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USCIS REVISES EARLIER GUIDANCE ON ITS FBI NAME CHECK POLICY

Posted on February 15, 2008 by Cyrus Mehta

By
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I wrote *MANDAMUS ACTIONS: AN EYEWITNESS ACCOUNT* (December 10, 2007, http://cyrusmehta.com/perseus/) to provide a basic overview of when federal litigation may be appropriate to compel the government to complete the adjudication of an application for which processing has been delayed by two years or more. I wrote this article in response to the announcement of a new U.S. Citizenship & Immigration Services (USCIS) and Federal Bureau of Investigation (FBI) initiative intended to help clear the USCIS adjudication backlog. This initiative involved the development of new strategies to process name check security clearances more quickly, including the allocation of additional funding and resources to clear the better part of the name check backlog within six months.

Here we are, two months later, and USCIS has issued an Interoffice Memorandum in which it revised earlier guidance on the adjudication of certain applications that require FBI clearance of the applicants prior to approval.[1] Previously, immigration benefits could not be granted until USCIS received both name (IP) clearance and fingerprint clearance from the FBI, which conducted its background investigations by running the applicants' biometrics through various databases. Pursuant to the findings of a 2005 report from the Office of the Inspector General of the Department of Homeland Security,[2] however, Associate Director Aytes revised this USCIS guidance to direct that adjudications officers approve certain applications where the delays are attributable only to the pendency of the FBI name checks, where the name checks have remained pending for more than 180 days and where the applications are otherwise

approvable.[3]

Qualifications to the Revised Guidance

It is important to note that the revised guidance provided by Associate Director Aytes is specifically limited to situations where only the name checks remain pending , and does not permit the approval of an application where the results of the various fingerprint investigations remain pending. Also, Associate Director Aytes categorically excluded Form N-400 Application for Naturalization from the list of applications that could be approved prior to the completion of the name check. As noted in the December 10, 2007 article, USCIS is required by statute to complete the adjudication of naturalization applications within 120 days of the examination on a naturalization application. INA § 336(b). The statute requires that a naturalization application be adjudicated regardless of the status of any background investigations. Where an applicant requests a hearing on his or her application before the federal district court because the application remains unadjudicated beyond 120 days, the U.S. Attorney's Office will often facilitate the background investigation to ensure that it is completed within the timeframe allocated by the district court. As the district courts have almost uniformly held that the word "examination" in INA § 336(b) means the interview, word is that USCIS will not even schedule naturalization applicants for their interviews until all FBI clearances have been completed and received by USCIS.

In the interest of national security, USCIS must still refer the applications enumerated in Associate Director Aytes' memo to the FBI for the same background checks that the government has always required. Moreover, Associate Director Aytes noted that despite the approval of an application, the FBI will continue to process the name checks for all of the enumerated applications. He then reserved the right of USCIS to rescind an approval should adverse information related to an applicant surface subsequent to the approval. Nevertheless, this is a very positive step by USCIS in its recent emphasis on customer service, and it is especially important to those applicants who have waited patiently during egregious processing delays – some as long as seven years – due to stalled FBI name checks. The remaining question, however, is how long it will take for USCIS to implement this new policy.

The Aftermath of the Revised Guidance

The American Immigration Law Foundation (AILF) announced on February 14, 2008 that "USCIS has informed that it already has begun to identify these cases and hopes to have taken action on them by April 30, 2008 . . . Applicants who have not filed district court actions, but otherwise meet the requirements outlined in the memo, may wish to send a demand letter to the agency with the memo attached requesting immediate adjudication of their application if they have not heard anything by April 30, 2008 . . . If it does not instigate action, the letter may be helpful if the applicant then decides to file a mandamus/APA action because the agency is not implementing its new policy."[4]

The USCIS district offices in Atlanta, Virginia and New York have reported to AILA liaisons that in anticipation of this policy change they have already completed the process of segregating out those cases awaiting name check clearances for longer than 180 days. In certain instances, where the applicants were fingerprinted more than 15 months ago, USCIS will issue new fingerprint appointment notices so that it may request updated fingerprint clearances from the FBI. As noted above, background investigations related to fingerprint clearances are not covered by Associate Director Aytes' memo. The New York District Office expects that it will issue all such fingerprint appointment notices within the next six weeks.

For those cases where the fingerprint clearances remain valid, the district offices listed above have indicated their intention to begin to adjudicate the covered applications within the next several weeks. The Atlanta District Office has asked that affected applicants and their attorneys wait until after June 1, 2008 to make individual inquiries, offering the explanation that such individual inquiries will limit file movement and needlessly drain resources necessary for case completions. The New York District Office has asked that affected parties wait until May 1, 2008 before contacting USCIS.

For those applicants who are unrepresented, and who are experiencing such delays, it would be wise during the next several months to first schedule an Infopass appointments with local application support centers through the USCIS web site at http://infopass.uscis.gov/ and inquire into the nature of the processing delays.[5] If the USCIS Infopass officer responds that the delay is attributable to the pendency of the FBI name check, send all correspondences to USCIS via certified mail to the attention of the immigration officer who conducted the interview so as to maintain a complete record of your

exhaustion of administrative, as opposed to judicial, remedies.

In conclusion, the lengthy delays because of the prior name check policy have been unconscionable. Applicants for immigration benefits pay considerable fees for a standard of service on par with DELL TM computers. More important, individuals file their applications to comply with the immigration laws of this country. As many immigration attorneys have noted in the context of mandamus lawsuits, there is simply no point to delaying the adjudication of an application under the pretense of some national security interest, when the individual making the application is physically present in the United States and has remained physically present during the years it has taken USCIS to adjudicate his or her application. USCIS has always possessed the authority to rescind the approval of an application if information later surfaced that the individual presented a tangible threat to national security. Rather than enhancing our national security, therefore, one could argue, and many have, that the prior USCIS policy undermined our national security because it failed to identify potential threats in a timely fashion. Either way you look at it, the only real accomplishment of the prior policy was to create a Kafkaesque atmosphere for many individuals who came to the U.S. legally and who make a substantial, positive impact on our economy, as well as upon society at-large.

UPDATE - February 20, 2008

The USCIS issued Questions and Answers on the FBI Name Check Policy

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[1] These applications include Forms I-485 Application to Register Permanent Residence or Adjust Status, I-601 Application for Waiver of Ground of Inadmissibility, I-687 Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act or I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603).

[2] Office of Inspections and Special Reviews, *A Review of U.S. Citizenship and Immigration Services' Alien Security Checks*, OIG-06-06 (Nov. 2005), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-06_Nov05.pdf.

[3] Associate Director of Domestic Operations, Michael Aytes, Interoffice Memorandum, *Revised National Security Adjudications and Reporting*

Requirements, HQ 70/23 & 70/28.1 (February 4, 2008), *available at* http://www.uscis.gov/files/pressrelease/DOC017.PDF.

[4] AILF, *Recent Mandamus Litigation* , *available at* http://www.ailf.org/lac/clearinghouse_mandamus.shtml (February 14, 2008).

[5] USCIS also has a customer service hotline, 1-800-375-5283, however, the individuals answering their phones seldom have information beyond what is posted on the USCIS web site at https://egov.uscis.gov/cris/caseStatusSearchDisplay.do;jsessionid=cba2fJaO0EHSO97F4m9lr, which is rarely updated beyond once an application is transferred from the Service Center to the local application support center.

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