UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Army Specialist Julian POLOUS AL MATCHY Plaintiff v. MICHAEL MUKASEY, Attorney General of the United States of America, MICHAEL CHERTOFF, Secretary of the United States Department of Homeland Security, JONATHAN SCHARFEN, Acting Director, United States Citizenship and Immigration Services, MICHAEL JAROMIN, District Director, United States Citizenship and Immigration Services, and ROBERT S. MUELLER III, Director, Federal Bureau of Investigation, Defendants.	)	Case No. 08-CV-2328 CM/DJW

PLAINTIFF'S ORIGINAL PETITION FOR NATURALIZATION AND COMPLAINT FOR INJUNCTIVE AND MANDAMUS RELIEF

COMES NOW Army Specialist Julian Polous Al Matchy, Plaintiff in the above-styled and numbered case, and for cause of action would show unto the Court the following:

1. Plaintiff, U.S. Army Specialist Julian Polous Al Matchy, is a long-time permanent lawful resident of the United States. In April 2007, having met all statutory requirements to be come a citizen of the United States, Spc. Polous Al Matchy applied for naturalization. He was interviewed by the responsible federal agency, U.S. Citizenship and Immigration Services ("USCIS") on January 18, 2008. Despite the passage of six months since his naturalization interview and numerous inquiries by Spc. Polous Al Matchy and his commanding officers, USCIS has failed to render a decision on his application for citizenship.

2. Spc. Polous Al Matchy is an active-duty member of the United States Army. He volunteered for the Army in March 2006 and was deployed to his native country of Iraq in November 2006. In September 2007, he was seriously injured by a suicide bomber who detonated himself some 10 feet away from plaintiff. According to his Commander, David Sutherland, "Despite his wounds, SPC Polousalmatchy continued to provide support and enabled my Soldiers to communicate with the Iraqi forces attempting to reestablish security, and wounded civilians attempting to get medical care". Exhibit 3. For his heroic service, Spc. Polous Al Matchy was awarded the Purple Heart, two Army Recommendation Medals and Gold Combat Spurs, among other awards and citations. Exhibit 4.

3. Despite Spc. Polous Al Matchy's contributions to the United States Army, the United States government refuses to adjudicate his application for naturalization, in violation of 8 C.F.R. § 335.3, which requires such adjudication within 120 days of examination. Under 8 U.S.C. § 1447(b), this Court may and should grant Spc. Polous Al Matchy's naturalization application after a *de novo* hearing.

4. Spc. Polous Al Matchy has been robbed of his statutory right to naturalize solely because of the bureaucratic failings and callous inaction of two federal government agencies—USCIS and the FBI. Upon information and belief, his naturalization has been delayed because of a background check known as an "FBI name check," which USCIS requires for naturalization even though it is not required by any statute or regulation. In conducting the name check, the FBI runs an applicant's name (and various alternative spellings and permutations of the applicant's name) against a drastically overinclusive database of names that have appeared in FBI files. That database contains the names of countless innocent persons, such as crime victims, witnesses, and persons who have applied for government security clearances. Because of Defendants' policies and practices, the FBI name check is highly likely to result in "false positive" results and is conducted in such a manner that lengthy delays are inevitable and systemic as FBI employees are required to check paper files in remote locations to verify that there is no adverse information affecting eligibility for naturalization.

5. As a result of Defendants' failure to adjudicate his application for naturalization, Spc. Polous Al Matchy is unable to obtain certain employment-related security clearances restricted to U.S. citizens, sponsor for lawful permanent residency any immediate relatives living abroad, apply for and receive business-related benefits reserved for U.S. citizens (such as federal small business loans), or travel freely as a U.S. citizen. Moreover, Spc. Polous Al Matchy is unable to vote in elections, serve on juries, and enjoy other rights and responsibilities of U.S. citizenship. Should he not be naturalized by October 20, 2008, he will not be able to vote in the November 2008 general elections.

6. Through this action, Spc. Polous Al Matchy seeks his immediate naturalization.

First, he petitions this Federal District Court for a hearing on and *de novo* adjudication of his naturalization application pursuant to 8 U.S.C. § 1447(b), which provides that if USCIS fails to make a determination on a naturalization application within 120 days of the interview, the applicant "may apply to the United States district court for the district in which the applicant resides for a hearing on the matter," and that the Court may "determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter."

