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; ROBERT MUELLER III, Director, Federal Bureau of lnvestigation; and the UNITED STATES OF AMERICA,

Defendants.

Case No. C07-1739-MJP

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO REMAND AND/OR DISMISS

Noted on motion calendar: February 22, 2007

I. INTRODUCTION AND SUMMARY

Defendants, by and through their undersigned counsel of record, hereby file this reply memorandum in support of the Government's preceding motion to remand and/or dismiss ("MTR/MTD"), and in response to the opposition brief filed by Plaintiffs ("Opp."). In their opposition, Plaintiffs failed to provide any compelling reason for creating jurisdiction under the Administrative Procedures Act ("APA") or denying remand of the individual naturalization applications back to USCIS. Defendants' motion to remand and/or dismiss, however, established that this controversy is not amenable to resolution under the APA and that, in any event, any alleged delays in background checks are not a violation of the APA. MTR/MTD at 9-19 (Dkt. No. 9). Plaintiffs' opposition has not refuted those claims. As such, this Court should grant Defendants' motion to remand and/or dismiss.

II. ARGUMENT AND ANALYSIS

A. Standard Of Review and Initial Disclosures.

When considering a motion to dismiss pursuant to Rule 12, the district court may review evidence outside the pleadings to resolve factual disputes concerning the existence of jurisdiction without converting the motion to one for summary judgment. *See Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947). Because the party invoking jurisdiction bears the burden of establishing its requirements, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992), the plaintiff must come forward with competent proof supporting its jurisdictional allegations. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

Despite Plaintiffs' assertions that Defendants improperly rely on materials outside the Complaint, Opp. at 16, Defendants' affidavits assist the Court in determining whether Plaintiffs have provided sufficient factual allegations to support jurisdiction for their assorted claims. The affidavits provide factual support regarding the reasonableness of the FBI name check delays, the parameters of that process, and the affidavits refute Plaintiffs' claim that the delays are unreasonable. Therefore, Defendants' affidavits are appropriate for consideration at this stage in the litigation.

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If the Court does not accept Defendants' reasoning regarding the purpose of Defendants' affidavits, the Court need not, as Plaintiffs suggest, covert the motion into a summary judgment motion as to all arguments raised therein.[1] The Court may also rule on the motion to dismiss without considering the content of the affidavits as Plaintiffs have requested; however, this request made by Plaintiffs is unreasonable considering that Plaintiffs themselves want certain portions of the affidavits admitted. Opp. at 16. In addition, because in this case initial disclosures were required prior to the filing of an answer or a motion to dismiss, it is appropriate to use information provided with these disclosures, which includes information found outside the Complaint.

Interestingly, Plaintiffs argue they are entitled to more information, either through supplemental initial disclosures or discovery requests, in order to respond to the motion to remand and/or dismiss, but then argue that Defendants' affidavits should not be allowed into the record for purposes of ruling on the motion because they were not included in the Complaint. Such a request is disingenuous.

Moreover, Plaintiffs are not entitled to the results of each of the named Plaintiffs' FBI name checks, the additional information they have requested, Opp. at 6-7, for two reasons. First and foremost, this information is law enforcement sensitive and privileged. Second, Defendants do not intend to rely on the individual results, so they were not required as part of Defendants' initial disclosures. *See* F.R.C.P. 26(a)(1)(B) (requiring, as part of initial disclosures, documents

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[1] Defendants concede that the Court could convert the motion into a motion for summary judgment solely with respect to the arguments raised by the Government on the merits of the APA claims; i.e., the Government's assertion that the delay in this case is reasonable. The Court need not address this issue, however, as the Government has demonstrated that the Court lacks jurisdiction over the delay claims, and a resolution on the merits is therefore moot. The jurisdictional arguments raised by Defendants are proper for resolution in a motion to dismiss. Because the motion seeks dismissal on the basis of a lack of subject matter jurisdiction, the Court may properly consider declarations in ruling on the motion. *Drier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997). And, in the event the Court does convert the motion to a summary judgment motion solely with respect to the reasonableness of the delay, the Court need not provide Plaintiffs with an opportunity for discovery if the Court finds that the points of Plaintiffs' factual contention are not relevant to the matters at bar. *See First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 298 (1968) (a party has no absolute right to discovery); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029 (5th Cir. 1983) (courts will "not open the discovery net to allow a fishing expedition.").

