

SECURITY CHECKS AND THE CURRENT STATE OF MANDAMUS

by Jerome G. Grzeca and C. Polly Ellingson*

All applicants for a U.S. immigration benefit, regardless of ethnicity, national origin or religion, are subject to criminal and national security background checks by U.S. Citizenship and Immigration Services (USCIS), not only to ensure that they are eligible for the benefit but also, according to USCIS, to enhance national security and ensure the integrity of the immigration process.¹

Certain types of applications undergo more scrutiny than others, depending upon risk factors. Though USCIS maintains the authority to conduct background investigations as necessary, it generally uses three background check mechanisms:²

- **The Interagency Border Inspection System (IBIS) Name Check** is done from a database containing information from 26 different agencies which includes records of known and suspected terrorists, sex offenders, and other “people of interest” to the law enforcement community. Though results of an IBIS check are usually available immediately, some results may trigger further investigation; if so, only when these issues are resolved is the IBIS check considered complete.

* **Jerome G. Grzeca** is the founding partner of Grzeca Law Group, S.C., and has practiced business immigration law for over 18 years, in both Washington, D.C. and Milwaukee, WI. He is listed with the Best Lawyers in America. He is currently chair of the Alaskan Cruise Conference Committee, co-chair of the American Immigration Lawyers Association’s (AILA) U.S. Citizenship and Immigration Services Fee Increase Comment Committee, a member of AILA’s USCIS Benefits Policy Liaison Committee and immediate past chair of the Nebraska Service Center Liaison Committee.

C. Polly Ellingson has been practicing immigration law for four years with Grzeca Law Group, S.C. in Milwaukee. Previously, she practiced health care and higher education law as General Counsel of The Medical College of Wisconsin in Milwaukee and Director of Hospitals Legal Affairs for the University of Washington in Seattle. She graduated from the University of Washington Law School in 1976 and is a member of the bar in Wisconsin and Washington.

¹ U.S. Citizenship and Immigration Services (USCIS) Fact Sheet, “Immigration Security Checks—How and Why the Process Works,” (Apr. 25, 2006).

² *Id.*

- **The Federal Bureau of Investigation (FBI) Fingerprint Check** is a check of the FBI’s Criminal Master File, providing information relating to criminal background in the United States. If there is a match, the FBI will forward an electronic copy of the criminal history to USCIS, generally within 24–48 hours.
- **FBI Name Checks** are done by searching the FBI’s Universal Index, consisting of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. An initial response by FBI to USCIS concerning a match generally takes about two weeks, but until all follow-up information is obtained and eligibility issues resolved, the name check is not deemed complete.

The Department of Homeland Security (DHS), on December 4, 2006, proposed adding a new system of records to DHS’s inventory, entitled Background Check Service (BCS), which would serve as a centralized repository to contain consolidated data on all background checks and results.³ The BCS would allow authorized USCIS representatives to request background checks and access the data stored in the BCS during the adjudication process. Though the BCS was to take effect January 3, 2007, it was not yet in operation as of the writing of this article. In any case, while the new system will assist with the coordination of information, it will not accelerate background checks, according to USCIS.⁴

Under USCIS policy,⁵ definitive FBI name checks are required in connection with the following applications: I-485 (Application to Register Permanent Residence or Adjust Status); I-589 (Application for Asylum and Withholding of Removal); I-601 (Application for Waiver of Ground of Excludability); I-687 (Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality

³ 71 Fed. Reg. 70414 (Dec. 4, 2006).

⁴ See answer to Question 1, Service Center Operations (SCOPS)/AILA Biweekly Telephone Conference Call Q & A (Jan. 8, 2007).

⁵ USCIS Interoffice Memorandum, M. Aytes, “FBI Name Checks Policy and Process Clarification for Domestic Operations” (Dec. 21, 2006), published on AILA InfoNet at Doc. No. 07022660 (posted Feb. 26, 2007).

Act); I-698 (Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603)); and N-400 (Application for Naturalization).

