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17
18 **UNITED STATES DISTRICT COURT**
19 **SOUTHERN DISTRICT OF CALIFORNIA**

20 HECTOR BARAJAS VARELA, an
21 individual,

22 Petitioner,

23 v.

24 UNITED STATES CITIZENSHIP AND
25 IMMIGRATION SERVICES; Kirstjen
26 NIELSEN, in her Official Capacity, Secretary,
27 U.S. Department of Homeland Security; L.
28 Francis CISSNA, in his Official Capacity,
Director, U.S. Citizenship and Immigration
Services; and Melissa W. MAXIM, in her
Official Capacity, Field Office Director, U.S.
Citizenship and Immigration Services.

Respondents.

CASE NO.

**PETITION FOR DE NOVO
NATURALIZATION HEARING
PURSUANT TO 8. U.S.C. §
1447(b)**

Immigration Case
Agency No. A043-654-110

1 **INTRODUCTION**

2 1. Petitioner, Specialist Hector Barajas Varela (“Spc. Barajas”), brings
3 this petition seeking a de novo naturalization hearing on his application for
4 naturalization, which has been pending without a decision since April 15, 2016.

5 2. Spc. Barajas is a decorated United States Army veteran, who spent
6 five years and ten months as a specialist in the 82nd Airborne Division. He
7 received an honorable discharge from the Army in 2001. Although born in
8 Mexico, Spc. Barajas was raised in Compton, California, and joined the Army as a
9 lawful permanent resident (“LPR”). Despite his eligibility to naturalize at that
10 time, he did not do so because he was under the mistaken impression from Army
11 recruiters that his honorable service automatically made him a U.S. citizen.

12 3. Following his honorable discharge, Spc. Barajas struggled to put his
13 life on track upon reentry to civilian life. Shortly after his 2001 discharge, he was
14 convicted of “shooting at an occupied motor vehicle” under California Penal Code
15 § 246. After serving his time in prison, Spc. Barajas was detained and deported.

16 4. Since this time, Spc. Barajas has successfully turned his life around
17 and devoted himself to a life of serving others. In 2010, he founded the Deported
18 Veterans Support House, which provides shelter, social services, and legal services
19 to recently deported veterans. Spc. Barajas has become the lead advocate for
20 noncitizen U.S. veterans who have been deported or are facing deportation.

21 5. In recognition of his rehabilitation and extraordinary contributions, in
22 April 2017, California Governor Jerry Brown issued a full and unconditional
23 pardon to Spc. Barajas for his 2001 conviction, writing in his pardon statement that
24 “since his release from custody, [Spc. Barajas] has lived an honest and upright life,
25 exhibited good moral character, and conducted himself as a law abiding citizen.”¹

26 _____
27 ¹ Governor Edmund G. Brown Pardon Statement for Hector Barajas Varela (Apr.
28 15, 2017),
https://www.gov.ca.gov/docs/4.15.17_Attested_Pardons_and_Commutations.pdf.

1 6. Spc. Barajas is eligible to naturalize as a U.S. citizen under 8 U.S.C. §
2 1440 due to his honorable service during a period of declared hostilities and his
3 good moral character. After filing his naturalization application on March 30,
4 2016, Spc. Barajas appeared for a naturalization examination with U.S. Citizenship
5 and Immigration Services (“USCIS”) on November 18, 2016. On that date, the
6 interviewing officer informed him that he had passed the required English and
7 civics portions of the examination, but USCIS did not issue a decision on his
8 application within 120 days of that decision; *i.e.*, by March 18, 2017. Indeed, to
9 date, no decision has been issued.

10 7. Under 8 U.S.C. § 1447(b), this Court has authority to conduct a
11 hearing and make a determination on a naturalization application in the first
12 instance when the agency fails to make a determination within 120 days following
13 a naturalization examination.

14 8. Section 1447(b) provides that a court may either: (1) “determine the
15 matter” by conducting a hearing and adjudicating the naturalization application, or
16 (2) “remand the matter, with appropriate instructions, to the Service to determine
17 the matter.” Spc. Barajas asks this Court to conduct a hearing and adjudicate his
18 application, rather than remanding it to USCIS. The agency already has withheld
19 adjudication for over twelve months.

20 9. In addition to violating the Immigration and Nationality Act and
21 applicable regulations, 8 U.S.C. § 1447(b); 5 C.F.R. § 335.3, USCIS’s delay is
22 unreasonable in violation of the Administrative Procedures Act (“APA”). 5 U.S.C.
23 §§ 555, 706.

24 10. Because more than 120 days have elapsed since the examination, this
25 Court has jurisdiction to conduct a hearing and make a determination on his
26 application in the first instance. Accordingly, Spc. Barajas requests that this Court
27 adjudicate and grant his application and administer the naturalization oath or order
28 that Respondents administer the naturalization oath.

