi v. Gonzales*, 2006 WL 3032413, at *5 (E.D. Mo. Oct. 23, 2006) ("There is no statute or regulation which imposes a deadline for the FBI to complete a criminal background check."). In addition, the statute requiring that USCIS complete a criminal background check – which includes the name check – does not contain any specific time frame for the FBI's investigation regarding the requested name checks. *See* Pub. L. 105-119, Tit. I, 111 Stat. 2448 (Nov. 26, 1997); *see also Mustafa v. Pasquerell*, 2006 WL 488399 at *5 (W.D. Tex. 2006) (rejecting APA claim against USCIS to complete adjudication of immigration petition where "no statute or regulation specifies a time period within which USCIS must act").[6] Thus, no statutory or regulatory authority limits the FBI's discretion in how it completes a plaintiff's background check, let alone how much time the FBI should allow for thoroughly completing this important task. Moreover, as the FBI has completed the name checks of all Plaintiffs, their claims against the FBI are now moot. *See*

[6] Concerning the background investigation itself, independent of the time strictures, it is well established that the courts generally have no power to order the Executive to undertake a particular investigation absent some statutory provision conferring this authority. *See, e.g.*, *United States v. Ramos*, 933 F.2d 968, 971 n.1 (11th Cir. 1991) (refusing request to order investigation and holding that "[c]riminal investigations are an executive functions within the exclusive prerogative of the Attorney General's office") (citations omitted); *Walker v. Schmoke*, 962 F. Supp. 732, 733 (D. Md. 1997) (noting that "no federal appellate court, including the Supreme Court (and the appellate courts, not the trial courts, make legal policy) has recognized that there is a federally enforceable right for the victim to have criminal charges investigated at all, let alone with vigor or competence.")

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

Cannon Decl. ¶¶ 41-44.[7]

3. The FBI's Procedures Do Not Violate The APA.

Even if the Court found Plaintiffs' APA claim against the FBI amenable to resolution under the APA, the claim must fail because the time necessary to complete background checks is not unreasonable. *See Telecomm. Research Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). The backlog of name checks applies to a small number of the overall applications for naturalization (less than 10 percent). *See* Cannon Decl. ¶ 14. In addition, the FBI must use limited resources to complete the background checks required not only for plaintiffs, but also for other naturalization applicants and for other individuals. *See id.* ¶¶ 5, 25-26 (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 USCIS has requested background checks in a broader range of circumstances post-9/11, a resource strain has been placed on the FBI. "[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 in the face of a statutory deadline, 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). With limited resources,

---

[7] The extent of the FBI's discretion in conducting USCIS-requested name checks is underscored by recent legislation seeking to reduce the length of personnel-related background checks. *See, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 3001(g), 118 Stat. 3638 (2004) (requiring the FBI to complete name checks regarding hiring candidates within 60 days if practical to do so). Had it wished to do so, Congress could have imposed a duty upon the FBI to complete immigration name checks within a particular deadline, and could have subjected this process to judicial review. *Cf. Haig v. Agee*, 453 U.S. 280, 300 (1981) ("congressional acquiescence may sometimes be found from nothing more that silence in the face of an administrative policy.") (citing *Zemel v. Rusk*, 381 U.S. 1, 11 (1965)). *See also* Pub. L. No. 101-515, 104 Stat. 2101, 2112 (1990) (the FBI may establish and collect fees to process name checks for [certain non-criminal, non law enforcement and other purposes] but imposing no deadlines).

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

the FBI has prioritized the processing of name checks in a reasonable and entirely legal manner consistent with the resources at their disposal. *See Liberty Fund*, 394 F. Supp. 2d at 117; *In re Barr Lab*, 930 F.2d at 75; *Mashpee Wampanoag Tribal Council*, 336 F.3d at 1101. The nature and extent of the interests at stake here also weigh heavily in favor of denying Plaintiffs' request for a premature decision on their applications. Plaintiffs' interest in an expedited decision is minimal and does not implicate human health and welfare. Plaintiffs remain free to work and travel within the United States. On the other hand, the FBI has an important national security interest in ensuring thorough and accurate results for Plaintiffs' background checks.

The FBI continues to address the backlog of background checks and has generally been processing the backlog on a first-in, first-out basis. Cannon Decl.¶ 18. The time necessary to complete name checks varies for a number of legitimate reasons. *Id.* ¶ 26. 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). The FBI has also shown that the large majority of name checks have been processed in a relatively short time frame and that the FBI is faced with numerous competing priorities and limited resources in processing name checks. Under such circumstances, courts have been unwilling to find an APA violation.

