No. 07-35150

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADIL RIKABI, *et al.*,

Plaintiffs–Appellants,

v.

ALBERTO R. GONZALES, *et al.*,

Defendants–Appellees.

Appeal From an Order of the United States District Court
for the Western District of Washington
CV-06-0570-RSL

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND NYU CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE IN SUPPORT OF PLAINTIFFS–APPELLANTS

Sarah Dunne
Aaron Caplan
American Civil Liberties Union
Foundation of Washington
705 Second Avenue, Third Floor
Seattle, WA 98104
(206) 624-2184

Cecillia D. Wang
Lucas Guttentag
American Civil Liberties Union
Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0775

Counsel for Amici Curiae
Additional Counsel Listed on Following Page

Additional Counsel for Amici Curiae

Smita Narula
Center for Human Rights and Global
Justice
New York University School of Law
245 Sullivan Street
New York, NY 10012
(212) 992-8824

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Statutes, Rules and Regulations:

Other Authorities:

INTRODUCTION

Amici curiae, the American Civil Liberties Union, the American Civil Liberties Union of Washington, and the Center for Human Rights and Global Justice at the New York University School of Law, respectfully submit this brief with the consent of the parties. *Amici* urge the Court to reverse the decision below. The district court remanded long-delayed naturalization applications to U.S. Citizenship and Immigration Services ("CIS" or "the agency") – without setting any timelines or giving appropriate instructions. The agency's failure to act violated its own regulations instructing that naturalization should be granted or denied at the time of the interview or at most within 120 days of the interview, 8 C.F.R. § 335.3, and was contrary to Congress's instruction that all applications for any form of immigration benefits should be processed within 180 days from the date of application, 8 U.S.C. § 1571.[1] Under the circumstances, the district court's decision to remand without instructions or timelines abdicates the judiciary's role – specifically assigned by Congress in 8 U.S.C. §

[1] The President also has directed the immigration agency to comply with a standard of processing all immigration applications within six months of receipt. *See* Remarks by the President at INS Naturalization Ceremony (July 10, 2001), *available at* http://www.whitehouse.gov/news/releases /2001/07/print/20010710-1.html.

1447(b) – to ensure that naturalization applications do not languish indefinitely and to hold the agency accountable for unreasonable delays.

Appellants and other eligible naturalization applicants are, by definition, long-time permanent residents who have demonstrated good moral character and who wish to pledge their allegiance to the United States. Without judicial action as contemplated by Congress, naturalization applicants like the appellants are left in indefinite limbo, despite meeting statutory requirements for naturalization. CIS's current practice and policy of unreasoned, indefinite delays is inconsistent with a transparent system of government in which agencies must follow stated rules.

The district court's approach would deprive tens of thousands of long-time U.S. permanent residents of a remedy for prolonged and indefinite delays in their efforts to become citizens and to join American civic society formally after contributing to it for so long as permanent residents. Those permanent residents are suffering concrete harms as a result of the agency's delays. These harms are particularly acute because of an apparent or perceived disproportionate impact on certain national origin groups.

As set forth in 8 U.S.C. § 1447(b), Congress rejected the idea that the government may delay the adjudication of naturalization applications indefinitely, without any recourse for the applicant. Nonetheless, CIS has

balked at resolving delayed cases, insisting that it has the exclusive power to make naturalization decisions despite clear statutory authority for the district courts to grant naturalization applications in cases of delay. The government has claimed that the delays are necessary for national security-related background checks. But as CIS's own ombudsman has noted, delays in processing background checks actually harm national security, because they permit possibly dangerous individuals to continue living in the United States indefinitely as lawful permanent residents.

Amici curiae respectfully urge the Court to reverse the decision of the district court.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of approximately 500,000 members dedicated to enforcing fundamental constitutional and legal rights. The Immigrants' Rights Project of the ACLU engages in litigation, advocacy and public education to protect the constitutional and civil rights of immigrants. The Immigrants' Rights Project has a particular interest and expertise in the issue of naturalization delays, as it has been or is currently serving as co-counsel in proposed class action lawsuits on the subject: *Zhang, et al. v. Gonzales, et al.*, No. 07-CV-503-SBA (N.D. Cal.), which is currently pending, and *Aziz,*

et al. v. Gonzales, et al., No. CV-06-4791-PA (C.D. Cal.), which was voluntarily dismissed pursuant to a settlement and stipulation.

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties and civil rights. The ACLU-WA engages in litigation and advocacy to ensure immigrants' rights and fair access to opportunity. It strongly supports the principles of due process and equal protection and their application to all people within Washington, both citizens and non-citizens.

The Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law undertakes legal research, advocacy, and litigation to defend and promote international human rights. Together with its International Human Rights Clinic, CHRGJ has researched and documented the disproportionate impact of counterterrorism policies on particular communities in the United States and abroad. CHRGJ has a particular interest and expertise in the subject of naturalizations delays; in April 2007 the Center published a 63-page report on the subject titled Americans on Hold: Profiling, Citizenship, and the "War on Terror."

ARGUMENT

Amici curiae urge the Court to reverse the decision of the district court. CIS's policies and practices have led to systemic, nationwide delays in naturalization, causing enormous harm to tens of thousands of longtime permanent residents and their families. The district court abdicated the responsibility conferred by Congress upon the federal courts to serve as a check on such unreasonable delays by CIS, by failing to grant citizenship or to remand to CIS with appropriate instructions, such as a reasonable deadline for adjudication.

I. THE GOVERNMENT'S POLICIES HAVE CAUSED TENS OF THOUSANDS OF NATURALIZATION APPLICANTS TO BE DELAYED UNREASONABLY

For reasons set forth in the appellants' opening brief at 15-17, the government violated the law by failing to decide appellants' naturalization applications within 120 days of their interviews with CIS. Such violations are rampant. Appellants are just two victims of a nationwide crisis of systemic delays in naturalization processing due to a background check known as an "FBI name check." *See, e.g.*, U.S. Gov't Accountability Office, Report to Congressional Requesters, Immigration Benefits: Improvements Needed to Address Backlogs and Ensure Quality of Adjudications (Nov. 2005) ("GAO Report"), *available at*

www.gao.gov/new.items/d0620.pdf; NYU School of Law, Center for Human Rights and Global Justice, Americans on Hold: Profiling, Citizenship, and the "War on Terror" at 13-14 (Apr. 2007) ("NYU Report"), *available at* www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf. Congress specifically provided for a remedy for appellants and others suffering from prolonged delays. 8 U.S.C. § 1447(b). By remanding to CIS without any "appropriate instructions" as contemplated by Congress, the district court abdicated its responsibility. In light of the large number of lawful permanent residents affected and the acute prejudice suffered by each of them, this Court should clarify the role of the district courts in ensuring that CIS does not delay cases unreasonably.

A. Tens of Thousands of Longtime Lawful Permanent Residents Have Been Subjected to Years-Long Delays in Naturalization as a Result of the Expanded FBI Name Check

Delays in the FBI name checks have affected tens of thousands of permanent residents who have applied to become U.S. citizens. The exact scope of the problem is difficult to discern because CIS has provided limited and varying reports. According to government submissions in this case, as of September 2006, there were 440,000 FBI name checks on immigration benefits (not limited to naturalization) that had been pending since at least January 2003, with an unspecified number of later-submitted applications

that have also been delayed. ER 163-64 (Decl. of Michael A. Cannon). However, according to a CIS report to Congress in May 2006, CIS stated that 153,166 name checks had been pending for more than 90 days, and 82,824 name checks had been pending more than one year. CIS Ombudsman, Annual Report 2006 at 24. CIS Ombudsman, Annual Report 2006 at 24 ("CIS Ombudsman Report").

The discrepancy between the various reports on delays is likely due to CIS's failure to keep adequate records. First, CIS does not even track the age of any given application. GAO Report at 5. Second, CIS defines and measures its "backlog" in a manner inconsistent with a congressional mandate that all immigration applications (including naturalization applications) be decided within 180 days. Rather than track how long each application has been pending, CIS simply compares the number of applications it has received in a given six-month period against the number of old applications pending during that period – on the theory that "by consistently completing more applications than are filed each month, the agency should gradually reduce its pending workload...." *Id.* at 15-16. But as the CIS Inspector General noted, this definition of backlog does not actually guarantee the desired result that every applicant will receive a response within six months. *Id.* at 16. Moreover, CIS has "reclassified"

large numbers of applications as "unripe," thus defining them out of the backlog. For example, CIS does not include in its backlog calculations those naturalization applications delayed because of an FBI name check or other outside agency action. CIS Ombudsman Report at 8-9. Thus, CIS maintains its records in a manner that obscures the extent of delay problems and makes it difficult to monitor agency compliance with congressional mandates about timely processing. *Id.*

It is clear, however, that the problem of naturalization delays has affected tens of thousands of applicants. One measure of the problem's enormity is the large number of applicants who have resorted to the statutory remedy in 8 U.S.C. § 1447(b). A Westlaw search for district court opinions on petitions for naturalization under section 1447(b) yields over 150 opinions. *See* Appendix 1 (list of district court opinions reported by Westlaw). There are surely many more 1447(b) cases that are not reported on Westlaw. In November 2005, the CIS Office of Chief Counsel estimated that there were 1,000 cases filed in the previous year alone challenging delayed FBI name checks. U.S. Dept. of Homeland Security, Office of Inspector General, A Review of U.S. Citizenship and Immigration Service's Alien Security Checks at 26 (Nov. 2005) ("OIG Report"), *available at* www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-06_Nov05.pdf. In addition,

there are at least four pending proposed class action lawsuits seeking injunctive and declaratory relief from naturalization delays. *Alsamman v. Gonzales*, No. 06-CV-2518 (N.D. Ill.) (compl. filed May 4, 2006); *Yakubova v. Chertoff*, No. 06-CV-3203 (E.D.N.Y.) (compl. filed June 28, 2006) (seeking certification of a district-wide class); *Kaplan v. Chertoff*, No. 06-CV-5304 (E.D. Pa.) (compl. filed Dec. 6, 2006) (seeking certification of a class of individuals losing SSI disability benefits as a result of naturalization delays); *Zhang v. Gonzales*, No. 07-CV-503 (N.D. Cal.) (am. compl. filed Feb. 8, 2007). Many of the plaintiffs in these cases have been held in limbo literally for years.[2]

The issue of systemic naturalization delays is of great concern not only for applicants personally, but also for the general public as an issue of government accountability and efficiency. Numerous newspapers have reported on the naturalization delay problem since the implementation of the

[2] *See, e.g., Hamzehzadeh v. Chertoff*, No. 06-CV-1462, 2007 WL 1629895 at *1 (E.D. Mo. June 4, 2007) (delay of two-and-a-half years from interview); *Gharbieh v. Chertoff*, No. 06-13869, 2007 WL 1584203 at *1 (E.D. Mich. May 30, 2007) (delay of over four years from interview); *Khan v. Gonzales*, No. 07-CV-29, 2007 WL 1560321 at *1 (D. Neb. May 29, 2007) (delay of three years from interview); *Zhao Yan v. Mueller*, No. H-07-0313, 2007 WL 1521732 (S.D. Tex. May 24, 2007) at *1 (delay of three years from interview); *Deng v. Chertoff*, No. C-06-7697, 2007 WL 1501736 at *1 (N.D. Cal. May 22, 2007) (delay of over three years from interview).

expanded FBI name check in 2002.[3] These media reports demonstrate that the problem is systemic and nationwide. As described in the following section, these delays have an enormous adverse impact on applicants and immigrant communities, as well as on the American public's expectation of an efficient and transparent system of government.

B. Naturalization Delays Cause Serious Prejudice to Applicants and Their Families

The public harm caused by CIS's naturalization delays is measured not only in the numbers of applicants affected, but also by the injury suffered by each of them. Appellants Rikabi and Al-Jabery exemplify one

---

[3] *See, e.g.*, Spencer S. Hsu, Immigration Agency Mired in Inefficiency, Wash. Post, May 28, 2007, at A1; Michael Higgins, Muslims Sue for Citizenship, Allege Gender, Religious Bias, Chicago Tribune, May 5, 2006, at 6; Lornet Turnbull, Backlog Holding Up Benefits, Seattle Times, Mar. 22, 2007, at B1; Kim Vo, 'Name Checks' Trigger Lawsuit, San Jose Mercury News, Feb. 9, 2007; Juliana Barbassa, Government Sued Over Citizenship Delays, Assoc. Press, Feb. 8, 2007; Matthai Chakko Kuruvila, Green-Card Holders File Suit Over 'Name Check' Delay, S.F. Chron., Feb. 8, 2007; Darryl Fears, U.S. Sued Over Dropping of Benefits for Disabled, Wash. Post, Dec. 21, 2006, at A3; Bruce Finley, Quest To Be Citizen Slows; FBI Sued Over Delays, Denver Post, Dec. 10, 2006, at A1; H.G. Reza, For Citizenship Delayed, 10 Taking U.S. to Court, L.A. Times, Aug. 1, 2006, at B1; Shelley Murphy, Their Lives Remain on Hold, Tangled in the Unexplained, Boston Globe, Dec. 17, 2005, at A14; Ann M. Simmons, Elderly, Disabled Refugees Cite Hardship, L.A. Times, Sept. 19, 2005, at 4; Mary Beth Sheridan, Some Would-Be Citizens Languish for Years in Security-Check Limbo, Wash. Post, Feb. 7, 2005, at B1; Nina Bernstein, Backlog Blocks Immigrants Hoping To Vote, N.Y. Times, Oct 15, 2004, at B1; Marc Santora, Threats and Responses: Naturalization; Citizenship Delayed for 1,500, N.Y. Times, Dec. 13, 2002, at A24.

of the most serious harms of delay – the loss of SSI disability benefits, which Congress made available to certain non-citizens for a limited seven-year period on the specific assumption that immigrants could be naturalized within that period. *See* 8 U.S.C. §§ 1612(a)(2)(A)(i), (ii); H.R. Rep. No. 105-149, 105th Cong., 1st Sess., at 1182 (1997) (explaining that Congress was extending original five-year period of eligibility to seven years because of delays in government's processing of green card and naturalization applications). For disabled and elderly immigrants who subsist on SSI disability benefits, the consequences of long delays in naturalization can be literally life-threatening. Moreover, these immigrants who receive SSI benefits are refugees and asylees who have escaped persecution or violence. *See* 8 U.S.C. §§ 1612(a)(1), § 1612(a)(2)(A).

In addition, delays in naturalization can prevent applicants from conferring citizenship or lawful permanent status on their immediate family members. For example, delays can cause a citizenship applicant to lose the opportunity to transmit her new nationality to a minor child. If a parent naturalizes before her child turns 18, the child may automatically gain derivative citizenship if the child is living in the United States in the parent's custody and is also a permanent resident. 8 U.S.C. § 1431. Thus, if a naturalization application is delayed for so long that a minor child reaches

the age of 18, the applicant's child will lose the opportunity for automatic derivative citizenship. In addition, as compared to a lawful permanent resident, a U.S. citizen has a far greater ability to petition for the immigration of immediate relatives to the United States. *See* 8 U.S.C. § 1151(b)(2) (spouses, children and parents of U.S. citizen are "immediate relatives" generally not subject to worldwide limitations on number of immigrant visas); 8 U.S.C. § 1153 (setting forth priority list for issuance of visas to family-sponsored immigrants). Delays in naturalization can cause applicants to be separated from their children living in the United States if the child does not otherwise have permanent status and reaches the age of majority during the pendency of the naturalization application. *See, e.g.*, *Alhamedi v. Gonzales*, No. 07 Civ. 2541, 2007 WL 1573935 at *2 (S.D.N.Y. May 30, 2007) (noting that applicant's 20-year-old daughter might be forced to leave her studies in the United States and return to home country if delay were not resolved before her birthday). In other cases, the applicant's spouse and children may still be living in the home country, and thus delays in naturalization mean delays in family reunification because relatives of lawful permanent residents are subject to visa limitations. 8 U.S.C. § 1153. Many permanent residents report that the years-long separation from a

spouse and children is the most agonizing aspect of the delay. *See* NYU Report at 2, 5, 22, 40.

Naturalization delays also result in restrictions on the ability of immigrants to travel freely. Many permanent residents are from countries that do not participate in the Visa Waiver Program, which affords U.S. citizens the ability to make short trips to 26 countries without the need for a visa. *See* http://travel.state.gov/visa/temp/without/without_1990.html#countries. Many permanent residents who are Muslim, or are perceived to be such, report that they are routinely subjected as non-citizens to intrusive questioning and searches by U.S. government officials while traveling. *See* NYU Report at 33-34. Thus, naturalization delays have caused many applicants – as well as their immediate family members who may be U.S. citizens – to refrain from travel altogether, even for urgent matters such as illness or death in the family. *See* NYU Report at 5, 23.

For many permanent residents, naturalization delays have had a negative impact on their employment. This is particularly true for highly skilled scientists, engineers, and other professional workers, who often have existing FBI records – which trigger "hits" in the FBI name check, although there is no derogatory information – as a result of previous employment-related security checks. GAO Report at 44-45. These permanent residents

often are hampered in their professional advancement because many jobs in their fields are available only to U.S. citizens. This is most often an impediment for white-collar professionals, but other immigrants who aspire to work in law enforcement or the U.S. military are similarly impeded. NYU Report at 24.

Finally, and most fundamentally, the crisis of naturalization delays has blocked the enfranchisement of tens of thousands of longtime permanent residents who wish to join American civic society formally, after years of contributing their work, community involvement, and tax revenues. *See* NYU Report at 33-23. FBI name check delays have delayed tens of thousands of immigrants from obtaining the right to vote. Nina Bernstein, Backlog Blocks Immigrants Hoping To Vote, N.Y. Times, Oct. 15, 2004, at B1.

Given the enormous impact of the widespread naturalization delays, this Court should clarify the district courts' statutory role in ensuring that the agency processes applications in a reasonably timely and transparent manner.

II. THE DISTRICT COURT'S DECISION TO REMAND WITHOUT INSTRUCTIONS IS INCONSISTENT WITH 8 U.S.C. § 1447(b) AND CONGRESIONAL INTENT

The district court's decision to remand without any instructions to CIS is inconsistent with 8 U.S.C. § 1447(b), which provides that when the agency has delayed its decision on a naturalization application, a district court may adjudicate or remand to CIS "with appropriate instructions." Notwithstanding the government's protestations that appellants' FBI name checks were incomplete, the district court had an obligation to act under the circumstances. The district court's remand order said only that CIS was "to adjudicate [plaintiffs' naturalization applications] as quickly as possible once their full background checks are complete." ER 199-200. Instructions this amorphous are equivalent to no instructions at all. Even though the government specified no derogatory information about appellants, no reason why additional time was needed to complete the FBI name checks, and indeed no indication that it *ever* would make a decision on the appellants' applications, the district court provided no remedy.

A. The Current Implementation of the FBI Name Check Is Highly Likely To Result in False Positive Results and Has Caused Systemic Delays in Naturalization

In the proceedings below, the government asserted that it could not make a decision on the appellants' naturalization applications because a certain background check called an "FBI name check" is not yet complete. The government has made this identical argument in hundreds of other

cases, due to systemic flaws in the implementation of the FBI name check process. Notwithstanding those flaws, if the government wishes to conduct an FBI name check as part of the naturalization process, the law requires that it do so in a reasonably timely manner.

