UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 1:17-cv-00998-ESH-RMM**
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' REPORT TO COURT (DKT. 108)

In a February 20, 2018 Minute Order, this Court directed Defendants to submit declarations relating to the parties' Joint Proposal for reporting on the status of each individual class member in this case. On February 28, 2018, Defendants submitted declarations in response to the Order. *See* Dkt. 108. Having reviewed Defendants' declarations, Plaintiffs respectfully submit this memorandum in response to Defendants' submission. As explained in detail below, Plaintiffs contend that Defendants' submission is not fully responsive to the Order and it does not fairly and accurately portray the amount of time it would take to gather and report the information requested by the Court.

Notably, Defendants' submission and recent reporting contain some startling admissions that reinforce the need for fulsome and frequent reporting. Among those admissions are Defendants' revelations that:

- Since July 7, 2017, *only 23 class members have been naturalized*, Dkt. 109 at 2, and we know that most of those naturalizations

occurred in close proximity to when Defendants had to report that statistic per a Court order. *See, e.g., id.* at 2, n.3

- Since July 7, 2017, *none of the eight non-citizen named Plaintiffs has even been scheduled for a naturalization interview (including Shu Cheng who, we now know, favorably completed the DoD enhanced background check process on January 22, 2018 – over six weeks ago).* Dkt. 109-1.
- Since July 7, 2017, *DoD has completed enhanced background investigations (and DoD adjudications) for only 191* of the more than 1,100 members of the class (even as the class is growing as *Kirwa* class members obtain their N-426s and join the *Nio* class). Dkt. 109 at 2, 3.
- *For a roughly 90-day period* between mid-October 2017 and mid-January 2018, without any notice to the Court or Plaintiffs, *DoD stopped conducting CAF adjudications for class members altogether* (Dkt. 93-4), and if Judge Huvelle had not ordered increased reporting, this three-month suspension may never have been revealed.

These facts demonstrate that the policies at issue in this case are resulting in enormous mounting delays: soon we will have a class that includes approximately 2,500 soldiers, each of whom started serving in the military at least two years ago and are pursuing their statutory right to "expedited" naturalization. Yet, *prior to January 22, 2018, USCIS was averaging about two class member naturalizations/adjudications per month.* And, the facts demonstrate that Defendants are

not even following their policies: Defendants' reporting demonstrates that even for those class members whose DoD background investigations are complete, USCIS is not promptly adjudicating their naturalization applications. All of this points to the urgent need for frequent reporting on the key naturalization process metrics, including those that this Court included in its Minute Order.

BACKGROUND

1. Plaintiffs commenced this lawsuit on behalf of themselves and a similarly-situated class of soldiers in May 2017, following Defendants' implementation of policies that unlawfully were delaying and interfering with Plaintiffs' statutory right under 8 U.S.C. § 1440(a) – as soldiers serving honorably in the Selected Reserve of the Ready Reserve – to pursue expedited naturalization.

2. Shortly after they commenced suit, two of the ten named Plaintiffs (class representatives) became naturalized United States citizens. The remaining eight, all of whom enlisted in the military *in or before June 2016*, still are awaiting final adjudication (*i.e.*, oath or denial) of their naturalization applications.

3. In July 2017, in response to the lawsuit, Defendants implemented a new policy, this time requiring that the soldier class await the completion of so-called DoD enhanced background investigations prior to USCIS final adjudications of their naturalization applications. Plaintiffs amended their complaint to challenge the lawfulness of the new policy.

4. In October 2017, Defendants implemented yet another new policy in response to the litigation, this time purporting to revoke or rescind the previously-issued N-426 certifications of honorable service that the class members need in order to pursue naturalization. Plaintiffs challenged this policy as well, with the District Court enjoining the policy's application to the class

and, in the related *Kirwa* litigation, ordering Defendants to issue N-426s to eligible soldiers seeking to naturalize.

5. Because of the irreparable harm demonstrated by the class members as a result of the delays, the District Court ordered Defendants to report on the progress of the pending naturalization applications for the named Plaintiffs and then the class as well. Of particular note, on January 17, 2018, following Plaintiffs' submission to the Court raising concerns about Defendants' conduct and the lack of naturalizations/adjudications, the District Court ordered extensive reporting with respect to the entire *Nio* class by January 22, 2018 (by 12 PM). Dkt. 91.

