

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIKHAIL IGNATYEV, MYROSLAVA  
VASYLIVNA MELNYK; MOHAMED  
S. ABDEL WAHAB; EUGENE KOIKOI;  
ABDI MOHAMED ALI; AHMED  
BELAGUID; MIRZA ARSHAD ALI BAIG;  
MIRZA MOHAMMED BAIG; MARIAM  
BAIG; ADEL KHALIL; CARLOTTA  
HOPE; AND VALENTINA CRUZ  
on behalf of themselves and all  
others similarly situated,

v.

MICHAEL CHERTOFF, in his official  
Capacity as Secretary of Homeland Security,  
MICHAEL MUKASEY, in his official  
capacity as Attorney General of the  
United States, ROBERT S. MUELLER,  
in his official capacity as Director of the  
Federal Bureau of Investigation,  
JONATHAN SCHARFEN, in his official  
capacity as Director of the U.S.  
Citizenship and Immigration Services<sup>1</sup>, and  
KAREN FITZGERALD<sup>2</sup>, in her official  
capacity as Acting District Director of the  
U.S. Citizenship and Immigration Services  
Philadelphia District Office.

Civ. Action No. 08-1547

**FILED**

OCT 08 2008

MICHAEL E. KUNZ, Clerk  
By SL Dep. Clerk

**SECOND AMENDED CLASS  
ACTION COMPLAINT**

**ACTION FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**PRELIMINARY STATEMENT**

I. Plaintiffs are lawful permanent residents of the United States who have lived in the United States for many years. Plaintiffs wish to become U.S. citizens and long ago submitted naturalization applications to United States Citizenship and Immigration Services ("USCIS"), the

<sup>1</sup> Emilio Gonzales left his post as Director of USCIS. Mr. Scharfen is now the Acting Director.

<sup>2</sup> Ms. Fitzgerald has recently replaced Evangeline Klapkis who had been serving as Acting District Director.

responsible federal agency.<sup>3</sup> Their naturalization applications have not been adjudicated, however, despite the passage of over six months since the dates of submission, because each of their applications is awaiting completion of an “FBI name check,” a background check that the FBI conducts on behalf of USCIS.

2. Plaintiffs seek to pledge their allegiance to the United States and to participate fully in our society as United States citizens. Having qualified to do so after years of working in the United States and contributing to their communities, Plaintiffs seek only what the law provides, which is a final decision on their naturalization applications within the reasonable timelines required by law.

3. Defendant USCIS officials Scharfen and Fitzpatrick the Secretary of Homeland Security are responsible for the naturalization process. Defendants Mueller and Mukasey are responsible for the FBI name check and other background checks conducted in the course of the naturalization process.

4. In November 2002, USCIS drastically altered the naturalization procedure by requiring a vastly expanded FBI name check to be conducted on every application, even though it is not required by either statute or regulation. The FBI implemented the expanded FBI name check in a manner that has caused systemic, unnecessary and prolonged delays in the naturalization process. As a result of Defendants’ policies and practices, the unwarranted and cumbersome new FBI name check procedure has resulted in months-long and even years-long delays in naturalization adjudication for Plaintiffs and the proposed class.

5. USCIS’s own Ombudsman has stated that, as implemented by Defendants, the FBI name check used in naturalization applications is of questionable value in detecting persons

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<sup>3</sup>In all statutory and regulatory provisions cited in this Complaint, the term “Service” refers to the USCIS. 8 U.S.C. § 1101(a)(34); 6 U.S.C. § 271.

who may pose a threat to security. Nevertheless, USCIS uses the FBI name check without imposing any deadlines for completion. In requiring FBI name checks and tolerating systemic and prolonged delays during those name checks, both USCIS and the FBI have acted with complete disregard for Congress's plain directive that USCIS should complete the processing of naturalization applications within six months from the date of submission. Through their insistence on FBI name checks, USCIS and the FBI have unreasonably delayed the processing of the naturalization applications of Plaintiffs and the proposed class members, and USCIS has unlawfully withheld final adjudication of these applications.