7. In addition to requesting that this Court grant his naturalization application pursuant to 8 U.S.C. § 1447(b), Spc. Polous Al Matchy also seeks injunctive relief from the unreasonable delays by USCIS and the FBI, pursuant to the Administrative Procedure Act, 5 U.S.C. § 555, and the mandamus act, 28 U.S.C. § 1361. Defendant officials of USCIS have a duty to adjudicate Spc. Polous Al Matchy's naturalization application in a reasonably timely manner. Defendant officials of the FBI have a duty to complete security checks required by USCIS for naturalization in a reasonable timely manner. Defendants have failed in those duties.

PARTIES

8. Plaintiff Army Specialist Julian Polous Al Matchy is a native and citizen of Iraq. He immigrated to the United States on May 5, 2001, and quickly applied for political asylum. He was granted asylum in 2002, and on March 1, 2005 became a Lawful Permanent Resident of the United States. Plaintiff is currently stationed and resides at Fort Riley, Kansas, within this District. Plaintiff's Alien Registration Number is A079 578 669.

9. Spc. Polous Al Matchy voluntarily joined the U.S. Army in March of 2006. In October 2007, one month after he was seriously injured in a suicide bomber's attack and his unit completed its tour of duty in Iraq, the Coalition Forces Commander in Diyala Province requested that Spc. Polous Al Matchy extend his deployment in Iraq. He willingly agreed and continued to serve in Iraq until December 2007. Spc. Polous Al Matchy continues to suffer from his injuries and is still receiving medical treatment. For his service in Iraq, Spc. Polous Al Matchy was awarded the Purple Heart, two Army Commendation Medals, Combat Action badge, Gold Combat Spurs and many certificates and letters of appreciation.

10. Spc. Polous Al Matchy submitted an application for naturalization to USCIS on April 17, 2007, while still deployed in Iraq, under 8 U.S.C. § 1439, which allows for lawful permanent residents having completed one year of active service to become eligible for naturalization without having to meet the residency or physical presence requirements other applicants are subject to. He successfully passed his naturalization examination on January 18, 2008, at the Honolulu Field Office of the USCIS. He has, on his own and/or through counsel, repeatedly contacted the government to find out the status of his naturalization application. His superiors in the U.S. Army also have contacted the Department of Homeland Security in an effort to expedite his FBI name check. USCIS's response to these inquiries is that security checks are still pending.
11. Spc. Polous Al Matchy meets all requirements for naturalization. He is of good moral character, as demonstrated by his exemplary and decorated service in the U.S. Army. He meets the requirements for length of lawful permanent residency and continuous physical presence, as applicable to members of the U.S. military pursuant to 8 U.S.C. § 1439. He has passed the English language and U.S. civics examination.

12. Defendant Michael Mukasey is the Attorney General of the United States, and this action is brought against him in his official capacity. The Attorney General is ultimately responsible for the Federal Bureau of Investigations ("FBI"), a subdivision of the Department of Justice.

13. Defendant Michael Chertoff is Secretary of the United States Department of Homeland Security ("DHS"), and this action is brought against him in his official capacity. He is charged with enforcement of the Immigration and Nationality Act, and is further authorized to delegate such powers and authority to subordinate employees of the DHS. 8 U.S.C. § 1103(a). More specifically, Defendant Chertoff is ultimately responsible for the adjudication of applications for naturalization. USCIS is an agency within the DHS subject to Defendant Chertoff's supervision.

14. Defendant Jonathan Scharfen is the Acting Director of USCIS. As such, he is responsible for the processing of naturalization applications. He is sued here in his official capacity.

15. Defendant Michael Jaromin, the District Director of the USCIS Kansas District including the Kansas City Field Office, is an official of the USCIS generally charged with supervisory authority over naturalization applications submitted by residents of Kansas, including Spc. Polous Al Matchy. This action is brought against Defendant Jaromin in his official capacity.

16. Defendant Robert S. Mueller III is the Director of the FBI. Upon the request of USCIS, the FBI is responsible for performing "FBI name checks" and other

background checks of all applicants for naturalization. Director Mueller is being sued here in his official capacity.

JURISDICTION

17. Jurisdiction in this case is proper under 8 U.S.C. § 1447(b), 28 U.S.C. §§ 1331 and 1361, 5 U.S.C. §701 *et seq.*, and 28 U.S.C. § 2201 *et seq.* Relief is requested pursuant to said statutes.

