AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY[1]

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CIRCUMVENTING NATURALIZATION DELAYS: HOW TO GET JUDICIAL RELIEF UNDER 8 USC § 1447(B) FOR A STALLED NATURALIZATION APPLICATION

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BACKGROUND

Your client filed an application, and finally, after a two year wait, CIS interviews your client. All goes well. The examiner tells you that your client will be scheduled for a swearing-in date in due time. More time goes by . . . three months . . . four months . . . six months . . . . Your client is becoming increasing anxious and impatient. And to top it off, the prolonged delay makes it look like you're not doing a good job.

Of course you've made all the phone calls, faxes, and e-mails you could to USCIS and AILA liaison. And the Congressional Aide knows nothing more than you, namely, the case remains pending.

Your initial inclination might be to file a *Mandamus Complaint*. But in this particular scenario, where the interview has already taken place, you can do something better -- file a *Petition for Hearing on Naturalization Application* in the United States District Court.

1. THE APPLICABLE LAW

INA Section 336(b), 8 U.S.C. § 1447(b), specifically provides for judicial review for a stalled naturalization petition in these circumstances. It states as follows:

> If there is a failure to make a determination under [INA] § 335 [8 U.S.C. § 1446]

> 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.

In short, the statute says that if more than 120 days have passed since the naturalization interview, the applicant can seek judicial relief. The judicial relief can come in two forms:

1) An adjudication of the naturalization application in court and by the court, or

2) A remand to CIS for immediate adjudication.

Which form of relief you choose to seek is a strategy decision that will depend on a number of factors, such as the merits of the case, the attitude of the local office, and the federal judge hearing the case. In many cases, however, you will likely want to ask the court to decide the application, rather than submit to the delays associated with further agency proceedings.

2. WHEN CAN THE FEDERAL COURT INTERVENE?

The statute is very specific in identifying precisely when a naturalization applicant can ask the district court to intervene and decide the case due to agency delay: when the agency fails to make a decision on the application within 120 days after the examination. 8 U.S.C. § 1447(b).[2] The majority of courts to consider the issue have determined that the examination referred to is the initial interview scheduled under 8 U.S.C. § 1446(a). *See, e.g., U.S.A. v. Hovsepian*, 359 F.3d 1144, 1151 (9th Cir. 2004) (treating the initial interview date as the trigger for the 120-day period for § 1447(b)); *Castracani v. Chertoff*, 377 F. Supp. 2d 71 (D.C.D.C. 2005) (same); *El-Daour v. Chertoff*, 2005 U.S. Dist. LEXIS 18325 (W.D. Pa. 2005) (explicitly finding that interview date was the date of "examination" under § 1447(b)); *Angel v. Ridge*, 2005 U.S. Dist. LEXIS 10667 (S.D. Ill. 2005) (explicitly finding that the 120-day period ran from date of first interview, not a rescheduled interview); *see also* 8 C.F.R. § 335.2; *cf. Danilov v. Aguirre*, 2005 U.S. Dist. LEXIS 10128 (E.D. Va. 2005) (finding that the term "examination" in § 1447(b) encompassed a process which included both the interview and the investigation).[3]

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[2] The only other point at which the district court has jurisdiction to decide a naturalization application is after CIS issues a final decision following the administrative appeal process. *See* 8 U.S.C. § 1421(c) (judicial review over a final denial of a naturalization application); 8 U.S.C. § 1447 (setting forth the administrative appeal process).

[3] At least one court has specifically rejected the reasoning of *Danilov*, finding that it was not based upon an accurate reading of either § 1447(b) or the regulations that implemented it. *El-Daour v. Chertoff*, 2005 U.S. Dist. LEXIS 18325 (W.D. Pa. 2005). *El Daour* also correctly pointed out that *Danilov* was decided without the benefit of briefing by the naturalization petitioner.

In some offices, examiners may ask – or sometimes pressure – the applicant to sign a waiver of the 120-day decision deadline. An applicant is not required to sign such a waiver. It is wise to consider your response to this possibility in advance, and to prepare your client. In limited circumstances, it may be to your client's benefit to sign the waiver – such as when he or she needs additional time to prepare for the civics test.