6. Defendants' unlawful conduct has deprived Plaintiffs of the privileges of United States citizenship. Plaintiffs cannot vote, serve on juries, expeditiously sponsor their immediate relatives living abroad for permanent residence, receive business and education loans and other benefits reserved for citizens, participate in the Visa Waiver Program, or travel abroad and return to the United States without fear of exclusion from this country. Plaintiffs' experiences are typical of tens of thousands of other naturalization applicants around the country who have suffered unreasonable and unlawful delays in the naturalization process because of long-pending FBI name checks.

7. Plaintiffs respectfully request, on behalf of themselves and all others similarly situated, that the Court certify the proposed class, enter judgment in favor of the proposed class on all claims, and grant the relief requested herein. Specifically, Plaintiffs request that the Court require the Defendants to adjudicate their applications for naturalization within the time periods prescribed by law, and declare that the Defendants' actions violate the naturalization statute and regulations, laws governing administrative agency action, and the Due Process Clause of the Fifth Amendment.

### JURISDICTION AND VENUE

8. This Court has jurisdiction over this action under the Administrative Procedure Act, 5 U.S.C. § 701, *et. seq.*, the Mandamus Act, 28 U.S.C. § 1361, and 28 U.S.C. §1331, which vest the United States district courts with jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States.

9. Venue properly lies with this district pursuant to 28 U.S.C. § 1391(b), as the named plaintiffs reside within this judicial district and a substantial part of the activities complained of occurred within this judicial district.

### THE PARTIES

10. The Named Plaintiffs and proposed class representatives are:

- (a) Mikhail Ignatyev, a resident of the City of Philadelphia, the State of Pennsylvania and the United States of America;
- (b) Mohamed S. Abdelwahab, a resident of West Chester, the State of Pennsylvania and the United States of America;
- (c) Myroslava Vasylivna Melnyk, a resident of Norristown, the State of Pennsylvania and the United States of America;
- (d) Eugene Koikoi, a resident of the City of Philadelphia, the State of Pennsylvania and the United States of America;
- (e) Abdi Mohamed Ali, a resident of the City of Philadelphia, the State of Pennsylvania and the United States of America;

(f) Ahmed Belaguid, a resident of Levittown, the State of Pennsylvania and the United States of America;

(g) Mirza Mohamed Baig and Mariam Baig, husband and wife, residents of Allentown, the State of Pennsylvania and the United States of America;

(h) Mirza Arshad Ali Baig a resident of Audubon, the State of Pennsylvania and the United States of America.

(i) Adel Khalil, a resident of the City of Philadelphia, State of Pennsylvania and the United States of America;

(j) Carlotta Hope is a resident of the City of Philadelphia, State of Pennsylvania and the United States of America.

(k) Valentina Cruz, a resident of the City of Philadelphia, State of Pennsylvania and the United States of America

11. Defendant Michael Chertoff is the Secretary of Homeland Security, which encompasses USCIS. He is charged with "[a]ll authorities and functions of the Department of Homeland Security (DHS) to administer and enforce the immigration laws." 8 C.F.R. § 2.1; 8 U.S.C. § 1103(a). He is sued in his official capacity.

12. Defendant Michael Mukasey is the Attorney General of the United States. He shares responsibility with Defendant Chertoff for administering and enforcing the nation's immigration laws. The Attorney General is the head of the United States Department of Justice ("DOJ"), which encompasses the Federal Bureau of Investigation. He is sued in his official capacity.

13. Defendant Robert Mueller is the Director of the Federal Bureau of Investigation (FBI). He is charged with administering the FBI's duties to conduct investigations in connection

with citizenship applications under review by USCIS, including conducting FBI name checks.

He is sued in his official capacity.

14. Defendant Jonathan Scharfen is the Director of USCIS. He is charged with administering the immigration laws of the United States, including the processing and adjudication of citizenship applications. He is sued in his official capacity.

15. Defendant Karen Fitzpatrick is the Acting District Director of the USCIS District Five. She is sued in her official capacity.