4. USCIS's Procedures Do Not Violate The APA.

Even if the Court found a cause of action over Plaintiffs' APA claim against USCIS, the claim would have to be dismissed because USCIS's actions with regard to Plaintiffs' background checks are not unreasonable. USCIS continues to make efforts to complete the full criminal background checks necessary prior to any adjudication. *See Telecomm. Research Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). As previously noted, Congress has explicitly required that the FBI complete a full criminal background check before adjudication of a naturalization application can occur. 8 U.S.C. § 1446 note, Pub. L. No. 105-119, Title I, Nov. 26, 1997, 111 Stat. 2448. USCIS is nearing completion of the full criminal background checks of Plaintiffs.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

Therefore, Plaintiffs' Second Count fails to state a claim and should be dismissed because 8 U.S.C. § 1447(b) provides an adequate remedy, the actions for which Plaintiffs seek review are not final, there is no legally required deadline for the completion of name checks or naturalization adjudications, and the actions of Defendant agencies FBI and USCIS are ultimately reasonable.

C. USCIS's Longstanding Investigation Requirements Do Not Violate The APA's Notice-and-Comment Requirements.

In their third cause of action, Plaintiffs argue that Defendants violated the APA by enacting an internal rule in November of 2002, when the scope of the file search during the name check process was expanded to include both "references," and "main files," without giving the public notice or the opportunity for the public to comment. *See* Cannon Decl. ¶ 23. Contrary to Plaintiffs' assertions, the APA does not require administrative agencies to follow notice and comment procedures in all situations. Rather, 5 U.S.C. § 553(b)(3) specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from the requirement. Because the November 2002 internal rule was an interpretive rule, this Court should dismiss Count Three.

Ninth Circuit jurisprudence defines such interpretive rules as "hortatory and instructional," which "merely clarify or explain existing law or regulations." *Alcaraz v. Block*, 746 F.2d 593, 614 (9th Cir. 1984) (citing *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983)); *see also Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986) (superceded on other grounds). Because interpretative rules only "clarify or explain existing law," they are "not subject to the rigors of the APA," and do not require notice and comment. *Gunderson v. Hood*, 268 F.3d 1149, 1155 (9th Cir. 2001). The fact that an interpretative rule has some substantial impact does not make the rule subject to notice and comment. *Alcaraz*, 746 F.2d at 614 (9th Cir. 1984) (citing *Rivera v. Becerra*, 714 F.2d 887, 890 (9th Cir. 1983)).

Here, Defendants' November 2002 expansion of the scope of the files searched in response to a request for a name check is an action that is equivalent to an interpretative rule or agency procedure because the action only served to modify the scope of the "full criminal

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

background check." The actual requirement of the name check portion of the "full criminal background check" was unchanged.

The name check requirement itself is not new. The INS long considered police department checks and background investigation as part of the examination of naturalization applicants. *See* Administrative Naturalization, 56 Fed. Reg. 50,475 (Oct. 7, 1991) (codified at 8 C.F.R. § 335.1) (requiring that "the investigation shall consist, at a minimum, of a review of all pertinent records, police department checks, and a neighborhood investigation . . ."). In fact, the INS gave notice beginning in 1995 that the Form G-325, or Biographical Information Form, would be used to "check other agency records (FBI, CIA, etc.) on applications or petitions submitted by applicants for benefits under the [INA] . . .," including naturalization applications. *See* Information Collections Under Review, 60 Fed. Reg. 38,371 (July 26, 2005). Congress codified this policy into a statute in 1997 with the passage of 8 U.S.C. § 1446(a), which prohibited the use of Congressional appropriations to "complete adjudication of an application for naturalization," prior to receipt of confirmation from the FBI that a "full criminal background check has been completed." USCIS promulgated regulations based on this act of Congress through an interim final regulation, published March 17, 1998. *See* Fingerprinting Applicants and Petitioners for Immigration Benefits; Establishing a Fee for Fingerprinting by the Service; Requiring Completion of Criminal Background Checks Before Final Adjudication of Naturalization Applications, 63 Fed. Reg. 12,987 (March 17, 1998) (codified at 8 C.F.R. § 335.2(b)) (requiring completion of criminal background checks before examination). In November 2002, as a result of the terrorist attacks of September 11, 2001, the Defendants expanded the scope of the files searched in response to a name check request to encompass a broader range of information by accessing both "main files," and "references." Cannon Decl. ¶ 23.