Since 2002, CIS has required the current version of the FBI name check for naturalization, even though there is no specific authority for such a check in either the Immigration and Nationality Act or regulations. The naturalization statutes require only that the applicant (1) demonstrate understanding of the English language and the history and government of the United States; (2) reside continuously in the United States as an lawful permanent resident for a period of five years; (3) demonstrate good moral character during such period; and (4) have a continuous physical presence in the United States during the five-year period of residency. 8 U.S.C. §§ 1423, 1427. The naturalization statutes require the government to "conduct a personal investigation of the person applying for naturalization in the vicinity or vicinities in which such person has been employed or has engaged in business or work," but permit waiver of this investigation. 8 U.S.C. § 1446(a). The statute does not specify what such an "investigation" should entail. The only statute to address the issue of background checks

specifically is an uncodified portion of a 1997 appropriations bill instructing that

> none of the funds 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, Tit. I, 111 Stat. 2440, 2448 (Nov. 26, 1997); *see* 8 U.S.C. § 1446, Note 2.

The regulations implementing naturalization background checks are similarly devoid of any mention of an FBI name check. One regulation provides that a naturalization investigation "shall consist, at a minimum, of a review of all pertinent records, police department checks, and a [waivable] 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. Another regulation provides that the applicant should not be scheduled to appear for an "initial examination" until after the agency has received "a definitive response from the [FBI] that a full criminal background check" has been completed. 8 C.F.R. § 335.2(b). The regulation defines a "definitive response" as one of the following: (1) FBI confirmation that the

applicant "does not have an administrative or criminal record; (2) FBI confirmation that the applicant does have such a record; or (3) FBI confirmation that the applicant's fingerprint cards "have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected." *Id.* Thus, 8 C.F.R. § 335.2(b) contemplates that the "criminal background check" is one based upon fingerprint records – *i.e.*, not a name check.

Although the implementing regulations do not require or authorize any "criminal background check" other than a fingerprint records check, CIS currently requires three types of background checks: (1) a check of the applicant's name against the Interagency Border Inspection System ("IBIS"), a centralized records system combining information on "national security risks, public safety issues and other law enforcement concerns" from multiple agencies; (2) a check of the applicant's fingerprints against FBI criminal records showing arrests, criminal charges not leading to convictions, and convictions; and (3) the "FBI name check," which involves checking the applicant's name against a database of "administrative, applicant, criminal, personnel and other files compiled by law enforcement." U.S. Citizenship and Immigration Services, Fact Sheet: Immigration

Security Checks – How and Why the Process Works (Apr. 25, 2006) (copy attached as Appendix 2).[4]

As modified in 2002, CIS's implementation of the FBI name check requirement has resulted in widespread delays in the processing of naturalization applications. As set forth below, those delays have three main causes. First, neither CIS nor FBI has imposed any internal deadlines on name checks. Second, the FBI name checks result in long delays because the name check database does not contain sufficient information to determine whether a possible "hit" is indeed a match between the applicant and the person in the database and then, if it is, whether there is any derogatory information about the applicant. In many cases, the FBI must conduct a laborious manual search of its paper records. *See* Excerpts of Record ("ER") at 162-63 (Decl. of Michael A. Cannon, Section Chief of FBI National Name Check Program).

---

[4] CIS implemented these specific requirements for naturalization without any public notice or opportunity for comment. *Amici* believe that CIS's implementation of the FBI name check therefore violates the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553. Moreover, for many reasons set forth here, the FBI name check is substantively flawed as a method of assessing an applicant's moral character. Because these issues are not presented in the instant case, however, *amici* do not brief them fully here. Assuming that the FBI name checks are a legitimate and lawful requirement, the government must complete them in a reasonably timely manner.

A third reason for long delays in the FBI name check process is that false positive results are highly likely due to the nature of the database and the manner of checking the applicant's name. Prior to 2002, the FBI name check was conducted by checking the name of an applicant against "main" entries in the FBI's records – i.e., names corresponding to the subject of an FBI file. In 2002, CIS elected to expand enormously the FBI name check for naturalization applications, checking applicants against not only "main" entries, but also "reference" entries – i.e., names of individuals or organizations that are only mentioned in a "main" file. Those "references" may be innocent persons, including witnesses or even crime victims. ER 160 (Decl. of Michael A. Cannon). Moreover, the decision whether to input a particular name as a "reference" is left entirely to an individual FBI agent and her supervisors. *Id.* at 161. Thus, by the government's own admission, a person may have a "reference" entry in an FBI file even though he has never engaged in any wrongdoing. The fact that a naturalization applicant's name appears in an FBI name check does not mean that there is any derogatory information about him. In that sense, the FBI name check as implemented since 2002 is not a "criminal" background check, as required by regulation. The purpose of a criminal background check is to detect whether an applicant may be engaged in criminal activity, including risks to

national security. Because the FBI name check database contains the names of many innocent people, the check is not designed to uncover criminal activity effectively.

Moreover, the way that the FBI conducts a name check also makes it highly likely to generate false positive results despite the absence of any derogatory information about the applicant. In addition to checking the applicant's name, the FBI also runs checks of various permutations and alternate spellings of the applicant's name. *Id.* at 162. The government argues that this step is "especially important considering that many names in our indices have been transliterated from a language other than English." *Id.* In other words, any language that uses a non-Roman alphabet – such as Arabic, Russian, or Chinese – must be transliterated for entry into U.S. databases, thus giving rise to alternate spellings (*e.g.*, Mohammed, Mohamed, Muhamad) that raise the probability of false positive results. The government also has acknowledged that the FBI name check process is likely to result in a high number of false positive results for persons with common names (such as Smith, Mohammed, or Singh). *See* Supp. Decl. of Michael A. Cannon, *Yakubova, et al. v. Chertoff, et al.*, No. 06-CV-3203 (E.D.N.Y.) (filed Sept. 1, 2006) (copy attached as Appendix 3). That effect is compounded for linguistic or cultural groups that have a relatively small

pool of given and family names, which is the case for many Muslims regardless of their nationality or native language. The combined result of these factors has led to an apparent disproportionate impact on applicants who are Muslim or from predominantly Muslim countries. Indeed, there is a widespread public perception that applicants who are Muslim or from predominantly Muslim countries are disproportionately affected by naturalization delays – not only because of the procedural factors set forth above, but because Muslims are overrepresented in the FBI's files. *See* NYU Report 20-21.

B. National Security Is Not Served by Delays in the Name Check Procedure

The government's argument that delays in the FBI name check are necessary for national security should be rejected out of hand. Assuming *arguendo* that the expanded post-2002 name check procedure actually serves national security, delays in those checks are not in the public interest for national security or any other purpose, given that eligible naturalization applicants by definition are long-time residents of the United States. Indeed, the CIS ombudsman has acknowledged that "the current USCIS name check policy may *increase* the risk to national security by prolonging the time a potential criminal or terrorist remains in the country." CIS Ombudsman, Annual Report 2006 at 25 (emphasis added), *available at*

http://www.dhs.gov/xlibrary/assets/CISOmbudsman_AnnualReport_2006.pdf ("CIS Ombudsman Report").[5]

In this particular case, CIS insists that it should have an indefinite period of time in which to adjudicate appellants' naturalization applications. It has given no explanation for why the FBI name check is incomplete after such a long delay, or why additional time is needed, and no indication as to when, or whether, the applications will ever be adjudicated. To justify systemic delays due to FBI name checks, CIS has merely invoked the phrase "national security." Federal courts have rightfully rejected such vague rationales for indefinite naturalization delays. *See, e.g., Mostovoi v. Sec'y of Dep't of Homeland Security*, No. 06 Civ. 6388, 2007 WL 1610209 (S.D.N.Y. June 4, 2007) (noting that deference to agency's practical constraints and primary responsibility for naturalization is appropriate, but that "such deference cannot be absolute"). *Cf. United States v. U.S. District Court*, 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the

[5] Moreover, CIS is inconsistent in its insistence on complete FBI name checks for immigration benefits. Both CIS and the enforcement arm of the Department of Homeland Security, the Bureau of Immigration and Customs Enforcement ("ICE"), permit grants of asylum even if the applicant's FBI name check is still pending. OIG Report at 13. The CIS and ICE position on the admission of asylum applicants without a FBI name check further suggests that CIS's policy of delaying naturalization for FBI name checks is not necessary for national security.

power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."); *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) ("[W]e are … troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions."); *American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400, 419 (S.D.N.Y. 2006) (rejecting government's blanket invocation of "'national security' as a protective shroud to justify exclusion of aliens on the basis of their political beliefs" and requiring specific explanation as to why particular individual poses actual risk). "Administrative agencies such as USCIS must explain and justify their actions in order to permit meaningful checks on executive power." *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1078-79 (N.D. Cal. 2005) (requiring CIS to issue proof of lawful permanent resident status to persons who had been granted such status by immigration judges, over government's objection that background checks had not been completed).

C. The District Court's Decision To Remand Without Instructions Is Inconsistent with 8 U.S.C. § 1447(b)'s Purpose of Providing a Remedy for Prolonged and Indefinite Delays

Like hundreds of other hopeful citizenship applicants, the appellants brought suit in district court under 8 U.S.C. § 1447(b). Congress enacted this statute in 1990, when it transformed the naturalization process from one involving both the Immigration and Naturalization Service and the district courts to one in which the agency would have the primary responsibility for naturalization.[6] Congress wanted to ensure that the district courts would remain an option for applicants who suffered delays in the administrative naturalization process, providing:

> If there is a failure [by the agency] 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. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

By its plain terms, section 1447(b) permits district courts to hold hearings on delayed naturalization applications and then to grant applications or "remand ... *with appropriate instructions*" to CIS for a final determination. 8 U.S.C. § 1447(b) (emphasis added); *see also United States v. Hovsepian*, 359 F.3d

[6] *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, §§ 401, 407(d).

1144, 1160 (9th Cir. 2004) (en banc) ("Congress empowered the district court to remand the matter to the INS with *the court's* instructions") (emphasis in original). In enacting section 1447(b), Congress specifically intended that the immigration agency should not be permitted to delay naturalization decisions indefinitely, and that applicants should have recourse to a judicial remedy in cases of delay. *Hovsepian*, 359 F.3d at 1163 ("A central purpose of the statute was to reduce the waiting time for naturalization applicants."). The legislative history demonstrates that Congress was deeply troubled by backlogs in the naturalization process. *See* 135 Cong. Rec. H4539-02, 4542 (statement of Rep. Morrison) ("This legislation ... addresses a very substantial concern that so many of all of our constituents have faced, and that is the problem of long backlogs in moving through the naturalization process ...."); *id.* at 4543 (statement of Rep. Richardson) ("Those seeking American citizenship fulfill several needed obligations....It is unfair, however, that we postpone their citizenship because of administrative backlog.").

In the decision below, the district court simply remanded the applications of appellants Rikabi and Al-Jabery to CIS without any "appropriate instructions" to resolve the delay, even though CIS gave no indication that it would take any steps *ever* to resolve the delay. In contrast

to its order regarding appellant Aziz, which required CIS to adjudicate the application within 30 days of Aziz's submission of a new form, the district court merely ordered CIS "to adjudicate plaintiff Rikabi's and plaintiff Al-Jabery's N-400 Application for Naturalization as quickly as possible once their full background checks are complete." ER at 199-200. The latter order did not contain an "appropriate instruction" as required under 8 U.S.C. § 1447(b). The district court order does not require CIS to take any definable action and sets no definable standard by which CIS's compliance could be measured. Under the district court's order, CIS is free to continue the status quo – a prolonged delay with no end in sight. Thus, the order provided no relief at all.

The district court's decision was therefore contrary to the plain language of 8 U.S.C. § 1447(b), which requires a district court either to grant, to deny, or to remand "with appropriate instructions." As one district court has noted, "when Congress has clearly granted jurisdiction, it is the Court's responsibility to exercise it." *Mostovoi v. Sec'y of Dep't of Homeland Security*, No. 06 Civ. 6388 (GEL), 2007 WL 1610209 at *3 (S.D.N.Y. June 4, 2007). *See also* 135 Cong. Rec. H4539-02, 4542-43 (statement of Rep. Morrison) ("When no decision is forthcoming within 120 days of the INS examination, the applicant can file a petition in the court.

The court has the ability to make a decision at that time or remand to the INS *for further factfinding*.") (emphasis added). The decision below serves as a negative and incorrect precedent, by suggesting that even when a naturalization applicant has demonstrated compliance with all statutory requirements, and the agency has given no indication that it will *ever* reach a decision, the court may elect to do nothing to cut short the agency's indefinite delay. While some district courts have taken an approach like that taken by the court below, others have properly exercised their authority under 8 U.S.C. § 1447(b) by giving plaintiffs meaningful remedies for unreasonable delays. *See, e.g., Mostovoi*, 2007 WL 1610209, at *5 (remanding to CIS with instruction to "take whatever steps are necessary" to make a determination within 30 days, and in the event to a positive determination to swear in the applicant within the next 30 days, and retaining jurisdiction to monitor compliance); *Astafieva v. Gonzales*, No C06-04820, 2007 WL 1031333, at *3 (N.D. Cal. Apr. 3, 2007) (initially giving government 60 days to complete name check and then, after government failed to do so, granting naturalization application after an evidentiary hearing); *Aslam v. Gonzales*, No C06-614, 2006 WL 3749905 (W.D. Wash. Dec. 19, 2006) (holding case in abeyance for 60 days for FBI to complete name check, and ordering government to show cause why

applicant should not be immediately naturalized if name check is not complete within 60 days); *Al-Kudsi v. Gonzales*, No. CV-05-1584, 2006 WL 752556 (D. Or. Mar. 22, 2006) (ordering FBI to complete name check within 90 days; ordering that if FBI fails to comply, CIS is to deem the name check completed with no adverse information; that naturalization should be granted within next 30 days after such event; and ordering CIS to forward naturalization certificate to court so that court may administer the oath of citizenship to applicant). This Court should clarify the district courts' role under 8 U.S.C. § 1447(b), to prevent other district courts in this Circuit from following suit.

The need for judicial action under 8 U.S.C. § 1447(b) is particularly acute because CIS has responded to the delay crisis with recalcitrance. In response to an upsurge in cases brought under 8 U.S.C. § 1447(b), CIS has instituted policies and practices expressly designed to frustrate the ability of delayed applicants to turn to the courts, despite Congress's intent that a judicial remedy should be available. First, CIS has rearranged the steps in the naturalization process for that purpose. Section 1447(b) contemplates judicial action when an application has been delayed more than 120 days from the naturalization "examination," which this Court has construed to mean the interview at which the applicant is questioned and tested on

English proficiency and U.S. government and civics. *Hovsepian*, 359 F.3d at 1161 ("8 U.S.C. § 1447(b) requires the INS to make a decision regarding a naturalization application within 120 days of the INS's initial interview of the applicant."). In light of this Court's holding in *Hovsepian*, CIS has changed its prior policy of holding naturalization interviews prior to completion of name checks, effectively shifting delays in adjudication from the post-interview period to the pre-interview period. Through this policy change, CIS is attempting to defeat district court jurisdiction by preventing the 120-day clock from beginning to run.[7] CIS undertook this policy change about the timing of the naturalization interview for the express purpose of preventing applicants from filing suit under 8 U.S.C. § 1447(b). *See* Memorandum from Michael Aytes, Acting Dir. of Domestic Operations, U.S. Citizenship and Immigration Services, to Regional Directors, et al., at 2 (Apr. 25, 2006) (copy attached as Appendix 4).[8] Thus, CIS has taken steps

[7] Whether CIS's policy change actually has the effect of defeating district court jurisdiction over cases in which the delay has been shifted to the pre-interview period is not presented in the instant case, and so *amici* do not address that issue here. The policy change is likely to be the subject of future litigation before this Court.

[8] This policy has had a dramatic impact on applications. At a March 2007 meeting with representatives of the American Immigration Lawyers Association, CIS officials stated that there were 58,000 applications still pending due to a name check delay, with interviews completed under the old CIS policy. However, as a result of the new policy, there were 110,000 cases with delayed interviews because of a pending FBI name check. *See*

that actually slow the processing of naturalization (by delaying interviews) in an effort to foil the federal district courts' express statutory authority under 8 U.S.C. § 1447(b).

In addition to changing its policy about the timing of naturalization interviews, CIS has also sought to discourage applicants from filing suit under 8 U.S.C. § 1447(b) by refusing to expedite the applications of those who file suit. Prior to December 2006, the government settled many suits under 8 U.S.C. § 1447(b) by completing outstanding name checks and offering to naturalize the plaintiff shortly after the filing of the litigation. However, in December 2006, CIS changed its policy to eliminate that basis for expedition, and announced the policy change publicly in February 2007. *See* Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Services, to Regional Directors, et al., at 2, 6 (Dec. 21, 2006) (copy attached as Appendix 5); USCIS Update: USCIS Clarifies Criteria To Expedite FBI Name Check (Feb. 20, 2007), *available at* www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf. As a result of this new CIS policy, frustrated applicants will be discouraged further from asking the courts to resolve their delayed cases.

Minutes of Mar. 14, 2007 AILA-USCIS Liaison Meeting at 8 (copy attached as Appendix 6).

In light of CIS's efforts to discourage litigation under 8 U.S.C. § 1447(b), it is particularly urgent that the federal judiciary assert its role in providing relief from unreasonable naturalization delays.

CONCLUSION

Amici curiae urge the Court to reverse the decision below. The district court failed to grant the application or to remand with specific instructions meant to resolve the delay. That disposition was inconsistent with 8 U.S.C. § 1447(b), and should be reversed.

Respectfully submitted,

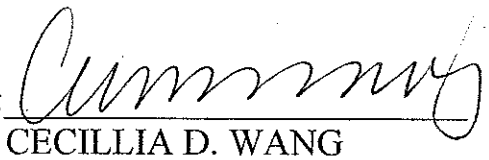
Dated: June 12, 2007

Cecillia D. Wang
Lucas Guttentag
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0775

Sarah Dunne
Aaron Caplan
American Civil Liberties Union Foundation of Washington
705 Second Avenue, Third Floor
Seattle, WA 98104
(206) 624-2184

Smita Narula
Center for Human Rights and Global Justice
New York University School of Law
245 Sullivan Street
New York, NY 10012
(212) 992-8824

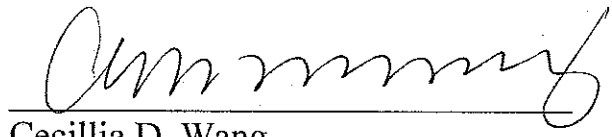
Counsel for *Amici Curiae*

By: 
CECILLIA D. WANG

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Washington, and NYU Center for Human Rights and Global Justice in Support of Plaintiffs-Appellants is proportionally spaced, has a 14-point Times New Roman typeface, and contains fewer than 7,000 words.

Dated: June 12, 2007



Cecillia D. Wang

APPENDICES

APPENDIX 1 - List of district court decisions citing 8 U.S.C. § 1447(b) reported by Westlaw

APPENDIX 2 - U.S. Citizenship and Immigration Services, Fact Sheet: Immigration Security Checks – How and Why the Process Works (Apr. 25, 2006)

APPENDIX 3 - Supp. Decl. of Michael A. Cannon, Yakubova, et al. v. Chertoff, et al., No. 06-CV-3203 (E.D.N.Y.) (filed Sept. 1, 2006)

APPENDIX 4 - Memorandum from Michael Aytes, Acting Dir. of Domestic Operations, U.S. Citizenship and Immigration Services, to Regional Directors, et al. (Apr. 25, 2006)

APPENDIX 5 - Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Services, to Regional Directors, et al. (Dec. 21, 2006)

APPENDIX 6 - Minutes of Mar. 14, 2007 AILA-USCIS Liaison Meeting

APPENDIX 1

Westlaw search for district court opinions on petitions for naturalization under section 1447(b)

Westlaw.