#### STATUTORY AND REGULATORY SCHEME

16. The United States Constitution grants Congress the power to “establish a Uniform Rule of Naturalization.” Art. I, § 8, cl. 4. Congress delegated authority for naturalization to the Attorney General. *See* 8 U.S.C. § 1421(a); Pub. L. No. 101-649, Tit. IV, 104 Stat. 4978, 5038-48 (Nov. 29, 1990). The Attorney General, in turn, delegated responsibility for naturalization to the former Immigration and Naturalization Service (INS). 8 C.F.R. § 100.2(a); 28 C.F.R. Pt. 105. Since the abolition of the INS in 2002, USCIS has been the federal agency responsible for processing and adjudication of naturalization applications. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §471, 116 Stat. 2135, 2205 (codified at 6 U.S.C. § 291(a)) (transferring authority for immigration enforcement and services from former Immigration and Naturalization Service to new Department of Homeland Security).

17. In order to apply for naturalization, a lawful permanent resident must file an application for naturalization with USCIS. 8 U.S.C. § 1445(a), (b); 8 C.F.R. §§ 316.4, 334.1, 334.2.

18. USCIS has a policy of processing naturalization applications in chronological order, based upon date of receipt of the application and fee. In accordance with this policy, when USCIS receives a naturalization application and fee, USCIS grants the applicant a "priority date" that is based on the date of receipt. INS Operation Instruction 103.2(q), *available at* Operations Instructions of the Immigration and Naturalization Service (Matthew Bender, 2007) (Lexis Immigration Library, Operations Instructions of the INS File).

19. Before a person may be naturalized, USCIS may conduct or waive a "personal investigation" of the applicant. 8 U.S.C. § 1446(a). By regulation, USCIS must also complete a "criminal background check." 8 C.F.R. §§ 335.1, 335.2.

20. Since 1997, Congress has also required that a "criminal background investigation" be conducted on each applicant for citizenship. Pub. L. 105-119, Title I, 111 Stat. 2440, 2448-49 (1997); 8 C.F.R. § 335.2(b). Congress did not specify what such an investigation should entail.

21. In March 1998, to implement the requirement of a criminal background check, the INS (USCIS's predecessor agency) promulgated a proposed rule for notice and public comment. *See* Requiring Completion of Criminal Background Checks Before Final Adjudication of Naturalization Applications, 63 Fed. Reg. 12979 (Mar. 17, 1998). After receiving public comment, INS promulgated a final regulation found at 8 C.F.R. § 335.2(b) to implement the 1997 law.

22. Under 8 C.F.R. § 335.2(b), the FBI performs a criminal background check on each naturalization applicant. This criminal background check involves a check of the applicant's fingerprints against FBI databases to confirm whether or not the applicant has an

administrative or criminal record. 8 C.F.R. § 335.2(b). These criminal background checks are usually completed within days if not hours.

23. Upon information and belief, although 8 C.F.R. § 335.2(b) defines the “criminal background check” to include only a fingerprint records check, USCIS requires two other security checks: a name check through the Interagency Border Inspection System (IBIS) database and the FBI name check.

24. After the “criminal background check” is completed pursuant to 8 C.F.R. § 335.2(b), USCIS schedules a naturalization examination, at which an applicant meets with a USCIS examiner who is authorized to ask questions and take testimony. 8 C.F.R. § 335.2(a). The examination typically includes questions testing the applicant’s English literacy and basic knowledge of the history and government of the United States. 8 C.F.R. § 335.2(c). Applicants with a medical disability that prevents them from learning English and /or civics may apply for a waiver of the citizenship examination. 8 C.F.R. § 312.1

25. The USCIS examiner must determine whether to grant or deny the naturalization application. 8 U.S.C. § 1446(d). Naturalization is not discretionary. USCIS must grant a naturalization application if the applicant has complied with all requirements for naturalization. 8 C.F.R. § 335.3. USCIS must make a final determination on every naturalization application, either at the time of the examination or, at the latest, within 120 days after the date of the examination. 8 C.F.R. § 335.3.

26. Once an application is granted, USCIS schedules the applicant for an oath ceremony at which he or she is sworn in as a United States citizen.

