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UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

[redacted]

Petitioner,
v.

Janet NAPOLITANO, in her Official Capacity, Secretary, U.S. Department of Homeland Security; and Alejandro MAYORKAS, in his Official Capacity, Director, U.S. Citizenship and Immigration Services.

Respondents.

Case No. _____

Petition for De Novo Naturalization Hearing Pursuant to 8 U.S.C. § 1447(b)

Immigration Case Agency No. [redacted]

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INTRODUCTION

1. Petitioner [redacted] (Petitioner) petitions this Court for a de novo naturalization hearing on his application for naturalization, which has been pending with Respondents for nearly two and a half years, since February 3, 2011.

2. Pursuant to 8 U.S.C. § 1447(b), this Court has jurisdiction to conduct a hearing and make a determination on a naturalization application in the first instance when the agency fails to make a determination within 120 days following a naturalization interview.

3. Petitioner appeared for a naturalization interview with the U.S. Citizenship and Immigration Services (USCIS) on September 28, 2011. On that date, the interviewing officer informed him that he had passed the required English and civics portions of the examination, but USCIS did not issue a decision on his application within 120 days of that decision; i.e., by January 26, 2012. Indeed, to date, no decision has been issued. Because more than 120 days have elapsed since the interview, this Court has jurisdiction to conduct a hearing and make a determination on his application in the first instance.

4. Under § 1447(b), this Court may either: 1) conduct a hearing and adjudicate the naturalization application, or 2) "remand the matter, with appropriate instructions, to the Service to determine." Petitioner asks this Court to conduct a hearing and adjudicate his application, rather than remanding it to the USCIS. The agency already has withheld adjudication for nearly two and a half years (since February 3, 2011) and may continue to withhold adjudication indefinitely. See 8 C.F.R. § 103.2(b)(18).

5. In particular, the Court should not remand this matter to USCIS because, upon

information and belief, Petitioner's naturalization application is subject to additional lengthy delays associated with the Controlled Application Review and Resolution Program (CARRP).

6. The CARRP program instructs USCIS to delay applications of individuals the agency believes may raise a national security concern pending further, prolonged investigations by additional internal and external agencies. Memorandum from Jonathan R. Scharfen, Former Deputy Director of USCIS, to USCIS Field Leadership, April 11, 2008 (2008 CARRP Memo).[1] This lengthy vetting process occurs in spite of the fact that the Immigration and Nationality Act, 8 U.S.C. § 1101 et. seq. does not contain a statutory basis for denying naturalization based on a national security "concern." See 8 U.S.C. §§ 1427, 1430 (listing relevant naturalization requirements).

7. Specifically, the 2008 CARRP Memo states that a national security "concern" exists whenever there is an "articulable link" between a person and an activity, individual, or organization described in 8 U.S.C. §§ 1182(a)(3)(A),(B) or (F) or 1227(a)(4)(A) or (B).[2] Based on USCIS' policy and practice, USCIS will consider a person to be a national security "concern" if he or she has provided information to the Federal Bureau of Investigation (FBI) in connection with a counter-terrorism

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[1] *Available at* https://www.aclu-sc.org/wp-content/uploads/2013/01/CARRP-Policy-for-Vetting-and-Adjudicating-Cases-w-NS-Concerns-Apr.-11-2008.pdf.

[2] Subsequent agency memoranda and guidance have revised the CARRP policy. *See* CARRP Policy documents, *available at* http://www.aclu-sc.org/issues/immigrant-rights/carrp/. Although some portions of the documents have been redacted, they do not appear to alter the definition of a national security concern set forth in the 2008 CARRP Memo and a January 2012 CARRP Course Power Point references the 2008 CARPP Memo as establishing the current policy. See CARRP Course Power Point, National Security Division, FDNS, version 2.3.1, updated January 2102, at page 7, *available at* https://www.aclu-sc.org/wp-content/uploads/2013/01/CARRP-Course-Powerpoint-Natl-Sec.-Division-FDNS-v.2.3.1-Jan.-2012.pdf.

investigation, has been the subject of FBI surveillance in connection with a counter-terrorism investigation, or has any possible association with other individuals suspected of being involved in terrorist activity.

