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PRACTICE ADVISORY[1]
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HOW TO GET JUDICIAL RELIEF UNDER 8 U.S.C. § 1447(b) FOR A STALLED NATURALIZATION APPLICATION

By the Legal Action Center

Section 336(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1447(b), specifically provides for direct judicial review of delays in adjudicating naturalization applications by the United States Citizenship and Immigration Services (USCIS).[2] It gives a district court jurisdiction to intervene in a case where USCIS has failed to make a decision on the naturalization application within 120 days of the applicant's "examination" by USCIS. In so doing it provides a statutory remedy for naturalization applicants against extensive post-interview delays by USCIS in adjudicating their applications.

Section 1447(b) includes five general elements:

1. USCIS must have failed to make a decision on the naturalization application;

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[2] Section 1447(b) reads 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.

2. The delay in decision-making by USCIS must have lasted for at least 120 days after the "examination";
3. The suit must be filed in the federal district court where the applicant resides;
4. The court then acquires jurisdiction over the naturalization application; and
5. The court may either decide the naturalization application or may remand the case with instructions to USCIS.

This practice advisory will outline these basic elements and will discuss litigation concerning this provision and the issues that have arisen from this litigation. It will also discuss when attorneys fees under the Equal Access to Justice Act are available in § 1447(b) suits.

1. USCIS must have failed to make a decision on the naturalization application.

As an initial matter, for § 1447(b) to apply, there must be no decision on the naturalization application. Section 1447(b) is only a remedy for delays in the adjudication of naturalization applications; it does not provide for district court review of the denial of a naturalization application. Instead, when a naturalization application "is denied after a hearing before an immigration officer," the applicant can seek review of the denial in the federal district court in the district in which he or she resides. 8 U.S.C. § 1421(c). A direct appeal under § 1421(c) is not discussed in this advisory.

2. A § 1447(b) action is ripe only after USCIS has failed to make a decision within 120 days of the naturalization "examination."

The statute is very specific in identifying precisely when a naturalization applicant can ask the district court to intervene due to agency delay: when the agency fails to make a decision on the application within 120 days after the "date on which the examination is conducted under [§ 1446]." 8 U.S.C. § 1447(b).

The meaning of the term "examination" is critical to determining when a § 1447(b) action can be brought, since it is only after the "examination" has taken place that the 120 day period begins to run. The majority of courts – including the only courts of appeals to decide the issue – have held that "examination" refers to the *initial interview* scheduled under 8 U.S.C. § 1446. *See, e.g., Walji v. Gonzales,* 500 F.3d 432, 436 and n. 5 (5th Cir. 2007) (citing cases)[3]; *U.S.A. v. Hovsepian,* 359 F.3d 1144, 1151 (9th Cir. 2004) (en banc); *Omar v. USA,* 552 F. Supp. 2d 713 (M.D. Tenn. 2008); *Shendaj v. Dedvukaj,* 543 F. Supp. 2d 724 (E.D. Mich. 2008); *Imran v. Keisler,* 516 F.Supp.2d 967 (S.D. Iowa 2007); *see also* 8 C.F.R. § 335.2. These and other courts hold that a § 1447(b) action can be brought if USCIS has failed to make a decision within 120 days after the initial interview. In *Walji,* the Fifth Circuit reached this conclusion based upon the statutory

[3] In *Walji,* the Fifth Circuit interpreted the Fourth Circuit decision *Etape v. Chertoff,* 497 F.3d 379 (4th Cir. 2007), as implicitly holding that the 120 day period begins to run from the date of the initial interview. Thus, *Etape* arguably can be construed as reaching this same result.

language of § 1447(b) (indicating that the "examination" was a distinct, single event); the statutory structure (distinguishing between the examination and the investigation of a naturalization application); the agency's own regulations; and the legislative history of § 1447(b). *Walji*, 500 F.3d at 436-38.

A minority of courts hold that the term "examination" encompasses a "process" which includes both the interview and the investigation of the application, including FBI security checks. *See, e.g., Danilov v. Aguirre*, 370 F. Supp. 2d 441 (E.D. Va. 2005); *Yarovitskiy v. Hansen*, No. 07-1174, 2007 U.S. Dist. LEXIS 57734 (N.D. Ohio Aug. 8, 2007); *Kassemi v. DHS*, No. 06-1010, 2006 U.S. Dist. LEXIS 74516 (D.N.J. Oct. 13, 2005). Under this interpretation, these courts dismissed § 1447(b) suits as premature – even though they were filed more than 120 days after the initial interview – because security checks were still pending. For additional case cites on both sides of this issue, *see* the Legal Action Center's (LAC) Litigation Issue Page on Naturalization Adjudication Delays, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/naturalization-adjudication-delays.

