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UNDERSTANDING THE FBI NAME CHECK POLICY THAT IS CAUSING NATURALIZATION DELAYS

Posted on March 9, 2007 by Cyrus Mehta

by
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A detailed internal memo from the US Citizenship and Immigration Services (USCIS) explains the labyrinthine FBI name check procedure that has caused delays to many people applying for citizenship or other immigration benefits, such as permanent residence.

The Interoffice Memorandum by Michael L. Aytes, Associate, Director, Domestic Operations, USCIS, dated December 21, 2006, at its very core, states that the USCIS will no longer expedite FBI name checks when an applicant brings a mandamus law suit against the USCIS. On the other hand, expedite request can still be made by an official when at least one of the following criteria for expeditious treatment are met:

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); and/or
4. Loss of social security benefits or other subsistence in the discretion of the District Director.

On February 20, 2007, USCIS issued a brief notice to the public reiterating the new expedite policy without referring to the internal memo.

According to the memo, the expedite request has to be initiated by the USCIS official via fax and not by the applicant. It remains to be seen whether an

applicant can prevail upon an officer to expedite the FBI name check claim. The memo specifically states that cases that are simply "old" or subject to a congressional inquiry do not qualify for an expedited name check unless one of the expedited criteria are met.

Details On Name Check Procedure

Unlike the February 20, 2007 notice, the internal memo provides great details on the FBI name check procedure. Although the memo states that the FBI name 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 application for a benefit," it fails to provide further details or examples.

The name check must be initiated on the following form types: I-485 (Application to Register Permanent Residence or Adjust Status); I-589 (Application for Asylum and Withholding of Removal); I-601 (Application for Waiver of Ground of Excludability); I-687 (Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act); I-698 (Application to Adjust Status from Temporary to Permanent Resident); and N-400 (Application for Naturalization).

The memo goes on to state that the 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. If only the month and date of birth is incorrect, but not the year, a separate name check is not required. But if the year is incorrect, a separate name check needs to be initiated. Names are searched in a multitude of combinations, switching the order of the first, middle, and last names, as well as the combination of just the first and last names, referred to as an "around the clock" search. The memo cites the example of how the name, "Jose Garcia Rodriguez" would be checked:

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 FBI search capability will also search for other versions of the name, such as Rodrigues. Although the name check can be initiated through the Claims computer system, certain name checks can only be initiated manually through a spread sheet. Also, when certain searches do not appear on the system, the name check query has to be initialed manually. The initiation of a manual name check request can inherently lead to further delays.

Different FBI Responses

The memo further notes that if the FBIQUERY System response indicates “No Record” (NR), an officer can proceed with the adjudication of the application. If, on the other hand, the FBIQUERY states “Positive Response” (PR), the report is sent to the HQ Office of Fraud and Detection and National Security (FDNS) for preliminary review before being forwarded to field offices and service centers. The FBIQUERY can also provide other responses such as “Pending Response” (PR), which also means that no approval can be rendered until there is a definitive response, either NR or PR. Other FBIQUERY responses include “Error” (E), “Duplicate” (D), “Unknown Response” (UR) or “No Data Found,” and the memo instructs how each of these responses ought to be dealt with by the USCIS officer before approving the application.

Given all of these complex procedures described in the memo, one gains a deeper insight into the inordinate delays faced by many naturalization applicants. In the event that the FBIQUERY reveals a Positive Response (PR), the memo requires a long drawn out procedure for reviewing the FBI report before the application can be processed for approval, including contacting the third agencies identified by the FBI.

Results Of Law Suits

Regardless of the memo, an applicant should not be deterred from suing the various agencies of the government based on their refusal to act on a benefits application. In the context of naturalization, Section 336(b) of the Immigration and Nationality Act allows applicants to request a hearing in federal district court if there is a failure to make a determination before the 120-day period

after the date of the examination. The government has tried to argue that the examination period does not begin to run until the initial interview of the applicant as well as mandatory background check records. Fortunately, few courts have agreed with the government's position. *See e.g. Danilov v. Aguirre*, 370 F. Supp. 2d 442 (E.D. Va. 2005) ("an examination is not a single event, but instead is essentially a process the agency follows to gather information concerning the applicant"). Most courts have held that the term "examination" only reflects the applicant's interview and not the ongoing process, which includes the background security checks.

A decision in the US District Court in New Jersey, *Khamal Kheridden v. Michael Chertoff*, 2007 U.S. Dist. LEXIS 13571, is illustrative of this approach. In that case, plaintiff Khamal Kheridden sued the Department of Homeland Security (DHS) four years after his naturalization interview on November 19, 2002, which he passed. The court agreed that the 120-day period had passed and therefore it had jurisdiction over Kheridden's law suit. While the court was unable to grant naturalization unless the FBI background check was completed, it held that Kheridden had an interest in "completing the naturalization process so that he can fully enjoy the benefits of a US citizen." The court nevertheless fashioned a remedy by directing the USCIS to use its best efforts to determine the status of Kheridden's name check and to expedite this process. The USCIS was further ordered to report to this court every 30 days the status of Kheridden's name check and its efforts to obtain the results of the name check, including correspondence and any other relevant documents. The court further ordered that once the USCIS received the results of the name check, it should make a decision on Kheridden's naturalization application as expeditiously as possible, but no later than 60 days after receipt of the name check results.

Conclusion

In conclusion, the best way to resolve the problem is for Congress to step in and mandate time limits for background checks. Fortunately, the Citizenship Promotion Act of 2007 (S. 795/H.R. 1379) was introduced in both the House and Senate on March 7, 2007. In addition to preventing fee increases, this bill also proposes to mandate that background checks be completed within a certain time frame, and if the background check is not completed within that time limit, it imposes a requirement on the government to document and account for the reasons for the delay. It is hoped that this worthy legislation gets passed very soon!

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