6. Following Defendants' January 22 report, Plaintiffs raised more issues with Defendants' conduct and the Court referred these reporting issues to the Magistrate Judge, in order to develop a reporting mechanism that adequately tracks the status of each class member. The Court has ordered similar reporting in the *Kirwa* action (and has referred similar reporting issues to the Magistrate Judge in that action as well).

7. At a hearing before this Court on February 16, 2018 regarding the content and frequency of Defendants' reporting, Defendants represented to the Court that they could not – without considerable burden – expand reporting beyond the few items they agreed to provide in the Joint Proposal (Dkt. 105 at 2-3), and even those items could not be reported more frequently than 120-day intervals. This Court subsequently issued its Minute Order directing Defendants' February 28, 2018 submission, which Plaintiffs address below.

DEFENDANTS' DECLARATIONS DO NOT SUPPORT THEIR POSITION

This Court directed Defendants to make the following submission:

> Defendants shall prepare and file one or more declarations informing the Court of the amount of time it would take to gather

> and report the following information, partially identified on page 3 of the parties' Joint Proposal, for each individual class member: (1) Status (DTP, Holdover, Discharge, Other); (2) Enlistment date; (3) How long the DoD enhanced background investigation has been pending and when the investigation began; (4) CAF adjudication date, (5) MSSD determination result; (6) Date DoD notified USCIS and class member of MSSD completion; (7) Date USCIS-ordered FBI background checks began; (8) Date Notice to Appear issued/removal or deportation initiated. Defendants shall also inform the Court of [9] the amount of time it would take to gather and report the total number of naturalizations since July 7, 2017. When identifying the amount of time needed, Defendants shall presume that its employees are working expeditiously to gather and report the requested information.

February 20, 2018 Minute Order.

In response, Defendants seek to portray the undertaking necessary to provide these data points as extraordinarily onerous and labor intensive. Indeed, they claim it would take hundreds of man hours to cull this information and assert that they could not possibly provide such comprehensive reporting in fewer than 120-day intervals. But Defendants' claims do not withstand scrutiny and are undermined by key facts and admissions.

To begin, Defendants do not adequately answer the Court's questions. The Court asked for time estimates to gather and report information on nine specific categories of information, but Defendants lump several of those categories – (1) through (5) – together, without providing individual time estimates, and they ignore one of the categories – (6) – altogether, providing no time estimate at all.

Moreover, Defendants' proffer as to how they would go about gathering the information is cumbersome, unnecessary, and backwards. Rather than start with the class lists (*Nio* and *Kirwa*), which they already have compiled, and work forward to identify those class members' progression through the naturalization process, Defendants describe an undertaking that would begin from a broader pool of military naturalization applicants and then try to identify class members from that

pool. And rather than build on the information they gather – and in many instances already have gathered and reported – Defendants act as if they would have to reinvent the wheel each time, developing each report from scratch and re-doing most of the work already done where the data has not changed and will not change. Finally, Defendants completely ignore the fact that they were able to compile much of the requested information in only two days following Judge Huvelle's January 17, 2018 Order. Indeed, Defendants completely ignore the prior declarations of Capt. Alicia Glanz, the Army officer who is in charge of tracking MAVNIs as they undergo DoD security screenings, both of which reveal that DoD has the means to easily obtain, report, and update the information at issue.

Accordingly, the information provided by Defendants is not a reliable indicator of the amount of time it would take to provide the requested information. Plaintiffs address each of the nine categories below.

Category 1: "Status (DTP, Holdover, Discharge, Other)"

The Court ordered Defendants to separately specify – with supporting declarations – the amount of time it would take to provide a report listing the status of each individual class member. As the Court is aware, class members can include soldiers in the DTP (Delayed Training Program), soldiers who are in "holdover" status – *i.e.*, they have completed basic training but remain stuck at basic training or AIT sites (for many months) because their DoD background checks are pending and they have not been naturalized, and soldiers who have been discharged from the Army, including under the Army's "time-out" rule(s) (but still seek naturalization based on their honorable service). Having this status reported will ensure that Defendants are indeed reporting on the full class (and not just the members currently in the DTP – see discussion below regarding enlistment dates reporting). Further, it is useful for the Court and the parties to know, when evaluating the delays, the particular status of the class member. For example, if a class member

has been discharged from the military, USCIS should be proceeding with the adjudication of those applications as there is no further background or security information being collected by DoD with respect to that naturalization applicant.