Sometimes USCIS continues the initial examination on the naturalization application and instructs the applicant to submit additional evidence. USCIS 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 USCIS 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 regulations support this interpretation by specifically differentiating 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 USCIS' decision is not the only period of delay in naturalization cases. USCIS 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, § 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). Where extensive delays occur at these other stages of the agency's adjudication, a mandamus or Administrative Procedure Act (APA) action in district court might be appropriate. In such an action, however, the sole relief available would be for the court to order USCIS to act on the application. Unlike § 1447(b), neither the mandamus statute nor the APA gives the court the jurisdiction to actually decide the application. *See, e.g., Ahmed v. Holder*, No. 13-00271, 2013 U.S. Dist. LEXIS 122648 (N.D. Oh. Aug. 27, 2013). For more on mandamus actions, including citations to naturalization cases, *see* the LAC's practice advisories on mandamus, http://www.legalactioncenter.org/practice-advisories-topic#fed-ct-review; and the LAC's Litigation Issue Page on Mandamus,

http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/mandamus.

3. The naturalization applicant must file the § 1447(b) action in the federal district court for the district in which the applicant resides.

Under the specific terms of the statute, a § 1447(b) suit must be filed in federal district court. Unlike an appeal of a removal decision, it is not filed in the court of appeals. Section 1447(b) also specifies that venue is in the district in which the applicant resides. For information on whom to sue and serve, *see* the LAC's Practice Advisory on this topic, http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf.

4. The statute vests jurisdiction over the suit in the district court.

Section 1447(b) explicitly gives the district court jurisdiction over the action. There is a question, however, as to whether this jurisdiction is exclusive, or whether the agency retains concurrent jurisdiction over the application. Frequently, after suit is filed under § 1447(b), USCIS will adjudicate the naturalization application and file a motion to dismiss the district court proceedings as moot. The agency takes the position that it retains concurrent jurisdiction with the district court. Moreover, where the application is denied by USCIS, the government takes the position that, after the § 1447(b) case is dismissed, the applicant must exhaust the administrative appeal required by statute before seeking federal court review of the denial. *See* 8 U.S.C. § 1421(c); 8 U.S.C. § 1447; 8 C.F.R. § 336.9(d). However, two federal courts of appeals have held that the administrative hearing referenced in the statute constitutes a claim processing requirement that is not jurisdictional. *See Schweika v. DHS*, 723 F.3d 710 (6th Cir. 2013); *Eche v. Holder*, 694 F.3d 1026, 1028 (9th Cir. 2012).[4]

All courts of appeals to have addressed the issue of concurrent jurisdiction under § 1447(b), as well as numerous district courts, reject USCIS' position and instead hold that, once the § 1447(b) suit is filed, only the federal court has jurisdiction; USCIS is without jurisdiction to decide the naturalization application unless the district court remands the case. *See, e.g., Bustamante v. Napolitano,* 582 F.3d 403 (2d Cir. 2009); *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007); *U.S. v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004); *Taalebinezhaad v. Chertoff,* 581 F. Supp. 2d 243 (D. Mass. 2008); *Castracani v. Chertoff*, 377 F. Supp. 2d 71 (D.D.C. 2005); *see also Al Maleki v. Holder,* 558 F.3d 1200, 1205 n.2 (10th Cir. 2009) (finding it unnecessary to answer the question but noting the persuasive reasoning of *Hovsepian* and *Etape*). Thus, in the Second, Fourth and Ninth Circuits, a denial of the application by USCIS after the § 1447(b) action is filed is without force because the agency had no jurisdiction to make the decision.

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[4] In *Schweika*, the Sixth Circuit specifically refused to defer to the regulation, which interprets this statutory provision as a jurisdictional prerequisite. *See* 8 C.F.R. 336.9(d). The court held that deference is never due to an agency's interpretation of a federal court's jurisdiction. *Schweika*, 723 F.3d at 718 (citing cases); *accord Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000) (striking down for similar reasons a companion regulation, 8 C.F.R. § 336.9(b), which imposed a 120 statute of limitations on filing suit).

A minority of district courts have agreed with the government, holding that USCIS has concurrent jurisdiction with a federal court after a plaintiff files a § 1447(b) action. *See, e.g., Hamdan v. Chertoff*, No. 07-700, 2008 U.S. Dist. LEXIS 10886 (D.N.M. Dec. 17, 2008); *Perry v. Gonzales*, 472 F. Supp. 2d 623 (D.N.J. 2007); *Maki v. Gonzales*, 2007 U.S. Dist. LEXIS 55588 (C.D. Utah July 30, 2007). After finding that USCIS acted within its jurisdiction when it denied a naturalization application despite a pending § 1447(b) suit, these courts dismissed the suits as moot.