As a result, Plaintiffs' assertion of a violation of the APA's notice and comment procedure has no basis in law, and Count Three should be dismissed.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

D. Plaintiffs' Fourth Cause of Action Must Be Dismissed, As Applicants Are Provided Notice of Remedies.

In their final cause of action, Plaintiffs contend that "[i[f a naturalization application is not granted at the time of the naturalization interview, CIS is required to inform the applicant of the remedies available under 8 U.S.C. 8 1447(b). *See* 8 U.S.C. § 1446(b) (CIS officer "shall, *at the examination,* inform the applicant of the remedies available to the applicant under section 1447 of this title" (emphasis added))." Plaintiffs further allege that Defendants failed to provide the requisite notice to members of the proposed notice subclass. Petition ¶ 81. Count Four should be dismissed because there is no greater judicial remedy or relief than that which Plaintiffs are already seeking, and USCIS complies with the statutory requirements, therefore making declaratory relief unwarranted. Specifically, USCIS issued a memorandum dated January 14, 2005, mandating that effective February 7, 2005, officers may only issue the new edition of USCIS Form N-652, which was revised on January 14, 2005. *See* Walk Decl., Ex. 1. The revised N-652 includes a notice at the bottom of the page, which satisfies the statutory requirement and states:

> NOTE: Please be advised that under section 336 of the Immigration and Nationality Act. you have the right to request a hearing before an immigration officer if your application is denied, or before the U.S. district court if USCIS had not made a determination on your application within 120 days of the date of your examination.

Walk Decl., Ex. 2. Because the revised N-652 clearly complies with the statute, there is no injunctive or declaratory relief available to Plaintiffs.

Plaintiffs Ahmed and Huang received copies of the revised N-652 forms at their interviews. Walk Decl., Exs. 11 & 13. Both Roshandel and Ghazi Moghaddam were interviewed prior to the issuance of the new version of the N-652, on July 22, 2004 and October 25, 2004, respectively. Thus, the previous N-652 forms provided to these two named Plaintiffs did not include the notice of available remedies. *See* Walk Decl., Exs. 9 & 10. Even though these two Plaintiffs did not receive the revised N-652, it does not mean that they were not provided any information regarding what to do if they had not received a decision from USCIS. Notably, Roshanak Roshandel did receive a notice during her interview, as she

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

received form 821, which states: "If you have not received a response after 120 days from the date of this notice, you may mail an inquiry to the following address: Immigration & Naturalization Service, P.O. Box 5208, El Monte, CA 91734. Please send a copy of this notice with your inquiry." *See* Walk Decl., Ex. 8. The statute does not require a description or requirement for a type of notice, but the statutory language merely states notice shall be provided. The agency is responsible for determining how the notice should be provided. The agency interprets the word "examination" to mean an ongoing process. *See Danilov v. Aguirre*, 370 F. Supp. 2d 441, 443 (E.D.Va. 2005) ("To begin with, § 1446(b) makes clear that an examination is not a single event, but instead is essentially a *process* the agency follows to gather information concerning the applicant."). Defendants acknowledge that this Court has rejected the agency's interpretation of the word "examination" since 2006. *See, e.g., Said v. Gonzales*, WL 2711765, *1(W.D.Wash., 2006) ("The Court declines to follow the reasoning of *Danilov* ... the word 'examination' in § 1447(b) refers to the date of the examination interview with a CIS officer, and not the entire 'examination process.'"). However, the agency did not view the examination of applicants as completed at the time of the initial interviews, and given the agency's interpretation, it cannot be expected to have provided a formal notice of remedies at any initial interviews prior to 2005. Simply because a formalized notice did not appear on the N-652 prior to 2005, it does not necessarily mean notice was not provided at all.

In any event, even if the agency should have provided the type of notice it provides now prior to 2005, the agency's action constitutes harmless error and the policy has now been corrected with the issuance of the revised N-652 form. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004.) ("[O]ur review for harmless error is more demanding of plaintiffs. Where the agency's error consisted of a failure to comply with regulations in a timely fashion, we have required plaintiffs to identify the prejudice they have suffered. Thus, when plaintiffs have "failed to identify any prejudice from the delay, no [judicial] action is warranted.").

Plaintiffs have the burden of showing of what injury they have suffered because USCIS did not systematically provide notice at the time of some of their initial interviews. Plaintiffs

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

can show no such injury. As lawful permanent residents, Plaintiffs have the ability to travel, work and enjoy a life in the United States. Any assertion that their cases would have been brought before the district court sooner but for the failure of notice, is not enough to meet their burden. Bringing their cases to the district court sooner does not necessarily mean that their naturalization applications would have been adjudicated sooner. Plaintiffs still would experience a wait, which is no different than what they were experiencing prior to judicial intervention. Thus, Plaintiffs fail to show a injury or any prospective relief that the Court could grant for Count Four.