In their submission, Defendants did not separately identify the amount of time it would take to report on this "status" category. Instead, Mr. Arendt's declaration lumps this category together with several others without giving a definitive answer as to any category or even the total of the categories. Dkt. 108-1 ¶ 6.

However, there is no need to guess how long it would take. In September 2017, in the related *Kirwa* litigation, the Army submitted a declaration from Capt. Alicia Glanz. In her declaration, Capt. Glanz reported that her "duties include *maintaining a roster that accounts for the* assignment and *duty status* of all individuals enlisted under the MAVNI program." *Kirwa* Dkt. 13-1 ¶ 1 (emphasis added). In their current submission, Defendants never account for this "roster" nor do they submit any declaration from Capt. Glanz. In any event, this prior declaration shows that Defendants already readily possess the *duty status* of all class members, in roster form. There is no basis for Defendants to contend – or this Court to find – that it would take any appreciable time or effort to report that duty status to the Court.

Category 2: <u>"Enlistment Date"</u>

The enlistment date for class members is an essential component of assessing the naturalization adjudication delays. Plaintiffs are eligible to apply for expedited naturalization as soon as they enlist and, in fact, their enlistment contracts obligate them to pursue naturalization at the earliest opportunity. Moreover, Defendants have asserted that DoD's enhanced background investigations begin on the date of enlistment. As such, naturalization delays can be measured from the date of enlistment.

In their submission, Defendants notably do not specify the amount of time it would take for them to compile this information. That is because Defendants already have compiled and reported this information for nearly all of the *Nio* current and future class members (*i.e.*, current *Kirwa* class members). *See* Dkts. 93-4, 110. Because these reports include the enlistment dates for all current MAVNI DTP members,[1] the only enlistment dates that remain to be reported are for the very small number of class members who are not currently in the DTP (*e.g.*, those who are holdovers, those who have been discharged, etc.). As soon as Defendants report on the small number of non-DTP class members (something that should have been done already to meet the Court's prior orders on class reporting), there is nothing to update on a going forward basis. *Enlistment dates do not change.* And, there is no prospect that new enlistees will join the *Kirwa* and *Nio* classes as Defendants have admitted that DoD has halted MAVNI enlistments and the last ones were in June 2016.

As a result, Defendants have not claimed, and cannot claim, any burden at all from having to report the enlistment date for class members.

Category 3: "How long the DoD enhanced background investigation has been pending and when the investigation began"

Defendants cannot plausibly claim that it would take any meaningful amount of time to provide this as part of their report. As noted, Defendants have stated that the enhanced background investigation begins on the date of enlistment. *See, e.g.*, Dkt. 109 at 3 ¶ 7. If so, using a spreadsheet, the number of days pending for the background investigation can be auto-populated on the spreadsheet, as shown by Defendants' reporting in January and February. *See* Dkt. 93-4, 110 (noting "auto-calculation").

[1] This illustrates the efficiency that will result from consolidated reporting as between the *Kirwa* and *Nio* classes.

If Defendants do not want to run the auto-population on a going-forward basis, Plaintiffs' counsel can do it themselves, provided that Defendants provide their reports, with enlistment dates, in native Excel format (which they should be ordered to do in any event). Because this information can be auto-generated, there is no need for Defendants to "collect" this information at all, and thus there is no associated burden.