18. Pursuant to 8 U.S.C. § 1447(b), this Federal District Court has jurisdiction over naturalization applications that remain pending 120 days or longer past the interview date. "If there is a failure to make a determination [on a naturalization application] before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. 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."

VENUE

19. Venue is proper in this court, pursuant to 28 U.S.C. § 1391(e)(3), in that this is an action against officers and agencies of the United States in their official capacities, brought in the District where the Plaintiff resides.

20. Furthermore, venue is proper under 8 U.S.C. § 1447(b), in that the applicant resides within the District of Kansas, as alleged in paragraph 8.

21. Plaintiff designates Kansas City, KS as the location for trial.

EXHAUSTION OF REMEDIES

22. Plaintiff is not required to exhaust any administrative remedies prior to bringing an action under 8 U.S.C. § 1447(b) or the Administrative Procedure Act, or for a writ of mandamus. USCIS and FBI do not provide for any administrative mechanism to address delays in naturalization.

23. Plaintiff has, however, attempted to ascertain the nature of the delays in his case, and has been informed that security checks are still pending. Despite Plaintiff's numerous inquiries and the efforts of his commanding officers in the U.S. Army to obtain expedited processing of his application, USCIS and FBI have failed to act.

LEGAL FRAMEWORK

General Requirements for Naturalization

24. Plaintiff has inquired with the Defendants as to the status of his pending naturalization application, all of which have issued responses which indicate that the background checks remain pending.

25. Federal immigration law allows persons who have been residing in the United States as lawful permanent residents to become United States citizens through a process known as naturalization.

26. A person seeking to naturalize must meet certain requirements, including an understanding of the English language and history and civics of the United States;

a sufficient period of physical presence in the United States; and good moral character. 8 U.S.C. §§ 1423, 1427(a). Permanent Residents who have served at least one year of active duty in the United States military are eligible for naturalization without having to meet the residency or physical presence requirements. 8 U.S.C. § 1439.

27. Persons seeking to naturalize must submit an application for naturalization to USCIS. 8 U.S.C. § 1445. USCIS is the agency that is responsible for adjudicating naturalization applications.

28. Once an application is submitted, USCIS may conduct an investigation of each naturalization applicant. 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1. The Attorney General may waive the investigation. Pursuant to regulation, USCIS must conduct a criminal background check, which is a fingerprint-based check of criminal records. 8 C.F.R. § 335.2(b).

29. After a criminal background investigation is completed, CIS schedules a naturalization examination, at which an applicant meets with a CIS examiner who is authorized to ask questions and take testimony. The CIS examiner must determine whether to grant or deny the naturalization application. 8 U.S.C. § 1446(d).

30. USCIS must grant a naturalization application if the applicant has complied with all requirements for naturalization. 8 C.F.R. § 335.3. Naturalization is not a discretionary benefit, but a right upon satisfaction of statutory requirements.

31. USCIS must grant or deny a naturalization application at the time of the

examination or, at the latest, within 120 days after the date of the examination. 8 C.F.R. § 335.3. Once an application is granted, the applicant is sworn in as a United States citizen.

32. When USCIS fails to adjudicate a naturalization application within 120 days of the examination, the applicant may seek de novo review of the application by a district court. 8 U.S.C. § 1447(b). When the applicant requests district court review, the district court gains exclusive jurisdiction over the application, United States v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004), and it may naturalize the applicant. 8 U.S.C. § 1447(b).

33. In general, Congress has provided that applications for immigration benefits should be adjudicated within 180 days of the initial filing of the application. 8 U.S.C. § 1571. The President has also expressed that view. *See* Remarks by the President at INS Naturalization Ceremony (July 10, 2001), available at http://www.whitehouse.gov/news/releases/2001/07/print20010710-1.html (urging immigration agencies to adopt standard of six-month processing time for applications for immigration benefits).

Pre-Naturalization Background Checks

34. Under 8 U.S.C. § 335.2, CIS should not schedule the "initial examination" (i.e., the naturalization interview) until the agency has received "a definitive response from the [FBI] that a full criminal background check" has been completed. 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." 8 U.S.C. § 335.2(b). Thus, 8 C.F.R. § 335.2(b) contemplates that the "criminal background check" required by regulation is based upon fingerprint records, and is not a "name check." The FBI fingerprint check is run against criminal records showing arrests, criminal charges not leading to convictions, and criminal convictions.