Under *Bustamante, Hovsepian* and *Etape*, it is now clear that in cases arising within the Second, Fourth and Ninth Circuits, USCIS will lose jurisdiction as soon as the applicant files a § 1447(b) suit. In these jurisdictions, USCIS cannot deprive a court of jurisdiction by denying the naturalization application. This issue remains an open question in all other circuits at the time of this update. In these other circuits, should USCIS 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 *Bustamante, Etape* and *Hovsepian* to argue that the district court should disregard the USCIS 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).*

Where, after the § 1447(b) action is filed, USCIS indicates that it would grant naturalization, you and the government attorney can submit to the district court a joint motion to remand to USCIS. The motion could stipulate that, upon remand, USCIS agrees to approve the naturalization application and ask the court to order this relief. In this way, USCIS will have jurisdiction when it approves the application.

A separate jurisdiction question arises when the naturalization applicant is placed in removal proceedings – either before or after the § 1447(b) action is filed. At least one court of appeals addressed this jurisdiction question, but found it unnecessary to resolve because it held instead that the district court could not grant relief under § 1447(b) when removal proceedings were pending. *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008). In reaching this conclusion, the court found that § 1447(b) relief was not available because of the restrictions that 8 U.S.C. § 1429 imposes on naturalizing an applicant in removal proceedings. *Ajlani*, 545 F.3d at 239 (finding that the "priority afforded removal proceedings by § 1429 limits the courts' authority to grant naturalization pursuant to § 1421(c) or § 1447(b)"); *see also Saba-Bakare v. Chertoff*, 507 F.3d 337, 340 (5th Cir. 2007) ("§ 1429 requires that Saba-Bakare wait until the termination of the removal proceeding before either a district court or the USCIS entertains a question regarding his naturalization application").

5. The district court may either decide the naturalization application or remand to USCIS with instructions.

Under § 1447(b), a court may "determine the matter" by granting or denying the naturalization application, or it may "remand the matter" for a determination by USCIS. 8 U.S.C. § 1447(b). Despite the statutory grant of authority to decide the naturalization application, the majority of district courts are reluctant to do so, particularly when

security checks are still pending. *See, e.g.*, *Hussein v. Gonzales*, 474 F. Supp. 2d 1265, 1269 (M.D. Fla. 2007).

A few district courts have decided naturalization applications under § 1447(b), however. For example, in *Taalebinezhaad*, 581 F. Supp. 2d 243, 245-46 (D. Mass. 2008), the court denied the government's motion to remand the case to USCIS, instead deciding to adjudicate the naturalization application itself. The court relied in part on the fact that security checks were no longer pending. In response to the government's claim that it should remand the case so that USCIS could bring its expertise to bear, the court noted that USCIS, as a party to the § 1447(b) case, could present its findings to the court. *Taalebinezhaad*, 581 F. Supp. 2d at 246 (quoting *Etape v. Chertoff*, 497 F.3d 379, 387 (4th Cir. 2007)). *See also Lifshaz v. Gonzales*, No. 06-1470, 2007 U.S. Dist. LEXIS 28946 (W.D. Wash. April 19, 2007) (considering the government's national security interest, but still finding it appropriate to conduct a hearing to avoid further delay); *Astafieva v. Gonzales*, No, 06-04820, 2007 U.S. Dist. LEXIS 28993 (D. Cal. April 2, 2007) (granting petitioner's application for naturalization after conducting an in camera hearing); *Shalan v. Chertoff*, No. 05-10980, 2006 U.S. Dist. LEXIS 253 (D. Mass. Jan. 6, 2006) (scheduling a hearing instead of remanding the case to USCIS).[5]

As noted, district courts have been reluctant to decide the naturalization application when security checks are not complete. However, a number of courts have remanded these cases with restrictions. For example, one court ordered that the case be held in abeyance for 60 days for the FBI to complete the name check; if after 60 days the name check was not complete, the government would have to show cause why the petitioner should not be naturalized immediately. *Aslam v. Gonzales*, No. 06-614, 2006 U.S. Dist. LEXIS 91747 (W.D. Wash. Dec. 19, 2006).