27. If USCIS does not issue a decision within 120 days of the examination, an applicant may file suit in district court under 8 U.S.C. § 1447(b). That statute confers

jurisdiction upon the district court in the district in which the applicant resides, and it allows the court either to determine the matter (*i.e.*, grant or deny citizenship) or to remand with appropriate instructions to USCIS to determine the matter. A primary purpose of that statute, enacted in 1990, was to decrease backlogs in the naturalization process and reduce waiting times for naturalization applicants. H.R. Rep. No. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison).

28. In addition, 8 U.S.C. § 1571(b) states, “It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial date of filing of the application ....” Naturalization applications are among the “immigration benefit applications” included within this provision. This provision, along with 8 U.S.C. § 1571(a), § 1572, and § 1573, makes clear Congress’s intent to eliminate persistent backlogs in the processing of immigration benefit applications. Moreover, Congress has defined the term “backlog” in the statute as “the period of time in excess of 180 days that such application has been pending before the Immigration and Naturalizations Service.” 8 U.S.C. § 1572(1).

29. Section 1571(b) provides the statutory guideline and “rule of reason” for determining whether naturalization applications are being processed in a timely manner. Under the most straightforward reading of 8 U.S.C. § 1571(b), all naturalization applications that are not finally adjudicated within 180 days of the date of submission are presumptively unreasonably delayed.

#### USCIS EXPANSION OF “FBI NAME CHECKS”

30. Plaintiffs are informed and believe that USCIS may have requested “FBI name checks” for naturalization applicants prior to 2002. Plaintiffs are informed and believe that before 2002, these FBI name checks may have involved searches of the applicant’s name against

an FBI database containing the names of persons "of interest" to the FBI – *i.e.*, criminal suspects, targets of investigations, and others suspected of wrongdoing.

31. Plaintiffs are informed and believe that beginning in November 2002, USCIS dramatically altered the naturalization procedure by expanding the scope of the FBI name check, by requiring the FBI to search applicants' names against additional databases.

32. The expanded FBI name check used by USCIS is not part of the "criminal background check" that is required by Public Law 105-119, tit. I, 111 Stat. 2448-49 (Nov. 26, 1997), and 8 § C.F.R. 335.2.

33. When it expanded the FBI name check requirement for naturalization in November 2002, USCIS did not promulgate a proposed rule or give notice and an opportunity for public comment on the rule, as it had done in 1998 when implementing the criminal background check requirement.

34. The expanded FBI name check was a substantive departure from prior USCIS policy because it imposed a new requirement in naturalization procedure not based on statute or regulations and because it has had a substantial adverse effect on applicants for naturalization by causing significant delays in adjudication. As such, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, required USCIS to promulgate a proposed rule, provide a notice and comment period, and thereafter promulgate a final rule prior to enacting the November 2002 expanded FBI name check.

35. Plaintiffs are informed and believe that the expanded FBI name check consists of a search of a person's name through the FBI's criminal and non-criminal files in its Central Records System. The Central Records System contains administrative, applicant, criminal, personnel, and other FBI files. Plaintiffs are informed and believe that, since November 2002,

the expanded FBI name check on naturalization applications includes an FBI search of not only "main files" for persons "of interest," but also "references files" for any person or entity that is mentioned in the "main files," including innocent persons who are not suspected of any wrongdoing, but who have come into contact with the FBI, including witnesses, interviewees, crime victims, and persons who have applied for security clearances for professional reasons, or who may have a name similar to those who have come into contact with the FBI.

36. Plaintiffs are informed and believe that since the November 2002 expansion, USCIS does not adjudicate applications for naturalization until it receives the results of a completed name check from the FBI.

37. Plaintiffs are informed and believe that USCIS and the FBI have entered into written agreements regarding the conduct of FBI name checks on, among others, applicants for naturalization, and that in these agreements neither USCIS nor the FBI impose any time limits for the completion of name checks.

38. Plaintiffs are informed and believe that from time to time and under certain circumstances, USCIS requests the FBI to expedite the name checks of certain individuals, including certain applicants for naturalization.