35. Nonetheless, CIS runs two name-based background checks on each naturalization applicant. First, CIS runs each 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 law enforcement and intelligence agencies. Second, in 1998, CIS instituted the FBI name check. As originally implemented in 1998, the FBI name check ran a naturalization applicant's name against a database containing the names of persons who are or were the subjects of an FBI investigation.

36. In 2002, without giving public notice and an opportunity for public comment, CIS drastically expanded the scope of the FBI name check, so that an applicant's name would be checked against not only the names of investigation subjects, but also other names that are merely mentioned in FBI files.

37. As expanded in 2002, the FBI name check requirement is implemented in such a manner that it is highly likely that an applicant may be identified erroneously as a person "of interest" to the FBI, thereby delaying adjudication of the naturalization application, even though the applicant has committed no crimes, does not pose any kind of security risk, and has never been a suspect in any investigation. For

example, the name check may result in a "hit" when the applicant's name is mentioned in FBI records because he has been an innocent witness or victim of a crime, has undergone an employment-related security clearance in the past, or has assisted the FBI in an investigation. Thus, since 2002, the FBI name check has not been implemented in a manner that is calculated effectively to uncover national security risks, criminal conduct, or other wrongdoing.

38. The FBI name check procedure is also highly likely to result in false positive results because the FBI runs not only a naturalization applicant's actual name, but also various alternate spellings and permutations of the applicant's given and family names.

39. Plaintiff is informed and believes that USCIS does not adjudicate applications for naturalization until it receives a completed FBI name check. Neither USCIS nor the FBI imposes any time limits for completion of FBI name checks. As a result of their policies, practices and procedures, including their failure to require FBI name checks to be completed in a reasonable time period, Defendants are responsible for systemic, years-long delays in adjudicating hundreds of thousands of naturalization applications nationwide, including the one submitted by Plaintiff.

40. Although Defendants have asserted that the FBI name checks are necessary for national security, there is no justification for delays in the FBI name check process. Delays in the FBI name check process do not serve the interest of national security. Indeed, as the CIS Ombudsman has reported, "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." USCIS Ombudsman, Annual Report 2006 at 25 (emphasis added), available at

http://www.dhs.gov/xlibrary/assets/CISOmbudsman_AnnualReport_2006.pdf. In his most recent annual report, the CIS Ombudsman expressed his "agree[ment] with the assessment of many case workers and supervisors at USCIS field offices and service centers that the FBI name check process has limited value to public safety or national security, especially because in almost every case the applicant is in the United States during the name check process, living or working without restriction." CIS Ombudsman, Annual Report 2007 at 40.

41. Upon information and belief, USCIS has not reported any instance of a security threat discovered through an FBI name check that was not also disclosed through criminal background checks such as the fingerprint check and IBIS database check. The USCIS Ombudsman has questioned USCIS's claims that the FBI name check provides information that is not otherwise available through other, existing background checks in the naturalization process. In his 2007 annual report, the USCIS Ombudsman states: "It is unclear how many of the FBI name check 'responses' also were revealed by one or more of the other security checks conducted for the [naturalization] applications. To date, the Ombudsman has been unable to ascertain from USCIS the total number of actual problem cases that the agency discovered exclusively as a result of the FBI name check. The Ombudsman understands that most, if not all, of the problem cases which would result in an eventual denial of benefits also can be revealed by the other more efficient, automated criminal and security checks that USCIS initiates." USCIS Ombudsman, Annual Report 2007, at 41.

42. USCIS has a written policy providing for expedited processing of the FBI name check for applicants who have been deployed with the U.S. military. Nonetheless, USCIS has failed to process Spc. Polous Al Matchy's naturalization application in

a reasonably timely manner, much less on an expedited basis.

CAUSES OF ACTION

COUNT ONE
DE NOVO ADJUDICATION PURSUANT TO 8 U.S.C. § 1447(b)

43. The allegations contained in paragraphs 1 through 42 above are repeated and incorporated as though fully set forth herein.

44. Defendants Chertoff, Scharfen and Jaromin have failed to adjudicate Plaintiff's naturalization application within 120 days after the date of his naturalization examination. Plaintiff is therefore entitled to de novo adjudication of his or her naturalization application by this Court under 8 U.S.C. § 1447(b).