In many cases, CIS continues the initial examination on the naturalization applicant and instructs the applicant to submit additional evidence. CIS will then schedule a *reexamination* of the applicant. *See* 8 C.F.R. § 335.3(b). Even when this happens, however, courts have held that CIS still must make its decision within 120 days of the *initial* examination. *See, e.g., Angel v. Ridge*, 2005 U.S. Dist. LEXIS 10667 (S.D. Ill. 2005) (explicitly finding that the 120-day period ran from date of first interview, not a rescheduled interview). The government might claim that this is not correct, and instead argue that the 120-day period does not begin to run until after the reexamination. For example, in a case in which the initial examination has been continued, if a § 1447(b) suit is filed 140-days after the initial examination, but prior to the reexamination being scheduled, the government may claim that the suit is premature. Neither the statute nor the regulations support this position, however. In fact, the regulations specifically differentiate between an "initial" examination and a "reexamination" following a continuance. 8 C.F.R. § 335.3(b) ("[T]he reexamination on the continued case shall be scheduled within 120 days of the initial examination"). The regulations then reiterate that the decision must be made within 120 days of the "first" examination. *See* 8 C.F.R. § 336.1(a).

Obviously, the period between the initial examination and CIS' initial decision is not the only period of delay in naturalization cases. CIS often delays in scheduling the initial examination and also delays in holding a hearing and making a decision after an administrative appeal. However, by its terms, 8 U.S.C. § 1447(b) is not available to redress these delays. *See, e.g., Langer v. McElroy*, No. 00-2741, 2002 U.S. Dist. LEXIS 123847 (S.D. N.Y. Dec. 16, 2002) (no jurisdiction under § 1447(b) where agency delays in acting on the administrative appeal) (unpublished decision). Where extensive delays occur at these other stages of the agency's adjudication, a mandamus action in district court might be appropriate. In a mandamus action, however, the sole relief available would be for the court to order CIS to act on the application. Unlike § 1447(b), mandamus does not give the court the jurisdiction to actually decide the application. For more on mandamus actions, *see* AILF's practice advisory entitled *Mandamus Actions: Avoiding Dismissal and Proving the Case, http://www.ailf.org/lac/lac_pa_081505.pdf.*[4]

3. NUTS AND BOLTS

A. Notifying the Government of Your Intention to File

[4] The regulations require CIS to schedule a hearing within 180 days of a timely-filed administrative appeal. 8 CFR § 336.2(b). Where CIS fails to schedule this hearing within 180 days, it might also be possible to treat the delay as a constructive denial of the administrative appeal, and request judicial review under INA § 310(c). 8 U.S.C. § 1421(c) (providing for judicial review of a final agency denial of a naturalization application).

As a practical matter, you should request cooperation by CIS before filing the petition. In many cases you will already have sent status inquiries and might have used your Congressional liaison.[5] Also, as a strategic matter, you should send a copy of the "draft" petition to the CIS and to the U.S. Attorney and indicate a deadline when you intend to file the petition. This will give the U.S. Attorney an opportunity to put some pressure on the CIS to adjudicate the application and to avoid the time and expense of litigation. It might also save your client a major expense. *If the CIS does not respond by your stated deadline, DO NOT HESITATE to file the petition. Otherwise, you will have damaged your credibility in the future.* Do not threaten to file the petition unless you absolutely intend to do so.

B. Filing the Petition

As the statute directs, you must file the case in the district court for the district in which your client resides. The statute does not specify exactly how to "apply" to the court for a hearing. But what seems to satisfy the judicial process is a document entitled "Petition for Hearing on Naturalization Application." This pleading is not much more complicated than a Petition for Review. Every district court has local rules, so be sure to consult the local rules regarding filing the petition.

In the pleading, you need to set out the court's jurisdiction, provide the pertinent dates, recite the procedural history of the naturalization application, and request the statutory relief. Since the statute provides the court with two options, you need to specify what it is you want the court to do. You can also ask for the other form of relief in the alternative. Be certain that at least 120 days have passed since the initial interview. Refer to the interview as the "examination" since this is the language used in the statute.

Additionally, where you are asking the court to decide the naturalization application, you can include in the petition allegations that your client satisfies all of the requirements for naturalization. You can also attach the naturalization application and other documents as exhibits to your petition.

C. Naming and Serving Defendants/Respondents

You must name as defendants/respondents the officers with responsibility over the processing of the naturalization application. Thus, the defendants/respondents will include the Attorney General;[6] Secretary of the Department of Homeland Security; Director of the United States Citizenship and Immigration Services (CIS); and the Director of the local CIS office that is

[5] Note, however, that neither of these steps is a necessary prerequisite to filing suit under 8 U.S.C. § 1447(b).

[6] The statute confers on the Attorney General the "sole authority to naturalize persons as citizens of the United States." 8 U.S.C. § 1421. Consequently, it is a good idea to name the Attorney General as a defendant, even though he no longer has supervisory authority over the Citizenship and Immigration Services.

handling your client's naturalization application. You can also name the agency itself, CIS.