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that the "disclosing party may use to support its claims or defenses").

All required disclosures have been made. The USCIS A-files previously produced to Plaintiffs' counsel were incomplete only because they had been provided to Defendants' counsel prior to the completion of the FBI name checks. On February 19, 2008, Defendants sent Plaintiffs' counsel certified and updated documents to update and complete these A-files. Defendants also replied to Plaintiffs' first discovery requests on that same date, as well as the FBI's administrative record for this case. *See* Declaration of Nancy Safavi, submitted herewith. Thus, Plaintiffs' request for leave to amend their Opposition dependent on initial disclosures is moot. Opp. at 7.[2]

B. This Court Should Remand Plaintiffs' Naturalization Applications to USCIS.

Plaintiffs allege that Defendants concede liability under the INA. Opp. at 2. However, Defendants' motion to remand and/or dismiss stated that Plaintiffs' claims pursuant to 8 U.S.C. § 1447(b) are under this Court's exclusive jurisdiction because of *United States v. Hovsepian*, 359 F.3d 1144, 1161 (9th Cir. 2004); MTR/MTD at 6. The vast majority of courts that have addressed the option of remand in cases brought under 8 U.S.C. 1447(b) have concluded that remand is an appropriate course of action. *See* MTR/MTD at 7-9 and the cases cited therein.

In this case, the Court should remand the case, giving USCIS the opportunity to utilize its expertise in adjudicating naturalization applications especially considering that a notable amount of time has passed since the named Plaintiffs' FBI name checks have been completed. The only impediment to the prompt resolution of those cases, at this point, is that pursuant to *Hovespian*, USCIS can not adjudicate the applications until this Court remands the individual 1447(b) claims. USCIS stands ready to adjudicate the applications once such a remand has occurred.

Plaintiffs speculate that the Defendants' request for a remand is a "transparent attempt to moot plaintiffs' claims." Opp. at 1. Plaintiffs offer no evidence for this speculation. Rather,

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[2] In addition, Defendants reserve the right to oppose any proposed amendments to Plaintiffs' Complaint. *See* F.R.C.P. 15(a)(2).

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Defendants' request for a remand is the best way to provide for the timely adjudication of Plaintiffs' naturalization applications. Plaintiffs' request that the Court naturalize the Plaintiffs because "no further hurdles to naturalization" exist, Opp. at 9, ignores the statutory requirement that the district court conduct individual hearings on each individual application for naturalization. *See* 1447(b). Thus, should the Court choose not to remand, the Court would need to schedule – at a minimum – four separate hearings.

Plaintiffs failed to address Defendants' argument that severance would be necessary if the Court were to hold individual hearings. MTD/MTR at 9. Thus, should the Court not remand the individual matters to USCIS for completion of the individual examinations, the Court should sever the individual Plaintiffs under Fed. R. Civ. P. 21.[3]

C. Plaintiffs Continue to Fail to Prove Jurisdiction Under the APA.

1. 8 U.S.C. § 1447(b) Provides An "Adequate Remedy in Court" and Precludes Review Under the APA.

As stated in Defendants' motion to remand/dismiss, the APA only provides a right of judicial review of agency action ". . . for which there is no other adequate remedy in a court." MTR/MTD at 9-10; 5 U.S.C. § 704. Here, Congress legislated an adequate remedy for naturalization applicants who experience delays by providing the availability of district court jurisdiction when an application for naturalization has been pending with USCIS for more than 120-days after the examination. 8 U.S.C. § 1447(b).

