

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-11380-RWZ

WALID SALLAM

v.

MICHAEL MUKASEY, et al.

MEMORANDUM OF DECISION AND ORDER

March 5, 2008

ZOBEL, D.J.

In mid-2002, plaintiff Walid Sallam (“Sallam”) filed a naturalization application with the U.S. Citizenship and Immigration Services (“CIS”) to become a United States citizen. On July 27, 2007, he brought this case seeking adjudication of his application under 8 U.S.C. § 1447 which provides:

(b) Request for hearing before district court. If there is a failure to make a determination under [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.

8 U.S.C. § 1447(b).

After the case was filed, the CIS denied his application on the ground that he had not met the requirement for continuous residence in the United States. Defendants now seek dismissal of the case because, they say, it is moot. The determinative question is whether 8 U.S.C. § 1447(b) vests exclusive jurisdiction in the federal courts

once a complaint has been filed, or whether the CIS retains concurrent jurisdiction.

The courts are split over this question, with two appellate courts deciding in favor of exclusive jurisdiction. See Etape v. Chertoff, 497 F.3d 379, 385 (4th Cir. 2007); United States v. Hovsepian, 359 F.3d 1144, 1159 (9th Cir. 2004) (en banc). No appellate court has adopted the opposite view and the First Circuit has not yet ruled on the issue.¹ Both parties agree that the majority of district courts have adopted the reasoning of Hovsepian finding exclusive jurisdiction. (See Docket # 16, 6; Docket # 17, 4.) In the only published District of Massachusetts case brought under 8 U.S.C. § 1447(b) addressing the issue, Yuping Li v. Chertoff, 490 F. Supp. 2d 130, 134 (D. Mass. 2007), Judge Tauro held that the CIS “failed to adjudicate Plaintiff’s petition in a timely matter and is [therefore] divested of jurisdiction.”²

I agree with the reasoning of the Hovsepian and Etape courts and adopt the majority view that once Sallam filed his petition in this court under 8 U.S.C. § 1447(b),

¹ Defendants state in their memorandum in support of dismissal that “[a]ssuming this court does not follow the First Circuit’s interpretation of 8 U.S.C. § 1447(b)” and find the matter moot, it should remand the matter to the CIS. (Docket # 16, 9.) However, it is unclear to what interpretation they are referring, as they fail to cite any case in which the Court of Appeals for the First Circuit has addressed the issue.

² Plaintiff cites Hussain v. Chertoff, 486 F. Supp. 2d 196 (D. Mass. 2007) (Wolf, C. J.), in support of exclusive jurisdiction, while defendant cites Khitab v. Novak, 524 F. Supp. 2d 105 (D. Mass. 2007) (Stearns, J.), to support concurrent jurisdiction. Neither case directly addresses the issue in the instant case. In Hussain, Chief Judge Wolf stated that the district court had jurisdiction because the “USCIS never made a decision on Hussain’s application.” See 486 F. Supp. 2d at 200. In Khitab, while the circumstances are similar – the agency denied the application after the case was filed – Judge Stearns did not address the jurisdictional question posed by 8 U.S.C. § 1447(b); rather he decided the case on the Administrative Procedures Act’s authorization of judicial review only of “final agency decisions.” See 524 F. Supp. 2d at 106 (internal quotation marks omitted).

the CIS no longer had jurisdiction to decide his application. The agency's December 18, 2007, decision denying Sallam's application is therefore null and void and the application is still pending. Under the statute, this court may now determine the matter or remand to the CIS with appropriate instructions. See 8 U.S.C. § 1447(b).

When plaintiff filed his petition, he asked this court to either adjudicate his application or, in the alternative, remand with instructions to the CIS to adjudicate his naturalization application within a fixed time period. It is now clear that the initial issue causing the delay in his application, completion of the FBI background check, has been resolved. Therefore, the agency shall decide the application expeditiously. If it denies his application, as it has indicated it will, the hearing before an immigration officer provided by 8 U.S.C. § 1447(a) will further develop the administrative record. If the officer affirms the agency's decision, plaintiff may then seek de novo review of the denial before the district court. See 8 U.S.C. § 1421(c).

Accordingly, defendants' motion to dismiss (Docket # 15) is DENIED. The action is remanded to the CIS for a resolution within 30 days of this order. If plaintiff's application has not been acted on within that time period, plaintiff shall notify the court and a hearing date will be set to determine the matter. Otherwise, this case shall be dismissed 60 days after this order.

March 5, 2008

DATE

/s/Rya W. Zobel

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