8. Petitioner does not present any threat to national security whatsoever.

9. However, upon information and belief, USCIS considers Petitioner a national security "concern" because he was previously investigated by the FBI in connection with a counter-terrorism investigation in 2008 and 2009. In addition, on November 5, 2009, the FBI did not allow Petitioner to board a commercial aircraft for an international flight. Furthermore, USCIS videotaped Petitioner's naturalization interview in accordance with CARRP adjudication protocol.[3]

10. Because USCIS has delayed adjudication of Petitioner's naturalization application for nearly two years since his naturalization interview, the Court should adjudicate his application rather than remanding it.

11. Petitioner is statutorily eligible for naturalization. Accordingly, pursuant to 8 U.S.C. § 1447(b), Petitioner requests that this Court adjudicate and grant his application and administer the naturalization oath or order that Respondent administer the naturalization oath.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the present action, including Petitioner's naturalization application, pursuant to 8 U.S.C. § 1447(b) (de novo naturalization hearing). The Court's jurisdiction over the naturalization application is "exclusive"; i.e.,

[3] See CARRP Course Power Point, National Security Division, FDNS, version 2.3.1, updated January 2102, at page 59, *available at* https://www.aclu-sc.org/wp-content/uploads/2013/01/CARRP-Course-Powerpoint-Natl-Sec.-Division-FDNS-v.2.3.1-Jan.-2012.pdf.

USCIS lacks jurisdiction to adjudicate the application while this case is ongoing. U.S. v. Hovsepian, 359 F.3d 1144, 1160 (9th Cir. 2004) (en banc).

13. Venue is properly with this Court pursuant to 28 U.S.C. § 1391(e) because this is a civil action in which Respondents are employees or officers of the United States, acting in their official capacity; because a substantial part of the events or omissions giving rise to the claim occurred in Fresno, California, in the Eastern District of California; and because Petitioner resides in Bakersfield, California, which is located within the Eastern District of California, and there is no real property involved in this action.

PARTIES

14. Petitioner [redacted] is a citizen and national of Tunisia who resides in Bakersfield, California. Petitioner is and has been a lawful permanent resident of the United States since November 6, 2007.

15. Janet NAPOLITANO is sued in her official capacity as the Secretary of the U.S. Department of Homeland Security. In this capacity, she has responsibility for the administration and enforcement of the immigration and naturalization laws. See 8 U.S.C. § 1103(a); see also § 402 of the Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (Nov. 25, 2002).

16. Alejandro MAYORKAS is sued in his official capacity as the Director of the U.S. Citizenship and Immigration Services, a component agency within the U.S. Department of Homeland Security. USCIS is the agency responsible for the adjudication of applications for naturalization.

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FACTUAL ALLEGATIONS

17. Petitioner is a native and citizen of Tunisia who resides in Bakersfield, California with his United States citizen wife and their two United States citizen children.

18. Petitioner became a lawful permanent resident on November 6, 2007, based on his marriage to his United States citizen wife.

19. On February 20, 2008, the FBI interviewed Petitioner at his home, then in Daly City, California. See accompanying Declaration of Stacy Tolchin (Tolchin Dec.) Exhibit F. He was questioned regarding his attendance at local mosques, his immigration status, and whether he expressed "anti-American/West" sentiment at his mosque. He responded that he attended a local mosque to pray, his immigration status was that of a lawful permanent resident, and he did not communicate any "anti-American" or "anti-West" sentiments at his mosque or elsewhere.

20. On November 5, 2009, Petitioner attempted to board a commercial aircraft to France and Tunisia with his family. Two FBI agents met him at the Air France ticket counter and informed him that he was not permitted to fly on a commercial aircraft at that time. Tolchin Dec. Exhibit G. (Petitioner has since flown internationally without incident, see ¶ 23, infra).

21. On February 3, 2011, Petitioner, through undersigned counsel Stacy Tolchin, applied for naturalization pursuant to 8 U.S.C. § 1430. Tolchin Dec. Exhibit A. This section allows the spouse of a United States citizen to apply for naturalization after having been a lawful permanent resident for two years and nine months.