Search Result Citations List - DCT 8 w/5 "1447(b)" and naturalization

1. Suarez v. Barrows, Slip Copy, 2007 WL 1624358, , N.D.Tex., June 05, 2007
2. Mostovoi v. Secretary of Dept. of Homeland Sec., Slip Copy, 2007 WL 1610209, , S.D.N.Y., June 04, 2007
3. Hamzehzadeh v. Chertoff, Slip Copy, 2007 WL 1629895, , E.D.Mo., June 04, 2007
4. Alhamedi v. Gonzales, Slip Copy, 2007 WL 1573935, , S.D.N.Y., May 30, 2007
5. Gharbieh v. Chertoff, Slip Copy, 2007 WL 1584203, , E.D.Mich., May 30, 2007
6. Khan v. Gonzales, Slip Copy, 2007 WL 1560321, , D.Neb., May 29, 2007
7. Yan v. Mueller, Slip Copy, 2007 WL 1521732, , S.D.Tex., May 24, 2007
8. Deng v. Chertoff, Slip Copy, 2007 WL 1501736, , N.D.Cal., May 22, 2007
9. Abdelbagi v. U.S. Citizenship and Immigration Service, Slip Copy, 2007 WL 1520990, , S.D.Tex., May 22, 2007
10. Andron v. Gonzales, --- F.Supp.2d ----, 2007 WL 1531855, , W.D.Mo., May 21, 2007
11. Mroczek v. Gonzales, Slip Copy, 2007 WL 1468798, , W.D.Wash., May 18, 2007
12. Alhassan v. Gonzales, Slip Copy, 2007 WL 1455841, , D.Colo., May 16, 2007
13. Qui v. Chertoff, --- F.Supp.2d ----, 2007 WL 1430207, , D.N.J., May 15, 2007
14. Silebi De Donado v. Swacina, --- F.Supp.2d ----, 2007 WL 1417600, 20 Fla. L. Weekly Fed. D 798, , S.D.Fla., May 14, 2007
15. Weir v. Gonzales, Slip Copy, 2007 WL 1430109, , W.D.Wash., May 14, 2007
16. Alsamir v. U.S. Citizenship and Immigration Services, Slip Copy, 2007 WL 1430179, , D.Colo., May 14, 2007
17. Berishev v. Chertoff, --- F.Supp.2d ----, 2007 WL 1390678, , D.Mass., May 11, 2007
18. Hussain v. Chertoff, --- F.Supp.2d ----, 2007 WL 1374753, , D.Mass., May 10, 2007
19. Bengana v. Chertoff, Slip Copy, 2007 WL 1385690, , E.D.Mo., May 08, 2007
20. Lahrar v. U.S. Citizenship and Immigration Services, --- F.Supp.2d ----, 2007 WL 1390665, , E.D.Va., May 08, 2007
21. Li v. Gonzales, Slip Copy, 2007 WL 1303000, , D.N.J., May 03, 2007
22. Saleh Ali v. Gonzales, Slip Copy, 2007 WL 1288814, , W.D.N.Y., May 01, 2007
23. Elaloul v. Hansen, Slip Copy, 2007 WL 1299274, , N.D.Ohio, May 01, 2007
24. Abdelkarim v. Gonzales, Slip Copy, 2007 WL 1284924, , E.D.Mich., April 30, 2007
25. Qiang Wang v. Gonzales, Slip Copy, 2007 WL 1299871, , S.D.Cal., April 30, 2007
26. Dong Liu v. Chertoff, Slip Copy, 2007 WL 1300127, , S.D.Cal., April 30, 2007
27. Issa v. Mueller, --- F.Supp.2d ----, 2007 WL 1454742, , E.D.Mich., April 27, 2007
28. Awada v. Gonzales, Slip Copy, 2007 WL 1218769, , E.D.Mich., April 24, 2007
29. Lin v. Secretary, U.S. Dept. of Homeland Sec., --- F.Supp.2d ----, 2007 WL 1231482, , W.D.N.Y., April 24, 2007
30. Yang v. Gonzales, Slip Copy, 2007 WL 1232066, , E.D.Mich., April 24, 2007
31. Yardimci v. Gonzales, Slip Copy, 2007 WL 1202819, , D.Utah, April 23, 2007
32. Shamdeen v. Gonzales, Slip Copy, 2007 WL 1217702, , W.D.Wash., April 23, 2007
33. Lifshaz v. Gonzales, Slip Copy, 2007 WL 1169169, , W.D.Wash., April 19, 2007
34. Sidhu v. Chertoff, Slip Copy, 2007 WL 1119690, , E.D.Cal., April 16, 2007
35. Singh v. Chertoff, Slip Copy, 2007 WL 1119787, , E.D.Cal., April 16, 2007
36. Deol v. Chertoff, Slip Copy, 2007 WL 1119791, , E.D.Cal., April 16, 2007
37. Adabkhah v. Gonzales, Slip Copy, 2007 WL 1120571, , D.Utah, April 13, 2007
38. Syed v. Chertoff, Slip Copy, 2007 WL 1080100, , S.D.Tex., April 09, 2007
39. Dimopoulos v. Blakeway, Slip Copy, 2007 WL 1052551, , S.D.Tex., April 05, 2007
40. Osowa v. Gonzales, Slip Copy, 2007 WL 1101216, , E.D.Mich., April 05, 2007
41. Alamen v. Chertoff, Not Reported in F.Supp.2d, 2007 WL 1063015, , C.D.Ill., April 04, 2007

42. Astafieva v. Gonzales, Slip Copy, 2007 WL 1031333, , N.D.Cal., April 03, 2007
43. Garcia-Guerra v. Chertoff, Slip Copy, 2007 WL 1004223, , E.D.Mich., March 30, 2007
44. Kaplan v. Chertoff, 481 F.Supp.2d 370, 2007 WL 966510, , E.D.Pa., March 29, 2007
45. Al-Saleh v. Gonzales, Slip Copy, 2007 WL 990145, , D.Utah, March 29, 2007
46. Al Saleh v. District Director, USCIS Detroit, Slip Copy, 2007 WL 925693, , E.D.Mich., March 28, 2007
47. Negam v. U.S., 480 F.Supp.2d 877, 2007 WL 891257, , N.D.Tex., March 23, 2007
48. Dimopoulos v. Blakeway, Slip Copy, 2007 WL 922224, , S.D.Tex., March 23, 2007
49. Mahd v. Chertoff, Slip Copy, 2007 WL 891867, , D.Colo., March 22, 2007
50. Lin v. Gonzalez, Slip Copy, 2007 WL 895472, , E.D.Cal., March 22, 2007
51. Grinberg v. Swacina, 478 F.Supp.2d 1350, 2007 WL 840109, 20 Fla. L. Weekly Fed. D 619, , S.D.Fla., March 20, 2007
52. Ibrhimi v. Still, Slip Copy, 2007 WL 841790, , N.D.Cal., March 20, 2007
53. Ogunwomoju v. District Director of Citizenship and Immigration, Slip Copy, 2007 WL 764537, , E.D.N.Y., March 09, 2007
54. Nguyen v. Gonzalez, Slip Copy, 2007 WL 713043, , S.D.Tex., March 06, 2007
55. Khan v. F.B.I., Slip Copy, 2007 WL 713142, , S.D.Tex., March 06, 2007
56. Arshad v. Chertoff, Slip Copy, 2007 WL 701185, , E.D.Tex., March 02, 2007
57. Hamim v. Chertoff, Slip Copy, 2007 WL 679643, , E.D.Mo., March 01, 2007
58. Kheridden v. Chertoff, Slip Copy, 2007 WL 674707, , D.N.J., February 28, 2007
59. Morrison v. Department of Homeland Security, Slip Copy, 2007 WL 627877, , E.D.Mich., February 23, 2007
60. Mechanic v. Department of Homeland Sec., Slip Copy, 2007 WL 580780, , S.D.Tex., February 20, 2007
61. Lazli v. U.S. Citizenship and Immigration Services, Slip Copy, 2007 WL 496351, , D.Or., February 12, 2007
62. Attili v. F.B.I., Slip Copy, 2007 WL 471124, , S.D.Tex., February 09, 2007
63. Aarda v. U.S. Citizenship and Immigration Services, Slip Copy, 2007 WL 465220, , D.Minn., February 08, 2007
64. Al-Ghanem v. Gonzales, Slip Copy, 2007 WL 446047, , D.Utah, February 07, 2007
65. Kalla v. Chertoff, Slip Copy, 2007 WL 415157, , N.D.Ga., February 06, 2007
66. Qazi v. Gonzales, Slip Copy, 2007 WL 446040, , S.D.Tex., February 06, 2007
67. Manzoor v. Chertoff, 472 F.Supp.2d 801, 2007 WL 413227, , E.D.Va., February 05, 2007
68. Perry v. Gonzales, 472 F.Supp.2d 623, 2007 WL 293424, , D.N.J., February 01, 2007
69. Hussein v. Gonzales, 474 F.Supp.2d 1265, 2007 WL 328691, 20 Fla. L. Weekly Fed. D 771, , M.D.Fla., January 31, 2007
70. Khan v. Frazier, Slip Copy, 2007 WL 270413, , D.Minn., January 29, 2007
71. Affaneh v. Hansen, Slip Copy, 2007 WL 295474, , S.D.Ohio, January 29, 2007
72. Simonovskaya v. Chertoff, Slip Copy, 2007 WL 210391, , D.Mass., January 26, 2007
73. Stepchuk v. Gonzales, Slip Copy, 2007 WL 185013, , W.D.Wash., January 18, 2007
74. Astafieva v. Gonzales, Slip Copy, 2007 WL 120852, , N.D.Cal., January 11, 2007
75. Aslam v. Gonzales, Slip Copy, 2006 WL 3749905, , W.D.Wash., December 19, 2006
76. Ahmed v. Chertoff, Slip Copy, 2006 WL 3771814, , S.D.Tex., December 15, 2006
77. Badier v. Gonzales, 475 F.Supp.2d 1294, 2006 WL 4079085, , N.D.Ga., December 01, 2006
78. Martinez v. Gonzales, 463 F.Supp.2d 569, 2006 WL 3477985, , E.D.Va., November 29, 2006
79. Stepchuk v. Gonzales, Slip Copy, 2006 WL 3361776, , W.D.Wash., November 17, 2006
80. Shalan v. Chertoff, Slip Copy, 2006 WL 3307512, , D.Mass., November 14, 2006
81. Tyomkina v. Gonzalez, Slip Copy, 2006 WL 4012178, , W.D.Wash., November 06, 2006
82. Zaidi v. Chertoff, Slip Copy, 2006 WL 3147722, , N.D.Ill., November 01, 2006
83. Shalabi v. Gonzales, Slip Copy, 2006 WL 3032413, , E.D.Mo., October 23, 2006
84. Shamsai v. Gonzalez, Slip Copy, 2006 WL 3003972, , N.D.Ga., October 20, 2006
85. Cuong Quang Le v. McNamee, Slip Copy, 2006 WL 3004524, , D.Or., October 20, 2006
86. Alnabi v. Gonzales, Slip Copy, 2006 WL 2990338, , D.Minn., October 18, 2006
87. El Kassemi v. Department of Homeland Sec., Slip Copy, 2006 WL 2938819, , D.N.J., October 13, 2006
88. Said v. Gonzales, Slip Copy, 2006 WL 2711765, , W.D.Wash., September 21, 2006

89. Chaudry v. Chertoff, Slip Copy, 2006 WL 2670051, , D.Minn., September 18, 2006
90. Amin v. U.S. Citizenship and Immigration Services, Slip Copy, 2006 WL 2645137, , N.D.Ohio, September 14, 2006
91. Yaqoub v. Chertoff, Slip Copy, 2006 WL 2454700, , E.D.Cal., August 22, 2006
92. Eng v. Chertoff, Slip Copy, 2006 WL 2442894, , S.D.Tex., August 21, 2006
93. Meyersiek v. U.S. Citizenship and Immigration Services, 445 F.Supp.2d 202, 2006 WL 2380795, , D.R.I., August 17, 2006
94. Etape v. Chertoff, 446 F.Supp.2d 408, 2006 WL 2355079, , D.Md., August 15, 2006
95. Martin v. Gantner, 443 F.Supp.2d 367, 2006 WL 2216748, , E.D.N.Y., August 04, 2006
96. Becker v. Chertoff, Not Reported in F.Supp.2d, 2006 WL 2128132, , D.N.J., July 26, 2006
97. Fuks v. Devine, Slip Copy, 2006 WL 2051321, , N.D.Ill., July 20, 2006
98. Khan v. Chertoff, Not Reported in F.Supp.2d, 2006 WL 2009055, , D.Ariz., July 14, 2006
99. Dahan v. U.S. Atty. Gen., Slip Copy, 2006 WL 2380388, , S.D.N.Y., June 24, 2006
100. Damra v. Chertoff, Not Reported in F.Supp.2d, 2006 WL 1786246, , N.D.Ohio, June 23, 2006
101. Mahapatra v. Melville, Slip Copy, 2006 WL 1734259, , N.D.Ga., June 20, 2006
102. Khelifa v. Chertoff, 433 F.Supp.2d 836, 2006 WL 1593972, , E.D.Mich., June 09, 2006
103. Meyersiek v. U.S. Citizenship and Immigration Service, Slip Copy, 2006 WL 1582397, , D.R.I., June 06, 2006
104. Daami v. Gonzales, Not Reported in F.Supp.2d, 2006 WL 1457862, , D.N.J., May 22, 2006
105. Mohamed v. Frazier, Not Reported in F.Supp.2d, 2006 WL 1424619, , D.Minn., May 18, 2006
106. Saba-Bakare v. Ridge, Not Reported in F.Supp.2d, 2006 WL 1350298, , S.D.Tex., May 16, 2006
107. Sow v. Campbell, Not Reported in F.Supp.2d, 2006 WL 1302602, , W.D.Tenn., May 04, 2006
108. Farah v. Gonzales, Not Reported in F.Supp.2d, 2006 WL 1116526, , D.Minn., April 26, 2006
109. Fuks v. Divine, Slip Copy, 2006 WL 1005094, , N.D.Ill., April 14, 2006
110. Al-Kudsi v. Gonzales, Not Reported in F.Supp.2d, 2006 WL 752556, , D.Or., March 22, 2006
111. Raufi v. Chertoff, 434 F.Supp.2d 813, 2006 WL 1302405, , S.D.Cal., March 16, 2006
112. Meraz v. Comfort, Not Reported in F.Supp.2d, 2006 WL 861859, , N.D.Ill., March 09, 2006
113. Benad v. Maurer, Not Reported in F.Supp.2d, 2006 WL 559244, , D.Colo., March 03, 2006
114. Zhang v. Chertoff, Slip Copy, 2006 WL 4045600, , E.D.Mich., February 01, 2006
115. Shalan v. Chertoff, Not Reported in F.Supp.2d, 2006 WL 42143, , D.Mass., January 06, 2006
116. Saidi v. Jenifer, Slip Copy, 2005 WL 5179147, , E.D.Mich., December 23, 2005
117. Essa v. U.S. Citizenship and Immigration Services, Not Reported in F.Supp.2d, 2005 WL 3440827, , D.Minn., December 14, 2005
118. Mahmood v. Jenifer, Slip Copy, 2005 WL 5179153, , E.D.Mich., November 30, 2005
119. Zaranska v. U.S. Dept. of Homeland Security, 400 F.Supp.2d 500, 2005 WL 3008426, , E.D.N.Y., November 10, 2005
120. Adebola v. Watson, Not Reported in F.Supp.2d, 2005 WL 2318536, , N.D.Tex., September 20, 2005
121. Ibrahim v. Department of Homeland Security, Not Reported in F.Supp.2d, 2005 WL 2230152, , S.D.Tex., September 13, 2005
122. El-Daour v. Chertoff, 417 F.Supp.2d 679, 2005 WL 2106572, , W.D.Pa., August 26, 2005
123. Omari v. Gonzales, Not Reported in F.Supp.2d, 2005 WL 2036498, , N.D.Tex., August 11, 2005
124. Placencia v. U.S., Not Reported in F.Supp.2d, 2005 WL 1861702, , E.D.N.Y., August 02, 2005
125. Castracani v. Chertoff, 377 F.Supp.2d 71, 2005 WL 1566443, , D.D.C., July 05, 2005
126. Ogunfuye v. Acosta, Not Reported in F.Supp.2d, 2005 WL 1607034, , S.D.Tex., July 01, 2005
127. Pichardo-Martinez v. Ashcroft, 399 F.Supp.2d 1043, 2005 WL 3047064, , D.Ariz., June 06, 2005
128. Danilov v. Aguirre, 370 F.Supp.2d 441, 2005 WL 1253527, , E.D.Va., May 26, 2005
129. Angel v. Ridge, Not Reported in F.Supp.2d, 2005 WL 1263143, , S.D.Ill., May 25, 2005
130. Adiemereonwu v. Gonzales, Not Reported in F.Supp.2d, 2005 WL 1206878, , N.D.Tex., May 20, 2005
131. Sweilem v. U.S. Citizenship and Immigration Services, Not Reported in F.Supp.2d, 2005 WL 1123582, , N.D.Ohio, May 10, 2005
132. Rodriguez v. Meissner, Not Reported in F.Supp.2d, 2005 WL 887709, , N.D.Tex., April 14, 2005
133. Alkenani v. Barrows, 356 F.Supp.2d 652, 2005 WL 388552, , N.D.Tex., February 14, 2005
134. Baez-Fernandez v. I.N.S., 385 F.Supp.2d 292, 2005 WL 94852, , S.D.N.Y., January 18, 2005

135. Dominguez v. Ashcroft, Not Reported in F.Supp.2d, 2004 WL 2632916, , D.Or., November 18, 2004
136. U.S. v. Dang, Not Reported in F.Supp.2d, 2004 WL 2731911, , E.D.Cal., November 15, 2004
137. Zhai v. U.S. Citizenship and Immigration Services, Not Reported in F.Supp.2d, 2004 WL 1960195, , N.D.Cal., September 03, 2004
138. Li v. I.N.S., Not Reported in F.Supp.2d, 2003 WL 102813, , S.D.N.Y., January 10, 2003
139. Langer v. McElroy, Not Reported in F.Supp.2d, 2002 WL 31789757, , S.D.N.Y., December 13, 2002
140. Zayed v. U.S., 221 F.Supp.2d 813, 2002 WL 31109212, , N.D.Ohio, August 06, 2002
141. Tellez v. U.S. I.N.S., 91 F.Supp.2d 1356, 2000 WL 433966, , C.D.Cal., February 14, 2000
142. Patel v. I.N.S., Not Reported in F.Supp.2d, 2000 WL 298921, , E.D.Mo., January 20, 2000
143. Galvez-Letona v. Kirkpatrick, 54 F.Supp.2d 1218, 1999 WL 504827, 16 NDLR P 58, , D.Utah, July 15, 1999
144. Sze v. I.N.S., Not Reported in F.Supp., 1997 WL 446236, , N.D.Cal., July 24, 1997
145. Souza v. Schiltgen, Not Reported in F.Supp., 1996 WL 241824, , N.D.Cal., May 06, 1996
146. Chavez v. I.N.S., 844 F.Supp. 1224, 1993 WL 597979, , N.D.Ill., May 25, 1993
147. Petition of Agcaoili, Not Reported in F.Supp., 1987 WL 20045, , C.D.Cal., November 09, 1987
148. Gambino v. Pomeroy, 562 F.Supp. 974, , D.N.J., December 02, 1982
149. In re Kwong Hai Chew, 278 F.Supp. 44, , S.D.N.Y., December 20, 1967
150. Petition of Millan, 266 F.Supp. 545, , C.D.Cal., April 13, 1967
151. In re Berenyi, 239 F.Supp. 725, , D.Mass., March 29, 1965
152. Petition of W, 164 F.Supp. 659, , E.D.Pa., September 02, 1958
153. Petition of Krause, 159 F.Supp. 687, , S.D.Ala., March 10, 1958
154. In re Hansen, 148 F.Supp. 187, , D.Minn., February 08, 1957

APPENDIX 2

U.S. Citizenship and Immigration Services, Fact Sheet: Immigration Security Checks – How and Why the Process Works (Apr. 25, 2006)

Press Office
U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Fact Sheet

April 25, 2006

Immigration Security Checks—How and Why the Process Works

Background

All applicants for a U.S. immigration benefit are subject to criminal and national security background checks to ensure they are eligible for that benefit. U.S. Citizenship and Immigration Services (USCIS), the Federal agency that oversees immigration benefits, performs checks on every applicant, regardless of ethnicity, national origin or religion.