E. Plaintiffs' Requests For Injunctive Relief Should Be Dismissed.

Plaintiffs' Request for Relief also seeks injunctive relief. However, an injunction is a "'harsh and drastic' discretionary remedy, never an absolute right." *Abend v. MCA, Inc.*, 863 F.2d 1465, 1478 (9th Cir. 1988). Federal judges are not obligated to issue an injunction for every violation of law. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 192 (2000). To qualify for injunctive relief, the Plaintiffs must demonstrate that they will sustain irreparable injury and that remedies at law are inadequate. *Walters v. Reno,* 143 F.3d 1032, 1048 (9th Cir. 1998) (citing *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). "In order to meet this standard, the plaintiffs must establish actual success on the merits, and that the balance of equities favors injunctive relief." *Id.; see also Amoco Prod. Co. v. Vill. Of Gambell, Alaska*, 480 U.S. 531, 542 (1987). Here, Plaintiffs have failed to establish any of the prerequisites for the issuance of a permanent injunction.

As a threshold matter, an adequate remedy at law already exists, as 8 U.S.C. § 1447(b) provides a remedy for those whose applications have been pending for over 120 days after completion of the naturalization examination. Moreover, this remedy at law, repeatedly and successfully used by plaintiffs throughout the United States, is readily available and accessible to others. Instructions on how to bring such actions are readily available on the internet (*i.e.*, American Immigration Law Foundation's website, http://www.ailf.org/lac/lac_pa_100605.pdf) and provide, with clear and concise detail, instructions on seeking relief.

Furthermore, no irreparable injury is proximately related to Defendants' actions because

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

"[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with . . . ." *United States v. Ginsburg*, 243 U.S. 472, 475 (1917); *see also Federenko v. U.S.*, 449 U.S. 490, 506 (1981). The law requires USCIS to take no action on Plaintiffs' applications prior to receipt of the final reports of the security background check. Because Plaintiffs do not have a right to naturalization, it cannot be shown that Plaintiffs have suffered irreparable injury as a result of the time necessary for Defendants to complete the adjudication of Plaintiffs' naturalization applications.

Finally, the public interest is always a factor to be considered in the granting of an injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 326-27 (1982). Here, particularly in light of heightened security concerns in the post-September 11 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. Therefore, this Court should dismiss Plaintiffs' request for declaratory and injunctive relief with regard to Counts Two through Four.

IV. CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court remand Plaintiffs' N-400 naturalization applications to USCIS, pursuant to 8 U.S.C. § 1447(b), for adjudication within thirty days of remand. In addition, the Court should dismiss Counts II-IV in Plaintiffs' Petition due to Plaintiffs' failure to state a claim upon which relief can be granted and/or lack of jurisdiction.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

DATED this 8th day of January, 2008.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
ELIZABETH J. STEVENS
Senior Litigation Counsel

/s/ Nancy N. Safavi
NANCY N. SAFAVI
Conditionally admitted in this Court
Trial Attorney
Office of Immigration Litigation
Civil Division
United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 514-9875
Fax: (202) 305-7000
Email: Nancy.Safavi@usdoj.gov

JEFFREY C. SULLIVAN
United States Attorney

/s/ Rebecca S. Cohen
Rebecca S. Cohen
Assistant United States Attorney
U.S. Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101
Phone: (206) 553-6526
Fax: (206) 553-4073
Email: Rebecca.Cohen@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Aaron H. Caplan
E-mail: caplan@aclu-wa.org

Alfred Arthur Day
E-mai: aaday@stoel.com

Christopher Strawn
E-mail: chris@nwirp.org

Margarita V. Latsinova
E-mail: chris@nwirp.org

Matt Adams
E-mail: matt@nwirp.org

Sarah A Dunne
E-mail: dunne@aclu-wa.org

I further certify that I have mailed by USPS, postage pre-paid, the foregoing document to the following non-CM/ECF participant, addressed as follows:

- 0 -

DATED this 8th day of January, 2008.

/s/ Rebecca S. Cohen
Rebecca S. Cohen
Assistant United States Attorney
U.S. Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101
Phone: (206) 553-6526
Fax: (206) 553-4073
Email: Rebecca.Cohen@usdoj.gov

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970