1 **JURISDICTION AND VENUE**

2 11. This Court has jurisdiction over the present action, including Spc.
3 Barajas’s naturalization application under 8 U.S.C. § 1447(b) (de novo
4 naturalization hearing), 28 U.S.C. § 1331 (federal question), and 5 U.S.C. § 702
5 (APA). The Court’s jurisdiction over the naturalization application is “exclusive”;
6 *i.e.*, USCIS lacks jurisdiction to adjudicate the application while this case is
7 ongoing. *U.S. v. Hovsepian*, 359 F.3d 1144, 1160 (9th Cir. 2004) (en banc).

8 12. Venue is proper under 28 U.S.C. § 1391(e) because this is a civil
9 action in which Respondents are employees or officers of the United States, acting
10 in their official capacity, and because a substantial part of the events or omissions
11 giving rise to the claim occurred in San Diego, California, within this judicial
12 district.

13 **PARTIES**

14 13. Spc. Barajas is a forty-year-old citizen and national of Mexico who
15 resides in Tijuana, Mexico.

16 14. Respondent USCIS is the agency responsible for the adjudication of
17 applications for naturalization. 8 C.F.R. § 332.1(a).

18 15. Respondent Kirstjen Nielsen is sued in her official capacity as the
19 Secretary of the U.S. Department of Homeland Security. In this capacity, she has
20 responsibility for the administration and enforcement of the immigration and
21 naturalization laws. *See* 8 U.S.C. § 1103(a); *see also* § 402 of the Homeland
22 Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (Nov. 25, 2002).

23 16. Respondent L. Francis Cissna is sued in his official capacity as the
24 Director of the U.S. Citizenship and Immigration Services, a component agency
25 within the U.S. Department of Homeland Security. USCIS is the agency
26 responsible for the adjudication of applications for naturalization.

27 17. Respondent Melissa W. Maxim is sued in her official capacity as the
28 Field Office Director for the San Diego Field Office of USCIS. She is the official

1 in charge of the field office assigned to conduct the examination on Spc. Barajas’s
2 naturalization application and is responsible for the adjudication of his application.

3 **FACTUAL ALLEGATIONS**

4 18. Spc. Barajas is eligible to become a United States citizen under 8
5 U.S.C. § 1440, due to his honorable wartime service in the U.S. Armed Forces.

6 19. In 1984, Spc. Barajas moved to the United States from Mexico with
7 his family at the age of seven. In 1992, Spc. Barajas became a Lawful Permanent
8 Resident (“LPR”). Spc. Barajas’s immediate family continues to reside legally in
9 the United States—his father, mother, and one of two sisters are naturalized
10 citizens, while his other sister is an LPR. Spc. Barajas’s twelve-year-old U.S.
11 citizen daughter Liliana also resides in the United States.

12 20. After graduating from high school, Spc. Barajas enlisted in the United
13 States Army on November 28, 1995. A year into his service, he became a member
14 of the 82nd Airborne Division. He won numerous accolades and awards, including
15 an Army Commendation Medal, Army Good Conduct Medal, and Army
16 Achievement Medal, and served until he was honorably discharged on October 26,
17 2001.

18 21. Following his military service, Spc. Barajas was convicted of
19 “shooting at an occupied motor vehicle” in violation of California Penal Code
20 (“CPC”) § 246. He entered a plea of nolo contendere and, on July 3, 2002, was
21 sentenced to three years imprisonment. After Spc. Barajas completed two years of
22 his sentence, Immigration and Customs Enforcement (“ICE”) detained him and
23 placed him in removal proceedings because of his conviction.

24 22. On January 2, 2004, Spc. Barajas was removed from the U.S. In
25 Mexico, Spc. Barajas did not speak Spanish fluently and struggled to find
26 employment. He subsequently re-entered the United States. When police pulled
27 him over for a traffic infraction in January 2010, they handed him over to ICE,
28 who reinstated his removal order from January 2, 2004. He was again removed

1 from the United States on January 22, 2010.

2 23. Since his removal in 2010, Spc. Barajas has devoted his life to helping
3 other deported U.S. military veterans. He founded the Deported Veterans Support
4 House, an organization dedicated to serving the needs of U.S. veterans by
5 providing housing, social services, legal resources, and advocacy. Spc. Barajas
6 works full-time as Director of the Deported Veterans Support House.

