

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

**Civil Act. No.**

**XXXXXXXX XXXXXXXX XXXXXXXX,**

**Plaintiff.**

**vs.**

**ALBERTO GONZALES, Attorney General of the United States;**

**MICHAEL CHERTOFF, Secretary for the Department of Homeland Security  
("DHS");**

**EMILIO T. GONZALEZ, Director for Citizenship and Immigration Services  
("CIS");**

**MARIO ORTIZ, District Director for the Denver CIS District;  
ROBERT S. MUELLER III, Director Federal Bureau of Investigations**

**Defendants.**

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**COMPLAINT FOR DE NOVO NATURALIZATION AND/OR MANDAMUS**

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**I. BACKGROUND AND STATEMENT OF CASE AND FACTS**

Plaintiff XXXXXXXX, files this complaint for *de novo* Naturalization and/or a Writ of Mandamus seeking the following relief: (1) adjudication of his naturalization application which has been pending with the Citizenship and Immigration Service since March 6, 2006. [Exhibit 1, I-797 Receipt Notice for Naturalization Application]. This Court may grant *de novo* review of the application under INA section 336(b); 8 U.S.C. §1447(b), which gives the District Court exclusive jurisdiction over naturalization

applications which have been pending for more than 120 days. 8 U.S.C. §1421; 8 U.S.C. §1427; 8 C.F.R. §§103.1(g)(2)(ii), and 316.2. *United States v. Hovsepian*, 359 F.3d 1144 (9<sup>th</sup> Cir. 2004). Plaintiff also seeks declaratory and injunctive relief to protect his constitutional and statutory rights as a lawful permanent resident (LPR) to timely adjudication of his N-400 Application for United States Citizenship.

Plaintiff is a lawful permanent resident who obtained his residency on October 22, 1996. [Exhibit 2, Resident Alien Card]. Petitioner resides in Colorado within the jurisdiction of the Denver District of Citizenship and Immigration Service (“CIS”).

Plaintiff has resided as a permanent resident in the United States for the requisite period of time before becoming eligible to apply for United States Citizenship. Immigration and Nationality Act (“INA”) § 316(a), 8 U.S.C. § 1427(a).

On March 6, 2006, Plaintiff paid the \$400.00 fee for an application for citizenship and for processing his fingerprints and submitted his application for adjudication by CIS. 8 C.F.R. §§316.4, 103.7. [Exhibit 3, N-400 Application for Naturalization, and Exhibit 1, I-797 Receipt Notice for the N-400]. On June 7, 2006, he was interviewed by Officer Kate Syfert on the application for naturalization. [Exhibit 4, Request for Applicant to Appear for Naturalization Interview]. He passed the required examination for English and scored 100% on his civics exam. INA §312(a)(1-2), 8 U.S.C. §1423(a)(1-2). [Exhibit 5, Naturalization Interview Results]. At that time, he was told that his application was approved pending FBI security checks. [Exhibit 5, Naturalization Interview Results].

Although having completed his application for United States Citizenship, Plaintiff has been waiting since March 6, 2006 for a decision on his application. Such inaction violates Plaintiff's statutory and constitutional rights.

As a Lawful Permanent Resident, he has acquired all the rights and obligations federal law accords persons with legal permanent resident status. Plaintiff is lawfully in the United States and has the right to apply for United States Citizenship. United States Citizenship is a cherished privilege that brings with it the right to fully participate in our democracy—to vote, serve on a jury, and to hold public office. United States Citizenship also allows certain individuals to engage in employment that is limited to United States Citizens. Citizenship protects such individuals from the ever expanding web of civil and criminal offenses that render an individual removable from the country. United States Citizenship confers the benefit of allowing such individuals to file petitions for other members of their family and, in some cases, shorten or eliminate the lengthy backlogs in family categories. Citizenship confers other business-related benefits such as the ability to apply for federal small-business loans and to travel abroad more freely under the terms of the Visa Waiver Pilot Program. Plaintiff, however, cannot fully enjoy these rights.

Plaintiff seeks an Order in Mandamus from this court ordering CIS to immediately complete processing of his naturalization application. Alternatively, plaintiff seeks *de novo* review of his naturalization application under INA section 336(b); 8 U.S.C. §1447(b) which allows for jurisdiction in the United States District Court over naturalization claims that have been pending for more than 120 days after the initial interview. Finally, Plaintiff seeks declaratory and injunctive relief requiring Defendants

to complete all necessary security checks and fully adjudicate Plaintiff's naturalization application forthwith.