Since 2002, USCIS has increased the number and scope of relevant background checks, processing millions of security checks without incident. However, in some cases, USCIS customers and immigrant advocates have expressed frustration over delays in processing applications, noting that individual customers have waited a year or longer for the completion of their adjudication pending the outcome of security checks. While the percentage of applicants who find their cases delayed by pending background checks is relatively small, USCIS recognizes that for those affected individuals, the additional delay and uncertainty can cause great anxiety. Although USCIS cannot guarantee the prompt resolution of every case, we can assure the public that applicants are not singled out based on race, ethnicity, religion, or national origin.

USCIS strives to balance the need for timely, fair and accurate service with the need to ensure a high level of integrity in the decision-making process. This fact sheet outlines the framework of the immigration security check process, explaining its necessity, as well as factors contributing to delays in resolving pending cases.

Why USCIS Conducts Security Checks

USCIS conducts security checks for all cases involving a petition or application for an immigration service or benefit. This is done both to enhance national security and ensure the integrity of the immigration process. USCIS is responsible for ensuring that our immigration system is not used as a vehicle to harm our nation or its citizens by screening out people who seek immigration benefits improperly or fraudulently. These security checks have yielded information about applicants involved in violent crimes, sex crimes, crimes against children, drug trafficking and individuals with known links to terrorism. These investigations require time, resources, and patience and USCIS recognizes that the process is slower for some customers than they would like. Because of that, USCIS is working closely with the FBI and other agencies to speed the background check process. However, USCIS will never grant an immigration service or benefit before the required security checks are completed regardless of how long those checks take.

How Immigration Security Checks Work

To ensure that immigration benefits are given only to eligible applicants, USCIS adopted background security check procedures that address a wide range of possible risk factors. Different kinds of applications undergo different levels of scrutiny. USCIS normally uses the following three background check mechanisms but maintains the authority to conduct other background investigations as necessary:

- **The Interagency Border Inspection System (IBIS) Name Check**— IBIS is a multiagency effort with a central system that combines information from multiple agencies, databases and system interfaces to compile data relating to national security risks, public safety issues and other law enforcement concerns. USCIS can quickly check information from these multiple government agencies to determine if the information in the system affects the adjudication of the case. Results of an IBIS check are usually available immediately. In some cases, information found during an IBIS check will require further investigation. The IBIS check is not deemed completed until all eligibility issues arising from the initial system response are resolved.

- **FBI Fingerprint Check**—FBI fingerprint checks are conducted for many applications. The FBI fingerprint check provides information relating to criminal background within the United States. Generally, the FBI forwards responses to USCIS within 24-48 hours. If there is a record match, the FBI forwards an electronic copy of the criminal history (RAP sheet) to USCIS. At that point, a USCIS adjudicator reviews the information to determine what effect it may have on eligibility for the benefit. Although the vast majority of inquiries yield no record or match, about 10 percent do uncover criminal history (including immigration violations). In cases involving arrests or charges without disposition, USCIS requires the applicant to provide court certified evidence of the disposition. Customers with prior arrests should provide complete information and certified disposition records at the time of filing to avoid adjudication delays or denial resulting from misrepresentation about criminal history. Even expunged or vacated convictions must be reported for immigration purposes.

- **FBI Name Checks**—FBI name checks are also required for many applications. The FBI name check is totally different from the FBI fingerprint check. The records maintained in the FBI name check process consist of administrative, applicant, criminal, personnel and other files compiled by law enforcement. Initial responses to this check generally take about two weeks. In about 80 percent of the cases, no match is found. Of the remaining 20 percent, most are resolved within six months. Less than one percent of cases subject to an FBI name check remain pending longer than six months. Some of these cases involve complex, highly sensitive information and cannot be resolved quickly. Even after FBI has provided an initial response to USCIS concerning a match, the name check is not complete until full information is obtained and eligibility issues arising from it are resolved.

For most applicants, the process outlined above allows USCIS to quickly determine if there are criminal or security related issues in the applicant's background that affect eligibility for immigration benefits. Most cases proceed forward without incident. However, due to both the sheer volume of security checks USCIS conducts, and the need to ensure that each applicant is thoroughly screened, some delays on individual applications are inevitable. Background checks may still be considered pending when either the FBI or relevant agency has not provided the final response to the background check or when the FBI or agency has provided a response, but the response requires further investigation or review by the agency or USCIS. Resolving pending cases is time-consuming and labor-intensive; some cases legitimately take months or even

several years to resolve. Every USCIS District Office performs regular reviews of the pending caseload to determine when cases have cleared and are ready to be decided. USCIS does not share information about the records match or the nature or status of any investigation with applicants or their representatives.

APPENDIX 3

Supp. Decl. of Michael A. Cannon,
Yakubova, et al. v. Chertoff, et al.,
No. 06-CV-3203 (E.D.N.Y.) (filed Sept. 1, 2006)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAISA YAKUBOVA, EMMA UNGURYAN, BELLA VESNOVSKAYA, DAVID VESNOVSKIY, VYACHESLAV VOLOSIKOV, SHELATA AWAD IBRAHIM

Plaintiffs,

v.

MICHAEL CHERTOFF, et al.

Defendants.

Case No: 1:06-cv-3203-ERK-RLM

SUPPLEMENTAL DECLARATION OF MICHAEL A. CANNON

I, Michael A. Cannon, declare as follows:

(1) I am currently the Section Chief of the National Name Check Program Section ("NNCPS"), formerly part of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at the Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since March 7, 2005.

(2) In my current capacity as Section Chief, I supervise the National Name Check Units. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the policy and the procedures of the United States Citizenship and Immigration Services ("USCIS"), which was constituted from portions of the former Immigration and Naturalization Service ("INS").

(4) I hereby incorporate by reference all the information previously provided in my Declaration dated July 20, 2006, which was submitted earlier in this case.

(5) The purpose of this Declaration is to provide the Court and the plaintiffs further explanation regarding 1) the processing of name check requests by the NNCPS which is

generally completed on a first-in, first-out basis ensuring that all applicants are treated equally and fairly; 2) the increasing volume of requests that must be processed with a limited budget and resources; 3) the factors contributing to the delays; and 4) the specific steps taken by the NNCPS to process requests more efficiently and expeditiously with its limited resources.

BACKGROUND OF THE NATIONAL NAME CHECK PROGRAM

(6) The National Name Check Program ("NNCP") has the mission of disseminating information from the FBI's Central Records System in response to requests submitted by Federal agencies, congressional committees, the Federal judiciary, friendly foreign police and intelligence agencies, and state and local criminal justice agencies. The Central Records System contains the FBI's administrative, personnel, and investigative files. The NNCP has its genesis in Executive Order 10450, issued during the Eisenhower Administration. This executive order addresses personnel security issues and mandates National Agency Checks ("NACs") as part of the pre-employment vetting and background investigation process. The FBI performs the primary NAC conducted on all U.S. Government employees. From this modest beginning, the NNCP has grown exponentially, with more and more customers seeking background information from FBI files on individuals before bestowing a privilege – whether that privilege is Government employment or an appointment, a security clearance, attendance at a White House function, a Green card or naturalization, admission to the bar, or a visa for the privilege of visiting our homeland. More than 70 Federal, state, and local agencies regularly request FBI name searches. In addition to serving our regular governmental customers, the FBI conducts numerous name searches in direct support of the FBI's counterintelligence, counterterrorism, and homeland security efforts.

(7) Congress enacted Public Law 105-119, Title I, 111 Stat. 2448-49 (1997), which provided that the INS could not adjudicate an application for naturalization unless the agency received confirmation from the FBI that a full criminal background check had been completed on the applicant. Pursuant to this law, the USCIS submits name check requests to the NNCPS for processing.

(8) According to 8 C.F.R. Section 335.2(b), a definitive response that a full criminal background check on an applicant has been completed includes: 1) Confirmation from the FBI that an applicant does not have an administrative or criminal record; 2) Confirmation from the FBI that an applicant has an administrative or criminal record; or 3) Confirmation from the FBI that two properly prepared fingerprint cards (Form FD-258) have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

(9) A full description of the FBI's Central Records System (CRS) is contained in my earlier Declaration dated July 20, 2006, and filed in this case. The earlier Declaration explains, among other things, the manner in which information is "indexed" in the CRS and retrievable.

THE NNCPS OPERATES ON A FIRST-IN, FIRST-OUT BASIS

(10) The NNCPS generally processes all name check requests submitted by USCIS on a first-in, first-out basis. The first-in, first-out process applies to the residual name check requests that are still pending after the initial electronic batch check and secondary check described in my earlier Declaration. This policy of first-in, first-out reflects that all applicants are equally deserving and ensures that all applicants are treated fairly. However, if an applicant's name check requires a review of numerous FBI records and files, even though that person came in first, the name check may require additional time until all responsive records are located and reviewed. An exception to the first-in, first-out policy exists when USCIS directs that a name check be handled on an "expedited" basis. USCIS determines which name checks are to be expedited. Once designated as an "expedite," that name check proceeds to the front of the queue, in front of the others waiting to be processed. The FBI limits the number of expedites USCIS can submit per week.

(11) There are four stages involved in the completion of an individual name check: Batch Processing, Name Searching, File Review, and Dissemination.

(12) The first stage in the process, Batch Processing, involves the transfer of the name check requests from USCIS to the NNCPS on magnetic tapes. Each tape can hold up to

10,000 names. Some requests are transmitted via facsimile. The tapes are uploaded into an FBI system and the names are electronically checked against the FBI's Universal Index (UNI). Approximately 68% of the name checks submitted by USCIS on the batch tapes are returned to USCIS as having "No Record" within 48 hours. A "No Record" indicates that the FBI's UNI database contains no identifiable information regarding a particular individual. Duplicate submissions (i.e., identically spelled names with identical dates of birth and other identical information submitted while the original submission is still pending) are not checked, and the duplicate findings are returned to USCIS within 48 hours.

(13) The second stage in the process is Name Searching. For the name check requests that are still pending after the initial electronic check, additional review is required. An FBI employee in the NNCPS physically enters the applicant's name into the computer database searching different fields and information. This secondary manual name search completed within 30 - 60 days usually identifies an additional 22% of the USCIS requests as having "No Record," for a 90% overall "No Record" response rate. The results of this 22% are returned to USCIS.

(14) The third and fourth stages in the process are File Review and Dissemination. The remaining 10% of name check requests are identified as possibly being the subject of an FBI record. At this point, the FBI records in question must now be retrieved and reviewed. If the record was electronically uploaded into the FBI ACS electronic record keeping system, it can be reviewed quickly. If not, the relevant information must be retrieved from an existing paper record. Review of this information will determine whether the information is identified with the request. If the information is not identified with the request, the request is closed as a "No Record," and USCIS is notified as such. Once a record is retrieved, the information in the file is reviewed for possible derogatory information. Less than 1% of the requests are identified with a file containing possible derogatory information. If appropriate, the FBI then forwards a summary of the derogatory information to USCIS. A backlog applies to a small number of overall applications for naturalization. Because of the significance and

permanence of the outcome, the NNCPS diligently follows the procedures established for each applicant's name check.

(15) After the FBI has completed the name check request for an individual, it is the responsibility of USCIS to determine whether to grant or deny a pending application for benefits under the Immigration and Nationality Act. The FBI is not involved in the adjudication of a pending application.

INCREASING VOLUME AND DEMANDS ON THE NNCPS

(16) Prior to September 11, 2001, the FBI processed approximately 2.5 million name check requests per year. As a result of the government's post-9/11 counterterrorism efforts, the number of FBI name checks has grown. In fiscal year 2002, the FBI processed approximately 2.7 million name check requests per year; in fiscal year 2003, the FBI processed approximately 5.7 million name check requests per year; in fiscal year 2004, the FBI processed approximately 3.8 million name check requests per year; in fiscal year 2005, the FBI processed in excess of 3.7 million name checks.

(17) A significant portion of the incoming name checks submitted over the past few years has been submitted by USCIS. In fiscal year 2003, 64% of the total incoming name checks were submitted by USCIS; in fiscal year 2004, 46% of the total incoming name checks were submitted by USCIS; in fiscal year 2005, 45% of the total incoming name checks were submitted by USCIS; and in fiscal year 2006, as of August 23, 2006, 45% of the total incoming name checks have been submitted by USCIS.

FACTORS CONTRIBUTING TO THE DELAYS

(18) As mentioned in my previous Declaration dated July 20, 2006, which I incorporated by reference in paragraph (4), in December of 2002 and January of 2003, USCIS resubmitted 2.7 million name check requests to the FBI for all pending applications for benefits under the Immigration and Nationality Act for which name checks were required. This was due to a review of the background check procedures employed by USCIS conducted in November 2002. It was determined that in order to better protect the people and the interests of the United

States, a more detailed, in-depth clearance procedure was required. One of these procedures involved the name check clearance performed by the FBI. At that time only those "main" files that could be positively identified with an individual were considered responsive. The risk of missing a match to possible derogatory record(s) was too great, and therefore it was agreed by the FBI and USCIS that the search criteria be changed to also include access to references. *From a process standpoint, this meant many more files were required to be reviewed for each individual, thus adding additional time and cost to the process.*

(19) The 2.7 million requests were in addition to the regular submissions by USCIS. The FBI has now returned an initial response for all 2.7 million requests. While many initial responses unquestionably indicated that the FBI had no information relating to a specific individual, approximately sixteen percent of the responses (over 440,000) indicated that the FBI *may* have information relating to the subject of the inquiry. These 440,000 requests have been in the process of being resolved, with over 427,000 being processed. Currently, less than 13,000 of those resubmitted requests remain pending.

(20) The FBI's processing of the more than 440,000 residuals has delayed the processing of regular submissions from USCIS. A dedicated team within NNCPS has been assigned to handle only these re-submitted name check requests. To the extent that the team members are working on only these applications, they are unavailable to process the normal submissions which are completed on a first-in, first-out basis, unless otherwise directed by USCIS.

(21) USCIS's name check requests outpace NNCPS's available resources. In FY-05, USCIS submitted 1,512,256 or 45% of NNCPS's incoming requests. That number exceeds the requests of NNCPS's next two largest customers combined. To meet the demands of its customers, NNCPS currently employs 52 Research Analysts and 15 File Assistants in its Dissemination Phase to process and review files for possible derogatory information, and disseminate the results. Of those, 10 Research Analysts and 1 File Assistant are dedicated to USCIS Resubmissions; and 15 Research Analysts and 2 File Assistants are dedicated to new

USCIS submissions. If a file must be retrieved from one of the 56 FBI field offices, the NNCPS staff must coordinate their requests with personnel in the field.

(22) The NNCPS is currently relocating to a new location, outside of Washington D.C. This physical relocation has directly contributed to a loss of experienced and seasoned staff. The decreased number of experienced staff has contributed to a delay in the processing of a name check request.

(23) The number of "hits" on a name when it is reviewed may further contribute to a delay in processing a name check request. A "hit" is a possible match with a name in an FBI record. The number of times the name appears in FBI records correlates to the number of records which require review.

(24) The processing of common names also contributes to a delay in processing a name check request. The names associated with a name check request are searched in a multitude of combinations, switching the order of first, last, and middle names, as well as combinations with just the first and last, first and middle, and so on. Without detailed information in both the file and agency submission, it is difficult to determine whether or not a person with a common name is the same person mentioned in FBI records. Common names often have more than 200 hits on FBI records.

(25) The accessibility of the FBI record needed for review also contributes to a delay in processing a name check request. If the date of the record is later than October 1995, the record text may be available electronically; if the record predates October 1995, the paper record has to be located, pulled, and reviewed. A record could be at one of over 265 possible locations across the country. Requests often involve coordinating the retrieval and review of files from the various 56 different FBI field offices. One person's name check may involve locating and reviewing numerous files, all at different physical locations. Each request must be communicated internally from the NNCPS to the field, and handled according to the current priorities of the particular field office. Since it is a paper based process, it is time consuming and labor intensive.

(26) Another contributing factor which was briefly mentioned earlier in this document is the expedited request. Processing an expedited case means that an employee is not available to work on a normal name check request. As directed by USCIS specifically, the FBI processes name check requests on a first-in, first-out basis unless USCIS directs that a name check be expedited.

THE NATIONAL NAME CHECK PROGRAM IS ADDRESSING THE FACTORS THAT CONTRIBUTE TO DELAYS IN PROCESSING A NAME CHECK

(27) NNCPS is continuing to develop the Name Check Dissemination Database ("NCDD"), an electronic repository for name check results, to eliminate manual and duplicate preparation of reports to other Agencies, and provide avenues for future automation of the name check process.

(28) NNCPS is partnering with other Agencies to provide contractors and personnel to process name checks.

(29) NNCPS has procured an employee development program to streamline the training of new employees, thereby significantly decreasing the amount of time needed before a new employee can begin to significantly impact the NNCPS workload.

(30) NNCPS, through the Records Management Division's Records Automation Section, is scanning the paper files required for review in order to provide machine readable documents for the Dissemination Database. The scanning is also creating an Electronic Records System that allows for future automation of the name check process.

(31) NNCPS is working with customers to streamline incoming product and to automate exchange of information.

(32) NNCPS is exploring technology updates to the Name Check process.

EXHIBITS

(33) Volume of Incoming Name Check Requests.

FY-94	1,792,874
FY-95	2,091,426
FY-96	2,939,521

FY-97	2,850,769
FY-98	2,148,993
FY-99	2,957,525
FY-00	2,449,981
FY-01	2,771,241
FY-02	3,288,018
FY-03	6,309,346
FY-04	3,884,467
FY-05	3,346,435
FY-06*	3,267,349

(34) Pending Name Checks at End of Fiscal Year.

FY-02	381,645
FY-03	818,397
FY-04	737,412
FY-05	368,041
FY-06*	519,539

(35) National Name Check Program FY-05

	Total	USCIS
Pending as of 10/1/2004	737,412	236,656 (32%)
Incoming:	3,346,435	1,512,256 (45 %)
Processed:	3,715,806	1,514,340 (41 %)
Pending as of 9/30/05:	368,041	233,806 (64 %)

(36) National Name Check Program FY-06*

	Total	USCIS
Pending as of 10/01/2005	368,041	233,806 (64%)
Incoming:	3,267,349	1,479,506 (45%)
Processed:	3,115,851	1,352,840 (43%)
Pending as of 8/23/2006:	519,539	360,472 (69%)

*FY-06 as of August 23, 2006

(38) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 31st day of August 2006.