7 24. The impact of Spc. Barajas’s work and his advocacy on behalf of
8 deported veterans worldwide been extensively documented by the news media, in
9 the United States and internationally.²

10 25. On April 15, 2017, California Governor Edmund G. Brown granted
11 Spc. Barajas a pardon for the sole conviction that caused his deportation.
12 According to the Governor’s office, “[a] gubernatorial pardon [is] granted to
13 individuals who have demonstrated exemplary behavior and have lived productive
14 and law-abiding lives following their conviction. Pardons are not granted unless
15 they are earned.”³ Governor Brown’s pardon statement concludes:

16 Hector Barajas Varela . . . has shown that since his
17 release from custody, he has lived an honest and upright
18 life, exhibited good moral character, and conducted
19 himself as a law abiding citizen. Indeed, Mr. Barajas
20 served in the United States Army and received the
21 Humanitarian Service Medal, Army Good Conduct
22 Medal, among other awards. He established the

24 ² See, e.g., Patrick J. McDonnell, A home in Tijuana is refuge for deported US
25 veterans, LA Times (Sept. 13, 2017), <http://www.latimes.com/world/mexico-america/la-fg-mexico-veterans-2017-story.html>; Gabe Ramirez and Daniella Diaz, Deported veterans fight to return ‘home’ from Mexico, CNN (Apr. 26, 2016), <http://www.cnn.com/2016/04/26/politics/deported-veterans-support-house-hector-barajas-tijuana-mexico/index.html>.

27 ³ See Office of Governor Edmund G. Brown, Jr., Governor Brown Grants Pardons, <https://www.gov.ca.gov/news.php?id=19751>.

1 Deported Veterans Support House in Tijuana, Mexico to
2 assist deportees in adjusting to life there. . . . [B]y
3 completion of his sentence and good conduct in the
4 community of his residence since his release, Hector
5 Barajas Varela, has paid his debt to society and earned a
6 full and unconditional pardon.”⁴

7 26. Spc. Barajas’s pardon erases his conviction for the purposes of his
8 eligibility to naturalize under 8 U.S.C § 1440. 8 C.F.R. § 316.10(c)(2) (a person
9 granted a full and unconditional pardon can establish good moral character for
10 naturalization in spite of a “aggravated felony” conviction); *see also* 8 U.S.C. §
11 1227(a)(2)(A)(vi) (waiving “aggravated felony” ground of removability if a full
12 and unconditional gubernatorial pardon has been granted).

13 27. “Any person who, while an alien . . . has served honorably . . . in an
14 active-duty status in the military, air, or naval forces of the United States” during a
15 period of hostilities as designated by Executive Order “may be naturalized” if he
16 enlisted while in the United States. 8 U.S.C. § 1440(a). Spc. Barajas enlisted
17 while in the United States and served during a designated period of hostilities.⁵

18 28. Unlike other forms of naturalization, no age, residence, or physical
19 presence requirements for naturalization apply to wartime service members. 8
20 U.S.C. § 1447(b). There is also no requirement that the applicant be an LPR at the
21 time of his application. *Id.*

22 29. By regulation, USCIS was required to issue a decision on Spc.
23 Barajas’s naturalization application, or schedule a second examination, within 120

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25 ⁴ Governor Edmund G. Brown Pardon Statement for Hector Barajas Varela (Apr.
26 15, 2017),
https://www.gov.ca.gov/docs/4.15.17_Attested_Pardons_and_Commutations.pdf.

27 ⁵ *See* Executive Order 13269—Expedited Naturalization of Aliens and Noncitizen
28 Nationals Serving in An Active-Duty Status During the War on Terrorism, 2002
WL 1833360, at *1.

1 days after the November 18, 2016 examination, *i.e.*, on or before March 18, 2017.
2 8 C.F.R. §§ 335.3(a); 336.1(a).

3 30. USCIS did not issue a decision, or schedule a second examination, on
4 or before March 18, 2017.

5 31. Spc. Barajas, through counsel, contacted USCIS on at least four
6 occasions to follow up on Spc. Barajas's application for naturalization, but no
7 decision on the application has been issued.

8 32. The delay of Spc. Barajas's naturalization application has caused great
9 emotional distress and anxiety to Spc. Barajas.

10 **CAUSE OF ACTION**

11 **COUNT ONE**

12 **(Petition for De Novo Naturalization Hearing, 8 U.S.C. § 1447(b))**

13 33. Spc. Barajas incorporates the allegations in the paragraphs above as
14 though fully set forth herein. The Immigration and Nationality Act at 8 U.S.C.
15 § 1447(b) provides as follows:

16 **Request for hearing before district court.** If there is a
17 failure to make a determination under section 335 [8
18 U.S.C. § 1446] of this title before the end of the 120-day
19 period after the date on which the examination is
20 conducted under such section, the applicant may apply to
21 the United States district court for the district in which
22 the applicant resides for a hearing on the matter. Such
23 court has jurisdiction over the matter and may either
24 determine the matter or remand the matter, with
25 appropriate instructions, to the Service to determine the
26 matter.

27 *See also* 8 C.F.R. §§ 335.3(a); 336.1(a).

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Dated: December 12, 2017

Respectfully submitted,

By: s/ Colleen C. Smith

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