## **I. JURISDICTION**

1. This action arises under the Constitution of the United States, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 1570, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1361, and 2201. This Court may grant relief pursuant to 28 U.S.C. §§ 1361, 2201, 2202, and 5 U.S.C. § 702 et seq.
2. Jurisdiction is not barred by the REAL ID amendments to the judicial review provisions of the Immigration and Nationality Act since this action does not challenge a final removal order, or a discretionary determination. Pub.L.No. 109-13 (May 11, 2005), amending INA section 242; 8 U.S.C. §1252. In addition, 8 U.S.C. 1252(b)(2)(B)(ii)(as amended by REAL ID), states that it applies to agency decisions or action, "the authority for which is specified *under this title*" to be discretionary. The "title" referred to is Title II of the INA. *See* INA §310 *et seq.*, 8 U.S.C. §1421 *et seq.* Thus, 8 U.S.C. §1252(b)(2)(B)(ii) is not an issue with regard to review of naturalization applications.
3. Should the Court review this case through Mandamus, jurisdiction is also not barred. Mandamus review is not available to challenge discretionary determinations. In this case, Plaintiff seeks adjudication of rather than approval of his naturalization application.

4. This complaint also arises under INA section 336(b); 8 U.S.C. §1447(b) which allows for *de novo* jurisdiction in the United States District Court over naturalization claims that are not adjudicated within 120 days of the interview. 8 U.S.C. §1421; 8 U.S.C. §1427; 8 C.F.R. §103.1(g)(2)(ii), 8 C.F.R. §310.2, and 8 C.F.R. §316.3.

## **II. VENUE**

5. Venue lies in the United States District Court for the District of Colorado because at least one defendant in this action resides in such district. 28 U.S.C. § 1391(e). In addition, the Plaintiff resides in the jurisdiction of the Denver District of CIS, and a substantial portion of the events in this litigation occurred in this judicial district. Furthermore, Defendants are officers or employees of federal agencies of the United States government, acting in their official capacity under color of legal authority.

## **III. PARTIES**

6. Plaintiff, XXXXXXXX XXXXXXXX is a lawful permanent resident of the United States and resident of the State of Colorado. He obtained his lawful permanent as the spouse of a United States Citizen on October 22, 1996. [Exhibit 2, Lawful Permanent Resident Card].
7. As a lawful permanent resident, he is protected by the Due Process Clause of the Fifth Amendment. Plaintiff has applied for United States Citizenship as allowed under the Immigration and Nationality Act and has paid the fees and fully complied with all of the obligations of the application.
8. Defendant Mario Ortiz is the CIS District Director of the Denver District of the CIS. In his capacity as CIS District Director, Mr. Ortiz administers the

immigration laws on behalf of the Secretary for Homeland Security (hereinafter “Department of Homeland Security or DHS”) in the state of Colorado, Wyoming and Utah. In his position, he has decision-making authority with respect to the matters alleged in this complaint by Plaintiff whose immigration case is in the control of the Denver District Office. He has been delegated the authority under 8 C.F.R. §310.2 to control all activities within the Denver District, including authority to grant or deny naturalization applications. He is sued in his official capacity.

9. Defendant Emilio T. Gonzalez, is the Director of CIS of the DHS. In his capacity as Director of CIS, Mr. Gonzalez is responsible for the administration of immigration benefits and services including the processing of citizenship applications, family and employment-based petitions, alien registration, asylum and refugee processing, and issuance of documentation evidencing immigration status and citizenship. As such, he has decision-making authority over the matters alleged in this complaint, specifically CIS’s failure to adjudicate the naturalization application and complete the necessary “name” checks in a timely manner. INA §310, 8 U.S.C. §1421, *et seq.* He is sued in his official capacity.
10. Defendant Michael Chertoff is the Secretary of Homeland Security. Secretary Chertoff is charged with, among other things, administering the CIS and the implementation and enforcement of the Immigration and Nationality Act. As such, he has ultimate decision-making authority over the matters alleged in this complaint, specifically CIS’s failure to adjudicate the naturalization application

and complete the “name” checks in a timely manner. INA §310, 8 U.S.C. §1421 *et seq.* He is sued in his official capacity.

11. Defendant Alberto Gonzales is the Attorney General of the United States, and as such, is the head of the United States Department of Justice and the Chief Law Enforcement Officer of the Federal Government. The Attorney General has the power to naturalize persons as citizens of the United States, 8 U.S.C. §1421(a). The Attorney General is also ultimately responsible for the Federal Bureau of Investigation, a subdivision of the Justice Department. The Attorney General is sued here in his official capacity.
12. Defendant Robert S. Mueller is the director of the Federal Bureau of Investigations (“FBI”). As Director of the FBI, he is charged with administering the FBI and its various subsets. As such, he has ultimate decision-making authority over the matters alleged in this complaint, specifically, the timely processing of security checks for purposes of adjudication of naturalization applications. He is sued in his official capacity.