Michael A. Cannon

MICHAEL A. CANNON
Section Chief
National Name Check Program Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

APPENDIX 4

Memorandum from Michael Aytes,
Acting Dir. of Domestic Operations,
U.S. Citizenship and Immigration Services, to
Regional Directors, et al. (Apr. 25, 2006)

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

U.S. Citizenship and Immigration Services

Interoffice Memorandum

TO: Regional Directors
Service Center Directors
District Directors, Including Overseas
Asylum Office Directors
Fraud Detection Unit Chiefs
National Benefits Center Director

FROM: Michael Aytes
Acting Associate Director, Domestic Operations

DATE: APR 2 5 2006

SUBJECT: Background Checks and Naturalization Interview Scheduling

As you know, consistent with our regulations, USCIS has not been scheduling naturalization interviews until we receive the results of the fingerprint checks that we conduct with the FBI, which we normally receive within a few days after the applicant appears for fingerprinting. We do not approve a naturalization application without first resolving all background checks concerning the applicant. For purposes of judicial economy, we will promptly cease even to schedule any naturalization interviews until all background checks have been completed in a particular case. This will mean cases will not be scheduled for interview until we have both the results of the fingerprint check and the results of the separate FBI name check process.

The FBI name check is another background check normally used in naturalization cases. 82% of FBI name checks are resolved within a few weeks. 99% are resolved within six more months. Unfortunately, the FBI name check in the remaining cases can sometimes take months and in rare instances years to resolve.

Naturalization adjudications are subject to a unique law, Section 336(b) of the Immigration and Nationality Act. That law allows an applicant to bring a lawsuit in federal court and allows the court to take over jurisdiction of the case if USCIS has not adjudicated the case within 120 days from when the examination was conducted. Thus, applicants in less than 1% of cases awaiting an FBI name check by that point have sometimes sought to bring such a lawsuit.

Not surprisingly, even when such lawsuits are brought, courts have not been approving the naturalization applications of applicants whose background checks have not been resolved. A few courts facing four-year old cases have given USCIS and FBI a deadline within which to complete the check, but the government has been able to complete the process within the court ordered deadline.

USCIS is steadily reducing its processing backlog toward a six months average processing time for naturalization cases. As USCIS has, due to your hard work and accomplishments, made progress in backlog reduction, a disparity has grown between USCIS normal processing time and the time it takes the FBI to complete its records check on the less than 1% of cases that require special FBI attention.

The applicants affected by those delays from the FBI name check process have increasingly begun to file lawsuits asking federal courts to decide naturalization cases that are not yet ripe for review because the background checks are not yet completed and resolved. USCIS will vigorously defend those lawsuits and is confident courts will not make decisions that frustrate national security.

Meanwhile, USCIS will begin imposing restraints on its processes to prevent the scheduling of a naturalization interview until all background checks, including the FBI name check, are completed. A priority information technology service request has been submitted to the OCIO's office to impose this block on interview scheduling.

While this will not necessarily eliminate mandamus actions, it will eliminate attempts to shift cases to the court before they are ripe for adjudication. USCIS also continues to work with the FBI to seek shorter times for FBI name checks.

This change in procedures will only affect naturalization interviews. It will take effect when the needed systems change is made, and will be prospective only. As soon as possible you will be notified when that change will take effect. When implemented, this change will clearly result in a temporary decrease in the number of cases available for scheduling, so field managers will need to begin to plan to use the resources not needed for these interviews on continued cases and other work.

Cc: General Counsel
International Operations
National Security and Records Verification

APPENDIX 5

Memorandum from Michael L. Aytes,
Assoc. Dir. of Domestic Operations,
U.S. Citizenship and Immigration Services, to
Regional Directors, et al. (Dec. 21, 2006)

U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W.
Washington, D.C. 30529

U.S. Citizenship and Immigration Services

Interoffice Memorandum

To: Regional Directors
Service Center Directors
District Directors (except foreign)
Officers in Charge (except foreign)
National Benefit Center Director

From: Michael L. Aytes
Associate Director, Domestic Operations

Date: DEC 2 1 2006

Re: FBI Name Checks Policy and Process Clarification for Domestic Operations

Background

Over the past few years, definitive FBI name checks (hereafter referred to as name checks) have been mandated on several form types as part of the effort to ensure that immigration benefits are provided only to those individuals who are eligible. Name checks search FBI administrative and investigative files based on the name and date of birth of the applicant. These checks have proven to be an effective tool in the identification of potential threats to our national security and in providing other relevant information that may affect the eligibility of an applicant for a benefit. This memorandum explains existing policy for domestic operations regarding name checks in order to provide all employees with a thorough understanding of this specific type of background check and of how the results affect the adjudication of applications for immigration benefits. In addition, several policy changes, which are explained in more detail later in this memorandum, are being instituted in the following areas:

1. *Missing or Incorrect Date of Birth (DOB)* – A new name check is required for year of birth changes or discrepancies.
2. *Validity Period* – A name check response can be used for multiple applications if the response is not more than 15 months old.
3. *Duplicate Requests* – Only one definitive response is necessary per application or within the 15-month validity period.

4. *Expedited Name Checks* – Mandamus filings will no longer be routinely expedited. The loss of Social Security benefits or other subsistence, however, continue to be a basis for routine expeditious processing.

This memorandum shall not apply to adjudications of I-589 and I-881 applications by the Asylum Division, which shall continue to be governed by the relevant sections of the Identity and Security Checks Procedures Manual. This memorandum also does not apply to adjudications of I-601 waiver applications filed overseas in conjunction with immigrant visa processing, which are subject to CLASS checks, and in some cases SAO clearances.

General Name Check Process

A definitive name check is required for the following form types: I-485, I-589, I-601, I-687, I-698, and N-400. Name checks for Form I-192, Application for Advance Permission to Enter as Nonimmigrant, are still required and will be performed if the form is filed with USCIS. A case may be denied, dismissed, administratively closed, withdrawn, or referred to immigration court prior to obtaining the final results of a name check, but offices may only exercise this option if they implement a post-audit system to monitor for the completion of the name check[1]. A completed name check or an initiated check is required prior to the issuance of a Notice to Appear[2]. A name check is not required for a Native American who is being accorded permanent resident status under section 289 of the Immigration and Nationality Act. Most name checks are initiated through data entry of case information into the corresponding processing system. CLAIMS 3 / CLAIMS Mainframe initiate name checks for I-485s and CLAIMS 4 initiates name checks for N-400s. Name checks for I-687s and I-698s must be initiated using a manual spreadsheet process discussed below and in attachment B. An I-601 name check will generally be completed by the associated I-485 name check. However, if an I-601 is filed independently of an adjustment application, then that name check must be initiated using the manual spreadsheet process discussed later in this memo[3]. The manual spreadsheet process may also be used to initiate name checks that were not otherwise initiated by automated systems. However, there are additional areas of the name check process that require further guidance as follows:

Name Variations:

Name checks are conducted using an applicant's name and date of birth, as listed on the application. Alias submissions and spelling variations do not require a separate check. Names are searched in a multitude of combinations, switching the order of the first, middle, and last names, as well as combinations of just the first and last names, first and middle names, etc (this is referred to as an 'around the clock' search). Through this process, the FBI automatically repositions the names submitted and the check will match against the primary name on record as well as any aliases.

For example, if the name submitted were Jose Garcia Rodriguez, the following names would be checked automatically:

---

[1] Refer to memorandum titled Closing of Cases with Pending Law Enforcement Checks, dated April 5, 2004.

[2] Refer to memorandum titled Security Check Requirements Preceding Notice to Appear Issuance, dated March 2, 2004

[3] Except for I-601s filed overseas in conjunction with immigrant visa applications.

Jose Garcia Rodriguez
Jose Rodriguez Garcia
Jose Garcia
Jose Rodriguez
Garcia Jose Rodriguez
Garcia Rodriguez Jose
Garcia Jose
Garcia Rodriguez
Rodriguez Jose Garcia
Rodriguez Garcia Jose
Rodriguez Jose
Rodriguez Garcia

The name check automatically includes a phonetic search and retrieves records with similar spelling variations (e.g. Rodriguez = Rodrigues). Due to these search methodologies, name checks shall not be resubmitted because of misspellings or use of alias names.

Missing or Incorrect Date of Birth (DOB):

The name check also includes an automatic variation on the DOB that is submitted. The DOB is an important primary value used by the FBI in the name check process. The check includes a search on the exact full date of birth as well as an expanded search on the year of birth. This methodology accounts for the different ways that a date of birth can be written (e.g. the day and the month may be written in different positions). Discrepancies within the day and month of birth do not warrant resubmission of a name check and a new name check should only be initiated if the year of birth is incorrect. If a new name check is required, the manual spreadsheet process must be used.

Missing or Incorrect Place of Birth (POB):

The POB is not used as a value in the initial stages of the name check process. The POB is used as an optional indicator or matching value in the later part of the name check process for only those cases that are returned with an initial response of "pending." See Attachment A for more information.

Missing or Incorrect A-Number:

Name checks are conducted using biographical information relating to the applicant. The Alien Registration Number (A-number) is not used as a variable in the FBI's process. Therefore, name checks performed with an inaccurate or missing A-number are valid and should not be resubmitted for a new check.

In instances where the FBIQUERY system reflects an inaccurate A-number, the system may be corrected by providing the following information to your respective regional office or service center point of contact:

Applicant Name
Correct A-number
Incorrect A-number
Synopsis of reason(s) for requesting an A-number correction

Regional offices and service centers should submit A-number correction requests via E-mail to the designated POC at Headquarters' Office of Field Operations, presently Pam Wallace.

Age Limits:

Names checks are required for applicants age14 years and older **at the time of adjudication** for all of the above-listed form types[4] **except** Form I-485, which has an upper age limit. CLAIMS 4 processes name check requests for applicants age 14 years and over (no upper age limit) while CLAIMS 3 submits name check requests for applicants between the ages of 14 and 80 years. The upper age limit of 80 years can be misleading in that a name check is conducted only if the applicant's 80th birthday falls on the same day that the USCIS name check utility is performed. If an applicant is 80 years and a day, a name check will not be performed. Until a CLAIMS 3 system modification to remove the upper age limit can be performed, the upper age limit of 80 years will remain in effect. For the purpose of the name check, the upper age limit of 80 years is defined as the date the applicant turns 80 years old. Further, if an applicant is less than 14 years of age at the time of filing but turns 14 years old while the application is pending, then a name check is required. If a new name check is required, the manual spreadsheet process must be used.

Validity Period:

A definitive (No Record "NR" or Positive Response "PR") name check response is valid indefinitely for the application for which it was conducted. If a definitive name check response is used to support other applications, the name check response is only valid for 15 months from the FBI process date. For example, an I-485 is filed on June 1, 2004 and a definitive name check response is processed for that application on December 1, 2004. The I-485 is denied on February 15, 2005, and another I-485 is filed for the same applicant on May 15, 2005. The December 1, 2004, FBI response may be used for the I-485 filed on February 15, 2005, even if another name check has been initiated. However, final adjudication or naturalization must occur within the 15-month validity period or a new name check will be required. Additional information, including a set of frequently asked questions, is included in this memorandum as Attachment A.

Duplicate Requests:

In many instances, duplicate name checks are initiated for a single application. The causes for multiple name check requests are primarily systems issues or resubmission requests made by local offices in an effort to facilitate a name check that is already in a "pending" status. Duplicate requests for the purpose of resolving "pending" name checks must not be initiated. Duplicate requests do not facilitate the resolution of "pending" name checks and only add to the backlog. In addition, duplicate requests for a single application result in multiple name check responses being

[4] Refer to Operating Instructions 105.10.

posted to the FBIQUERY system. Often, a final response will be received from the FBI and posted to FBIQUERY, but because duplicate requests were made there are additional "pending" responses in the system. **Only one** definitive response is necessary and adjudication may continue in those instances where a final FBI response has been processed, and is within the **15-month validity period**, even though additional "pending" responses remain unresolved for that application.

Manual Spreadsheet Process:

A manual spreadsheet is available to domestic offices to be used when a name check cannot be performed or was not initiated by one of the automated systems. The local offices send their spreadsheets to their respective regional offices on a weekly basis as needed. Regional offices and Service Centers forward the spreadsheets to designated points of contact in Headquarters' Office of Field Operations to initiate the name checks with the FBI. The initial response should appear in FBIQUERY within forty-five (45) days from the date of submission by the local office. See Attachment B for manual spreadsheet instructions and a sample spreadsheet.

There are several situations that may necessitate the initiation of a check outside of the normal data entry process:

1. An applicant turns fourteen (14) years of age during the time his/her case is pending and, therefore, requires a name check to be completed.

2. "NO DATA" response cases: If the FBIQUERY system shows "NO DATA" for a case more than ninety (90) days after the date the information was entered into CLAIMS 3 / CLAIMS Mainframe or CLAIMS 4. If a name check request was submitted through the spreadsheet process and ninety (90) days have passed without a response posted in the database, the local office should contact their regional or service center point of contact in order to verify that the name was included on the weekly report submitted to HQ. If it is verified that the name check was included on the submission to HQ, the regional or service center point of contact should report the missing name check to the HQ point of contact. If the name check cannot be verified as having been forwarded to HQ, then the local office will need to resubmit the name check request on the spreadsheet to their regional or service center point of contact.

3. "ERROR" response cases: If FBIQUERY shows an "ERROR" response, the office with the case must resubmit the case data on the manual spreadsheet if the error has not been corrected in 30 days.

4. Prior to issuance of an NTA if an FBI name check has not been initiated.

Expedited Name Checks:

Cases with significant and compelling issues can have the name check expedited. Cases that are simply "old" or the subject of a congressional inquiry *do not* qualify for an expedited name check unless one or more of the expedite criteria are met. An expedite can be requested by an office

whether the FBIQUERY system shows "NO DATA" or "PENDING." Requests must meet at least one of the following criteria for expeditious treatment:

1. Military Deployment
2. Age-out cases not covered under the provision of the Child Status Protection Act (CSPA) and applications affected by sunset provisions such as Diversity Visas (DVs).
3. Compelling reasons as provided by the requesting office (e.g. critical medical conditions)
4. Loss of Social Security benefits or other subsistence in the discretion of the District Director

NOTE: In the interest of fairness and in processing cases chronologically mandamus filings are no longer routinely treated expeditiously.

Expedite processing is done via fax to a designated headquarters point of contact. HQ will fax a response to the initiating office, which will serve as evidence that the name check was completed. The fax will be annotated with the final response from the FBI. There may be a delay of 3 weeks or more in updating the FBIQUERY system with the results of an expedited check. However, the faxed response is acceptable for adjudication purposes and should be placed with the case file. See Attachment C for additional information regarding expedited name checks. Expedite requests shall be faxed to the attention of Pam Wallace at (202)-272-1008.

Use of the FBIQUERY System:

The official repository for name check responses is the FBIQUERY system, located on the FBI Tracking Menu in National Systems. A user can access the name check database through the CLAIMS, RNACS, or RAPS sub-menu, or from the CIS system by pressing the 'CLEAR' button and typing 'FBIQUERY.'

Normally, a user should initiate a query in the name check database by using the alien registration number (A#) of the applicant; however, a search can also be initiated by using the name and date of birth. When querying the system by name, it is recommended to broaden the search by changing the "Name Search" value from "F or Full" to "P or Partial." The name check database will provide one of several different results in response to a query. All name check responses from the FBI with process dates on or after December 1, 2002 are valid responses. The system default is to display the most recent data. The table below is a synopsis of the specific codes that a user will see in the name check database:

FBIQUERY System Responses

Code	Description	Action
NR	No Record	Proceed with the adjudication of the application. A printout of the FBI response or the faxed expedited response must be included in the case file.

PR	Positive Response	An FBI report was sent to HQ FDNS and will be forwarded to the local office. HQ FDNS forwards the report to the office shown as the File Control Office (FCO) in CIS. Do not proceed with the adjudication until the FBI report has been reviewed by the adjudicator and a determination is made based on the content of the report.
IP H I	Pending	The FBI has not completed the background check. Except for N-400 applications[5], an interview can be conducted, but an approval cannot be rendered until a definitive response (either NR or PR) has been received from the FBI. A case may be denied or withdrawn if the office implements a post-audit system.
E	Error	The name check request could not be processed due to formatting or code error. Do not proceed with the adjudication until a definitive response has been received from the FBI. If the error has not been corrected in 30 days, the office should submit a manual name check using the manual spreadsheet process.
D/DD	Duplicate	The FBI previously processed the name check. The original response should be displayed in the name check response database either under the same A# or under the same name/DOB. If no original response can be found, the 'Duplicate' response can be used in its place. In the 'Duplicate' response, the final response information will show the date and the response on the right side of the 'FBI RESPONSE INFORMATION' section. 'FN' means final response and it will be followed by the date and a code for a No Record response (NR) or a code for a PENDING response (H or I).
RC	Request Cancelled	The name check request has been cancelled.
UN	Unknown Response	This is actually a POSITIVE response and follows

[5] Refer to memoranda regarding N-400 interview without completed FBI name checks, titled Background Checks and Naturalization Interview Scheduling, dated April 25, 2006, and Background Checks and Naturalization Interview Scheduling Follow-Up Memo, dated May 22, 2006.

		the action of "PR" above. The UN code appears because a new code was added by the FBI that is not included in the USCIS conversion tables. Therefore the system defaults to UN or Unknown. The HQ FBIQUERY system technical team has been tasked to correct the response information in the system.
No Data Found	No Data Found	The query provided no information that a name check has been initiated. If you checked by A#, you should also search by the name/DOB. Change the "F" to a "P" in the NAME SEARCH field in the lower part of the FBI Query screen when querying by name/DOB. If, after 90 days from the data entry date of the case, or if 90 days after the name data was provided on a manual spreadsheet, the database still shows 'no data', then the case information should be submitted (or resubmitted) using the manual spreadsheet process.

The response codes listed above are not necessarily the actual response codes returned by the FBI. The FBI uses many different response codes but for purposes of consistency and simplicity, USCIS consolidates the original FBI responses into the codes noted above. On occasion, primarily with manual Name checks and duplicate responses, the internal FBI response code will appear in the FBIQUERY database. The following codes are considered NO RECORD responses: ND, NP, and NR. The codes DS, RP, OC, and RF, are considered POSITIVE RESPONSE results and offices must wait for a report from FDNS. Additional information regarding the processes supporting positive responses is explained later in this memorandum.

Positive Responses (PR):

In instances where the name check produces a positive response, a report detailing the information contained in the FBI record is returned to USCIS and, ultimately, the report is forwarded to the field office or service center shown as the A-file File Control Office (FCO) in the Central Index System (CIS). Prior to June 7, 2004, the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center (LESC) forwarded FBI G-325 positive responses to the field offices and service centers, but on June 7, 2004, the HQ Office of Fraud Detection and National Security (HQ FDNS) assumed that responsibility[6]. All FBI reports are sent to HQ FDNS for preliminary review before being forwarded to field offices and service centers.