Category 4: "CAF Adjudication Date"

While the July 7, 2017 Policy at issue in this case is premised on USCIS's determination to wait for DoD to gather background *information* (as part of DoD's enhanced background investigation – *i.e.*, information within the SSBI/Tier 5 report, the NIAC, and the CI review) and for USCIS to then use that *information* to inform USCIS's assessment of the soldier's good moral character and attachment to the constitution for naturalization purposes, Defendants have since taken the position that the *adjudications* completed by DoD (*i.e.*, by DoD CAF to determine if the soldier will be given Top Secret clearance once naturalized and by the Army to determine if the soldier is "suitable" – including physically suitable – for on-going service in the military) fit within that USCIS policy. While Plaintiffs disagree with Defendants' current position that separate and irrelevant military-specific adjudications rationally fall within the "information-gathering" basis for the USCIS July 7, 2017 Policy, as long as the naturalization applications are being held up for the DoD CAF adjudication, Defendants should have to report the progress being made for this key milestone.

One example of why this data point is important is shown by the Defendants' January reporting, which revealed (since Defendants did not notify the Court or Plaintiffs of this) that *DoD CAF purposefully stopped its adjudications for the class for a three-month period during a time when the Court did not hold a hearing or require class-wide reporting* by Defendants. *See* Dkt.

93-4 (three-month gap between mid-October 2017 and mid-January 2018 shown in DoD CAF Suitability Recommendation Date column).

In spite of the January reporting (or perhaps because of what the January reporting revealed), Defendants contend that they cannot provide this date in their future reporting absent some Herculean effort. But Defendants' declarant, Mr. Wright, does not support this claim. Dkt. 108-2. According to Mr. Wright, who identifies himself as being responsible for the "Special Processing Team at the DoD CAF" which processes and assembles MAVNI files for CAF Adjudication, *id.* ¶¶ 1-2, it would take five minutes per class member to determine the CAF Adjudication date. *Id.* at ¶ 5. Yet, Mr. Wright assumes that a "contractor" – one of only two assigned to processing MAVNI cases – would have to *manually* input each class member's social security number into a database, on each reporting cycle, to determine the CAF status of that soldier. *Id.* at ¶ 6.

Surely, that cannot be correct. Indeed, we know it is wrong. On January 17, 2018, Judge Huvelle ordered DoD to provide the CAF Adjudication date for the entire class. *Two days later – on January 19, 2018* – Capt. Glanz – the same Army Captain who submitted the September 2017 declaration in the *Kirwa* case referenced above – executed another declaration that was later submitted to the Court. Capt. Glanz testified that she is responsible for maintaining "a security information portal" that is shared by the Army and DoD. Dkt. 93-4 at ¶ 2. *In just two days*, Capt. Glanz "retrieved the information fields in the portal pertaining to the Court's order" and generated the report – which Defendants later produced – responsive to the Court's query. *Id.* at ¶ 3. That report – Dkt. 93-4, Exh. 1 – provides the "DoDCAF Suitability Recommendation Date," along with numerous other fields of information.

Interestingly, Capt. Glanz – the person responsible for maintaining the information in a "portal" that she was easily able to query and from which she was quickly and easily able to generate a report – did not provide a declaration for Defendants' February 28 submission to this Court. Defendants elected instead to rely on Mr. Wright, from an entirely different DoD organization, without making any reference to Capt. Glanz, her information portal, or her prior declaration. There is no reason for this Court to accept Mr. Wright's self-serving and contradictory assessment in light of the prior sworn testimony of Capt. Glanz that Defendants already submitted to the Court.

Even if one were to disregard Capt. Glanz's declaration, Defendants cannot support their claim. The reality is that DoD already has compiled a class list. And DoD already has identified 191 class members who have completed the background investigation, which necessarily means the CAF adjudication. Going forward, even if Capt. Glanz's information portal were not so readily available, Defendants would have at least two easy alternatives: (1) run the class member names in "batch" form – rather than individually – from their spreadsheet to obtain the results, or (2) Mr. Wright's dedicated MAVNI unit can – on a daily or weekly basis – simply review the adjudications during that cycle, and cross-reference those completed adjudications against the class list. In other words, DoD need only keep a running list of those CAF adjudications that are completed each week and update their report accordingly on a rolling basis. Given the glacial pace at which CAF is adjudicating this class, this should be a relatively easy task that should take minutes in total during each reporting cycle. The notion that any of this should "impact the processing of MAVNI cases" is nonsensical. Certainly, the backward manner in which Mr. Wright claims he would perform the task appears to be deliberately calculated to induce burden and is far out of step with this Court's instruction that Defendant personnel work "expeditiously" to gather the information.

