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 OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS

Noted on motion calendar: February 22, 2007

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

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Defendants ("Government), by and through their undersigned counsel of record, respectfully file this opposition to Plaintiff's motion for class action and ask the Court for an order denying class certification for Plaintiffs' claims related to their N-400 Petitions for Naturalization filed with the United States Citizenship and Immigration Services ("USCIS").

I. INTRODUCTION AND BACKGROUND

This putative class action lawsuit is brought by four named Plaintiffs: Roshanak Roshandel, Vafa Ghazi-Moghaddam, Hawo Ahmed and Lin Huang.

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 his 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 her 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 his 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 her background checks were not yet complete. *Id.*

All of Plaintiffs' FBI name checks have now been completed. Accordingly, USCIS is ready to adjudicate Plaintiffs' N-400 applications as soon as it regains jurisdiction when this case is dismissed and/or remanded. *See* Defendants' Motion to Remand and/or Dismiss (Dkt. No. 9).

Even though USCIS is ready to adjudicate their applications, Plaintiffs continue to seek

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class certification. Plaintiffs' Motion for Class Certification contains class action allegations on behalf of a proposed class of "[a]ll lawful permanent residents of the United States residing in the Western District of Washington who have submitted naturalization applications to USCIS but whose naturalization applications have not been determined within 120 days of the date of their initial examination due to the pendency of a 'name check.'" Plaintiffs' Motion for Class Certification "Motion" at 2. The Motion alleges that approximately 400 legal permanent residents are currently affected by the practice of delayed adjudication due to the name check requirement, *id.* at 4, and that these delays prevent Plaintiffs from "participating fully in civic society." *Id.* at 2.[2] Plaintiffs' motion fails, however, to identify for which specific cause of action (or causes of action) in their Complaint they seek class-wide relief.

Because of their failure to identify a cause of action that supports class-wide relief and because Plaintiffs' own proposed class definition is troublesome, Plaintiffs' motion should be denied. Plaintiffs' motion should also be denied because (1) Plaintiffs lack standing; and (2) Plaintiffs do not meet the prerequisites for class certification as set forth in Federal Rules of Civil Procedure 23(a) and (b), for the reasons set forth below.

II. ARGUMENT AND AUTHORITIES

A. NONE OF THE ALLEGED CAUSES OF ACTION SUPPORT CLASS-WIDE RELIEF.

1. The Remedies Available Under 8 U.S.C. § 1447(b) Do Not Support Class Wide Relief.

First and foremost, 8 U.S.C. § 1447(b), the provision at issue here, does not allow for class actions seeking declaratory or injunctive relief. Under 8 U.S.C. § 1447(b), there are only two remedies: (1) the court "may either determine the matter or (2) remand the matter, with appropriate instructions, to [USCIS] to determine the matter." 8 U.S.C. § 1447(b).

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. This Court

[2] Plaintiffs' Motion approximates the number of putative class members as 400. For the purposes of this opposition memorandum only, Defendants will use the same number.

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is in the jurisdiction of the Ninth Circuit Court of Appeals, which has ruled 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 Plaintiffs' applications is exclusive, and if the Court were to certify a class (absent this remedy in 8 U.S.C. § 1447(b)), this Court would have exclusive jurisdiction over each of the putative class member's applications. The Court's exclusive jurisdiction creates several issues as to the practicality and manageability of a class action case for N-400 applications. Primarily, the Court would have to conduct individualized hearings for each of the putative class members.[3] Assuming that there are approximately 400 putative class members, this imposes a very heavy burden for the Court, as the Court would have to hear each of these cases in addition to the other cases filed and scheduled on its docket. Additionally, USCIS would be unable to adjudicate the applications while they are pending before the Court, as in the instant case.

Oddly, Plaintiffs state that "[t]his lawsuit does not ask the Court to naturalize the entire class. Instead, it seeks declaratory and injunctive relief[4] to remedy the pervasive ***institutional*** name check-related delays and to force the government to process the naturalization applications of eligible lawful permanent residents in a timely manner, as required by law." Motion at 6. This statement contradicts Plaintiffs' own request for relief in their Complaint at ¶ 67, where Plaintiffs specifically request the Court to grant the putative class members' applications pursuant to 8 U.S.C. § 1447(b). Complaint at ¶ 67. As stated above, granting such relief on a class-wide basis is impracticable for the Court.