In this case, Plaintiffs rely on *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) to show jurisdiction is proper under the APA. Opp. at 14. The statute the Court reviewed in *McNary* differs from the statute presently before the Court. In *McNary*, the Court considered whether a statute that provided for administrative review, but specifically precluded district court review, was an "adequate remedy in court" for a class action. *Id.* at 483. The fact that *McNary* also dealt with APA review of class claims is not determinative. What is determinative is that

[3] Plaintiffs request that the Court order USCIS to show cause why the Plaintiffs should not be naturalized, Opp. at 2, 10-11. This request is absent in their Complaint, nor has a motion been filed requesting such an order. Regardless, and without conceding that remand is inappropriate, this request ignores the statutory requirement for an individual hearing, as cause as to why an individual should not be naturalized would be specific to each individual.

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unlike the statute in *McNary*, the statute presently at issue, 8 U.S.C. § 1447(b), does not strip district court jurisdiction, but specifically provides a basis for district court jurisdiction.

Thus, Plaintiffs cannot prevail on their APA claims 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 delay, provides an "adequate remedy in court," and is the only statute under which such a claim can be asserted. MTR/MTD at 9*; see, e.g., United States v. Fausto*, 484 U.S. 439, 448-49 (1988); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."); *Antonishin v. Keisler*, 2007 WL 2788841 (N.D. Ill. 2007) at * 13, citing *Alsamir v. USCIS*, No. 0-cv-07151-WDM-BNB, 2007 WL 1430719, at *2 (D. Colo. May 14, 2007) (concluding that the availability of s 1447(b) review precludes mandamus and APA relief).

Plaintiffs attempt to refute *Fausto*, but their argument is not compelling. Opp. at 14-15. Here, Plaintiffs do intend to circumvent section 1447(b) by creating jurisdiction under the APA because they ask the Court to conclude that adjudication of their naturalization applications has been unreasonably delayed. They ask the Court to use the APA to reach their desired result, which is bypassing section 1447(b).

Plaintiffs' reliance on *Yakubova v. Chertoff*, No. 06-CV-3203 (E.D.N.Y) is misguided. Opp. at 14. The judge in *Yakubova* did not address the issue of whether jurisdiction under the APA was proper; rather, the judge took jurisdiction under section 1447(b). *Yakubova* Order at 8. Moreover, the judge noted that Defendants' arguments and the evidence that was provided were persuasive. *Id.* at 7.

2. Plaintiffs Fail to Show that There Are Any Required Deadlines.

With regard to Defendant USCIS, Plaintiffs have not established a mandatory duty to act on a naturalization application within 120-days from the completion of an examination or 180-days from receipt of an application. Plaintiffs' position that 8 U.S.C. § 1571(b) creates an actionable duty under the APA to take action within 180-days of receipt of an application fails,

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where the controlling authority in this jurisdiction recognizes that so-called "Sense of Congress" resolutions, like the one codified at 8 U.S.C. § 1571(b), create no enforceable federal rights. *See Yang. v. California Dept. of Social Serv.*, 183 F.3d 953, 958 (9th Cir. 1999) (citations omitted). Similarly, the plain language of 8 U.S.C. § 1447(b) does not require USCIS to act on applications within a particular time frame, but only serves as a jurisdictional provision. *Compare* 8 U.S.C. § 1447(b) ("If there is a failure to make a determination [on a naturalization application]. . . before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter."), *with* 18 U.S.C. § 923(d)(2) ("The Attorney General must approve or deny an application for a license [to deal or manufacture firearms] within the 60-day period beginning on the date it is received. If the Attorney General fails to act within such period, the applicant may file an action. . ."") (emphasis added).