[6] Refer to memorandum titled FDNS Processing of Positive FBI Responses to G-325 Name Checks, dated October 21, 2004

HQ FDNS will contact the third agencies identified by the FBI for the files referenced in the FBI's positive response record, unless the third agency is identified as a local agency in respect to the local USCIS office. Further, if FDNS determines the FBI report includes information relating to National Security, the case will be referred to the National Security Adjudication Unit.

If more than 90 days have elapsed after the posting of a "PR" result in the FBIQUERY system without a report being received, and the office is the FCO as shown in CIS, the office should contact HQ FDNS to inquire about the status of the PR record. Offices may contact Mr. Robert Kruszka at HQ FDNS via E-mail.

Hardcopy Responses:

Hardcopy responses are acceptable for documenting the name check results. In nearly all instances, hardcopy responses will be used for expedited checks, but hardcopy responses are not limited to expedited cases.

Points of Contact

Questions regarding this memorandum should be directed through appropriate supervisory and operational channels to the attention of Greg Collett, 202-272-1023, HQ Field Operations. Local offices should work through their regional offices.

ATTACHMENT A
Frequently Asked Questions Regarding FBI Name Checks

What do I do if there is an NR and an IP/E update in the FBIQUERY system?

If multiple records appear for the same application, only one definitive response is necessary. Adjudication may continue in those instances where a final FBI response has been received even though additional "pending" responses remain unresolved for that name. Likewise, a definitive response may be used with another application if final adjudication occurs within 15 months of the FBI process date. Applications can continue to be denied, dismissed, administratively closed, withdrawn, or referred to immigration court because of reasons other than the name check, but only if the office implements a post-audit system to monitor for the completion of the name check[3].

At the time of final adjudication, or at time of oath for naturalization applicants, the FBIQUERY system shall be checked again to determine if any "pending" responses have subsequently resulted in a "PR." In instances where a "PR" is returned, adjudication shall cease and offices are to follow the guidance provided in the memo relating to positive responses.

If an applicant's primary name changes between the time of filing and the time of adjudication, does the new name need to have a name check conducted prior to an approval adjudication?

No. USCIS does not need to conduct a name check on the applicant's new name.

What do I do if the DOB in the system is wrong?

For name checks initiated by automated systems (CLAIMS 3, CLAIMS 4, RAPS) and for name checks submitted on the manual spreadsheet, the FBI searches the entire year of the submitted date of birth. For example, if a date of birth is March 1, 1980, the FBI will do a search for all dates in the year 1980. Therefore, if the year of the date of birth is incorrect, you should resubmit the name via the manual spreadsheet using the correct year of the date of birth. Stated another way, if only the month and/or the day of the date of birth are incorrect, a new name check is not required.

For expedited name checks that are faxed to HQ and manually checked at the FBI, the FBI will search the date of birth provided and also do a search by reversing the day and the month of the date provided. The FBI will not search the entire birth year for these expedited checks. For example, if an expedited name check has a date of birth of March 10, 1980, the FBI will also search using a date of birth of October 3, 1980.

If the date of birth does not meet the above guidelines and a new name check is needed with the corrected date of birth, you should resubmit the name using the correct date of birth on the

[3] Refer to memorandum titled Closing of Cases with Pending Law Enforcement Checks, dated April 5, 2004

manual spreadsheet or, if for an expedited name check, via fax to the HQ point of contact for expedited name checks.

What do I do if the applicant's A-number is wrong in the FBIQUERY system?

The name search is based on the name and date of birth of the applicant. If a record can be located in the name check database using a name/DOB search, the record can be used. Name checks performed with an inaccurate or missing A-number are valid and should **not** be resubmitted for a new check. See page 3 and 4 of this memo for information on how to submit an A-number correction.

What do I do if the applicant's Place of Birth is incorrect/missing?

The place of birth does not need to be displayed in the response to make the response valid. The FBI does not consider the POB in the initial query so if the initial response from the FBI is No Record, the POB was not needed. If the incorrect POB was submitted and the initial response is PENDING, a new name check is required and the manual spreadsheet process must be used.

What do I do if the applicant's name is misspelled in FBIQUERY?

Misspelled names are not required to be re-run. The FBI uses an "around the clock" name search engine combined with a phonetics search logic that takes into account misspellings, name variations, and alias names. This means that all probable variations of a name are checked to include spelling and the order of names.

Does a name check expire?

A name check response is valid indefinitely for the application for which it was conducted. In addition, a definitive name check response may be used to support other applications but, when used for another application, the response is only valid for 15 months from the FBI response date.

How do I obtain third agency information?

Prior to June 7, 2004, the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center (LESC) forwarded FBI G-325 responses to the field when the name check was updated as "PR." Since June 7, 2004, the HQ Office of Fraud Detection and National Security (HQ FDNS) assumed that responsibility[8]. For additional information, refer to the October 21, 2004 memorandum issued by Don Crocetti entitled FDNS Processing of Positive FBI Responses to G-325 Name Checks.

[8] Refer to memorandum titled FDNS Processing of Positive FBI Responses to G-325 Name Checks, dated October 21, 2004

If more than 90 days have passed after the posting of a "PR" result without a report being received and the office is the FCO as shown in CIS, then the office should contact HQ FDNS to inquire about the status of the PR record. Offices may contact their regional or service center point of contact for assistance in requesting another copy of the PR report, if that is required.

A case has been listed as PENDING for several months; should I resubmit it?

No. Although some cases seem to take an inordinate amount of time to move from a PENDING response to a final response, submitting a second check will actually delay clearance. Check with your supervisor to determine if the case warrants expeditious processing.

APPENDIX 6

Minutes of Mar. 14, 2007
AILA-USCIS Liaison Meeting

March 14, 2007, AILA – USCIS: Liaison Meeting Minutes

In attendance from AILA: Shawn A. Orme, USCIS Liaison Committee Chair; Carlina Tapia-Ruano, AILA President; Kathleen Campbell Walker, AILA President-Elect; Charles H. Kuck, AILA 1st Vice President; Jeanne A. Butterfield, AILA Executive Director; Robert P. Deasy, AILA Director of Liaison and Information; Alexis S. Axelrad; Emily J. Curray; Jerome G. Grzeca; Loan T. Huynh; Stephen J. Navarre; Ruth K. Oh; Sharon R. Mehlman, SCOPS Liaison Committee Chair.

In attendance from USCIS: Michael L. Aytes, Associate Director, Domestic Operations; John Allen, Acting Deputy Chief, Service Center Operations (Domestic Operations); Donald Neufeld, Chief, Field Operations (Domestic Operations); Lynden D. Melmed, Chief Counsel; Efren Hernandez, Chief, Business and Trade Services; Pearl Chang, Chief, Regulation and Product Management (Domestic Operations); Debra Rogers, Chief, Information and Customer Service (Domestic Operations); Marla Davis, Project Management, (Domestic Operations); Patricia Stivala, Program Manager, Information Customer Service (Domestic Operations); Bernadette Doody, Special Assistant, (Domestic Operations), Claudia Salem, Office of Chief Counsel; John Bird, Deputy Chief, International Operations; Sally Blauvelt, Chief (Office of Communications); David Fickett, Chief (Office of Transformation), William Hannon Chief (Office of Communications).

Please note that these minutes are unofficial and do not represent enunciation of formal policy on the part of USCIS. USCIS policy is developed and announced through the formal rule-making process and through the development and distribution of various forms of policy guidance and directives.

The meeting commenced with a brief opening exchange between Michael L. Aytes, Associate Director, Domestic Operations, Robert P. Deasy, AILA Director of Liaison and Information and Shawn A. Orme, USCIS Liaison Committee Chair. For AILA, Bob Deasy and Shawn Orme thanked Mr. Aytes for being responsive to AILA's questions and concerns presented through the liaison process. Mr. Aytes indicated he believes that AILA has an important perspective that is helpful to USCIS in developing policy and procedures.

AILA Committee Note: The concept of transitioning the Service toward an account based system was repeatedly mentioned during the liaison meeting and is highlighted in a number of the answers reprinted below. The committee anticipates learning more about the Service's thoughts and plans for transition to such a system in future discussions.

Agenda Q&A

1. **Backlog Reduction**

   Please provide an update regarding USCIS' backlog reduction goals. Has there been any significant progress/regression since the September 26, 2006 meeting?

USCIS Response: Backlog reduction efforts have regressed since our September 26, 2006, liaison meeting. The regression is due several factors including a significant loss of resources (e.g. subsidies). There has also been a significant increase in receipts. As of January 2007, there were 81,000 cases pending. The majority of the cases are pending because of visa retrogression and security check delays. One of the reasons for USCIS' request for a fee increase is to help sustain backlog reduction efforts. On a positive note, term employees that were scheduled to expire will be extended through mid-July 2007.

The primary growth in receipts is in relative petitions (I-130s) and adjustment of status applications (I-485s). From January 2006 to January 2007, there has been a 15% increase in overall receipts. There has also been a 68% increase in receipt of naturalization applications since January 2007. USCIS believes this is a result of the publicity generated by the announcement of the proposed fee increase. USCIS is concerned that if the trend in higher receipts continues the backlog will increase. Although it would appear that an increase in receipts would provide USCIS with additional resources, higher receipts actually highlight the current structural problem with USCIS' fee accounts. USCIS receives no appropriations but has its spending level set by Congress each fiscal year. As a result, even though USCIS has additional monies coming in the door, the Service can not use the increase in revenue to apply additional resources.

To remedy this situation, USCIS is working on preparing a reprogramming request to Congress that will hopefully be approved by summer 2007. Under current policy, USCIS can not use additional revenue until the reprogramming request is approved by Congress. If the reprogramming request is approved, USCIS can spend more on hiring and overtime. In addition, USCIS' CFO is in current discussions about how to quickly apply monies during a surge time without the need for a reprogramming request. USCIS has to balance spending needs during a surge to make sure it is not left bankrupt for the rest of the fiscal year.

AILA Committee Follow-Up Comment: Jeanne A. Butterfield, AILA's Executive Director, mentioned that March 24, 2007, is National Citizenship Day and that USCIS will most likely see an additional surge in N-400 applications. Mr. Aytes was pleased to hear that more people would be applying for citizenship.

2. **Technology**

a. The new AR-11 web function has been very well received, and AILA is grateful to have been included in the testing phase. Would USCIS consider consulting with AILA regarding future technology changes? Members are also reporting the unfortunate disappearance of a number of helpful features and pages on the latest version of USCIS' website. Is there an anticipated time frame for the reappearance of features users relied upon, and would USCIS be open to suggestions from AILA on changes to the new website format?

USCIS Response:

AR-11 web function:

USCIS HQ is pleased that the online AR-11 web function is being well received and that AILA was able to participate in the testing phase. USCIS used AILA's feedback to help develop the AR-11 web function prior to launch. Moving forward, USCIS is looking to get customer input on a regular basis prior to introducing new technology changes as opposed to after launch. It is USCIS' intention to conduct routine focus groups and get its customers' perspective prior to roll out of new technology. AILA will be invited to participate in the first focus group scheduled for April 2007. In addition, USCIS indicated that the change of address function for N-400 applications should be live by May 2007.

AILA Committee Follow-Up Comment: AILA reiterated its eagerness to participate as a partner with USCIS in the roll out of future technology changes.

USCIS website:

USCIS is committed to dealing with AILA as directly as possible to improve the redesigned website. For general issues regarding the website AILA should interact with Debra Rogers, Chief, Information and Customer Service (Domestic Operations). Ms. Rogers and her team serve an internal advocate within the Service. USCIS wants to know as soon as possible of errors on the website, especially errors on forms and filing instructions. One solution USCIS is reviewing is bundling press releases with forms, when there is a change of filing instruction, in case the form itself can not be immediately changed. USCIS wants to give customers a better idea up front what to expect in processing and procedure at the time of filing. USCIS acknowledges that the website is a work in progress and that it is still very hard at work trying to reintroduce previous features such as Spanish and other language capability. USCIS' first step is to recover the old features and then work towards introducing new features.

AILA Committee Follow-Up Question: The committee asked for the background on the need for the website redesign.

USCIS Response: The infrastructure of USCIS' website needed to be updated to accommodate planned changes for the future. The website needed to be able to handle new servers, updated software packages, and hopefully incorporate e-filing in the future. The advent of expanded e-filing was one catalyst for changes to the website. USCIS still relies on ICE for a couple of intranet sites but for the most part the Service is substantially in charge of its own processes including transitioning to controlling its own data centers and server housing. ICE still controls the CRIS (online case status) system. It is accurate to report that there remains an extra level of bureaucracy to the website while ICE and USCIS continue to share some service agreements.

b. Please provide an update on any program(s) being developed to create the permanent capture of biometrics. AILA understands that the Department of State has initiated a program to ensure that one electronic file is created for each applicant/beneficiary, thus facilitating the transfer and sharing of information among various agencies. What is the status of this program?

USCIS Response: USCIS confirms that the Department of State has created an electronic file program. In addition, USCIS is working towards the "permanent" capture of biometrics. To this end, USCIS is in the process of implementing two programs related to the permanent capture of biometrics. The first step in the process is the creation of the Background Check System (BCS). The BCS is an intermediate step which will hopefully assist in the FBI name check process by changing the format of the data collection system.

USCIS hopes to have the second and final step in the process, the Background Security System (BSS), operational in the next eighteen (18) months. The BSS will be a biometrics storing system that will allow biometrics information to be re-used and will hopefully be tied into the Department of State's system in the future. Although the implementation of the BSS will allow biometrics information to be re-used and lessen the frequency customers must appear at their local Application Support Centers (ASC), it will not permanently end the need for an individual to check in with an ASC. USCIS will still require applicants to appear at ASCs periodically for updated photographs and continued identity verification. As the BSS program is implemented USCIS will review the standards for frequency of required visits for applicants at the ACSs.

c. Please provide an update on the status of transformation to electronic filing.

USCIS Response: USCIS is re-evaluating the format of e-filing and discussing adding an e-filing component for every type of application/petition filed with the Service. As part of the discussion USCIS is contemplating an expansion of the use of lock boxes modeled after the commercial banking industry. This is a recent position change within the Service that is still under preliminary discussion. There is no timeframe set for lock box expansion but is being discussed with an eye towards moving USCIS to handle credit cards transactions in the future.

AILA Committee Follow-Up Comment: The committee indicated its unease with the expansion of the lock box program in light of the serious issues that have been brought to AILA National's attention since the implementation of the current system. Difficulties with the current lock box system include the inability to track missing cases and the long lag time in cases being filed at the Chicago lock box and appearance at the Missouri Service Center.

USCIS Response: USCIS HQ is very interested in learning about and addressing the problems with the current lock box system especially before any expansion takes place. From USCIS' perspective the lock box system is advantageous because everything that comes into the lock box is imaged (in grey scale). Under the technology currently in place at the lock box, USCIS cannot confirm authenticity of an individual document. However, USCIS can verify that a particular document was or was not included in a package and can replicate a lost document. Currently, the NBC and the VSC have some limited access to the images captured by the lock box. USCIS is hopeful that that the lock box system will have bar coding capability in the future and can be expanded to assist in the receipting and preliminary steps of adjudication of cases. Lock box expansion is another component of the transition towards an account based system.

3. **Phase III of Bi-Specialization/Staffing/Regulations**

    a. Please provide an update on Phase III of bi-specialization. When will it be effective and what will the next phase entail?

USCIS Response: USCIS is committed to making sure all future phases of bi-specialization are announced well in advance of implementation. In addition, HQ has asked Service Center Operations to take a hard look at bi-specialization and whether its continued use and further expansion will assist in the transition to an account based system. USCIS HQ wants to stress that the account based system is not being discussed as just a mechanism for the Service to re-use data but is being contemplated as a way to develop ongoing relationships with its customers.

AILA Committee Follow-Up Comment: The committee requested that AILA be able to participate in the discussion concerning the continued use and expansion of bi-specialization and the transition to an account based system. The committee highlighted the use of petitioner pre-certification by the Department of Labor in the PERM process as one possible model for an account based system.

USCIS Response: USCIS indicated it was open to a dialogue with AILA on its perspective on the transition to an account based system. USCIS, however, is not contemplating a pre-certification process as part of the approach, but is more focused on developing a better understanding of large and/or repeat users.

AILA Committee Follow-Up Questions: The current agenda was developed and submitted to USCIS prior to the announcement of Phase III of bi-specialization (i.e. direct filing of Forms I-129 & I-539 at the VSC and CSC as of April 2, 2007). The

committee asked USCIS HQ a number of questions about the rationale for implementing Phase III to coincide with the beginning of the filing period for H-1B cap subject cases, including information on how the Service is preparing to handle the rumored onslaught of cases in the first few days of the filing period (e.g. mailroom training, discussions with courier services, etc.). In addition, the committee requested the Service contemplate a blanket grace period for errors in filing until the H-1B cap is reached, and requested that in the future the Service provide as much notice as possible for changes in filing procedure so that USCIS and AILA can work together to inform the public of important changes in procedure.

USCIS Response: USCIS indicated the change in filing procedure was intended to avoid some of the problems encountered by the VSC, which was the sole Service Center designated to process H-1B cap subject filings under Phase I of bi-specialization. The hope is that by splitting the H-1B cap workload at two sites, the VSC and CSC, the Service will be better able to timely manage the receipting and adjudication process. The Service is planning to carefully scrutinize the data coming in from the field, and, if necessary, shift workload to the other Service Centers. In addition, USCIS indicated it is committed to doing a better job of keeping the public informed of the cap count on its website, and is in the process of putting out a mass mailing to inform the public of the change in filing procedure. At this point USCIS will not change the length of the grace period from 15 days, but once the filing period begins may lengthen the grace period if data from the field suggests customers are making significant errors in filing. Statistics from last year indicate that errors in filing were not significant. For the first 15 days of the filing period (April 2nd-17th) cases will be receipted in and adjudicated at the place of filing even if filed at the wrong Service Center. After the grace period ends, cases will be returned if filed with the wrong Service Center.

USCIS is hearing the same rumors that the public is hearing about the possibility of reaching the cap in the first few days of filing, and is anticipating a mass drop of cases on the 1st day of the filing period. To prepare for this, USCIS has been working with its contracting staff in the mail rooms to provide additional training, and has had refresher training for other personnel at the VSC and CSC who are involved in the adjudication of I-129 petitions.

AILA Committee Follow-Up Question: The committee requested clarification on whether a number is recaptured when a cap-subject H-1B petition is denied. In addition, the committee requested clarification on the instructions given to the mail room staff at the VSC and CSC on where to look on Form I-129 to determine whether a case has been filed in the correct jurisdiction. Specifically, the committee asked whether the mail room staff will be looking at the address field on Page 1, Part 1, Question #2, or the address field for the place of employment on Page 3, Part 5, Question #5.

USCIS Response: USCIS indicated that a number is recaptured when an H-1B cap subject case is denied, but that it is a more complicated formula than a "first in – first out" out calculation. USCIS does not determine it has received a sufficient number of cases to reach the cap solely on the physical number of filings received at the Service

Centers. The formula to determine if the cap has been reached takes into account statistical rates of approval and denial. USCIS indicated it would inform AILA what fields are being reviewed to determine the proper place of filing.

AILA Committee Note: For detailed information on Phase III of bi-specialization including the latest information on the H-1B cap please check AILA infonet regularly for updates at http://www.aila.org/RecentPosting/RecentPostingList.aspx. In addition, see the USCIS website at www.uscis.gov.

b. Please provide an update on the likelihood of permanent placements for a number of senior management positions within USCIS that are currently being filled temporarily.