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[3] 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).

[4] Defendants continue to assert, as outlined in their Motion to Dismiss/Remand, that declaratory and injunctive relief are not warranted.

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Moreover, even if the Court were to remand[5] all of the putative class members' applications back to USCIS for a decision in a "timely manner," the result would be no different than what USCIS is currently doing. USCIS is constantly processing naturalization applications. Such a remand instruction – as requested by the Plaintiffs in their Complaint[6] – would be unsurmountable for the agency and would cause further delays in processing other applications, such as those for adjustment of status. Additionally, such a general request to remand all pending naturalization applications to the agency would make all approximately 400 applications of equal weight, giving no consideration to which applications have remained pending the longest.

There is nothing in 8 U.S.C. § 1447(b) that compels USCIS to adjudicate a naturalization petition within 120 days. The 120 day time frame is not a deadline or a standard for reasonableness, but rather the number of days that must pass after the examination before a district court may assume jurisdiction over the naturalization application. 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). The simple fact that an

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[5] 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.,* U.S. Dist. Ct. W.D. Wash., Case No. C06-1696-RSM (October 18, 2007 Order of 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, *2 (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."). 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).

[6] Plaintiffs have requested that the Court remand the putative class members' applications for naturalization to USCIS with instructions to render a decision on each application within 90 days. Complaint at ¶ 68.

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application has been pending for more than 120 days does not guarantee an immediate adjudication, especially if the requisite background checks have not been completed.

For all of the above reasons, class certification should be denied as it is not an available remedy under 1447(b), nor is it manageable or practicable for the Court or USCIS.

2. Plaintiffs' APA Claims Lack Merit And Do Not Warrant Class Wide Relief.

Plaintiffs state "[i]n this action, plaintiffs challenge both the unlawful delay in adjudicating their naturalization applications and the implementation of the 'name check' on behalf of themselves and others similarly affected." Motion at 2. Plaintiffs then further state "[t]he plaintiffs challenge – and seek declaratory and injunctive relief from – a pattern of systemic delays in the processing of the naturalization applications due to FBI name checks that affects the class as a whole." *Id*. at 8.

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) – a judicial hearing or a remand back to the agency with instructions. 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 by the FBI or naturalization adjudications by USCIS. *See* Motion to Remand and/or Dismiss (Dkt. No. 9).

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

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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"). In sum, 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).

As mentioned earlier, 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 have 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, 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 the Defendants. 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.

Moreover, 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, Plaintiffs' cannot seek class wide relief for a cause of action under the APA. *See Ahmadi, et al., v. Chertoff, et al.*, No. C 07-4355-WHA, 2007 WL 3022573 (N.D.

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Cal. 2007) (slip op).

Even if the Court were to rule that the Plaintiffs do have a claim under the APA for the delay in adjudication, it still would not negate the fact that each case would have to be handled individually. The reasonableness of the time frame for adjudication of each of the applications would depend on the facts of each case, *i.e.*, when the application was filed, whether negative information was retrieved from any of the background checks, whether the application was determined to be fraudulent, whether the applicant provided necessary information, etc. As such, class-wide relief is not warranted or practicable under the APA.

3. Plaintiffs Fail To Define Any Subclass.

Originally, Plaintiffs alleged that there was a subclass of individuals who did not receive notice of the available judicial remedy at the time of the interview. Complaint at ¶ 81. In Plaintiffs' Motion for Class Certification, however, mention of this subclass is absent. "The district court is not 'to bear the burden of constructing subclasses' or otherwise correcting Rule 23(a) problems; rather, the burden is on Plaintiffs to submit proposals to the court." *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001) (citing *United States Parole Commission v. Geraghty*, 445 U.S. 388, 408 (1980)).

This cause of action lacks merit, as there is no greater judicial remedy or relief than that which Plaintiffs are already seeking, and USCIS currently complies with the statutory requirements, therefore making declaratory relief unwarranted. Additionally, no subclass should be certified as Plaintiffs have not met their burden of establishing one.