According to USCIS, less than 1 percent of the cases subject to an FBI name check remain pending longer than six months.⁶ However, delays in processing name checks of more than six months and, in some cases, more than one year, have caused foreign nationals and their attorneys great frustration, especially since USCIS has adopted the position that “USCIS will never grant an immigration service or benefit before the required security checks are completed regardless of how long those checks take.”⁷ These delays appear to be attributable not only to the need for additional investigation of positive responses but also to errors in formatting or coding name check requests and failure of the USCIS Headquarters’ Office of Field Operations to initiate name checks forwarded by local offices on manual spreadsheets.⁸

Until recently, a mandamus action (an action to compel an officer of the United States to perform his duty)⁹ was listed by USCIS as a means to expedite an FBI name check for foreign national clients filing applications for certain kinds of immigration benefits when excessive delays were experienced. However, in a February 20, 2007, USCIS Update,¹⁰ the agency announced that:

[USCIS] is no longer requesting the FBI to expedite a name check when the only reason for the request is that a mandamus (or other federal court petition) is filed in that case [but] USCIS may continue to request an expedited FBI name check if the case meets one of the other approved criteria, including:

1. Military deployment,

2. Age-out cases not covered under the Child Status Protection Act, and applications affected by sunset provisions such as diversity visas,

3. Significant and compelling reasons, such as critical medical conditions, and

4. Loss of social security benefits or other subsistence at the discretion of the USCIS District Director.

The February 20, 2007, USCIS Update is based on the December 21, 2006, interoffice memorandum from Michael Aytes discussing FBI name-check policy and USCIS procedures for initiating FBI name checks.¹¹ Regarding expedited name checks, the memorandum states that “Cases with significant and compelling issues can have the name check expedited. Cases that are simply “old” or the subject of a congressional inquiry *do not* qualify for an expedited name check unless one or more of the expedite criteria are met.”

If one or more of the remaining criteria used by USCIS to request an expedited name check from the FBI¹² is applicable to your client, then a mandamus action to compel a USCIS decision on an application is an option that should be considered. But is a mandamus action to compel action on a client’s application still worth pursuing when the only reason to do so is to attempt to expedite an FBI name check?

Mandamus may not generally be used to compel the government to exercise its discretion in any particular manner, though in some cases, the filing of a mandamus action may induce USCIS to adjudicate a pending application, thereby settling the action without a court decision being issued. However, in a list of recently selected decisions in mandamus cases since 2006 published by the American Immigration Law Foundation’s (AILF) *Litigation Clearinghouse Newsletter*,¹³ the decisions vary by jurisdiction.

In decisions favorable to plaintiffs in cases brought in the district courts of California, Connecticut, Florida, and Minnesota, the court found mandamus jurisdiction to order adjudication of plaintiffs’ Applications to Adjust Status where the I-485s had

⁶ USCIS Fact Sheet, *supra* note 1.

⁷ *Id.*

⁸ USCIS Interoffice Memorandum, *supra* note 5.

⁹ See American Immigration Law Foundation (AILF), Legal Action Center (LAC), “Mandamus Actions: Avoiding Dismissal and Proving the Case,” *AILA’s Immigration Litigation Toolbox* (AILA 2d Ed.2005), discussing basic information about filing an immigration-related mandamus action in federal district court.

¹⁰ USCIS Update, “USCIS Clarifies Criteria to Expedite FBI Name Check: Federal Litigation Removed as Sole Basis to Expedite Check” (Feb. 20, 2007), published on AILA InfoNet at Doc. No. 07022160 (posted Feb. 21, 2007).

¹¹ USCIS Interoffice Memorandum, *supra* note 5.

¹² USCIS Update, *supra* note 10; USCIS Interoffice Memorandum, *supra* note 5.

¹³ See the list of cases and discussion regarding preparation of mandamus actions in “Recent Mandamus Litigation,” *Litigation Clearinghouse Newsletter* (AILF), available at www.aifl.org/lac/clearinghouse_mandamus.shtml.

been pending for periods ranging between two years and seven years. In other actions brought in New York and Texas, the district courts found jurisdiction over mandamus actions to compel adjudication of a nonimmigrant visa application pending for approximately four months and a Petition for an Alien Relative (I-130) pending for approximately five years.

