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' SUPPLEMENTAL DECLARATIONS (DKT. 118)

On March 16, 2018, Defendants submitted supplemental declarations to the Court (Dkt. 118) in response to this Court's March 9, 2018 Minute Order. Plaintiffs respectfully submit this brief memorandum to address Defendants' latest submission. As set forth below, and as laid out in their prior memorandum on this same subject (Dkt. 112), Plaintiffs continue to believe that Defendants are not accurately describing the time and resources necessary to report on specific aspects of the naturalization adjudication process for class members.

THE MARCH 9 MINUTE ORDER

The March 9 Minute Order was not issued in a vacuum. Instead, it followed extensive briefing by the parties (Dkts. 108 and 112) in response to the Court's February 20, 2018 Minute Order ("Feb. 20 Order"). The Feb. 20 Order directed Defendants to specify – with supporting declarations – the time and resources it would take for Defendants to regularly report on specific events in the naturalization adjudication process for each member of the class. Following that first round of briefing, the Court directed Defendants to make further submissions as follows:

> 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 for each individual class member:
>
> (1) the class member's enlistment date;
>
> (2) the date the class member's N-400 form was filed;
>
> (3) the date the class member's case was referred to USCIS; and
>
> (4) the class member's naturalization date.
>
> Defendants' response should provide a breakdown of the amount of time it would take to gather and report on each individual category identified, as well as the amount of time required for all four categories.

In response, Defendants submitted two declarations: one from Michael Hoefer, Dkt. 118-1, of the United States Citizenship and Immigration Services ("USCIS"), and the other from Christopher Arendt, Dkt. 118-2, of the Department of Defense ("DoD"). Defendants claim, based on those declarations, that it would take "3.5 weeks" to gather and report on the four categories and make the additional assertion that it would "divert resources" to undertake this effort on anything more frequent than a 120-day cycle. Dkt. 118 at 3.

DEFENDANTS ARE CONTINUING TO OVERSTATE THEIR REPORTING EFFORT

A. Defendants' "3.5 Weeks" Claim is Irrational

Defendants contend – as they did before – that it would take them "approximately 3.5 weeks to collect each of the four categories of information" identified in the March 8 Minute Order. Dkt. 118 at 2. But then, Defendants concede that the "vast majority of that time is spent simply generating an updated list of current and former class members." *Id.* And in Mr. Hoefer's declaration, he admits that – with the updated list – it would take just *one day* for USCIS to identify any class members who naturalized. Dkt. 118-1 at ¶ 8. Indeed, Mr. Hoefer acknowledges that

once USCIS has the updated class member list in hand, *it would take USCIS no appreciable time or effort to answer the Court's questions:*

> Once a list of current or former class members has been generated in consultation with DoD, adding specific data fields to a report does not add a significant amount of time to overall reporting as long as that data field is included in [the USCIS "CLAIMS 4" database.]

Id. at ¶¶ 9-10 (also confirming that the "CLAIMS 4" database contains the naturalization information that the Court's Minute Order identified).

There are two fundamental problems with Defendants' explanation. First, Defendants' time estimates are premised on the remarkable claim that USCIS *does not – to this day – have a list of the MAVNI soldiers* and, instead, must, on each occasion, rely on DoD to identify the MAVNI soldiers from USCIS's list of all military naturalization applications. *Id.* ("USCIS has to provide this list to DoD to identify which individuals meet the aspects of the *Nio* class definition that are within DoD's sole knowledge, such as the program under which they were recruited."). This assertion is incredible given that the July 7, 2017 USCIS Policy that is central to the allegations in this case applies to *MAVNI* soldiers with pending naturalization applications. If USCIS does not know which applications are from MAVNI soldiers more than eight months *after* instituting this Policy (and over a year after instituting its prior MAVNI-specific hold policies), how can it possibly be applying that Policy or, at a minimum, applying it rationally?