B. <u>PLAINTIFFS LACK STANDING.</u>

1. Plaintiffs Fail To Establish Substantial And Immediate Harm.

"Standing is a jurisdictional element that must be satisfied prior to class certification." *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997). To assert claims on behalf of a class, named plaintiffs must demonstrate "a likelihood of substantial and immediate irreparable injury" as a result of the challenged official conduct. *Hodgers-Durgin v. De la Vina*, 199 F.3d 1037, 1042-44 (9th Cir. 1999) (en banc). Where a plaintiff "seeks prospective injunctive relief,

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he must demonstrate 'that he is realistically threatened by a repetition of the violation.'" *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)).

Plaintiffs lack standing in the present case, as they have failed to demonstrate actual or potential harm arising out of the defendants' alleged conduct. To have standing to maintain a claim, a plaintiff must at a minimum satisfy the "actual injury" component of the standing doctrine. *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993). This element "requires an injury to be 'real and immediate,' not merely 'conjectural' or 'hypothetical.'" *Id.* (citations omitted). More specifically, Plaintiffs claim that the delay in adjudicating their applications has resulted in their inability to become citizens, thus preventing Plaintiffs from voting, traveling freely and participating fully in civic society. Complaint at ¶¶ 12, 17, 22, 27. Such claims are unsubstantiated because, as discussed below, Plaintiffs fail to show past or future irreparable harm. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (finding that the speculative nature of claim of future injury precluded plaintiff from establishing a likelihood of substantial and immediate injury); *Stevens v. Harper*, 213 F.R.D. 358, 367-70 (E.D. Cal. 2002) ("Beyond bold assertions, plaintiffs do little to substantiate their claims . . .").

With respect to voting, simply because Plaintiffs are not United States citizens does not mean that they are unable to participate in civic society. The inability to vote does not render someone apolitical. Should a person sincerely be interested in politics, he or she can still participate in the political process by assisting with campaigns, attending political functions or providing monetary donations, and he or she may do so freely.

As another example, legal permanent residents can travel domestically and abroad. Their travels are not restricted by the United States government. Many United States citizens experience difficulty while traveling, including random security checks or delays in customs, especially if they have traveled to certain countries or brought back certain types of items. After the events of September 11th, even United States citizens can no longer travel with the ease that they could before. Additionally, any delays in travel or heightened scrutiny of the individual

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while he or she is traveling is fact specific to that particular travel and when it occurs. Plaintiffs cannot establish a systematic pattern of this type of injury attributable to Defendants' alleged conduct, and they also cannot show that it is immediate and substantial.

As a final example, legal permanent residents can seek employment and are eligible to work, just like United States citizens. Legal permanent resident status does not restrict a person's ability to work. And being an United States citizen does not guarantee a job, but merely the opportunity to apply for particular jobs. Several factors contribute to the hiring process, and there is no evidence that any Plaintiff is or has been unable to find employment due to his or her lawful permanent resident status.

Plaintiffs' alleged injuries are not necessarily resolved by this lawsuit, nor are they imminent, nor are they entitled to relief for those particular injuries. Plaintiffs argue that the harm is a delayed adjudication and the lack of a grant of citizenship itself, but it is well-established that legal permanent residents have no right to naturalize. "No alien has the slightest right to naturalization unless all statutory requirements are complied with." *United States v. Ginsburg*, 243 U.S. 472, 475 (1917). USCIS determines whether all statutory requirements are met when adjudicating the applications. *See generally* 8 U.S.C.A. § 1427. Good moral character is one statutory requirement and background checks are an essential tool used by USCIS in adjudicating whether an individual meets that requirement, as well as whether the application is barred by other statutory factors, such as 8 U.S.C. §§ 1424-25.

The judicial remedy under 8 U.S.C. § 1447(b) for a hearing or a remand does not give rise to a right to naturalization nor can it be used to justify the potential injuries or harms alleged by Plaintiffs. *See Ohio Adult Parole Authority v. Woodward,* 523 U.S. 272, 280 n.2 (1998); *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983) (emphasizing that "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause"); *Joelson v. United States*, 86 F.3d 1413, 1422 (6th Cir. 1996) (finding that statutory scheme governing bankruptcy trustee case rotation procedure did not create a protected property interest under the due process clause regarding the assignment of future cases).