Even if the Court is compelled by the language of 8 C.F.R § 335.3, which appears to require adjudication of a naturalization within 120-days of an examination, that regulation has been superseded by Congress's statutory mandate that USCIS may not adjudicate a naturalization application until completion of a full criminal background check, which includes completion of an FBI name check. Pub. L. No. 105-119, Title I, 111 Stat. 2448 (Nov. 26, 1997). Moreover, given that a separate statute precludes adjudication until the name checks are complete, it cannot be said that Defendants are acting unreasonably. *Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657 (N.D. Tex. 2005) (not unreasonable to wait for results of the name check).

Plaintiffs' opposition brief merely restates the claim in the Complaint that USCIS is required to adjudicate naturalization applications within 120 days. This is not cognizable in the face of a statute requiring USCIS to complete a criminal background check prior to adjudication. In 1997, Congress enacted legislation that underscores the importance the Legislative Branch places on the favorable completion of a background investigation, as a necessary prerequisite to favorable adjudication of an application for naturalization. That legislation mandates that:

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> [N]one of the funds appropriated or otherwise made available to the Immigration and Naturalization Service shall be used to complete adjudication of an application for naturalization unless the Immigration and Naturalization Service has received confirmation from the Federal Bureau of Investigation that a full criminal background check has been completed, except for those exempted by regulation as of January 1, 1997.

Pub. L. No. 105-119, Title I, 111 Stat. 2448 (Nov. 26, 1997), *reprinted in* Historical and Statutory Notes following INA § 335, 8 U.S.C. § 1446, 8 U.S.C. § 1446 ("Criminal Background Checks"). Notably, the relevant statutory scheme does not contain any specific time frame for the FBI's investigation regarding the requested name checks.

Moreover, "to the extent that Plaintiffs' claim of unreasonable delay against [US]CIS involves allegations that this delay is caused by the FBI, these allegations fail to state a claim upon which relief may be granted." *Kaplan v. Chertoff*, 2007 WL966510 (E.D. Pa. 2007). Congress has "forbidden [USCIS] from taking any action [on a naturalization application] until background checks are completed." *Id*.

D. The Delays Are Reasonable.

Neither Plaintiffs' statement of doubt regarding the legitimacy of the agency interest in the name check process nor Plaintiffs' disagreement with the conduct of the process can stand as valid challenges to the congressionally mandated process. *See Antonishin v. Keisler*, 2007 WL 2788841 (N.D. Ill. 2007) (citing *United States v. Jester*, 139 F.3d 1168, 1171 (7th Cir. 1998)); *see also Omeiri v. Dist. Dir., Bureau of Citizenship and Immigration Serv.*, 2007 WL 2121998, at *3 (E.D. Mich. 2007).

The Supreme Court has recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Plaintiffs question why the FBI name check is necessary at all now that USCIS has implemented a new policy where name checks are not required for final adjudication of adjustment of status applications. Opp. at 18-19. Plaintiffs misunderstand the policy. USCIS still requires the name checks for adjustment of status cases; however, where the application is otherwise approvable and the FBI name check has been pending for more than 180 days, the case

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may be adjudicated without the final results of the FBI name check. USCIS made this determination based on a need to align their policy with Immigration and Customs Enforcement. This is why naturalization applications were not included. It is not for Plaintiffs to determine what is reasonable and what is unreasonable according to whether a policy favors them or not. Defendants are in the best position to determine how to process background checks and the scope of the checks.[4]

Additionally, Defendants maintain that even if the Court determines that there is some mandatory temporal requirement, the requirement that name checks be complete prior to action on a naturalization application now modifies any temporal requirements the Court deemed mandatory.[5]

Finally, because they do not address this issue anywhere in their Opposition, Plaintiffs appear to concede that if the Defendants are facing a resource strain in processing the applications, their APA claim cannot succeed. As Defendants have previously explained, limited resources have forced Defendants to prioritize the processing of name checks. Defendants have done so in a reasonable and entirely legal manner consistent with the resources at their disposal.