Rule 4(i) of the Federal Rules of Civil Procedure (FRCP) governs service of the summons in suits against the United States or its agencies, officers, or employees. Additionally, regulations for the Department of Homeland Security instruct that service of the summons and complaint in suits against DHS or its officers and employees is to be sent to the Office of General Counsel, United States Department of Homeland Security, Washington, DC, 20528. *See* 6 C.F.R. § 5.42(a).[7]

After the summons and complaints have been served on all defendants/respondents, you will need to file proof of service with the court. *See* FRCP 4(l). Courts may have different procedures for doing this, so check your local rules and do not hesitate to place a call to the clerk. Court clerks are there to help and in most instances they are very helpful.

For a complete discussion of naming and serving defendants in immigration-related suits such as this, *see* AILF's Practice Advisory, *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (http://www.ailf.org/lac/lac_pa_083005.pdf).

D. Settlement, Discovery, Case Management Conference, and Hearing

Following service of the complaint and summons, the defendants/respondents will have 60 days to answer. FRCP Rule 12(a)(3). After the defendants/respondents file an answer, the parties will be required to engage in an initial exchange of information. *See, e.g.*, FRCP 16, 26. The attorney for petitioner must contact the U.S. Attorney to attempt settlement and discuss discovery. *Id.* Thereafter, the Court will issue a scheduling order, and may set a scheduling conference. *Id.* Among other things, the scheduling order will set the time for amending the pleadings, completing discovery, and filing motions. FRCP 16(b).

You should always be sure to check the local rules of the court as they may contain additional requirements or explain local practice. For example, some courts might classify this action as one involving admission to citizenship, which under local rules may render the action exempt from a case management conference (although not from the initial meeting of the parties and the scheduling order, outlined in FRCP 16 and 26). If the court does not schedule a conference, or if your local rules exclude this from a case management conference, you may nevertheless file a motion to request one.

Some judges hold the case management conference in chambers, while others do so in the formal courtroom. In either case, your goal in this meeting or hearing will be to outline the issues in the case and the relief you seek. You can use this opportunity to make apparent to the judge the government's unnecessary and prolonged delay, and the court's authority to step in and adjudicate the naturalization application. Case management conferences are usually short and

[7] The regulations list the zip code for DHS as 20258. The postal service indicates that no such zip code exists, however, and thus this appears to be a typographical error. The CIS website lists the zip code noted above: 20528.

to-the-point, so keep your statements simple and clear. Most judges will simply want to know what the case is about, why the clients are entitled to a hearing, and why the government has delayed. Beware the U.S. attorney's tendency to take control of the hearing. Do not hesitate to jump in and make your case.

Bear in mind that many federal judges will have never heard this type of case before, so the judge may be intrigued and inclined to set the matter for a hearing. Judges frequently are sympathetic to the individual who has been subjected to the government's inexcusable delay. Following the case management conference, the court will issue a scheduling order with mandatory deadlines for each step of the case. FRCP 16(b).

You will be able to engage in discovery. *See* FRCP 26 *et seq*. Among other things, you can ask for a copy of the entire CIS file on your client, if you do not already have it. *See* FRCP 34.[8] You may also wish to direct interrogatories to defendants/respondents (FRCP 33) or to seek admissions from them. FRCP 36.

If there are any purely legal issues not involving disputed facts, the court may be willing to resolve them pursuant to a motion for summary judgment or for partial summary judgment. *See* FRCP 56.[9] If there are factual disputes, you will be able to present evidence at a hearing. The court will not be restricted to reviewing only evidence that is already before the agency, but can consider additional evidence that you present. The court's review of your client's naturalization application will be *de novo*. *See United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (*en banc*) (comparing judicial review under § 1447(b) to judicial review of a final denial of a naturalization application under 8 U.S.C. § 1421(c)).

D. District Court vs. Agency Jurisdiction

Frequently, after suit is filed under 8 U.S.C. § 1447(b), the CIS will quickly adjudicate the naturalization application and file a motion to dismiss the district court proceedings as moot. The agency has historically taken the position that it retains concurrent jurisdiction with the district court after a suit under § 1447(b) is filed, and thus argues that it has the authority to continue to process the application. Moreover, where the application is denied by the CIS, CIS takes the position that the individual must exhaust the administrative appeal required by statute before he or she will be able to go back into district court. *See* 8 U.S.C. § 1421(c) (judicial review over a final denial of a naturalization application); 8 U.S.C. § 1447 (setting forth the administrative appeal process); 8 C.F.R. § 336.9(d); *cf. Chavez v. INS*, 844 F. Supp. 1224 (N.D. Ill. 1993) (no jurisdiction to reinstate § 1447(b) suit where agency denied application following remand; applicant had to exhaust administrative remedies before seeking judicial review under 8 U.S.C. § 1421(c)).