USCIS Response: There are a number of GS-14 and GS-15 position openings that will be publicized in the near future. In addition, the position of District Director remains open in the Detroit, Atlanta and Tampa USCIS District Offices, and the announcement of the incoming Southeast Region Director should be made by mid-summer 2007. Finally, and most importantly, the position of Director of Service Center Operations remains open. The position has been announced twice and will be announced a third and final time before a decision is made. In the meantime, the policy of rotating the Service Center Directors to USCIS HQ in Washington, DC will continue until a permanent placement is made for Director. Christina Poulos, the Acting Director at the California Service Center, will be rotated to HQ as of March 20, 2007. Presently, the Service Center Directors are part of the Senior Executive Service (SES). There are thirty-two (32) members of the SES nationwide. SES members are able to be deployed more rapidly within the Service to meet senior staffing demands.

c. Please provide an update on the status of regulations being developed or ready to be issued relative to, among others, AC21, CSPA, EB-5, and religious workers.

USCIS Response: The religious worker regulations cleared the Office of Management and Budget (OMB) this week and should be announced soon. Unfortunately AC21 regulations are not at the top of priority list and will most likely not be issued this year. USCIS anticipates putting out further guidance on the CSPA before regulations are issued. USCIS does not anticipate issuing EB-5 regulations until next year. Finally, there has been some movement on regulations relating to the U visa category. The Office of the Chief Counsel has detailed an attorney to the Office of the USCIS Chief of Staff to assist in and hopefully speed up the regulations issuance process.

4. **Security**

a. Please provide an update regarding what progress is being made to address the security check backlog. What, if anything, is planned administratively to improve the security check process for those applicants whose information requires manual checking by the FBI?

USCIS Response: USCIS is grappling with the security check backlog and believes that this is one of the most difficult issues facing the Service. USCIS is committed to working on every level to address this problem. Secretary Chertoff has spoken to Attorney General Gonzales on the issue and discussions between USCIS and the FBI continue on every level. USCIS believes that the proposed fee increase will help the situation. In addition, USCIS is in discussion with the FBI about gaining more access to the FBI's database so that the Service can complete some of the check process and is in discussions about developing more specific criteria of what constitutes a "hit" for immigration purposes. Currently, the security check clearance is processed through the National Security and Records Verification Directorate (NSRV) at USCIS. USCIS believes AILA should see some improvement in the flow of information between USCIS and the FBI in the next few weeks as a result of the continued discussions and changes to criteria and format of information including electronic data return. USCIS is also reviewing whether delays in clearance return are occurring once information is sent by the FBI to the NSRV.

Currently, one third of all pending N-400 Applications for Naturalization are pending due to delays in FBI name check clearance. 58,000 cases are waiting completion at the District level under the old policy of interviewing regardless of whether the name check had been completed. Under the current policy of waiting to schedule until the name check has been completed, two out of every three new N-400's filed are awaiting interview scheduling, approximately 110,000 cases.

b. AILA members report that in family-based immigration cases, as well as in employment-based immigrant and nonimmigrant matters, USCIS officers have requested that applicants voluntarily participate in informal, post-completion "audits." Please provide AILA with background regarding these audits, including the type of information sought; the authority for conducting such audits; and the ramifications on an individual who declines to participate.

USCIS Response: There is no consensus at USCIS HQ on whether to continue or discontinue the audit process. USCIS is committed to having a system that works to make the right decision on cases at the time of adjudication.

5. American Competitiveness in the Twenty-first Century Act of 2000 ("AC21")

AILA acknowledges and appreciates the issuance of the recent update to the Adjudicator's Field Manual on H and L periods of admission and would like to take this opportunity to thank USCIS for incorporating many of the recommendations previously submitted by AILA on this issue.[1] However, although the update included many ameliorative provisions it did not address the issue of AC21 sections 106(a) and 104(c) benefits being extended to both spouses. Are the arguments regarding the extension of 106(a) and 104(c) benefits to both spouses (when only one spouse is named on a qualifying labor certification or I-140 petition) still under discussion by HQ? AILA respectfully requests that the extension of these benefits be incorporated into another policy memorandum and/or be included in the forthcoming AC21 regulations.

USCIS Response: USCIS does not anticipate there will be any further changes in policy in this area than what was enunciated in the December 5, 2006, Aytes Memorandum.

6. 245(k)

AILA appreciates USCIS' willingness to review the 245(k) issues discussed in the September 26, 2006 meeting. Is HQ planning to issue further guidance regarding the application of 245(k) to the field offices? If such guidance has been drafted and disseminated, can AILA be provided a copy?

USCIS Response: USCIS has drafted guidance regarding the application of 245(k) that is currently within circulation at HQ. USCIS anticipates the issuance of guidance in this area within the next few months.

7. Degree Equivalency

Is there any update from HQ regarding the contemplated privatization of equivalency determinations?

USCIS Response: USCIS HQ remains very interested in the issue of privatization of equivalency determinations and discussions on the subject continue, however, the issue is not a top priority within the Service at this time.

8. Work Authorization Under VAWA

a. What is the status of the memorandum addressing I-765 processing for those eligible under VAWA 2005?

---

[1] *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year*, Memorandum, Michael Aytes, Associate Director, Domestic Operations, USCIS, HQPRD 70/6.2.8, HQPRD 70/6.2.12, AD 06-29 (Dec. 5, 2006).

b. Have the issues concerning work authorization for spouses of A and G nonimmigrants under VAWA 2005 been resolved?

USCIS Response: There is a memorandum in circulation at USCIS that will address both issues presented above. USCIS anticipates publication of the memorandum in the coming months of 2007.

Impact of the NTA Memorandum of Understanding

In an attempt to assess the impact of the July 2006 memorandum, *Disposition of Cases Involving Removable Aliens*,[2] AILA respectfully requests that USCIS provide statistics regarding the number of NTAs issued since July 2006. Specifically, AILA requests information regarding the number of NTAs initiated by an issuing office subsequent to denial of an I-485 for: (a) discretionary reasons, (b) petition denial, and (c) revocation of an approved petition. Additionally, AILA requests the number of NTAs issued by USCIS based upon a criminal conviction or other grounds of removability or inadmissibility.

Additionally, at the conclusion of the September 26, 2006, agenda meeting, USCIS indicated it would be open to feedback from AILA on the effects of the July 11, 2006 memorandum. AILA has recently received a number of alarming reports from members around the country relating to the issuance of NTAs on the same day, or shortly thereafter, in a particular matter. AILA understands that the Standard Operating Procedure (SOP) includes guidance for adjudicators to respect afforded periods of appeal, reopening, and/or reconsideration when issuing NTAs in a specific case.

Members report NTAs being issued simultaneously with denials during the statutorily afforded periods of appeal, reopening, and/or reconsideration from the following local offices: Atlanta, Dallas, Houston, Cleveland, Baltimore, Seattle, West Palm Beach, and Miami. In a number of cases, motions to reopen or reconsider were timely filed prior to the issuance of the NTA. AILA respectfully requests that USCIS provide notice to the district offices and service centers to reiterate the guidance within the SOP regarding statutorily afforded periods of appeal, reopening, and/or reconsideration.

USCIS Response:

NTA Statistics

FY	NTAs Issued	NTAs Referred to Other Orgs
2005	8,254	1,666
2006	15,181	9,591
2007*	10,653	4,425

[2] Policy Memorandum 110, Michael Aytes, Associate Director, Domestic Operations, USCIS, 70/1-P (July 11, 2006).

*** Data through April 30, 2007**
Source: PAS Data

Since the publication of the July 2006 memorandum, *Disposition of Cases Involving Removable Aliens*, USCIS has not seen a significant increase in the number of NTAs being issued. The purpose of the memorandum was to emphasize that the issuance of NTAs should be in conjunction with ICE. USCIS does not track the particular reason for the issuance of a NTA only overall numbers. In addition, USCIS' statistics do not reflect the issuance of NTAs on the basis of criminal issues because those NTAs should be issued by ICE. USCIS will be modifying the Standard Operating Procedure (SOP) guidance issued to the field to address the issue of timing. Generally, USCIS offices issuing NTAs should be sensitive to statutorily afforded periods of appeal, reopening, and/or reconsideration. However, USCIS reserves the right to issue a NTA before the period of appeal or at any point in the adjudication process on a case-by-case basis.

AILA Committee Follow-Up Comment: The committee stressed its concern over the continued practice of certain USCIS District Offices issuing NTAs in all denied cases that in many cases lack legal sufficiency. In one particular district, attorneys have been told that ICE is not reviewing the legal sufficiency of NTAs issued by USCIS. The committee inquired whether NTAs are reviewed by USCIS legal counsel before issuance and whether a formal process of review could be establish for NTAs that counsel believe have been improvidently issued.

USCIS Response: As a result of the information provided by AILA through the liaison process, USCIS was able to identify offices that were not following stated procedure in this area. USCIS continues to be open to receiving AILA's feedback on this issue. USCIS agrees that when appropriate legal counsel should be utilized in the NTA issuance process, however, USCIS does not anticipate that a CIS attorney will be checking every NTA issued. The Service does not want to waste its own or ICE's resources by issuing unwarranted NTAs. USCIS is reluctant to establish a centralized and/or formalized process for review of NTAs that are believed to be issued in error. At this time, counsel should continue to bring NTA issuance errors to the attention of the Service Center Director or Field Office Director where the NTA was issued. In addition, USCIS HQ wants AILA to continue to forward examples of problems in this area to their attention through the liaison process.

9. *Matter of Perez-Vargas*

In *Matter of Perez-Vargas,* 23 I&N Dec. 829, 834 (2005), the BIA held that immigration judges lack jurisdiction to determine, under INA § 204(j), whether an adjustment applicant is performing a "same or similar" job as the job described in a previously approved immigrant visa petition. As a result of the holding in *Perez-Vargas,* individuals in proceedings who qualify for portability under INA § 204(j) have no avenue to pursue their adjustment applications. This results from the BIA's decision and by the clear mandate contained at 8 CFR § 245.2(a)(1) and 1245.2(a)(1) that an individual in removal

proceedings must not have his or her adjustment application considered in any other forum other than in removal proceedings.

In the absence of regulations implementing INA § 204(j) and given the BIA's decision in *Perez-Vargas*, Congress' ameliorative intent in passage of the portability provisions of AC21 is currently being frustrated. AILA respectfully requests that USCIS HQ issue regulations and/or guidance which addresses the proper mechanism for an individual to renew an adjustment of status application in removal proceedings where the issue of portability under INA § 204(j) is presented.

AILA suggests that USCIS permit a porting employer to either request reopening of an I-140 to consider the porting issue or to file an I-140 petition on behalf of a beneficiary solely to determine the portability issue (i.e. whether the new employment constitutes "same or similar" employment). The adjudication of the I-140 petition in this situation would be limited to addressing the portability issue only.

Once approved, the I-140 petition in the name of the porting employer could be used by the Immigration Judge as a basis for the beneficiary's adjustment of status application either initially filed or renewed in removal proceedings.

AILA Committee Note: After the agenda for this meeting with USCIS HQs was finalized and submitted to USCIS, but prior to the meeting, the Fourth Circuit vacated *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), and held that IJs have jurisdiction to make findings regarding the validity of an approved I-140 under INA § 204(j). *Perez-Vargas v. Gonzales*, 05-2313 (4th Cir. Feb. 22, 2007). For more information about the latest developments in this case visit the American Immigration Law Foundation's website at: http://www.ailf.org/lac/ina204_0806.shtml#developments.

USCIS Response: The Service is aware of the Fourth Circuit's decision in *Perez-Vargas v. Gonzales*. The government has until April 9, 2007, to petition for a re-hearing. USCIS will formulate and announce guidance on this issue once all court action is completed.

10. I-360 Religious Worker Petitions

AILA has observed a substantial drop in I-360 adjudications, resulting perhaps from the recent USCIS practice of issuing RFEs on the majority of religious worker I-360 petitions. AILA understands that as of January 29, 2007, USCIS has discontinued the practice of issuing generic RFEs to I-360 petitioners. AILA would like to commend USCIS for taking this corrective action. However, AILA also understands that service centers have been instructed not to adjudicate religious worker petitions without first conducting a site visit. While AILA recognizes that DHS can utilize necessary means to address perceived fraud from the petition process, it is nonetheless disconcerting that bona fide cases are being severely prejudiced.

A number of issues are of particular concern. First is the prejudice to cases where the five-year limit on R-1 status is reached during the extended processing of the I-360, leaving the R-1 worker with no status. Moreover, given the expiration of the Special Immigrant Religious Worker classification in September 2008, the timely processing of these cases is increasingly critical.

AILA also understands that the USCIS is considering potential options to alleviate the five year limitation problem given the increased adjudication times for these types of cases. We appreciate USCIS' efforts in this area. To that end, AILA seeks clarification regarding several issues in this area so that we can better understand the process:

a. **Security Checks**

How many religious worker petitions are "pending security checks?" Would USCIS provide a breakdown of how many religious worker I-360s and I-129s are currently undergoing security checks? Since I-360 petitions do not grant an immediate benefit, why must the security check process be so thorough and extensive? For I-129 petitions, why is the security check process seemingly much more extensive than the usual nonimmigrant security check process?

b. **Fraud Investigation and Site Visits**

1. Does the status inquiry response from USCIS that the case is "pending security checks" mean that the case is under investigation for possible fraud? Does an initial security check in fact take place for such cases? Does the case then get transferred to a Fraud Detection Unit (FDU)? Without divulging confidential fraud selection criteria, please verify if all I-360 and I-129 religious worker petitions are being referred to FDUs or if some petitions are moving forward to final adjudication. How long does the Service anticipate FDUs will be part of the regular adjudication of these types of petitions?

2. To what extent has USCIS already implemented the site visit requirement mentioned in the regulatory agenda? What criteria are used to determine whether a site is acceptable?

3. How many I-360 religious worker petitions are currently with FDUs for investigation? How many I-129 petitions? What is the average FDU review time to determine whether a case is referred to ICE or returned to the service center adjudication queue? Considering current FDU resources, how long does the Service anticipate a fraud investigation will last, including site visits? What mechanisms are in place to deal with the backlog?

4. What additional options are being considered by USCIS to improve the processing times of religious worker petitions?

USCIS Response: As of the end of January 2007, seven hundred and fifty-one (751) I-360 petitions were pending site visits or other in-depth analysis. USCIS is aware of the sunsetting of the Religious Worker Program and is trying to get back on track to a six month processing time. USCIS is not relying on the extension of the Religious Worker Program to provide relief of the backlog issue. A total of 900 cases have been shipped to local offices for applicable site review. As previously noted in the minutes to the September 26, 2006, USCIS AILA Liaison Meeting, IBIS checks are run on every type of case and are not unique to the I-360 petition adjudication process. **(See Question 11, pages 8-9, September 26, 2006, AILA-USCIS Liaison Meeting Minutes).**

The Service will not divulge fraud selection criteria but confirmed that it is utilizing a number of different methods to process cases. USCIS is committed to treating cases individually and not applying one broad stroke. In order to avoid triggering profiling concerns every I-360 and R1 petition is subject to a verification interview of the petitioning organization and/or the organization named on the 501 (c)(3) letter used in the petition to include a possible site visit. The change in I-360 and R-1 petition processing was the result of serious fraud concerns as there were a number of significant substantive issues that USCIS believed needed a closer look. The implementation of the new processes has led to the creation of site surveys which will hopefully lead to developing more targeted and efficient criteria for review in the future.

AILA Committee Follow-Up Comment: As mentioned above AILA commended the Service for ending the practice of issuing "boiler-plate" RFEs on all pending I-360 petitions. The committee asked USCIS to comment further on this change in policy.

USCIS Response: USCIS is committed to ending the practice of "blind" RFEs and wants the RFE practice to be more analytical. USCIS is currently reviewing its Standard Operation Procedures (SOPs) in the area of RFE issuance to assist adjudicators in drafting relevant and necessary requests. Adjudicators should use common sense and take advantage of publicly available information to address concerns about a particular petitioner, such as annual reports on a company's website. If something is publicly available, USCIS should not request it through the RFE process. It is USCIS' hope that moving toward an account based system will eliminate some of these issues, as a petitioner's information will be readily available to USCIS, and will be able to be updated by the petitioner on a regular basis.

11. EB-5 Investor Program

a. AILA respectfully requests that USCIS provide the latest statistics on I-526 and I-829 petitions filed, approved and denied for FY 2006 and 2007.

b. Is concurrent processing of I-526 petitions and adjustment of status applications currently under consideration by USCIS? AILA suggests that concurrent processing of these applications will promote the overall goals of the EB-5 program. Most notably, it will hasten investors' money going into projects and thereby increasing job creation for US workers.

USCIS Response: USCIS has seen an increase in filings at the EB-5 Regional Centers.

From I-526 and I-829 Statistics

FY	I-526 Receipts	I-526 Approvals	I-526 Denials	I-829 Receipts	I-829 Approvals	I-829 Denials
2006	486	344	132	89	108	108
2007*	383	235	91	97	75	37

*** Data through April 30, 2007**
Source: PAS Data

USCIS is continuing to take under advisement the request for concurrent processing of I-526 petitions and adjustment of status applications, however, an announcement on this issue is not imminent. The concern USCIS has with concurrent filing of I-526 petitions with I-485s is the same concern it continues to have with I-140/I-485 concurrent filings, namely, the issuance of ancillary benefits such as EADs and Advance Paroles on the basis of potentially fraudulent and/or "not approvable when filed" immigrant visa petitions.

AILA Committee Follow-Up Comment: AILA appreciates USCIS concern in not wishing to issue ancillary benefits on the basis of possibly unapprovable or clearly fraudulent petitions. However, AILA believes the benefits far outweigh the risks in the EB-5 context. Just as I-140 petitions generally have to pass prima facie review before concurrently filed I-765 and I-131 applications can be processed, the same procedures could be put in place in the I-526 review process and/or ancillary benefits could be held in abeyance until the I-526 petition has in fact be approved.

12. VAWA and *Perez-Gonzalez* / I-212 Memo

At the September 26, 2006 meeting, two specific issues were presented regarding field guidance issued last year on I-212 adjudications.[3] Specifically, the memo does not acknowledge the following: (1) the VAWA exception to INA § 212(a)(9)(C)(i); and (2) Congress' understanding of I-212s as articulated in VAWA 2005. During the September

[3] *Effect of* Perez-Gonzalez v. Ashcroft *on adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders under INA 241(a)(5)*, Memorandum, Michael Aytes, Acting Associate Director for Operations, and Dea Carpenter, Acting Chief Counsel, HQOCC 70/21.1.16-P; 70/21.1.17-P (March 31, 2006).

26 meeting, USCIS indicated it was formulating guidance on this issue. AILA respectfully requests an update on the status of such guidance.

Additionally, AILA suggests the following changes to the memorandum:

a. AILA recommends that the March 31, 2006, memorandum on I-212s should be amended to explicitly state that it does not apply to VAWA self-petitioners;

b. The memorandum should include a citation and discussion of the VAWA waiver at INA § 212(a)(9)(C)(ii)-(iii); and

c. The memorandum should discuss the "Sense of Congress" language passed in the Violence Against Women Act of 2005.

AILA believes that amending the March 31, 2006, memorandum will provide the necessary instruction to both USCIS officers and immigration practitioners handling I-212s and VAWA cases.

USCIS Response: There is a memorandum circulating within USCIS right now that will address the concerns/requested changes listed above. USCIS anticipates the memorandum will be finalized and issued in the coming months of 2007.