However, the *Litigation Clearinghouse Newsletter* also cites decisions adverse to plaintiffs that have been reached in cases brought in the Eighth Circuit Court of Appeals and district courts in Florida, Massachusetts, Minnesota, Missouri, New York, Texas, and Virginia. Those cases involving delayed background checks include *Zahani v. Neufeld*,¹⁴ *Chaudry v. Chertoff*,¹⁵ *Jabr v. Chertoff*,¹⁶ and *Mustafa v. Pasquerell*.¹⁷

In another recent case in which an FBI background check was an issue, a permanent lawful resident who had passed all naturalization tests sought to expedite the adjudication of his naturalization application where more than three years had elapsed since his interview by USCIS, though the FBI background check had not been completed. Since USCIS had not made a determination on the plaintiff's naturalization application within 120 days of the "examination" as set forth in INA §336(b), the court found jurisdiction. Though it declined to adjudicate the application, the court remanded the case to USCIS with the direction that the agency use its best efforts to determine the status of the name check and expedite the process. The court also ordered the agency to report to the court every 30 days the status of its efforts to obtain the results of the name check, including relevant documents and, upon receiving the results, make a

decision on the plaintiff's application within 60 days.¹⁸ Most district courts addressing similar circumstances have determined that the term "examination" refers to a single event and have thus found subject matter jurisdiction (*see Khamal* for citations). However, even when jurisdiction is found, plaintiffs should not expect that courts will adjudicate the applications; at best, they will remand the cases to USCIS with varying directions to adjudicate the applications within specific time periods or attempt to expedite the required name checks.

If it is known that an FBI name check has been completed but an application for immigration benefits remains unadjudicated for an unreasonable time period, mandamus might be considered to attempt to discover the results of the name check as well as to compel a USCIS decision on the application. Though USCIS has stated that it "does not share information about the records match or the nature or status of any investigation with applicants or their representatives,"¹⁹ the DHS notice proposing the Background Check Service²⁰ states as follows:

In addition to those disclosures generally permitted under 5 USC §552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 USC §552a(b) as follows:

...

B. To another federal agency ... or to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding.

The object of obtaining FBI name check results would be to attempt to address and resolve with USCIS attorneys any issues posed by positive responses generated by the name check, prior to USCIS's acting on an application. Prior to submitting any application, the applicant's attorney should have asked the client about any arrest, traffic offense or criminal conviction, checked any public criminal record databases regardless of the client's response, and obtained any judgments of conviction, in order to consider the effect of such events on the client's

¹⁴ *Zahani v. Neufeld*, No. 05-1857, 2006 U.S. Dist. LEXIS 56416 (M.D. Fla. 2006) (delays for FBI background checks were justifiable for an I-485 pending more than three years).

¹⁵ *Chaudry v. Chertoff*, No. 06-1303, 2006 U.S. Dist. LEXIS 66842 (D. Minn. 2006) (no right to immediate adjudication for an I-485 pending for 17 months, since INA §245(a) allows for criminal and national security checks to ensure eligibility for adjustment of status).

¹⁶ *Jabr v. Chertoff*, No. 06-543, 2006 U.S. Dist. LEXIS 84588 (D. Mo. 2006) (background checks must be completed before decisions could be made on an I-485 and I-130 pending for three years).

¹⁷ *Mustafa v. Pasquerell*, No. 05-658, 2006 U.S. Dist. LEXIS 8047 (W.D. Tex. 2006) (no clear right to adjudication because USCIS may perform background checks under 8 Code of Federal Regulations (CFR) §103.2(b)(7) and withhold adjudication under 8 CFR §103.2(b)(18), and there is no governing time limit).

¹⁸ *Khamal Kheridden v. Michael Chertoff*, et al., 2007 U.S. Dist. LEXIS 13571 (D.N.J.).

¹⁹ USCIS Fact Sheet, *supra* note 1.

²⁰ 71 Fed. Reg. 70415 (Dec. 4, 2006).

eligibility for the immigration benefit. The client's record should also be revisited before undertaking any mandamus action. However, whereas a client's criminal background will be known to the client and can be accessed in publicly available records, other adverse information contained in name check results may be unavailable, even through discovery. Consequently, the applicant and his attorney may be limited to appealing USCIS decisions rather than affecting the adjudication process.

Decisions on whether or not to pursue mandamus actions to compel USCIS action on a pending application must take into account judicial decisions within the relevant jurisdiction, any prior USCIS actions in the case, and the equities of the individual beneficiary's circumstances. However, given the variability of decisions in these types of actions, even within the same state and same district, the outcome of such actions will be difficult to predict.