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Plaintiffs fail to establish that there is an actual, imminent, and substantial harm. As a result, Plaintiffs lack standing as a class action and class certification should be denied.

2. Plaintiffs' Claims Are Moot.

It is not necessary to certify a class in this matter. The four named plaintiffs have completed FBI name checks and Defendants are steadily processing the applications of other putative class members. In addition, USCIS no longer conducts interviews prior to the completion of the background checks, making this putative class static and dwindling. Based on Plaintiffs' own class definition and their own assertions about the relief sought, their claims are moot.

In *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920 (9th Cir. 2007), this Court held:

> [A] suit brought as a class action must as a general rule be dismissed for mootness when the personal claims of all named plaintiffs are satisfied and no class has been properly certified. . . . In these situations there is no longer a 'case or controversy' to be decided within the meaning of Article III of the Constitution.

Id. at 924 (citation and quotation marks omitted).

Plaintiffs contend that because all four named Plaintiffs received requests to be re-fingerprinted within seventeen days of their Complaint being filed, Defendants are attempting to moot their 1447(b) claims before the Court can reach a decision on the matter. Motion at 9-10. To the contrary, this shows that Defendant USCIS is continually working on processing naturalization applications in a timely manner. In this particular case, had USCIS not requested current fingerprints, the initial fingerprints might have expired prior to receipt of the results of the completed FBI name checks. This shows that USCIS was taking every action possible to timely adjudicate Plaintiffs' applications while waiting for the results of the FBI name checks. In addition, Defendants have no current policy in place that requires expedites of applications or name checks due to an applicant's involvement in litigation. *See* USCIS Press Release dated February 20, 2007 entitled "USCIS Clarifies Criteria to Expedite FBI Name Check," available at www.uscis.gov. Based on Plaintiffs' own class definition, Plaintiffs' adjudications are no longer

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caused by the delay in processing a FBI name check; rather, the delay is caused by this litigation. As such, their claims are moot.

The standing requirement is commingled with the mootness doctrine. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980). When a named plaintiff's claim is mooted prior to the court ruling on the class certification, the plaintiff must prove that he continues to have a "personal stake" in the injunctive relief sought and that he is in a position to provide vigorous advocacy in order to have Article III standing. *Id.* at 403-04.

The Ninth Circuit Court of Appeals has considered whether applicants for naturalization, whose applications were granted during the pendency of the litigation, continued to have standing to represent a class. The Court found that they did not have Article III standing. In *Sze v. INS*, 153 F.3d 1005 (9th Cir. 1998), the named plaintiffs sought class certification and a declaratory judgment based on a delay in obtaining a naturalization decision more than 120 days after initial examination. While the case was pending, all of the named plaintiffs were naturalized. *Id.* at 1008. The Ninth Circuit found that it lacked jurisdiction under Article III to consider the appeal based on the expiration of the claims of all named plaintiffs during the pendency of the appeal and the fact that none of the exceptions to the mootness doctrine applied. *Id.* at 1009.

In the case at hand, the named Plaintiffs' claims are moot because their FBI name checks are complete, and therefore, they no longer meet their own definition outlined for the putative class. Regardless, if and when Plaintiffs are naturalized, they will lack standing if their naturalization occurs prior the certification of this class. Moreover, the process of conducting a FBI name check and the naturalization application process only occurs once, and it will not be repeated for all putative class members and specifically for the four named Plaintiffs. As the Ninth Circuit stated in *Sze*, "[i]nasmuch as the named plaintiffs have been naturalized, it is highly unlikely that they would ever have to repeat the process." *Sze*, 153 F.3d at 1009. Thus, Plaintiffs

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have no personal stake in the injunctive relief which they initially sought.

When this is the case, the district court must decide whether an exception to the mootness doctrine applies. *See Sze*, 153 F.3d at 1009; *see also Kennerly v. United States*, 721 F.2d 1252, 1260 (9th Cir. 1983); *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997). If no exception applies, the Court lacks jurisdiction over the plaintiffs and their claims must be dismissed. No exceptions apply here, and therefore class certification should be denied.