45. This Court should grant Plaintiff's naturalization application pursuant to 8 U.S.C. § 1447(b), because he meets all of the requirements for naturalization under chapter 2 of the Immigration and Nationality Act, 8 U.S.C. § 1421 et seq., and therefore has a right to become a naturalized citizen of the United States.

46. In the alternative, should the Court not grant a de novo review of the naturalization application, 8 U.S.C. § 1447(b) allows the Court to remand "with appropriate instructions" to USCIS. For these instructions to have any meaning, they must mandate compliance with the 120 day deadline contained in 8 U.S.C. § 1447(b). Because Defendants have already failed to act within the 120-day period, any remand should require USCIS to adjudicate the application immediately and by a date certain.

COUNT TWO

UNREASONABLE DELAY

IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

47. The allegations contained in paragraphs 1 through 46 above are repeated and incorporated as though fully set forth herein.

48. The Administrative Procedure Act requires administrative agencies to conclude matters presented to them "within a reasonable time." 5 U.S.C. § 555. A district court reviewing agency action may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The court also may hold unlawful and set aside agency action that, inter alia, is found to be: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C); or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). "Agency action" includes, in relevant part, "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §551(13).

49. The failure of Defendants Chertoff, Scharfen and Jaromin to adjudicate Plaintiff's application for naturalization within a reasonable time on the basis of delays in the processing of FBI name checks, in violation of 8 U.S.C. § 1446(d) and 8 C.F.R. § 335.3, violates the Administrative Procedures Act, 5 U.S.C. § 555(b); 5 U.S.C. §§ 706(1), 706(2)(A), 706(2)(C), 706(2)(D).

50. The failure of Defendants Mukasey and Mueller to complete Plaintiff's FBI name check within a reasonable time period, with the full knowledge that USCIS requires the completion of such FBI name check for adjudication of applications for naturalization, violates the Administrative Procedures Act, 5 U.S.C. § 555(b); 5 U.S.C. §§ 706(1), 706(2)(A), 706(2)(C), 706(2)(D).

51. As a result of Defendants' actions, Plaintiff has suffered and continues to suffer injury. Declaratory and injunctive relief are therefore warranted.

COUNT THREE

WRIT OF MANDAMUS

28 U.S.C. § 1361

52. The allegations contained in paragraphs 1 through 51 above are repeated and incorporated as though fully set forth herein.

53. Defendants have a ministerial duty to Plaintiff to timely adjudicate his naturalization application and to complete the FBI name check and any other investigation required by USCIS for his naturalization. They have failed in that duty.

54. Plaintiff has no adequate remedy at law for Defendants' failure to timely adjudicate the naturalization application and to complete the FBI name check and any other investigation required by USCIS required for naturalization.

55. The Court should grant relief in the form of a writ of mandamus compelling

Defendants to complete the FBI name checks and any other investigation required by USCIS for Plaintiff's naturalization and to adjudicate the application.

PRAYER FOR RELIEF

WHEREFORE, in view of the arguments and authority noted herein, Plaintiffs pray for the following relief:

(1) Assume jurisdiction over the matter;

(2) Pursuant to 8 U.S.C. § 1447(b), review de novo and grant Plaintiff's application for naturalization pursuant to 8 U.S.C. § 1447(b) or, in the alternative, remand Plaintiff's application for naturalization to USCIS with instructions to adjudicate the application within 10 days;

(3) In the alternative, or to the extent the Court deems necessary for the granting of relief under 8 U.S.C. § 1447(b), order injunctive relief requiring Defendants to complete immediately all steps necessary for adjudication of Plaintiff's naturalization application, including the FBI name check, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 555(b), 706(1), 706(2)(A), 706(2)(C), and 706(2)(D).

(4) In the alternative, or to the extent the Court deems necessary for the granting of relief under 8 U.S.C. § 1447(b), compel Defendants to complete immediately all steps necessary for adjudication of Plaintiff's naturalization application, including the FBI name check, pursuant to the Court's mandamus authority under 28 U.S.C. § 1361;

(5) Award reasonable attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412; and

(6) Grant any and all further relief this Court deems just and proper.

Respectfully submitted,

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**Pro hac vice* application forthcoming

Attorneys for Plaintiff

Exhibit List

Exhibit 1: Form N-400 Receipt Notice
Exhibit 2: Results of Interview Dated January 18, 2008
Exhibit 3: Letter from Commander David Sutherland
Exhibit 4: Certificates of Some of the Plaintiff's Military Awards