#### **IV. LEGAL FRAMEWORK**

##### **A. NATURALIZATION**

13. Plaintiff is a lawful permanent resident of the United States having obtained his residency through an immediate relative visa petition on October 22, 1996.  
[Exhibit 2, Lawful Permanent Resident Card].
14. Plaintiff has resided as a lawful permanent resident for the required statutory period of time necessary to qualify him to be eligible to file for naturalization.  
INA §316(a).

15. Beginning ninety days before the completion of the required residency period, applicants for naturalization may commence the application process by submitting form N-400 to the Service Center with jurisdiction over the applicant's place of residence for preliminary processing along with the required filing fees of \$330.00 and an additional fee of \$70.00 for processing of fingerprints and biometrics. 8 C.F.R. §§310.2; 334.2(a); 103.7. [Exhibit 3, Application for Naturalization].
16. The Service Center processes the application and schedules the applicant for fingerprints and for an examination. 8 C.F.R. §310.2, 334.2(a). The case is then transferred to the District office for the naturalization interview and examination.
17. The regulations require that the interview and examination cannot be scheduled until CIS has received a definitive response from the FBI that a full criminal background check of an applicant has been completed. 8 C.F.R. §335.2(b).
18. The fingerprints are conducted at a local Application Support Center and are electronically transmitted to the FBI. In most cases, the FBI processes and returns the results to CIS within 24 hours.
19. Currently, cases are being set for interview and examination in Denver within 3 to 4 months from the time of filing.
20. The applicant must appear for an initial examination. INA §335(a); 8 U.S.C. §1446(a); 8 C.F.R. §335.1. At the examination, the applicant is interviewed regarding the responses on the N-400 to determine statutory eligibility for naturalization and to elicit all information on eligibility. 8 C.F.R. 335.2(a). Generally, the applicant must demonstrate the required period of physical residency, good moral character during that period, and also demonstrate that he



- or she is positively disposed to the principals of the United States Constitution and willing to take an oath of allegiance to the United States. 8 C.F.R. §335.2(a).
21. The applicant is also required to pass a test of English comprehension including written and spoken English, unless exempted. 8 C.F.R. §312.1(c)(1).
  22. If there are deficiencies in the application, or the individual does not pass the English or civics examination, the applicant is offered the opportunity to overcome the deficiencies, and/or retake the examination. The applicant must be offered at least 60 days to overcome such deficiencies. 8 C.F.R. §335.3(b). If the person does not pass the English or civics exam, he or she will be offered a second opportunity to take the test within 90 days. 8 C.F.R. §312.5(a).
  23. Under all circumstances, the regulations require CIS to schedule a second interview within the 120 day period after the initial application and/or make a decision to grant or deny a naturalization application within 120 days of the interview. 8 C.F.R. §335.3(a). The statute confirms that if the CIS does not make a decision within the 120 day period after the examination, the applicant may request that the U.S. District Court take jurisdiction over the case and intervene either by deciding to naturalize the applicant or by ordering the CIS to make a decision on the case. INA §336(b), 8 U.S.C. §1447(b).
  24. The CIS officer must grant the application if the applicant has complied with all the requirements for naturalization. There is no discretion involved in these determinations. 8 C.F.R. §335.3(a).
  25. If the application is denied, such denial must be within 120 days of the initial interview. 8 C.F.R. §336.1(a). Such denial must be written in narrative form and

contain a concise, clear explanation of the facts which serve as the basis for the denial, the section of law applicable which bars the applicant from admission to citizenship, and the legal reasons supporting the denial. 8 C.F.R. §336.1(b). It must also include an explanation of the applicant's right to administrative review.

*Id.* This notice must be served in person or by certified mail at the applicant's last known address. 8 C.F.R. §336.1(c). The application and file are then transferred to the CIS officer in charge of conducting administrative reviews of denials. 8 C.F.R. §335.4.

26. If the case is approved, the applicant is scheduled for an oath ceremony at which time the individual formally takes an oath of allegiance to the United States and receives his or her naturalization certificate. INA §337(a), 8 U.S.C. §1448(a).
27. Plaintiff has complied with all statutory and regulatory requirements for his application for naturalization. He is eligible for citizenship as a matter of law, and there is no apparent basis for the delay other than the pending name check.
28. Plaintiff has exhausted all administrative remedies on this case.
29. Since the date of the June 7, 2006 interview, the naturalization application has been pending for 155 days as of the date of this filing.

## **VII. CLAIMS FOR RELIEF**

### **Count One NATURALIZATION**

30. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 29 above.
31. Plaintiff seeks a determination by the Court that he meets the requirements for naturalization and is to be naturalized as a United States Citizen without further

delay. Pursuant to 8 U.S.C. §1447(b), this Court should exercise its authority to grant Plaintiff's naturalization application.