C. PLAINTIFFS FAIL TO MEET THE REQUIREMENTS OF RULE 23.

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 S.W. 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).

Should plaintiffs fail to carry out their burden as to any of the requirements of Rule 23, they will be precluded from the maintaining of the lawsuit as a class action. *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 675 (S.D. Cal. 1999) (citing *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975)). To this end, maintenance of a class action lawsuit, as governed by the Fed. R. Civ. Proc. 23, requires the satisfaction of a two-step procedure prior to judicial certification of a "class" of plaintiffs. First, plaintiffs must satisfy all four (4) of the conjunctive requirements expressed in Rule 23(a). Namely:

> One or more members of a class [must] sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members [would be] impracticable,[7] (2) there [would be] questions of law or fact common to the class, (3) the claims or defenses of the representative parties [would be] typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect

[7] Defendants do not contest the numerosity of the proposed class as defined by the Plaintiffs.

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the interests of the class.

Fed. R. Civ. P. 23(a). In addition to satisfying these four requirements for class certification, the plaintiffs must also satisfy one of the three subsections listed in Rule 23(b), such that:

> 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 (otherwise referred to as the "commonality requirement")...

Fed. R. Civ. P. 23(b)(2).

In determining whether plaintiffs have met their burden of proof regarding these requirements, the Court may not consider the merits of the plaintiffs' claims, *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), but should instead take the substantive allegations of the complaint as true. *Schwartz*, 183 F.R.D. at 675 (citing *Blackie v. Barrack*, 524 F.2d 891, 901, n. 17 (9th Cir. 1975)). Of course, if the court is not fully satisfied with the legal sufficiency of the allegations, the class should not be certified. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (citing *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982)). The Court is not required to accept conclusory or generic allegations regarding the suitability of the litigation for resolution through class action. *Stevens*, 213 F.R.D. at 378 (citing *Morrison v. Booth*, 763 F.2d 1366 (11th Cir. 1985) (rejecting certification in the absence of factually specific allegations)). To this end, the Court may consider evidence that relates to the merits, if such evidence is relevant to the requirements of Rule 23. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

In the face of these obligations, Plaintiffs have failed to satisfy their affirmative burdens for class certification with the allegations filed in their Complaint.

1. Plaintiffs Fail To Demonstrate The Existence Of Common Issues Of Law Or Fact Linking The Class Members Together.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class" prior to certifying a case potentially suitable for class action. "The commonality requirement is said to be met if plaintiffs' grievances share a common question of law or of fact." *Armstrong*, 275 F.3d at 868. More specifically, "commonality focuses on the relationship of common facts and legal

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issues among class members." *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1342 (9th Cir. 2007). Thus, the commonality requirement is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Smith v. University of Washington Law School*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (quoting *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 712 (D. Ariz.1993)); *see also Foreman v. Heineman*, 240 F.R.D. 456, 506 (D. Neb. 2007).

Consistent with 8 U.S.C. § 1447(b), class-wide relief is inappropriate in this case. Indeed, and 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, class wide relief is inappropriate because the Court cannot conduct one hearing for all putative class members – the Court must conduct an individual hearing for each and every naturalization applicant as mandated by Congress, or remand the case back to USCIS. While there are some common issues of law and fact, ultimately, the determination as to whether an applicant should be naturalized is fact-specific to individual applicants.

With regard to Plaintiffs' APA claims, it also follows that the nature of the time frame or wait for final adjudication depends on the facts of each individual case. More importantly, the FBI name check is merely one step in the entire background examination process conducted by USCIS. Plaintiffs' assumption that the FBI name check is the sole reason for a delay in processing is in error. For example, the wait could be because of the name check backlog, or because of the need for further evidence, or because of a fraud investigation, or for any number of other reasons. Even if the wait stemmed from the FBI name check itself, the case could still be with the FBI because of a more extensive FBI investigation, or with 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. Again, the 120 day time frame outlined in 1447(b) does not stand for the proposition that 120 days is a reasonable time for USCIS to adjudicate the applications. In

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situations where USCIS or the FBI has a legitimate law enforcement interest in further investigating cases, the delay is reasonable. Even if the law enforcement interests are satisfied, if the agency lacks the resources or control to adjudicate all applications within a 120 day time period, the delay is still reasonable.