Second, and highly relevant for present purposes, Defendants' explanation demonstrates the irrationality of Defendants' approach to the Court's four questions. The bulk of the 3.5-week period presumes that USCIS – for each report – must (a) compile a list of *all* military naturalization cases, (b) send that list to DoD so that DoD can identify those who are MAVNIs, and then (c) have DoD send the list back to USCIS to check the status of the class member applications and issue the report.

This makes no sense. As Plaintiffs detailed in their earlier Response, Dkt. 112 at 7, Defendants *already* have a database with the names of all MAVNIs. A DoD declarant in this case (and in the related *Kirwa* case) – Captain Alicia Glanz – has testified to the Court on two previous occasions as to the existence of the database[1] and she has demonstrated – by doing so herself – the ability to generate the list (and populate it with additional data) in less than two days. *Id.* at 10.[2] Beyond that, this list already has been generated, multiple times for multiple purposes – for internal DoD purposes, for reporting to the Court in *Kirwa* and *Nio*, and for the class member lists that were ordered in both *Kirwa* and *Nio*.[3] As such, rather than proceed in the convoluted manner in which Defendants say they would approach the reporting going forward, there is a far easier and more direct path: (1) *start* with the finite MAVNI list of approximately 2,500 soldiers,[4] and (2) have USCIS cross-check the list against the naturalization cases – a one day process according to Mr. Hoefer – and generate the updated report on the status of those applications.

Plaintiffs spelled all of this out in their recent Response. Notably, Defendants' current submission makes no reference to Plaintiffs' submission. They neither dispute Plaintiffs' contentions nor do they offer any explanation from Captain Glanz or others as to why they cannot use the existing MAVNI list to avoid the multi-week effort they now claim they would have to undertake. As Plaintiffs noted earlier, Defendants' indirect and circuitous approach is out of step

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1 Capt. Glanz testified that she is responsible for maintaining "a security information portal" for MAVNIs that is shared by the Army and DoD. Dkt. 93-4 at ¶ 2.

2 In her declaration in the *Kirwa* case, Capt. Glanz testified that her "duties including maintaining a roster that accounts for the assignment and duty status of all individuals enlisted under the MAVNI program." *Kirwa* Dkt. 13-1 at ¶ 1.

3 With this statement, Plaintiffs are not suggesting that certain class list omissions need not be corrected, including the omission of non-DTP class members (see Dkt. 112 at 8), but in large part, the list has been generated.

with this Court's directive that Defendants' estimate assume that Defendants will work in an efficient manner to compile and report on the class: "When identifying the amount of time needed, Defendants shall presume that its employees are working expeditiously to gather and report the requested information." Feb. 20 Order.

B. DoD's Two-Week Estimate to Provide the Class Members' Enlistment Dates and MSSD Determination Dates Is Irrational

Defendants also claim that it would take DoD two weeks – for each reporting cycle – just to identify class member enlistment dates and MSSD dates. Dkt. 118 at 2 (noting that this two-week period would be coterminous with the USCIS effort and therefore would not add to the overall 3.5 week estimate). However, Defendants fail to acknowledge that they already have the enlistment date for each member of the class (and do not need to re-generate that date for each report as the date does not change).[5] Plaintiffs emphasized this very point in their earlier Response. Dkt. 112 at 8. Defendants simply and inexcusably refuse to acknowledge this fact.

The same is true with respect to the MSSD determination date. As Plaintiffs pointed out in their recent submission (Dkt. 112 at 12-15), this, too, is tracked in the DoD database, is readily

[4] It is particularly odd for Defendants to again suggest recreating the wheel each time, when in the *Kirwa* case, they proposed "consolidating the reporting in *Kirwa* and *Nio* so that all reporting information for both cases is contained in one report" and they supported their proposal with the assertion that "[c]onsolidation of the reports in the two cases is further warranted given that *Kirwa* class members become *Nio* class members once they receive a certified N-426 and submit an N-400 application for naturalization to USCIS." *Kirwa* Dkt. 71 at 6-7. With consolidated reporting, the entire list of current and future *Nio* class members will have to be provided by DoD, so why would USCIS ignore that list each time and instead start from scratch? And, what efficiency would be gained from the consolidated reporting, which DoD promoted in the *Kirwa* joint proposal, if that list is not used as the starting point?