This Court should direct Defendants to provide updates on the CAF Adjudication date on the bi-weekly basis Plaintiffs have requested.

Category 5: "MSSD determination result"

The MSSD determination result is another key data point for understanding and assessing delays in processing naturalization applications in light of the path that Defendants have chosen for implementing the USCIS July 7, 2017 Policy. If DoD has made a "suitable" or favorable military suitability determination, that is another indicator that the background investigation did not turn up any information that would negatively impact the soldier's naturalization application in terms of good moral character or attachment to the constitution. As such, any further delay in finishing the processing of that soldier's naturalization application cannot be excused. USCIS cannot claim that it is waiting for any additional information from Defendants before finally adjudicating the naturalization application. If DoD has determined that the soldier is "unsuitable," that means that DoD's involvement in the process is over (even under Defendants' current too-broad interpretation of the July 7, 2017 Policy), and USCIS should have whatever information DoD has collected on the soldier and can/should proceed with its naturalization assessment and naturalization application processing based on the "good moral character" standard, rather than the MSSD and NSD standards applied by DoD.[2]

Once again, Defendants have not separately specified the amount of time it would take to provide the MSSD result for each class member. Instead, Mr. Arendt simply lumps this category in with several others before opining – in conclusory fashion – that "[r]equiring reporting [of all

[2] Of course, an unsuitable determination does not mean that the soldier lacks good moral character or attachment to the constitution. Rather, military suitability can be based on a variety of factors – such as the soldier's health, age, or the number of young dependents – that have no bearing whatsoever on any naturalization eligibility criteria.

of these categories] every two weeks would significantly tax Army's personnel devoted to the MAVNI's issues." Dkt. 108-1 ¶6. As such, Mr. Arendt's (and Defendants') answer is non-responsive to the Court's question.

But, here too, the Court need not guess. We have the benefit of Captain Glanz's January 17, 2018 declaration, in which she was able to access the security information portal and report out the suitability results, among other items, within two days of the January 17, 2018 Order from Judge Huvelle. Dkt. 93-4, Exh. 1 (last column of spreadsheet: "Army Suitability Review (Suitable/Pending/Unsuitable)"). Defendants offer no explanation for why the person responsible for maintaining DoD's security information portal for MAVNIs and who previously was able to generate a report on multiple categories including the MSSD determination was not the one who answered this Court's questions.

Moreover, as Defendants have reported only 200 or so MSSD determinations since July 7, 2017, Defendants cannot plausibly claim that it would be burdensome to track this category on a bi-weekly basis, especially since this is data point that can easily be generated with the MSSD date data point that Defendants have agreed to provide and neither data point needs to be updated once reported for any class member.[3] Again, DoD need only keep a running list of the MSSD determinations that are completed each week and update their report accordingly on a rolling basis, a very easy task given the slow pace at which these determinations are being made. As a result, the record shows that this is a relatively simple task, one that has been done before, and one that can be provided with ease going forward.

[3] According to Captain Glanz, "[t]he Army's military suitability determination is the culmination of the Army's background check process." Dkt. 93-4 at ¶ 5.

Category 6: "Date DoD notified USCIS and class member of MSSD completion"

As noted already, Defendants are contending that USCIS's policy of waiting for the completion of DoD's background investigation before finally adjudicating MAVNI naturalization applications is rational and is not causing unlawful delays in naturalizations. However, Defendants' position is undermined if DoD is not promptly notifying USCIS when that background investigation or MSSD determination is complete (or, if USCIS, for some reason, is not recognizing DoD's notification) – which is happening because numerous class members with MSSD completions listed on Defendants' February 28, 2018 report to the Court at Dkt. 109 are still being told by USCIS that it cannot process their applications because DoD still has not "officially" notified USCIS of the completion (now many weeks after those completions and even after the completions were reported to the Court).[4] Hence, Plaintiffs request that Defendants provide the date when USCIS (and the affected soldier) were notified of the completion.