**Count Two**  
**FIFTH AMENDMENT**

- 32. Plaintiff realleges and incorporates the paragraphs 1-29 above.
- 33. Defendants' policies, practices or customs violate Plaintiff's Fifth Amendment substantive and procedural due process rights.

**Count Three**  
**MANDAMUS ACTION**  
**28 U.S.C. § 1361**

- 34. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 29 above.
- 35. Defendants are charged with the responsibility of administering and implementing the Immigration and Nationality Act. Defendants bear sole responsibility for providing a determination on the "name" checks so as to approve the naturalization application within the statutory framework and timeline. Defendants' failure to discharge their statutory obligations is injuring Plaintiff. Defendants should be compelled to perform a duty owed to Plaintiff. Namely, the clearance of the pending name check and the non-discretionary adjudication of the naturalization application.

**Count Four**  
**ADMINISTRATIVE PROCEDURES ACT**  
**5 U.S.C. §§ 701 et seq.**

- 36. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 29 above.
- 37. By failing to clear the name check within the 120 day period after the naturalization interview, Defendants' practices and procedures violate the

Administrative Procedures Act and constitute agency action that is arbitrary and capricious, and not in accordance with law. 5 U.S.C. §§ 701 et seq.

38. The Administrative Procedures Act requires administrative agencies to conclude matters presented to them “within a reasonable time.” 5 U.S.C. §555. A District Court reviewing agency action may “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §706(1). The Court may hold unlawful and set aside agency action that, inter alia, is found to be: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. §706(2)(A); “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. §796(2)(C); or “without observance of procedure required by law,” 5 U.S.C. 706(2)(D). “Agency action” includes, in relevant part, “an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. §551(13).
39. The failure of the defendants to adjudicate the naturalization application within 120 days of the date of the naturalization on the basis of “name checks,” in violation of 8 U.S.C. §1446(d) and 8 C.F.R. §335, violates the Administrative Procedures Act, 5 U.S.C. §555(b), 5 U.S.C. §§706(1), 706(2)(A), 706(2)(C), and 706(2)(D).
40. The failure of the Defendants to timely complete name checks with the full knowledge that CIS requires the completion of such name checks for adjudication of applications for naturalization of the plaintiff violates the Administrative Procedures Act, 5 U.S.C. §555(b), 5 U.S.C. §§706(1), 706(2)(A), 706(2)(C), and 706(2)(D).

41. The failure of the Defendants to set deadlines for completing name checks and to take all the other reasonable steps necessary to complete the adjudication of applications for naturalization of the plaintiffs in violation of 8 U.S.C. §1446(d) and 8 C.F.R. §335 violates the Administrative Procedures Act, 5 U.S.C. §555(b), 5 U.S.C. §§706(1), 706(2)(A), 706(2)(C), and 706(2)(D).

**Count Five  
DECLARATORY JUDGEMENT ACT**

42. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 29 above.
43. Plaintiff contends that Defendants actions are unconstitutional, violate the INA, and are arbitrary and capricious and seek a declaration to that effect. 28 U.S.C. § 2201.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully ask the Court to:

1. Assume jurisdiction over this matter;
2. Review *de novo* and grant the Plaintiff's application for naturalization. 8 U.S.C. §1447(b).
3. Order Defendants to promptly adjudicate in a time period not to exceed 60 days, the currently pending application for naturalization.
4. Declare that Defendants' policies, practices and customs which deprive Plaintiff of his right to an adjudication of his naturalization application within the statutory 120 day timeframe violates the United States Constitution, the Immigration and Nationality Act and the Administrative Procedures Act;
5. Declare that Defendants' practices violate legal duties owed to

Plaintiff under the Immigration and Nationality Act;

6. Award Plaintiff's counsel reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. §504, 28 U.S.C. §2412; and
7. Grant such other and further relief as may be just and proper.

Respectfully Submitted,

By: s/Jeff Joseph  
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ATTORNEY FOR THE PLAINTIFF

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## CERTIFICATE OF SERVICE

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I, Jeff Joseph, hereby certify that I served a true and correct copy of the Petition for *de novo* Review of Naturalization Application and/or Writ of Mandamus upon the U.S. Attorney, via electronic mail on November 9, 2006 at [terry.fox@usdoj.gov](mailto:terry.fox@usdoj.gov) , and by hand delivery on November 10, 2006 at the following address:

1225 17<sup>th</sup> Street, Suite 700  
Denver, CO 80202

And to the following parties via first class mail on November 10, 2006

Mr. Doug Bow  
Chief Counsel  
Citizenship and Immigration Service  
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Denver, CO 80239

Alberto Gonzales  
Attorney General of the United States  
U.S. Department of Justice  
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Michael Chertoff, Emilio T. Gonzalez, and Mario Ortiz c/o:

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Respectfully submitted,

s/Jeff Joseph

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