22. Attached to that application was Form G-28, Notice of Entry of Appearance, which requires USCIS to serve all immigration-related correspondence on his attorney of

record. 8 C.F.R. § 292.5(a). Tolchin Dec. Exhibit A. On February 7, 2011, the USCIS issued a receipt for the naturalization application, and also mailed a copy to Ms. Tolchin. Tolchin Dec. Exhibit B. The agency also subsequently issued a notice of a "biometrics" appointment on February 14, 2011, and again mailed a copy of the notice to Ms. Tolchin. Tolchin Dec. Exhibit C. Petitioner appeared for his "biometrics" appointment on March 2, 2011, where a photograph and fingerprints were taken at the Application Support Center in Bakersfield, California.

23. The following month, on April 13, 2011, Petitioner boarded and flew on a commercial aircraft to Tunisia. He returned to the United States on July 4, 2011, without incident.

24. On July 27, 2011, Ms. Tolchin inquired to USCIS about scheduling a date for Petitioner's naturalization interview. On July 29, 2011, USCIS sent Ms. Tolchin a notice acknowledging this inquiry. Tolchin Dec. Exhibit D.

25. On September 27, 2011, Petitioner received a notice in the mail that USCIS had scheduled his naturalization interview for the following day, September 28, 2011, in Fresno, California. Notably, USCIS did not send Ms. Tolchin any notice of the interview, although such notice is expressly required by regulation. 8 C.F.R. § 292.5(a).

26. Under USCIS regulations, a naturalization interview is not set until criminal background checks are complete. 8 C.F.R. § 335.2(b). Such checks specifically include a review of any record before the Federal Bureau of Investigation. Id.

27. Petitioner appeared for a naturalization interview at the Fresno USCIS office the following day, September 28, 2011. Due to the short notice, Ms. Tolchin was not able to rearrange previously scheduled commitments in order to appear with Petitioner at

the interview. Tolchin Dec. ¶ 6.

28. USCIS videotaped the naturalization interview, during which the interviewing officer questioned Petitioner about issues beyond the scope of the statutory requirements for naturalization, including his finances and telephone calls abroad.

29. Following the interview, the officer notified Petitioner that he had passed the required civics and English portions of the examination. Tolchin Dec. Exhibit E.

30. By regulation, USCIS was required to issue a decision on Petitioner's naturalization application, or schedule a second interview, within 120 days after the September 28, 2011 interview; i.e., on or before January 26, 2012. 8 C.F.R. §§ 335.3(a); 336.1(a).

31. USCIS did not schedule issue a decision, or schedule a second interview, on or before January 26, 2012. In fact, almost two years have elapsed, and USCIS still has not issued a decision.

32. The delay of Petitioner's naturalization application has caused him and his family great emotional distress and anxiety.

CAUSE OF ACTION

COUNT ONE

(PETITION FOR DE NOVO NATURALIZATION HEARING, 8 U.S.C. § 1447(b))

33. Petitioner incorporates the allegations in the paragraphs above as though fully set forth here. The Immigration and Nationality Act at 8 U.S.C. § 1447(b) provides as follows:

> Request for hearing before district court. If there is a failure to make a determination under section 335 [8 U.S.C. § 1446] of this title 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.

See also 8 C.F.R. §§ 335.3(a); 336.1(a).

34. More than 120 days have elapsed since USCIS interviewed Petitioner on September 28, 2011. To date, USCIS has failed to make a determination on Petitioner's naturalization application. This Court has the authority to conduct a de novo hearing on a naturalization application when more than 120 days have elapsed since the naturalization interview. 8 U.S.C. § 1447(b).

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

(1) Assume jurisdiction over this matter;

(2) Conduct a de novo hearing on Petitioner's application for naturalization;

(3) Grant Petitioner's application for naturalization;

(4) Administer the oath of allegiance or order Respondent to administer this oath;

(5) Award reasonable costs and attorneys' fees; and

(6) Grant such further relief as the Court deems just and proper.

Dated: July 24, 2013

Respectfully submitted,

By: /s/ Stacy Tolchin

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