In their submission, Defendants entirely ignore this category. While their summary response indicates that Mr. Arendt answers this question, Dkt. 108 at 1, a review of Mr. Arendt's

[4] For example, Defendants claim that – even though (1) named Plaintiff Shu Cheng's DoD background check was complete on January 22, 2018 (2) DoD was able to notify Ms. Cheng's Army recruiter of that fact, (3) the Army was able to make all the necessary arrangements for Ms. Cheng to ship to BCT and then to a separate AIT location, (4) the Army was able to tell Ms. Cheng to be ready to ship on March 26, 2018, (5) DoD was able to update multiple on-line reports accessible to Ms. Cheng concerning her ship date and favorable background check results, and (6) Defendants were able to report to this Court on February 28 that her background checks were complete and favorable – USCIS still has not received "official" notification from DoD that Ms. Cheng's background checks are complete. As such, USCIS has not continued to process Ms. Cheng's application and will not even forward it from the National Benefits Center to the local field office so that a naturalization interview can be scheduled. And, according to Defendants, that means that Ms. Cheng likely will not be interviewed or naturalized before she ships to basic training on March 26 (more than two months after her DoD enhanced background checks were completed and more than two years after she enlisted in the military) and that she – and according to USCIS "most" other MAVNIs – will have to wait until returning to their home locations following BCT and AIT to even have a naturalization interview scheduled. For Ms. Cheng, that will mean that beyond the two years since enlistment, she will be subject to a wait of another six months following completion of her DoD enhanced background checks (assuming there are no

declaration finds no mention of this category other than in his opening paragraph where he quotes this Court's Order. Dkt. 108-1 at ¶ 1.

Given Defendants' failure to respond on this point, the Court should find that there is no evidence that it would take Defendants any appreciable time to compile this information in regular reporting. Moreover, as with other categories, this is a one-time report. Once the MSSD is complete, DoD can easily record when it notifies USCIS and the class member of that completion. And once the notice is given, there is no need to update that information in subsequent reporting for that soldier. Again, this is a ministerial task of great significance to tracking the delays in the naturalization process for these class members and Defendants should update the report on a bi-weekly basis. However, if Defendants do not want to include this in its bi-weekly reporting, a very efficient alternative (on a going forward basis) would be to have DoD include the Court and Plaintiffs' counsel on its notifications to USCIS, which USCIS representatives have told class members are provided on a weekly basis.

Category 7: "Date USCIS-ordered FBI background checks began"

This category provides yet another metric of key importance. In recent weeks, Defendants have claimed for multiple soldiers that USCIS cannot finally adjudicate naturalization applications – *even after DoD completed its enhanced background investigation and so-informed USCIS* – because USCIS must still obtain a "name check" report from the FBI. In many instances, this excuse has caused weeks and months of additional delays for soldiers, including class members who have shipped to basic training without being naturalized just because USCIS purportedly did not receive the FBI name check report in time for adjudication prior to shipping. Accordingly, tracking the date of USCIS's request to the FBI is necessary.

---

other delays induced by Defendants) before even being interviewed for naturalization. That is just an example of why having Defendants report this data point is important.

In their response, Defendants do not separately specify the amount of time it would take to compile this information, but lump it together with other categories and claim that "it would take 3.5 weeks each time to complete the type of reporting the Court is currently contemplating." Dkt. 108-3 at ¶ 21. Here again, this estimate makes no sense. Defendants admit that the information is captured in a database. *Id.* ("this information is recorded in CLAIMS 4"). And since Defendants already have the class list, there is no reason why they cannot query that database, in batch mode, and run a report. And since only one FBI name check is needed for each soldier, the updates would only reflect new name check requests. As such, Defendants' amorphous 3.5 week prediction is unsupported.

Moreover, any burden on Defendants is of their own making because USCIS requesting *the FBI name check is entirely duplicative of what DoD does for each class member as part of the enhanced background investigation*. In other words, Defendants (collectively) already obtain the exact same FBI name check report for each soldier. USCIS knows this but is insisting that rather than obtain a copy of that report from the DoD or the FBI, it must make a separate, duplicative request to the FBI to run an identical, superfluous name check. That certainly is not an efficient use of manpower for USCIS and it is a waste of resources for the FBI (which may explain why Defendants did not offer a FBI declarant for their submission). And for the soldiers, it means substantial and injurious additional delay for no reason.