39. Plaintiffs are informed and believe that beginning in April 2006, in response to a deluge of lawsuits around the country brought by frustrated naturalization applicants pursuant to 8 U.S.C. § 1447(b), USCIS implemented a new policy of refusing to schedule naturalization examinations for those applicants whose FBI name checks were not completed. USCIS has stated that an express purpose of this policy change was to preclude litigation under 8 U.S.C. § 1447(b) by those who have passed naturalization examinations and are awaiting final adjudication of their naturalization applications. As a result of this change in policy, which

appears to be an explicit effort to thwart Congress's intent to provide delayed naturalization applicants with recourse to the federal courts, the applications of substantial numbers of class members have been unreasonably delayed, and naturalization examinations have not been scheduled because of pending FBI name checks.

40. FBI name checks are now the cause of systemic, prolonged delays in the processing of applications for naturalization. In both 2006 and 2007, the USCIS Ombudsman – the individual charged by Congress with providing recommendations on improving USCIS services and operations – declared that name checks “significantly delay adjudication of immigration benefits for many customers, hinder backlog reduction efforts, and may not achieve their intended security objectives.” Citizenship and Immigration Services Ombudsman Annual Report 2006, at 23 (June 29, 2006) (hereinafter “2006 Report”), *available at* [http://www.dhs.gov/xlibrary/assets/CISOmbudsman\\_AnnualReport\\_2006.pdf](http://www.dhs.gov/xlibrary/assets/CISOmbudsman_AnnualReport_2006.pdf); Citizenship and Immigration Services Ombudsman Annual Report 2007, at 37 (June 11, 2007) (hereinafter “2007 Report”), *available at* [http://www.dhs.gov/xlibrary/assets/CISOMB\\_Annual\\_Report\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf).

41. In the most recent report, the Ombudsman declared that “FBI name checks may be the single biggest obstacle to the timely and efficient delivery of immigration benefits” and that the delays are getting worse, not better. 2007 Report at 37. The report noted that as of May 2007, over 329,000 USCIS name checks were pending, with 64 percent of those cases (over 211,000) pending more than 90 days, and 32 percent (almost 107,000) pending more than one year. *Id.* at 37. The 2007 report also found that the problem of long-pending name checks had worsened in the preceding year. *Id.*

42. The Ombudsman also questioned the value of FBI name checks in accomplishing their stated purpose, which is to detect persons who should be denied immigration benefits

because they pose a danger or threat to security. In response to USCIS's claims of effectiveness, the Ombudsman declared that "most, if not all, of the problem cases that would result in an eventual denial of benefits also can be revealed by the other more efficient, automated criminal and security checks that USCIS initiates." 2007 Report at 41.

43. Moreover, the Ombudsman "agree[d] with the assessment of many case workers and supervisors at USCIS field offices and service centers that the FBI name check process has limited value to public safety or national security, especially because in almost every case the applicant is in the United States during the name check process, living or working without restriction." 2007 Report at 40. In further acknowledgment of the limited utility of name checks, the Ombudsman noted that "[n]ame checks are not conducted by the FBI as part of ongoing investigations or from a need to learn more about an individual because of any threat or risk perceived by the FBI." 2007 Report at 38.

44. In addition, "[t]o date, the Ombudsman has been unable to ascertain from USCIS the total number of actual problem cases that the agency discovered exclusively as a result of the FBI name check." 2007 Report at 41. Neither USCIS nor the FBI has ever shown that the FBI name check has led to the detection of a national security threat posed by a naturalization applicant that would not have been discovered independently through the fingerprint records check or IBIS database check, both of which are routinely completed within minutes or days and result in no delays in naturalization.

**FACTS AS TO NAMED PLAINTIFFS**

**Mikhail Ignatyev**

45. Plaintiff Mikhail Ignatyev, native of the Ukraine and citizen of the Russian Federation, is 60 years old. He arrived in the United States with his wife Alla Ignatyeva in April 1999 as public interest parolees under a law passed by Congress to assist certain nationals of former Soviet republics who faced long standing persecution because of their religion. Mr. Ignatyev and Ms. Ignatyeva qualified for this status because Ms. Ignatyeva had suffered persecution in the former Soviet Union because of her Jewish faith and ethnicity.