"[What] constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." *Saleh v. Ridge*, 367 F. Supp. 2d 508, 512 (S.D.N.Y. 2005). 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).

For all these reasons, Plaintiffs fail to satisfy their affirmative burden of demonstrating the existence of common issues of law or fact that link the class members together. Therefore, the Court should deny Plaintiffs' motion for class certification.

2. Plaintiffs Fail To Meet The Typicality Requirement Of Rule 23(a)(3).

Rule 23(a)(3) essentially requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." *Dukes*, 474 F.3d at 1231. "The test for typicality is whether other class members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct." *Id.* at 1232 (citing *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508 (9th Cir. 1992)).

To this end, Plaintiffs allege that typicality is met as "[t]he named plaintiffs and class members have the same legal theories and seek the same declaratory and injunctive relief for themselves and for the class as a whole." Motion at 7. However, this argument is also without merit. Specifically, Plaintiffs can not establish typicality for the same reasons they cannot establish commonality. This is because 8 U.S.C. § 1447(b) by its nature requires an individualized hearing or remand and because the question as to whether the delay in adjudicating the applications are fact specific. Accordingly, there are no common or typical issues amongst putative class members.

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Moreover, Plaintiffs also fail to satisfy this particular prerequisite for class certification because there is no causal link between the alleged injuries and the defendants' actions (the delayed FBI name checks). The Complaint fails to show how any of the alleged injuries suffered by the named plaintiffs and the proposed class are specifically caused by defendants' actions and are typical of each and every Plaintiff. Even amongst the four named Plaintiffs, only one actually asserts problems with traveling to some degree of specificity.[8]

In addition, "[t]ypicality . . . is [also] said to require that the claims of the class representatives be typical of those of the class, and [is] to be 'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Armstrong*, 275 F.3d at 868 (quoting *Marisol v. Giuliani*, 126 F.3d 372, 376 (2nd Cir.1997)). Thus, "[i]n order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining 'some direct injury as a result of the challenged statute or official conduct.'" *Id.* at 860 (quoting *O'Shea v. Littleton*, 414 U.S. 488 (1974)).

Here, the named Plaintiffs' claims will not be typical of the putative class members. Each applicant's claim will not arise from the same course of events, as some individuals will have a completed FBI name check sooner than others. Due to the timing in each putative class member's case, one case cannot be said to be typical of one another. Also, dependent on the results of each putative class member's background checks or FBI name check, the legal claims asserted against the Defendants would not be typical of each putative class member. Those who have FBI name check "hits" would assert different claims than those who have IBIS "hits" or even from those who are currently under investigation for fraud, or from those who have "clean" records.

Therefore, for all these reasons outlined above, Plaintiffs fail to satisfy their affirmative burden of demonstrating that the claims of the named Plaintiffs are typical of the claims of the

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[8] Complaint at ¶ 17. Plaintiff Vafa Ghazi-Moghaddam alleges difficulty while traveling with his Iranian passport. *Id.* His situation, however, is not typical of someone who may be a putative class member and traveling on, *e.g.*, a Canadian or an Italian passport.

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class as a whole. Consequently, this Court should deny Plaintiffs' motion for class certification.

3. The Proposed Class Fails To Satisfy Rule 23(a)(4)'s Adequacy of Representation Requirement.

Additionally, Plaintiffs cannot demonstrate that they are adequate representatives of the class they purport to represent. *See* Fed. R. Civ. P. 23(a)(4). A showing of adequate representation requires named plaintiffs in a putative class action to demonstrate that their claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Falcon*, 457 U.S. at 158 n.13.[9] "This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel."[10] *Dukes*, 474 F.3d at 1233.

As applied to the instant case, Plaintiffs have once again failed to demonstrate how adjudication of the claims of any of the named Plaintiffs will fairly and adequately protect the interest of the proposed class. *See* Fed. R. Civ. P. 23(a)(4). Instead, Plaintiffs merely offer a perfunctory assertion that this aspect of the requirement is satisfied: "As already set forth above, named plaintiffs share the proposed class' desire to enforce reasonable time limits on the government's processing of naturalization applications." Motion at 7.