If Defendants continue to insist upon securing a second, duplicative name check from the FBI for each soldier, they should have to report the dates of such requests.

Category 8: <u>"Date Notice to Appear issued/removal or deportation initiated"</u>

In their submission, Defendants admit that they can easily query the ICE database, in batch mode, for the entire class, "in a matter of minutes." Dkt. 108-4 at ¶¶ 5-6 ("If both the names and A-numbers of individual class members are available, [ICE] can execute a records query in batch

mode, which means that all of the *Nio* class members' names and A-numbers can be searched simultaneously. . . . [T]he data base query can be completed in a matter of minutes."). Defendants do not contend that the names and A-numbers are unavailable, nor could they given that Defendants have compiled class lists and have this information at the ready. The fact that ICE can run these queries and database searches in batch mode in a matter of minutes certainly suggests that the other categories of information that are the subject of the Court's Order can be done in similar fashion.

The ICE declarant further notes that if the database query identifies any class member who has been issued a Notice to Appear or has been placed in removal proceedings, it "would take approximately (10) ten minutes" to verify the accuracy of that database response. Dkt. 108-4 at ¶ 7. Defendants do not claim that any such verification would be unduly burdensome. Nor could they make such a claim as how could that number be large, particularly if Defendants have no intention of seeking to deport any members of the class. Moreover, this 10-minute verification effort is a small price to pay to inform the Court and Plaintiffs that a United States soldier (and class member) who claims eligibility for naturalization – and has perhaps fallen out of status because of Defendants' delays – has been placed in deportation or removal proceedings in spite of the "lawful presence" promises made by Defendants.

Accordingly, since Defendants have established that this effort would take minutes for the entire class, the Court should order Defendants to report on this metric on a bi-weekly basis.

Category 9: "Total number of naturalizations of class members since July 7, 2017"

The total number of naturalizations (or complete adjudications of naturalization applications, including denials) obviously is key to assessing whether Defendants are withholding

or unreasonably delaying naturalization application processing. The Court understands this and has asked (and received) this information from Defendants on multiple occasions.

Once again, in their response, Defendants do not separately specify the amount of time it would take to compile this information, but lump it together with other categories and claim that would take "3.5 weeks, including the time needed to coordinate with DoD." Dkt. 108-3 at ¶ 19. Here again, this estimate makes no sense. Defendants admit that the information is captured in the same database as other data. *Id.* at ¶ 19 ("The CLAIMS 4 database includes a data field indicating whether an individual has naturalized"). And, Defendants admit that they were able to report this data. *Id.* ("this information is part of the February 28, 2018 report). Given that Defendants now have the class list (and the list of future class members from the current *Kirwa* class), there is no reason why they cannot query that database easily in the future, in batch mode, and run a report. As such, Defendants' 3.5 week estimate, seemingly based on the amount of time it took to coordinate with DoD to identify class members and future class members, does not make sense.[5]

CONCLUSION

For all these reasons, Plaintiffs request that the Court direct Defendants to report on all of the requested metrics on a bi-weekly basis pending a further order of the Court.

[5] Notably, the suggestion that USCIS and DoD did not previously coordinate regarding the names of class members and future class members is odd, as it raises serious questions about USCIS's prior MAVNI hold policies and how they were implemented, and the current July 7, 2017 Policy and how it is being implemented, if USCIS is not able to identify (and distinguish) naturalization applicants who are the subjects of these policies from those military naturalization applicants who are not.

March 7, 2018

Respectfully submitted,

/s/ Joseph L. LoBue

Joseph J. LoBue (D.C. Bar No. 484097)
Douglas W. Baruch (D.C. Bar No. 414354)
Jennifer M. Wollenberg (D.C. Bar No. 494895)
Neaha P. Raol (D.C. Bar No. 1005816)
Shaun A. Gates (D.C. Bar No. 1034196)
Katherine L. St. Romain (D.C. Bar No. 1035008)
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, D.C. 20006
Telephone: (202) 639-7000
Facsimile: (202) 639-7003
Email: joseph.lobue@friedfrank.com
Email: douglas.baruch@friedfrank.com
Email: jennifer.wollenberg@friedfrank.com

Counsel for Plaintiffs and the Certified Class