[5] As Plaintiffs have noted and Defendants do not dispute, the "enlistment date" for class members only has to be collected (and has been collected) once. Enlistment dates obviously do not change. And, since DoD halted any new MAVNI enlistments since 2016, there is no prospect that the class members here will expand beyond the *Kirwa* and *Nio* classes.

retrievable, and cannot be a burdensome task (particularly given the relatively few determinations completed every two weeks by DoD and DoD's pre-existing obligation to promptly report the same to USCIS). Defendants simply ignore these facts, without refuting any of them. As such, DoD's "two week" estimate cannot be reconciled with the facts and record.

Moreover, Defendants now claim that DoD does not actually "refer cases to USCIS, but instead uploads information pertaining to the MSSD to a shared online portal once that decision has been made." Dkt. 118 at 2, n.1. As a preliminary matter, this description confirms (again) that the information is tracked electronically and thus is readily available to Defendants.

As for the type of MSSD "information" that DoD makes available to USCIS, Defendants do not say, but Plaintiffs understand that it is in the form of a DoD memo confirming that the soldier has been deemed militarily suitable and the effective date of that suitability determination. *See* Exhibit 1 (copy of Army Memo provided to USCIS re Plaintiff Shu Cheng, reflecting MSSD effective date of January 22, 2018). As such, it would be important for Defendants to report *both* (1) the date DoD makes the MSSD determination (*i.e*., the effective date), which matches the date reported by Defendants within their February 28 report,[6] and (2) the date that determination is uploaded and made available to USCIS via the shared portal. Plaintiffs are concerned that DoD does not in fact promptly upload the information to USCIS "once"[7] the internal decision is made, creating additional delays in the naturalization adjudication process. *See* Dkt. 119 (Memo) at 5 (stating "Defendants have admitted that DoD waits weeks after it informs recruiters that a soldier's

[6] *See* Dkt. 109-1; *see also* Exhibit 2 (partially unredacted page from Dkt. 109-1 showing Plaintiff Shu Cheng's January 22, 2018 MSSD completion date).

[7] *See* Dkt. 118 at 2 n.1 (Defendants use the term "once"); Dkt. 112 at 14-15 n. 4 (description of gap between (a) DoD's determination and use of the MSSD for basic training planning and other purposes and (b) DoD's notification to USCIS with respect to Plaintiff Cheng).

background checks are complete before 'officially' or 'formally' notifying USCIS of this same fact" and providing examples and exhibits regarding the same.).[8] As such, it is important that both dates be captured absent some assurance that Defendants will remediate the delays caused to date by this gap and that going forward there will be no gap between the date of the MSSD and the date that determination is shared with USCIS (such that USCIS will finish its adjudication of the naturalization case).

FREQUENT REPORTING IS ESSENTIAL TO GUARD AGAINST FURTHER HARM TO CLASS MEMBERS

Although the Court's Minute Order did not request it, Defendants argued in their submission that their reporting to the Court should be on a *120-day cycle* which, in their view, would be an "appropriate balance" between demonstrating "progress" and ensuring that Defendants attend to other "agency" matters. Dkt. 118 at 3. These gratuitous assertions compel a response.

Defendants continue to act as if the Court-ordered reporting in this case is an unwarranted burden on them and that its purpose is only to show "demonstrable progress toward adjudicating class members' naturalization applications." But Defendants' premises are wrong. Any administrative inconvenience to Defendants pales by comparison to the tremendous (and proven) harm to the U.S. soldiers who comprise the class in this case. Almost all of these soldiers enlisted in the Army over two years ago and all were promised an "expedited" path to naturalization. Every additional day without U.S. citizenship harms them immensely, leaves them in immigration limbo, and is contrary to law.