Despite this broad-brush statement, the interests of a legal permanent resident personally affected by the alleged delay of a FBI name check will no doubt differ from the interests of other legal permanent residents who are allegedly, personally affected by a different part of the background check or FBI name check, or by legal permanent residents who receive completed FBI name checks during the course of this litigation. Accordingly, Plaintiffs fail to demonstrate that they are adequate representatives of the class they purport to represent.

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[9] In this regard, courts have found that the commonality, typicality, and adequacy of representation requirements "tend to merge." *See Falcon*, 457 U.S. at 158 n.13; *Nguyen v. Kissinger*, 70 F.R.D. 656, 664-65 (N.D. Cal. 1976).

[10] Defendants do not contest Plaintiffs' attorneys' ability to represent the proposed putative class.

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An injunction that would require adjudication of the putative class members' N-400 applications and completion of their FBI name checks would disrupt the FBI's current policy of "first in-first out." Plaintiffs would have then created an interest antagonistic to the interests of the class as a whole because some putative class members may already have an expedited request. Using an injunction for this entire class and thus making every putative class members' claim a priority would only delay legitimate expedited requests. Moreover, such a request would place the class members' applications in front of the applications of other individuals who have been waiting longer that the individual class members.

Plaintiffs' claims are therefore antagonistic, and they are not adequate representatives. Plaintiffs fail to demonstrate that they meet all of the required elements for class certification under Rule 23(a).

4. The Proposed Class Is Not Maintainable Under Rule 23(b)(2).

Finally, despite the claims outlined in the Complaint, Plaintiffs have failed to demonstrate that the proposed class is maintainable under Fed. R. Civ. P. 23(b)(2). More specifically, on its face, the Complaint asserts that this putative class is maintainable under subsection (b)(2), such that if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, . . . final injunctive relief or corresponding declaratory relief [would be appropriate] with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). However, Plaintiffs' cause of action lacks the evidence needed to maintain the proposed class under Rule 23(b)(2). According to one court, "[a]n extremely close identity of common questions and of typicality of claims is required if the relief is to enjoin defendants from further acting on grounds generally applicable to the class as a whole." *Nguyen v. Kissinger*, 70 F.R.D. 656, 667 (N.D. Cal. 1976).

First, 8 U.S.C. § 1447(b) is triggered if an adjudication has not been completed within 120 days, and the applicant seeks judicial recourse. If an applicant seeks this judicial remedy, it resolves his or her personal case against USCIS for a delayed adjudication. This renders class action relief unnecessary since a remedy is already available. As previously stated, the judicial remedy of 8 U.S.C. § 1447(b) requires an individual hearing or a remand to USCIS. In either

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instance, because the applications for naturalization are fact-specific, 23(b)(2) can not apply.

In *Nguyen*, the plaintiffs alleged that Vietnamese children were brought to the United States in violation of due process without proper documentation showing that they were orphaned. *Id.* In response, the court held that the requirements of Rule 23(b)(2) were not satisfied because, even if a class were certified, the court would be faced with "[s]ome two thousand individual adjudications." *Id.* In so finding, the court based its holding on a determination that the requirement of a "close identity" between plaintiffs was lacking because of the individualized nature of each person's due process claim. *Id.*

Similarly, the instant putative class challenging Defendants' delayed adjudications present several distinct, individualized legal and factual claims. As such, Defendants' actions with respect to individuals challenging the process employed for their specific application would not be "generally applicable" to the putative class as a whole. *See* Fed. R. Civ. P. 23(b)(2).

Further, Plaintiffs assert that Defendants have failed 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 continue to work diligently on processing applications in general.

Accordingly, as Plaintiffs fail to demonstrate that they meet the additional requirements of Rule 23(b), the Court should deny class certification.

III. CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Plaintiffs' Motion for Class Certification.

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DATED this 13th day of February, 2008.

Respectfully submitted,

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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:

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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 13th day of February, 2008.

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