

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, et al.,

Defendants.

Case No. C07-1739-MJP

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

**Scheduled for oral argument:
April 11, 2008**

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, Nancy N. Safavi, Trial Attorney for the U.S. Department of Justice, Civil Division, Office of Immigration Litigation, and Elizabeth J. Stevens, Senior Litigation Counsel for said Office; and hereby respectfully renew and supplement their Motion to this Court for an order of dismissal and/or an order remanding Plaintiffs' N-400 Petitions for Naturalization to the United States Citizenship and Immigration Services ("USCIS"), in response to Plaintiffs' filing of a First Amended Complaint on Tuesday, April 8, 2008. For the purpose of judicial economy, as a hearing on the original Motion is scheduled for April 11, 2008, Defendants incorporate all legal and factual arguments previously submitted to the Court in the Government's Motion to Dismiss And/Or Remand to USCIS and in the

Government's Reply in Support of said Motion. The instant supplemental Motion is supported by the Second Declaration of Susan Walk ("Second Walk Decl.") submitted herewith.

I. FACTS

A. Newly Added Plaintiffs.

On April 8, 2008, Plaintiffs filed an amended complaint, adding three new individual Plaintiffs. Plaintiff Ahmad Alkabra, a citizen of Palestine, filed an N-400 Petition for Naturalization with USCIS on October 24, 2005. *See* First Amended Complaint ¶ 28 (Dkt. No. 21). USCIS conducted a naturalization interview of Alkabra in February of 2006. *Id.* ¶ 29. Alkabra's application was not adjudicated at that time because his background checks were not yet complete. *Id.*

Plaintiff Mohammad Reza Aidinejad, a citizen of Iran, filed an N-400 Petition for Naturalization on January 9, 2006. *Id.* ¶ 30. USCIS conducted a naturalization interview of Aidinejad on August 12, 2006. *Id.* ¶ 31. Aidinejad's application was not adjudicated at that time. *Id.* The First Amended Complaint makes no specific factual allegations regarding the reason provided by USCIS for the lack of adjudication of Aidinejad's application, other than the vague statement referring to "Defendants' unlawful conduct." *Id.* ¶¶ 2, 30-32.

Plaintiff Zahra Abedin, a citizen of Iran, filed an N-400 Petition for Naturalization with USCIS in January of 2005. *Id.* ¶ 33. USCIS conducted a naturalization interview of Abedin on May 31, 2005. *Id.* ¶ 34. Ahmed's application was not adjudicated at that time because Ahmed's background checks were not yet complete. *Id.*

B. New Background Information.

On December 26, 2007, for fiscal year 2008, Congress appropriated 20 million U.S. dollars for DHS and the Federal Bureau of Investigation ("FBI") to address the name check backlog. *See* Title IV of Div. E, Consolidated Appropriations Act, 2008, Pub. L. 110-161 (Dec. 26, 2007). In accordance with Congressional instructions in that appropriation, USCIS and the FBI submitted a joint plan to Congress that details the agencies' plan to address the FBI name

1 check backlog.¹ On April 2, 2008, USCIS issued a press release regarding the backlog reduction
 2 plan. *See* Second Walk Decl. ¶ 3 and Exhibit A. Pursuant to the plan, USCIS and the FBI will
 3 work to have all name check requests pending more than three years as of May 31, 2008,
 4 completed by May 31, 2008, and all name check requests pending more than two years as of July
 5 31, 2008, completed by July 31, 2008. Second Walk Decl., Exhibit A.

6 USCIS and the FBI have diligently worked to address the backlog, primarily by
 7 processing the oldest name check requests first. As a result of their efforts, more than 40 percent
 8 of the name checks of putative class members have been completed since December 2007. *See*
 9 Second Walk Decl. ¶ 4.

10 II. ARGUMENT

11 A. Remand Is The Most Expeditious And Appropriate Means Of Resolving This 12 Case.

13 In addition to remanding the cases of the original named Plaintiffs to USCIS for
 14 adjudication within thirty days, as requested in Defendants' original Motion, this Court also
 15 should remand the applications of the newly added Plaintiffs to USCIS for adjudication with no
 16 deadline, as this is the simplest and most expeditious means of resolving the claims of all
 17 individual Plaintiffs. First, a remand to the agency to "determine the matter" is a means
 18 expressly provided for under 8 U.S.C. § 1447(b), and a remand is one of the forms of relief that
 19 Plaintiffs specifically requested in their First Amended Complaint. 8 U.S.C. § 1447(b); First
 20 Amended Complaint ¶ 76 (Dkt. No. 21) (asking the Court to "remand proposed plaintiff class
 21 members' naturalization applications to CIS pursuant to 8 U.S.C. § 1447(b) with instructions to
 22 render a decision on each proposed plaintiff class members' naturalization application within 90
 23 days.").