In other cases, the courts have placed time limits on when USCIS must act on an application after remand. In *Alawieh v. U.S. Attorney General*, No. 09-10413, 2009 U.S. Dist. LEXIS 15129 at *5 (E.D. Mich. Feb. 26, 2009), the court imposed a 45 day deadline for USCIS to decide the naturalization application, noting that an order without a deadline, "effectively instructs the government to do nothing at all inasmuch as it is not clear when, if ever, the instruction is violated." *See also Asfour v. Napolitano*, 732 F. Supp. 2d 512 (E.D. Pa. 2010) (ordering USCIS to adjudicated the application within 7 days in accord with the parties' agreement and retaining jurisdiction to ensure that defendant complied with the order); *Hussein v. Gonzales*, 474 F. Supp. 2d 1265, 1269 (M.D. Fla. 2007) (ordering USCIS to act on petitioner's application no later than 54 days from the date of the decision); *Alhassan v. Gonzales*, No. 06-1571, 2006 U.S. Dist. LEXIS 89018, *5-6 (D. Colo. Dec. 7, 2006) (ordering USCIS to adjudicate the application within 60 days of receiving the FBI name check). Courts also have imposed time limits on when security checks must be completed. *See, e.g., Al-Kudsi v. Gonzales*,

[5] Where the court adjudicates the naturalization under § 1447(b), its review is *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)).

No. 05-1584, 2006 U.S. Dist. LEXIS 16761 (D. Or. March 22, 2006) (where the attorney general was named as a defendant, court ordered him to instruct FBI to complete name check within 90 days; if not completed by then, USCIS was to treat the failure as a successfully completed name check and approve the naturalization); *Aarda v. United States Citizenship & Immigration Servs.*, No. 06-1561, 2007 U.S. Dist. LEXIS 9244, *2 (D. Minn. Feb. 8, 2007) (instructing defendants to complete all background checks within 120 days of the court's order).

6. Attorneys fees may be available under EAJA.

Several courts have awarded plaintiffs attorneys fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), in § 1447(b) cases. Under EAJA, the plaintiff must establish the following to be eligible for an award of attorneys fees from the government: (1) that the plaintiff is the prevailing party in the matter; (2) that the government failed to show that its position was substantially justified or that special circumstances make an award unjust; and (3) that the requested fees and costs are reasonable. 28 U.S.C. § 2412(d)(1)(A). For more information about EAJA, including information on the statutory filing deadlines, see the LAC's Practice Advisory, Requesting Attorneys Fees Under the Equal Access to Justice Act, http://www.legalactioncenter.org/sites/default/files/EAJA_Fees_04_07_06.pdf; *see also* the LAC's Litigation Issue Page on Adjudicating Naturalization Delays, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/naturalization-adjudication-delays.

Courts have found that a plaintiff is the prevailing party in § 1447(b) cases if USCIS completes adjudication of the application after the court remands the matter to USCIS. In *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir. 2009), the court upheld the district court award of fees, holding that the plaintiff prevailed under the test in *Buckhannon Bd. and Care Rest Home, Inc. v. W.V. Dep't of Health and Human Resources,* 532 U.S. 598 (2001). The Tenth Circuit held that USCIS did not act voluntarily when, pursuant to a joint motion, the court ordered it to administer the naturalization oath to the applicant by a date certain. *See also Alghamdi v. Ridge*, No. 05-344, 2006 U.S. Dist. LEXIS 68498 (N.D. Fla. Sept. 25, 2006); *Osman v. Mukasey*, 553 F. Supp. 2d 1252 (2008 W.D. Wash.); *but see Iqbal v. Holder*, 693 F.3d 1189, 1194-95 (10th Cir. 2012) (naturalization applicant in a § 1447(b) suit was not the prevailing party when court remanded case to USCIS without ordering any specific action to be taken by the agency).

Courts also have held that the government failed to demonstrate that its litigation position or its failure to act on the application – the underlying agency action behind the suit – was substantially justified because it provided no specific reasons for the delay. *See e.g. Alghamdi v. Ridge*, No. 05-344, 2006 U.S. Dist. LEXIS 68498 (N.D. Fla. Sept. 25, 2006); *Irahim v. Chertoff*, No. 07-2415, 2009 U.S. Dist. LEXIS 16148 (E.D. Ca. Feb. 9, 2009).

Not all courts have awarded EAJA fees in § 1447(b) cases, however. For example, in *Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011), the Fourth Circuit upheld the district court determination that, although the naturalization applicant was a prevailing party,

USCIS's litigation position had been substantially justified. In *Aronov v. Napolitano*, 562 F.3d 84 (1st Cir. 2009) (en banc), the First Circuit reversed a district court award of fees. The court held that the plaintiff was not the prevailing party in the § 1447(b) case because the court's remand order under the circumstances presented did not satisfy the necessary "judicial imprimatur" on the favorable resolution of the case, as required by *Buckhannon*. The First Circuit in *Aronov* also held that the government demonstrated that its actions – the delay in adjudicating the naturalization application – were substantially justified. *Aronov*, 562 F.3d at 94.