

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
CIVIL MINUTES - GENERAL

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Case No. CV 07-0283 GPS(PLAx) Date: July 31, 2007

Title: Duong Cao Tran v. Emilio T. Gonzalez, Director of U.S.
Citizenship and Immigration Services

PRESENT: THE HONORABLE GEORGE P. SCHIAVELLI, JUDGE

Jake Yerke
Courtroom Clerk

Not present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present Not Present

PROCEEDINGS: Defendant Emilio T. Gonzalez's Motion to Dismiss or, in the Alternative, to Remand (In Chambers)

On June 25, 2007, a hearing was held on Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, to remand the matter to the United States Citizenship and Immigration Services ("CIS") pursuant to 8 U.S.C. § 1447(b).

For the reasons stated below, Defendant's Motion to Dismiss for lack of subject matter jurisdiction is **DENIED** and Defendant's Motion in the alternative to Remand the matter to CIS is **DENIED**.

Plaintiff Duong Cao Tran ("Tran") came to this country from Vietnam. He is now a lawful permanent resident of the United States. He brought this civil action seeking to expedite the adjudication of his Application for Naturalization (Form N-400). Tran filed his Application on April 19, 2005. Shortly after the Application was filed, CIS forwarded to the Federal Bureau of Investigation ("FBI") a request for a required background check. On September 12, 2005, CIS interviewed Plaintiff. No final action has yet been taken on Plaintiff's Application.

A lawful permanent resident of the United States becomes eligible for naturalization as a citizen once he/she (1) satisfies the five-year statutory residency requirement, (2) has resided continuously in the United States from the date of the application to the time of admission as a citizen, and (3) is of good moral character. 8 U.S.C. § 1427(a). The naturalization process begins when the applicant files a Form N-400. 8 U.S.C. § 1445(a); 8 C.F.R. 334.2. Subsequently, CIS must conduct a comprehensive background investigation. 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1. Finally, the applicant

must be interviewed by an examiner. 8 U.S.C. §§ 1446(d), 1423(a). The interview must occur "only after [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).

Pursuant to Fed. R. Civ. P. 12(h)(3), a court "shall dismiss" any action over which it lacks subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of alleging the requisite facts to establish jurisdiction. See *United States ex. rep. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1998), citing *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 188 (1936). Here, plaintiff premises subject matter jurisdiction on 8 U.S.C. § 1447(b), which provides: "If there is a failure to make a determination under[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."

Whether this Court has subject matter jurisdiction turns on the statutory meaning of the term "examination" in 8 U.S.C. § 1447(b). Plaintiff argues this Court has jurisdiction because his September 12, 2005 interview by CIS constituted the statutory "examination" and therefore triggered the 120-day period. Defendant argues that "examination" refers to an ongoing process that collectively includes the initial interview, background investigation, and additional means by which CIS collects information about an applicant. Thus, Defendant contends the 120-day period commences only after the interview and the FBI background check have been completed, and therefore this Court lacks jurisdiction, despite Defendant's admitted variance from its own regulations requiring the interview to occur only after the background check is completed.

There is no Ninth Circuit precedent regarding the statutory interpretation of "examination," and the district court decisions are in conflict. See *Kitilya v. Gonzalez*, 2007 U.S. Dist. LEXIS 34151 (C.D. Cal. March 27, 2007). Defendant relies primarily on *Danilov v. Aguirre*, 370 F.Supp.2d 441, 443 (E.D. Va. 2005)(holding "an examination is not a single event, but instead is essentially a process the agency follows to gather information concerning the applicant").¹

¹ On June 19, 2007, the Fifth Circuit decided *Walji v. Gonzales*, 2007 WL 1747911 (holding "when the CIS examination is premature because the mandatory security investigation is not complete, the 120-day time period of 8 U.S.C. § 1447(b) does not begin to run until CIS receives the FBI's 'definitive response,' described in 8 C.F.R. § 335.2(b).").

A narrow majority of district courts have rejected the *Danilov* reasoning, finding "examination" refers to the naturalization interview. See, e.g., *Astafieva v. Gonzalez*, 2007 U.S. Dist. LEXIS 5906 (N.D. Cal. Jan. 11, 2007).

Based on the plain reading of the statutory language "...before the end of the 120-day period after *the date on which the examination is conducted...*" (emphasis added), the "examination" must refer to the date of the CIS interview, in Tran's case September 12, 2005, as the specific date on which the 120-period is triggered. Additionally, 8 U.S.C. § 1446 establishes distinct requirements, first for the "investigation," then for the "examination." Furthermore, CIS's regulations distinguish between the "investigation" (8 C.F.R. § 335.1) and the "examination" (8 C.F.R. § 335.3). Defendant's failure to comply with the statutory and administrative regulations by conducting Plaintiff's interview *prior* to the completion of Plaintiff's background check is not a sufficient reason for the Court to conclude that the 120-day period was not triggered by the September 12, 2005 interview.

Accordingly, because Defendant did not meet its 120-day deadline for making its determination, this Court has subject matter jurisdiction under 8 U.S.C. § 1447(b). Therefore, Defendant's motion to dismiss for lack of subject matter jurisdiction is **DENIED**.

The issue then becomes what remedy the Court should fashion. The Court has discretion to determine the matter pursuant to 8 U.S.C. § 1447(b). Plaintiff contends the 120 days should run from the date of the interview, and therefore, the determination should be imminent. However, the courts discretion includes setting a reasonable date for the determination to be made.

Therefore, CIS is **ORDERED** to make a determination on Plaintiff's naturalization application within 120 days from the date of this Order.

IT IS SO ORDERED.