13. Ability to Pay

AILA recognizes that the ability to pay requirement for I-140 petitions is an important mechanism to determine the bona fides of an offer of employment and to identify the occasional sham employer that has no real intent or ability to employ the beneficiary. Notwithstanding, there are instances where adjudicators are issuing unnecessary RFEs on bona fide petitions by utilizing a formulistic interpretation of the ability to pay criterion.

For purposes of illustration: An architecture firm that has been in business for 42 years, with four offices, filed an I-140 petition with a priority date in 2006. A tax return for 2005 (most recent) was submitted showing gross income of $13+ million and Taxable Income before special deductions (Form 1120, Line 28) of $253,000.00. The balance sheet portion of the return showed Net Current Assets of $926,805. The return included a deduction of $1.6 million as a Net Loss Carryover from 2002 and 2003. The RFE summarily concluded: "A company that carries a New Operating Loss of this amount is not showing financial stability. The Service must look at the totality of the evidence presented to make a decision regarding the ability of a company to remain an ongoing business and pay the proffered wage to the beneficiary." (SRC-07-014-53511)

AILA is concerned that past guidance from USCIS encourages adjudicators to employ pedantic accounting analyses for which they are not qualified and which obfuscates the larger goal and function of the ability to pay requirement, thus resulting in increased numbers of unnecessary RFEs which ultimately serve only to frustrate USCIS' goal of increasing productivity and efficiency.

AILA respectfully requests that USCIS provide additional field guidance reminding adjudicators that the underlying purpose of the ability to pay requirement is merely to determine that, more likely than not (i.e. preponderance of the evidence standard), a petitioner is a real and viable operating business enterprise that is able to meet its ongoing short-term financial obligations, including payroll obligations to its employees. AILA further requests that adjudicators be reminded to apply the holding in *Matter of Sonegawa*, 12 I & N Dec. 612 (Reg. Comm. 1967) when reviewing a petitioner's ability to pay the required wage under the appropriate preponderance of the evidence standard. Notably, *Matter of Sonegawa* provided that a petitioner is not precluded from showing the ability to pay the proffered wage required on the labor certification when "the petitioner's expectations of continued increase in business and increasing profits are reasonable expectations" although there may be an uncharacteristically unprofitable year during the required time period.

USCIS Response: USCIS appreciates the illustration included in the agenda and wants cases such as the one described above brought to HQs attention through the AILA liaison process. USCIS is in agreement that a petitioner's ability to pay should be reviewed through a simple, straightforward process that does not turn USCIS adjudicators into CPAs. USCIS is trying to make this a smaller issue of concern and contention but is loathe to issue additional formal guidance on ability to pay as a significant amount of guidance has already been put out on this issue over the last few years. USCIS is considering developing and disseminating fact sheets to the public that would help both adjudicators and customers understand the kind of evidence that can be used to determine a petitioner's ability to pay. USCIS agrees that the size and life-span of a petitioner should be a factor in the ability to pay review. In addition, well-known, public companies should not undergo burdensome scrutiny.

14. Child Status Protection Act (CSPA)

AILA respectfully requests an update on when USCIS expects to amend *The Child Status Protection Act – Memorandum Number 2*, Johnny N. Williams, Executive Associate commissioner, Office of Field Operations, USCIS, HQADN 70/6.1.1 (Feb. 14, 2003), to reflect the holding in *Matter of Rodolfo Avila-Perez*, 24 I. & N. Dec. 78 (BIA, Feb. 9, 2007).

Specifically, AILA urges USCIS to issue updated guidance on the CSPA which reflects the BIA's holding that section 8(1) of the Child Status Protection Act (CSPA), as enacted, does not require an individual whose visa petition was approved before the CSPA's effective date to have an adjustment application pending as of August 6, 2002, to be eligible for benefits under the CSPA. In furtherance of Congress' clear intent through passage of the CSPA to provide expansive relief and promote the reunification of families, AILA urges the USCIS to issue updated guidance on this issue as soon as possible.

USCIS Response: USCIS is aware of the holding in *Matter of Rodolfo Avila-Perez*, and further guidance on the CSPA is currently in circulation at HQ. USCIS is hopeful that the updated guidance on the CSPA will be issued prior to AILA's Annual Conference in mid-June 2007.

15. F-1 to H-1B Cap Gap Rule

USCIS has previously exercised its discretion and extended the status of F-1 and J-1 nonimmigrants for whom an H-1B petition is timely filed to bridge any resulting gap in status. Most recently, however, ICE and USCIS have not favorably exercised this discretion and, as a result, former students have been forced to leave the US, causing tremendous inconvenience and expense.

AILA maintains that the favorable exercise of discretion to remedy such a "cap gap" is in accord with the goals announced in the Rice-Chertoff "Joint Vision: Secure Borders and Open Doors in the Information Age". In addition, numerous reports and studies have raised concerns that the United States is not perceived as a welcoming destination for international students, many of whom stay after they have concluded their studies at the request of U.S. employers and who make significant contributions to the economic, technical, cultural and social welfare of the United States. AILA urges that graduating students be welcomed and not sent away. Failure to close the "cap gap" for these foreign nationals frustrates this goal.

AILA therefore requests that the prior practice of extending a nonimmigrant student or exchange visitor's "duration of status" be adopted for those individuals for whom an H-1B petition has been timely filed. Specifically, AILA requests that the date of expiration of the student or exchange visitor's grace period be extended to the effective date of the petition's approval.

USCIS Response: USCIS does not anticipate and change in policy on this issue.

AILA Committee Follow-Up Comment: The committee requested that USCIS HQ convey AILA's concerns to USCIS Director Gonzalez on the F-1 to H-1B cap issue. Mr. Aytes indicated that our concerns would be conveyed.

16. K-2 Adjustment of Status Issues

AILA members report disparate treatment and results for K-2 dependent visa holders who apply for adjustment of status in the United States. AILA has received reports that USCIS offices in various locations around the country have been denying some adjustment applications of K-2 applicants when the qualifying marriage to the K-1 fiancé occurs after the K-2 dependent has reached the age of 18 but is still under 21. The justification generally provided in these denied cases is that since the K-2 dependent has turned 18 he or she no longer qualifies as a stepchild and is therefore ineligible to adjust status.

Members are also reporting denials of adjustment of status applications filed by K-2 dependents before turning 21 where the application remains pending past the 21st birthday. Regardless of the availability of CSPA protections, AILA is concerned that statutory provisions specifically governing K-2 adjustments are not being applied by adjudicators.

AILA respectfully requests USCIS review and consider the arguments and recommendations on these issues in the attached Addendum to this agenda.

USCIS Response: USCIS indicated that the first issue presented above by the committee, a qualifying K-1 marriage that takes place when a K-2 dependent is between the ages of 18 and 21, is the subject of short guidance that should be issued imminently. USCIS indicated that AILA's presentation and clarification of this issue was extremely helpful in moving the issue to the forefront. The second issue presented, the ability of K-2 dependents to adjust status after reaching 21, is not addressed in the guidance referenced above. USCIS is willing to take a hard look at the information and arguments presented by AILA on this issue.

AILA Committee Note: USCIS' guidance on a K-2 dependent's ability to adjust status when the qualifying marriage to the K-1 fiancé occurs after the K-2 dependent has reached the age of 18 but is still under 21 can be viewed at:
http://www.uscis.gov/files/pressrelease/K2AdjustStatus031507.pdf

17. I-130 Petition Adjudication Delays

On January 26, 2007, the Visa Office at the State Department announced that in compliance with the enactment of Title IV of the Adam Walsh Child Protection and Safety Act of 2006 [P.L. 109-248] consular offices at U.S. embassies and consulates are no longer authorized to accept I-130 petitions. United States citizens residing abroad are now required to submit their I-130 petitions to the USCIS service center with jurisdiction over their place of residence. AILA is therefore concerned that the additional workload resulting from this change in procedure will result in lengthy processing times for I-130s at the VSC and CSC. As of January 17, 2007, the USCIS' listed "goal" processing time for I-130 Petitions filed by U.S. citizens at the VSC is 10 months and 7 months at the CSC.

In order for USCIS to meet its stated commitment to family reunification, AILA respectfully requests that sufficient resources be allocated to ensure a six month goal processing time (if not less) for I-130 petitions filed in the immediate relative category at both service centers with I-130 jurisdiction.

USCIS Response: USCIS is aware of the growing backlog of pending I-130 petitions at the VSC and CSC and hopes to reallocate resources to reduce processing times. USCIS is working with the Department of State to formulate guidance and procedure on how to move forward with I-130 petitions filed by United States citizens residing abroad

including fee receipt and security check clearance issues. USCIS will not be taking back previously approved I-130 petitions for re-adjudication based on the requirements of the Adam Walsh Child Protection Safety Act of 2006.

AILA Committee Note: On March 21, 2007, the Department of State announced that "consular posts abroad will resume accepting petitions for immediate relative immigrant classification from American citizens who are resident in their consular districts, including members of the armed forces, as well as true emergency cases, such as life and death or health and safety, and other determined to be in the national interest." To demonstrate residency in a consular district, petitioners must be able to show that they have permission to reside in the consular district and that have been doing so continuously for at least six months before the filing of the petition. For the complete announcement by the Department of State see:
http://www.state.gov/r/pa/prs/ps/2007/mar/82030.htm.

In addition, on March 26, 2007, USCIS provided guidance on qualifying to file an I-130 petition abroad and on whether to file at a USCIS international office or consular post. The USCIS announcement includes the link to the list of international offices and instructions to Form I-130. For the complete announcement by USCIS see:
http://www.uscis.gov/files/pressrelease/I130procedures032607.pdf

18. Jurisdiction over Adjustment of Status Applications of Arriving Aliens in Removal Proceedings

On May 12, 2006, DHS and EOIR jointly published interim regulations addressing USCIS' jurisdiction over adjustment of status applications of arriving aliens in removal proceedings. 71 Fed. Reg. 27,585-592 (May 12, 2006). Since the interim regulations were issued and implemented on May 12, 2006, AILA has received numerous reports of USCIS adjudicators who appear to be unaware that the regulations have changed and, as a result, are incorrectly rejecting or denying adjustment applications of arriving aliens due to a lack of jurisdiction. Essentially, such adjudicators are erroneously relying on 8 C.F.R. § 245.2(a)(1) as it existed prior to the May 12, 2006 amendments.

AILA respectfully requests that USCIS issue instructions to the field regarding the elimination of 8 C.F.R. §§ 245.1(c)(8), 1245.1(c)(8). Specifically, such guidance should confirm that USCIS maintains jurisdiction over the adjudication of the adjustment of status application of an arriving alien in removal proceedings, with the limited exception of certain advance parolees under the regulations.

Please also advise as to the following:

a. What steps should be taken if an adjustment of status application is erroneously denied for lack of jurisdiction under the former regulations?

b. Can a request be made that the case be re-adjudicated under the current regulations without the necessity of filing a motion to reopen?

c. What is USCIS' position as to whether it has jurisdiction over the adjustment application of an arriving alien with an unexecuted final order of removal? If USCIS takes the position that it does not have jurisdiction when there is a final order of removal, please explain the legal basis for this position. AILA maintains that jurisdiction should remain as USCIS now has jurisdiction over the adjustment applications of *all* arriving aliens, both those in proceedings and those not in proceedings. Moreover, the final order would not be a bar to adjustment or otherwise render the individual inadmissible.

AILA Committee Note: After the agenda for this meeting with USCIS HQ was finalized and submitted but prior to the meeting, USCIS issued guidance implementing the interim rule which permits paroled arriving aliens in removal proceedings to apply for adjustment of status. The memorandum, *Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status,* Michael L. Aytes, Associate Director, Domestic Operations, USCIS, HQDOMO 70/23.1 (Jan. 12, 2007) can be viewed in its entirety at: http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf. For further discussion of the memorandum see also AILF's practice advisory at: http://www.ailf.org/lac/lac_pa_060308_arraliens.pdf

USCIS Response: USCIS indicated that the answers to questions (a.) and (b.) presented above can be found in the January 12, 2007, memorandum, but to reiterate, any denials received by counsel on this issue that conflict with the interim rule and newly issued guidance should be brought to the attention of the issuing office and do not require a formal motion reopen with filing fee to be submitted. As discussed in the January 12, 2007, memorandum, it is USCIS' position that it retains jurisdiction over the adjustment application of an arriving alien with an unexecuted final order of removal but the final decision regarding jurisdiction and eligibility for adjustment of status in any matter will be made on a case by case basis.

AILA Committee Follow-Up Question: The committee commended USCIS for putting out guidance that clarified the issues presented above. The committee, however, suggested the memorandum be amended to reflect the ability of aliens who are paroled into the United States who also maintain H or L status remain eligible to adjust status on the basis of an employment-based visa petition. Specifically, Section 3, Part B, of the January 12, 2007, memorandum states that "Section 245(c)(7) of the Act completely bars a paroled arriving alien from adjusting status on the basis of an employment-based immigrant visa petition under section 203(b) of the Act, because a parolee is not in a 'lawful nonimmigrant status.'" (citing 8 CFR 245.1(b)(9)). The regulation specifies that this requirement applies "at the time he or she files an application for adjustment of status." Although the context of the memo is filing adjustment applications upon arrival,

AILA suggest that the sentence should be corrected to clarify that the alien must be in "lawful nonimmigrant status" at the time of filing.

AILA's suggested wording reads as follows: "Because parole is not equivalent to 'lawful nonimmigrant status,' section 245(c)(7) of the Act bars a paroled arriving alien from applying for adjustment of status on the basis of an employment-based immigrant visa petition under section 203(b) of the Act, unless the paroled arriving alien will be resuming status pursuant to a valid L or H petition."

USCIS Response: USCIS will review AILA's request for clarification and suggested language of Section 3, Part B, as it relates to paroled aliens who also maintain H or L status.

19. Jurisdiction over Form I-212, Application for Permission to Reapply for Admission

The regulations at 8 C.F.R. § 212.2(d) require that I-212 applications be filed at the district office having jurisdiction over the prior deportation or removal proceedings, unless the individual is also filing Form I-601 simultaneously for a waiver under section 212(g), (h), or (i). AILA members have recently received rejections of I-212 applications due to a purported lack of jurisdiction.

Please reaffirm to the field that I-212 applications should continue to be filed with the district office where the prior deportation or removal proceedings occurred unless the exception listed above applies. AILA also recommends that field guidance be sent to all district offices reminding them of the filing requirement contained at 8 C.F.R. § 212.2(d).

USCIS Response: Except as provided in 8 CFR 212.2(g)(3), USCIS confirms that District Offices retain jurisdiction of I-212 applications unless an alien described in 8 CFR 212.2(d) is filing both an I-212 application and an I-601 waiver. USCIS will provide appropriate instructions to field offices on this issue.

Closing Remarks and Comments:

At the conclusion of the meeting USCIS and the committee discussed a number of issues and topics not included on the formal agenda. In addition, a few topics were discussed by USCIS representatives present at the committee meeting and also part of the USCIS panel at AILA's 2007 Spring CLE Conference in Washington, DC on March 16, 2007. The following is a summary of those comments:

1. TPS Renewal in Removal Proceedings: EADs

USCIS is aware of the decision that permits individuals to renew a request for TPS in removal proceedings. The committee requested clarification on where a TPS applicant in removal proceedings should file a request for employment authorization. USCIS

indicated that it has formed a mini-working group with ICE and guidance on this issue should be formulated and announced in the near future.

Comments on Proposed Fee Increase

USCIS' top priority is finalizing the fee increase rule published in the Federal Register on February 1, 2007. USCIS is now focused on evaluating the comments that have come in connection with the proposed fee increase.

AILA Committee Note: For a comprehensive review of the materials related to the proposed fee increase please see AILA infonet at:
http://www.aila.org/content/default.aspx?docid=21536

Comprehensive Immigration Reform: USCIS has started to develop contingency planning to implement comprehensive immigration reform when and if it becomes a reality. USCIS is viewing this as an issue of resource allocation and how best to shift resources and workload if CIR is passed by Congress. The prevailing view at USCIS is that the issuance of benefits under CIR would not take the format of a discrete program such as what was developed for legalization. The need to begin formalizing the Service's approach to this issue has already impacted resources at USCIS as time and energy has already been spent and continues to be spent on this issue. The committee urged USCIS to let AILA know of its challenges so our association could provide feedback during the planning stages. USCIS indicated it was open to asking for and receiving feedback from AILA on this and other challenges currently facing the Service.

Increase in Litigation

The Office of the General Counsel indicated that there has been a 400% increase in litigation over the last nine to ten months. A majority of the office's resources are being used to address the surge in litigation. The surge in litigation is primarily a result of the delays in adjudication created by the security check backlog. USCIS is committed to working with the FBI to fix the security check process. One effect of the surge in litigation was the change in USCIS' processing of N-400 applications. In the past an N-400 interview was scheduled regardless of whether the required security checks had cleared. The current policy is not to schedule the N-400 interview until all required security checks have cleared. USCIS indicated that we may see more changes like this put into place as a result of the increase in litigation.

N-400 History Exam Re-design: USCIS indicated that they are strongly in favor of the re-design of the civics testing portion of the N-400 application. USCIS assured the committee that the history test was not re-designed to make the test harder and reduce the pass rate. The data coming out of the testing phase of the new format indicates that the passage rate is the same or better as the old history exam. USCIS is contemplating disengaging the civics exam from the N-400 interview in the future. One idea is that

applicants could take the civics exam as often as needed at a separate location, such as the ASCs, in electronic format. Applicants would be able to take the civics exam at their leisure, as many times as required to pass, prior to their N-400 interview at USCIS District Offices. USCIS is also discussing whether N-400 applications should continue to be filed at all four Service Centers. USCIS is reviewing whether N-400 applications should be filed at one location (e.g. NBC) to standardize the screening process.

EADs

USCIS indicated during the panel at AILA's 2007 Spring Conference that the Service is closely monitoring the EAD workload at all the Service Centers and at the NBC to proactively adjudicate EADs well before the 90th day. USCIS indicated sweeps are constantly run to determine what cases are in the pipeline and those that can be worked and brought to completion. USCIS restated the difference in clock stoppage of EAD processing for RFEs for initial evidence and RFEs sent for additional evidence. However, USCIS indicated that in practice, the electronic sweeps do not differentiate between RFE types. If the system establishes that an RFE has been answered the case will be worked, if the system shows that an RFE is still outstanding the case will not be worked.

AILA Committee Note: For a review of the clock stoppage rules and other information about the EAD process see the **September 26, 2007, USCIS-AILA Committee Minutes, pages 2-4**. The committee urges AILA members to continue to bring examples of breakdowns in the EAD system to AILA National's attention through the liaison process.

CERTIFICATE OF SERVICE

I, Derrick Wortes, declare as follows:

I am employed in the office of a member of the bar of this Court at whose direction the following service was made. I am over the age of eighteen years and am not a party to the within action.

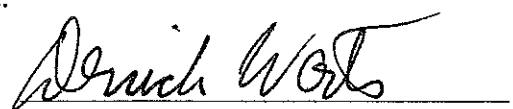
On this day, I served one copy of the foregoing Brief of *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Washington, and NYU Center for Human Rights and Global Justice in Support of Plaintiffs–Appellants by U.S. mail, first-class, postage pre-paid addressed to the following:

Daniel J. Davis, Esq.
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 3611
Washington, DC 20530
Attorney for Defendants–Appellees

Matt Adams
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
Attorney for Plaintiffs–Appellants

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: June 12, 2007
San Francisco, California



Derrick Wortes