24 Second, even if this Court assumes jurisdiction to adjudicate Plaintiffs' individual Section
 25 1447(b) claims, the Government respectfully submits that the Court should remand each named
 26 Plaintiff's naturalization application to USCIS in deference to the agency's expertise with respect

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 28 ¹ An official public version of the plan has not been released. Once Defendants receive a
 public version, Defendants will provide a copy to counsel for Plaintiffs and to the Court.

1 to adjudicating the issues inherent in such applications. USCIS is in the best position to render a
2 decision on Plaintiffs' individual applications because it is the designated agency responsible for
3 and qualified to determine the issuance of immigration benefits. In that event, the Court will
4 have the benefit of a reasoned, individual adjudication based upon a complete record, including
5 the results of the required background investigations.

6 Concerning the background investigation itself, independent of the time strictures, it is
7 well established that the courts generally have no power to order the Executive to undertake a
8 particular investigation absent some statutory provision conferring this authority. *See, e.g.,*
9 *United States v. Ramos*, 933 F.2d 968, 971 n.1 (11th Cir. 1991) (refusing request to order
10 investigation and holding that "[c]riminal investigations are an executive function within the
11 exclusive prerogative of the Attorney General's office") (citations omitted); *Walker v. Schmoke*,
12 962 F. Supp. 732, 733 (D. Md. 1997) (noting that no federal appellate court, including the
13 Supreme Court (and the appellate courts, not the trial courts, make legal policy) has recognized
14 that there is a federally enforceable right for the victim to have criminal charges investigated at
15 all, let alone with vigor or competence."). For this reason, requiring all putative class or
16 individual applications to be completed within an artificial deadline is contrary to legislative
17 intent.

18 In other words, the Court should permit USCIS to complete the required investigations to
19 create records on which any review of its decisions, if necessary, could be based, and to
20 adjudicate the individual Plaintiffs' applications. For the reasons discussed above, it is
21 respectfully submitted that a remand of the individual claims of the original four Plaintiffs under
22 8 U.S.C. § 1447(b) to USCIS for adjudication within thirty days, and a remand of the individual
23 claims of the three newly added Plaintiffs under 8 U.S.C. § 1447(b) for prompt completion of
24 USCIS's investigation and prompt adjudication, is the most appropriate manner in which to
25 proceed, and thus the Government respectfully asks the Court to grant its Motion.

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B. The Backlog Reduction Plan Further Weighs Against Plaintiffs' Non-Section 1447(b) Claims And Class Certification.

First, Plaintiffs continue to request the extraordinary remedy of injunctive relief. The backlog reduction plan put in place by USCIS and the FBI provides additional strength to Defendants' position that it would not be in the public interest to issue the injunctive relief requested by Plaintiffs. Congress provided additional resources to USCIS and the FBI to address the backlogs of which Plaintiffs complain, and this Court should defer to the agencies' reasonable plan to allocate those resources to the oldest pending requests nationwide, rather than impose a judicially created, geographically limited preference plan. Notably, under the agencies' new, reasonable plan, no putative class members' name check requests should remain pending as of July 31, 2008, and may be completed sooner. *See* Second Walk Decl., Exhibit A.

Moreover, under the proposed plan, any putative notice-of-remedy sub-class members' name check request, which would require an interview preceded by a name check request submitted prior to February 7, 2005, should be completed by May 31, 2008. *Id.*

IV. CONCLUSION

For the reasons provided in the Government's initial Motion to Dismiss And/Or Remand to USCIS, in its Reply in Support of said Motion to Dismiss, and the foregoing reasons, the Government respectfully requests that the Court remand the individual named Plaintiffs' claims under 8 U.S.C. § 1447(b) to USCIS. In addition, the Court should dismiss Counts II-IV of the First Amended Complaint based on failure to state a claim.

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1 DATED this 10th day of April, 2008.

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3 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 10th day of April, 2008.

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