46. The couple lives in Philadelphia, Pennsylvania. Mr. Ignatyev was employed for many years as an assembler by Elmar Window Fashions. Due to ill health, he has ceased working.

47. Mr. Ignatyev became a lawful permanent resident ("LPR") on April 28, 2000, and filed a naturalization application with USCIS on March 29, 2006. This was also the priority date issued to him by USCIS. He was fingerprinted in connection with his application on May 6, 2006, at the Application Support Center.

48. Mr. Ignatyev's wife was naturalized as a citizen of the United States on March 16, 2005.

49. Shortly after his application to naturalize was filed, Mr. Ignatyev was diagnosed with prostate cancer. Following intense chemotherapy treatment, his condition is now in remission. However, the ordeal has left him severely depressed and afraid for his health.

50. At this time, Mr. Ignatyev remains in poor mental health stemming from his cancer and cancer treatments and is unable to work. As a result, he and his wife are in financial straits because her income alone is insufficient to support them.

Mr. Ignatyev has waited to be scheduled for an examination in connection with his naturalization application for almost two years. Upon information and belief, USCIS has delayed his examination because FBI has not completed Mr. Ignatyev's FBI name check.

51. Mr. Ignatyev has been prejudiced by the long delay in the adjudication of his naturalization application in several ways. First, in this election year, where interest in Presidential candidates has reached record levels, he wishes very much to participate in the voting process to the extent he is able. Second, if Mr. Ignatyev were a United States citizen, he would qualify for federal- and state-funded benefits that would provide critical supplemental income and health care benefits. However, because of the long delay in his naturalization, he is unable to apply for those benefits. Citizenship will allow him the peace of mind to know that he will be entitled to receive medical benefits that will cover the cost of his treatments and keep him in good health for years to come.

**Myroslava Vasylivna Melnyk**

52. Plaintiff, Myroslava Vasylivna Melnyk, a native of the Ukraine and a citizen of the Russian Federation. She became a lawful permanent resident on April 20, 2000. She filed an application for naturalization on February 1, 2006.

53. Ms. Melnyk, who is 36 years old, lives in Norristown Pennsylvania. She is employed as a teacher at a Ukrainian Catholic School.

54. Ms. Melnyk is currently engaged to a United States citizen and intends to marry and establish a life for herself here in the United States.

55. Following her application for naturalization, Ms. Melnyk was scheduled for a naturalization examination set for May 22, 2006. On May 12, 2006, she was notified by USCIS that her examination had been cancelled due to pending background checks. One year later, on

May 12, 2007, USCIS indicated that her name check was still pending. Ms. Melnyk has not received any new information concerning her application.

56. Ms. Melnyk has been prejudiced by the inordinate delay in the processing of her naturalization applications. She is eager to participate fully in United States society as a citizen. She is especially eager to participate in the electoral process in this Presidential election year.

57. Ms. Melnyk, who will be married soon, wishes to start a family and build her life in the United States as a citizen. The continued delay of her application leaves her in an unsettled state without the full rights and protections conferred by United States Citizenship.

**Mohamed S. Abdelwahab**

58. Plaintiff, Mohamed S. Abdelwahab, a native of Egypt came to the United States through the diversity visa lottery program. He became a lawful permanent resident on April 7, 1999. His application for naturalization was received by USCIS on November 10, 2005. Mr. Abdelwahab was scheduled for an naturalization examination on April 12, 2006. However, on April 4, 2006, he was informed that his examination was cancelled "due to unforeseen circumstances." He also received notice from USCIS that his case was awaiting the results from the background checks.

59. Mr. Abdelwahab has written numerous letters and made numerous phone calls to determine the status of his naturalization application. Despite these efforts, he has been unable to learn any reason for the continued delay of his application other than the pending background checks.

60. Mr. Abdelwahab lives in West Chester where he owns a small communications business.