[8] You can also obtain the file through a FOIA request.

[9] For example, in its answer, the government may claim that your client's conviction was for a crime involving moral turpitude and that your client is barred from establishing good moral character as a result. The question of whether a particular conviction is for a crime involving moral turpitude is a legal issue which could be decided by summary judgment.

Recently, the Ninth Circuit Court of Appeals rejected the argument that CIS retains concurrent jurisdiction over the application. The Court held that, once suit was filed under 8 U.S.C. § 1447(b), the district court assumed *exclusive* jurisdiction over the naturalization application, and CIS lost the authority to decide the case. *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (*en banc*). In *Hovsepian*, the applicant filed for judicial review under 8 U.S.C. § 1447(b) after the legacy INS failed to decide his application within 120 days of the initial examination. While the case was pending at the district court, the legacy INS denied the naturalization application. The district court determined that the legacy INS no longer had jurisdiction over the case, and the court thus disregarded the legacy INS decision and instead proceeded to approve the naturalization application. On appeal by the legacy INS, the Ninth Circuit found that the district court was correct in asserting exclusive jurisdiction. In reaching this conclusion, the Court considered the plain language of § 1447(b), the larger statutory context, and Congress' policy objectives.

Thus, it is now clear that in cases arising in states within the Ninth Circuit, CIS will lose jurisdiction over a case as soon as the applicant files for judicial review under 8 U.S.C. § 1447(b). In these states, CIS will not be able to deprive the Court of jurisdiction by attempting to moot the federal court case by denying the naturalization application. Because *Hovsepian* is the only published court of appeals decision that addresses this issue, however, it remains an open question in other circuits.[10] In these other circuits, should CIS deny your client's application after you have filed for district court review of the case under 8 U.S.C. § 1447(b), you can rely on *Hovsepian* to argue that the district court should disregard the CIS decision and instead independently adjudicate the application. *See, e.g., Castracani v. Chertoff*, 377 F. Supp. 2d 71 (D.C.D.C. 2005) (adopting *Hovsepian); Zaranska v. U.S. DHS*, 2005 U.S. Dist. LEXIS 17559 (S.D. NY 2005) (same).

If CIS conditionally approves the naturalization application, however, you will not need to raise the jurisdiction issue with the court, since your client will have prevailed on his or her naturalization application. Instead, you should request an immediate scheduling for swearing-in your client. You can immediately ask the district court to hold the case in abeyance until your client is actually sworn-in. Do not withdraw the complaint on the basis that the application was "approved" and do not submit to the U.S. Attorney's attempt to moot the issue. The naturalization application is not fully adjudicated until your client is sworn-in, and therefore, your need for federal court relief still exists up until that point.

E. Equal Access to Justice Fees (EAJA)

[10] There are several unpublished decisions – all of which predate *Hovsepian* – which have held that the district court case is mooted when the legacy INS adjudicated the naturalization application after suit is filed under 8 U.S.C. § 1447(b). *Kembi v. INS*, No.00-1336, 2001 U.S. App. LEXIS 4482 (6th Cir. Mar. 16, 2001); *Kia v. INS*, No. 98-2399, 1999 U.S. App. LEXIS 5808 (4th Cir. Mar. 30, 1999); *Bahet v. Ashcroft*, No. 01-9334, 2002 U.S. Dist. LEXIS 10196 (S.D. N.Y. Apr. 10, 2002). As unpublished decisions, none is precedential.

If the court approves your client's naturalization application, do not forget to file a timely application for attorney fees under the Equal Access to Justice Act (EAJA). 28 U.S.C. § 2412. To be timely, the application must be filed within 30 days of the "final judgment." Additionally, if CIS adjudicates the naturalization application as the result of your suit – whether favorably or unfavorably – you may also be entitled to attorneys fees under EAJA. There are several legal issues you will need to address, particularly the "prevailing party" issue. For starters, *see Buckhannon Board & Care Home, Inc. v. W. Virginia Dept. of Health & Human Services*., 532 U.S. 598, 625 (2001); *see also* AILF's Practice Advisory, *Requesting Attorney's Fees Under the Equal Access to Justice Act* (http://www.ailf.org/lac/lac_pa_060304.pdf).

EAJA fees are beyond the scope of this practice advisory, so for now, hit the keyboard and get that Petition for Hearing on Naturalization Application on file.

Good luck, and "see you in court!"[11]

[11] These are the exact words of the U.S. Attorney, as she slammed down the phone when contacted with the suggestion that she ask her client (CIS) if it would simply adjudicate the application and settle the case. Several months later, the court awarded EAJA fees in the amount of $3,102.14.