E. The APA Does Not Require USCIS to Follow Notice and Comment Procedures In This Case.

Plaintiffs argue that the APA's notice and comment requirements should apply because the FBI name check requirement is a substantive rule, rather than an interpretive rule. Opp. at 19. First, a number of courts addressing claims under 8 U.S.C. § 1447(b) have found that the FBI name check may properly be read into the requirement of a full background check. Chief

[4] Plaintiffs state that the name checks do not appear to identify criminal history, but rather whether any form of the applicant's name appears in law enforcement records. Opp. at 4. The 9/11 Commission indicated that "more effective use of information available in U.S. government databases could have identified up to 3 hijackers." 2004 WL 1634382, at 351. The 9/11 Commission wisely observed that our nation's adversaries purposefully have employed individuals who were unlikely to raise suspicions or have criminal records.

[5] Plaintiffs assume that because USCIS did not wait for their FBI name checks prior to conducting their interviews, this means that the FBI name check was not considered part of the criminal background check that must be completed before the examination. Opp. at 4. The FBI name check has always been a part of USCIS's background investigation and whether it is completed prior to the initial interview makes no legal difference.

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Judge Lasnik has held that USCIS may request that the FBI complete a background check for naturalization defendants. *See Stepchuk v. Gonzales*, 2006 WL 3361776 (Order Denying Plaintiff's Motion for Summary Judgment, Dkt. No. 44) (W.D. Wash. Nov. 17, 2006), *appeal filed* Feb. 27, 2007 (Dkt. No. 48). In *Stepchuk*, the plaintiffs had argued that USCIS lacked the authority to request that the FBI complete a background check because their naturalization interviews had already occurred. *Id.* at 7-8, *4-*5. In denying the plaintiffs' summary judgment motion, the Court first noted that, "[c]onfirmation that an applicant is eligible for naturalization requires a thorough background investigation." *Id.* at 7, *4 (citing 8 C.F.R. § 335.1 ("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[.]"); 8 U.S.C. § 1446(a) ("Before a person may be naturalized, an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person applying for naturalization[.]")). The *Stepchuk* Court emphasized that since 1997 Congress has "required [that] a complete FBI criminal background investigation be conducted on each applicant for citizenship." *Id.* (citing Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, Tit. I, 111 Stat. 2440, 2448-49 (1997)).

Judge Lasnik later reaffirmed this holding in denying the plaintiffs' motion for reconsideration. *Stepchuk*, 2007 WL 185013 at *1-2. In its Order, the Court expressly held that: "the FBI's name check may be considered a part of the requirement for a 'full criminal background check.'" *Id*. Several courts outside of this District have come to the same conclusion, holding that the FBI name check is a valid part of the criminal background check required by 8 C.F.R. § 335. *See, e.g., Wang v. Gonzales*, 2008 WL 45492, at *2 (D. Kan. 2008) (rejecting the plaintiff's contention that USCIS's use of the FBI name check was *ultra vires*); *Morral v. Gonzales*, 2007 WL 4233069, at *1 n.2 (D. Minn. 2007) (the FBI name check is one step in the background check process); *Shalabi v. Gonzales*, 2006 WL 3032413, at *2 (E.D. Mo. 2006) ("A 'name check' may certainly be read into the requirement of a full criminal background

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check."); *Aman v. Gonzales*, 2007 WL 2695820 (D. Colo. 2007), at *3 (citing *Stepchuk*).

Second, USCIS's determination that an FBI name check should be included as part of a "full criminal background check" or personal investigation is internal policy that "did not create a new law, right, or duty." *Antonishin*, No. 06-CV-2518, slip op. at * 19 (finding that USCIS's inclusion of FBI name checks was interpreting the scope of the "full criminal background check.").

Here, such internal policy changes had no substantive impact on agency decision making. USCIS adjudications still apply the same standards to naturalization applicants; they simply have a more accurate, larger tool at their disposal to determine whether applicants can meet the requisite standards. Moreover, applicants bear no additional burdens of proof or production in the application process.

F. Plaintiffs Fail to Sustain a Cause of Action for Count Four, the "Notice of Remedies" Claim.

Defendants did not concede that USCIS failed to give the required notice prior to January 2005. *See* MTR/MTD at 16-18. While Defendants did admit that the N-652 forms provided at the interview are now different, Defendants did not concede that notice was never provided prior to 2005. *Id.*

Plaintiffs admit that Roshandel did receive a notice to send a written inquiry to the agency after 120 days had passed, as they have not refuted this. *See* MTR/MTD at 16-17; Roshandel's 821, Exhibit B. Plaintiffs have not provided evidence that Roshandel did send a written inquiry.

Plaintiffs contend that Defendants provide speculation as to whether notice was provided prior to 2005, Opp. at 19, but Plaintiffs have not refuted Defendants' contention that the agency determines how to provide the notice, as the statute does not require a description or requirement for a type of notice. Plaintiffs also did not rebut Defendants' assertion that the agency interprets the word "examination" to mean an ongoing process. *See, e.g., Danilov v. Aguirre*, 370 F. Supp. 2d 441, 443-44 (E.D.Va. 2005). As such, Plaintiffs concede that the agency determines how to provide the notice.

Plaintiffs insist that there is a claim because failure to provide notice of remedies leaves

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putative class members waiting. Opp. at 19. Notably, this assertion would only apply to putative class members who were interviewed prior to February 2005. However, this is still not enough to meet Plaintiffs' burden. Plaintiffs do not show how this waiting is any different from any other applicant who did receive notice. Plaintiffs further state Defendants' assertions should be tested by discovery. Opp. at 19. Such vague and equivocal statements demonstrate that Plaintiffs filed a lawsuit in the hopes that they could substantiate their claims through "blind groping, undertaken in the hope of finding something to which this suit could be anchored." *Searer v. West Michigan Telecasters, Inc.*, 381 F. Supp. 634, 643 (W.D. Mich. 1974).

Accordingly, the Court cannot grant relief on this claim as no genuine issue of fact exists, and the agency currently provides notice of remedies on the revised form N-652.

G. Injunctive Relief Should Be Denied And Is A Proper Issue For A Motion To Dismiss.

Plaintiffs argue that their allegation that "they have sustained and will continue to sustain irreparable injury unless the Court grants injunctive relief," is sufficient to state a claim for injunctive relief. Opp. at 22. However, Plaintiffs' claims of a right to injunctive relief fail to state more than mere labels, conclusions, or formulaic recitations of the elements of causes of action, and thus this Court should find them insufficient to establish injury. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007).

No alien has an absolute right to be naturalized. *See, e.g., U.S. v. Ginsburg,* 243 U.S. 472 (1917). Moreover, the Plaintiffs have failed to allege any harms specifically stemming from the length of time USCIS and/or the FBI has taken to complete their investigations prior to a final adjudication, and their harms are merely hypothetical. Alternatively, even if the Court were to find that Plaintiffs have a substantive harm – which Defendants oppose and do not concede – Plaintiffs' allegedly irreparable harms are perfectly reparable via this Court's exercise of jurisdiction under 1447(b).

Plaintiffs' reliance on *Yakubova* does not stand for the proposition they suggest, Opp. at 22, as the court determined that discovery was necessary before ruling on whether APA jurisdiction existed. *Yakubova* Order at 8. The decision does not stand for the proposition that

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Defendants' motion to dismiss is premature or that the Court should refuse to dismiss the claim for injunctive relief. To the contrary, the *Yakubova* court refused to grant injunctive relief for Plaintiffs, and the court did find the Defendants' evidence persuasive. *Id*.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court remand Plaintiffs' claims under 8 U.S.C. § 1447(b) back to USCIS for the adjudication of their applications. In addition, the Court should dismiss Counts II-IV of the Complaint due to lack of jurisdiction and failure to state a claim under the APA.

DATED this 22nd 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 22nd day of February, 2008.

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