[8] Exhibit 1 attached hereto illustrates the same point. While Plaintiff Cheng's MSSD was complete and effective January 22, 2018, DoD did not issue and provide the memo to USCIS until sometime in March 2018, even though DoD used that MSSD for its own purposes during that gap period (*see* Dkt. 112 at 14-15 n. 4).

At every juncture in this litigation, Defendants have sought to justify their delays, positing one excuse after another and almost always promising to the Court that final naturalization application adjudications for these soldiers is just around the corner if only Plaintiffs would be patient. Yet, the regular reporting has shown the opposite. Since June 2017, Judge Huvelle required weekly or bi-weekly reporting on the individually-named Plaintiffs. More recently, Judge Huvelle extended aspects of that reporting to the class. The reality is that, as of Defendants' February 28, 2018 reporting, Defendants had naturalized only 23 class members – less than 1% of the eligible soldiers. And most of those class members were naturalized in January 2018, only after Plaintiffs brought issues to the Court's attention and Defendants felt compelled to act.[9]

Hence, regular reporting has been essential to effectively monitor (and where necessary challenge) the naturalization adjudication process for class members and to mitigate the ongoing harm to these soldiers. Reporting on a 120-day cycle for members of the class – particularly where there is no reliable record of a reporting burden –certainly would add to the delays and harm experienced by class members, who prior to the Defendants' imposition of unlawful policies affecting their naturalization applications would have been naturalized (from application date to oath ceremony date) in less time than the amount of time Defendants now want to give themselves just to report on these soldiers' progression through the process.

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.

[9] As noted in Plaintiffs' prior response, without the class-wide reporting ordered by Judge Huvelle, neither Plaintiffs nor the Court would have learned that DoD stopped conducting CAF Adjudications between mid-October 2017 and mid-January 2018. Dkt. 112 at 2, 9-10.

March 22, 2018

Respectfully submitted,

/s/ Joseph L. LoBue

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Counsel for Plaintiffs and the Certified Class

Exhibit 1

DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF G-1
300 ARMY PENTAGON
WASHINGTON DC 20310-0300

DAPE-MPA 1 March 2018

MEMORANDUM FOR Commander, U.S. Army Recruiting Command, 1307 Third Avenue, Fort Knox, KY 40121

SUBJECT: Favorable Military Service Suitability Determination for Specialist (SPC) Cheng, Shu (2331)

1. References:

a. Memorandum, Acting Assistant Secretary of the Army, (Manpower and Reserve Affairs), 27 October 2017, subject: Military Accessions Vital to the National Interest (MAVNI) Pilot Program Military Service Suitability Review and Determination (MSSD).

b. Memorandum, Deputy Chief of Staff, G-1, 2 November 2017, subject: Delegation of Authority to Make a Military Service Suitability Review and Determination (MSSD).

c. Department of Defense Instruction 1304.26 (Qualification Standards for Enlistment, Appointment, and Induction) 23 March 2015, Change 2, *11 April 2017*.

2. Pursuant to the authority delegated in reference 1.a., the Chief, Accessions Division, Office of the Deputy Chief of Staff, G-1, I find that SPC Cheng is suitable for military service effective 22 January 2018. The Army and Department of Defense (DoD) were able to determine with a reasonable degree of certainty that SPC Cheng is not under investigation, is not pending adjudication of derogatory information by the DoD Consolidation Adjudications Facility (CAF), and meets all accession qualifications and eligibility requirements of reference 1.c.

3. This MSSD satisfies the DoD requirement that non-citizen Soldiers receive a MSSD pending a final favorable National Security Determination.

4. A copy of this memorandum will be provided to the Soldier and will also be placed in the individual's Army Military Human Resource Record.

FOR THE DEPUTY CHIEF OF STAFF, G-1:

PAUL L. ASWELL
Chief, Accessions Division

Exhibit 2

[redacted]	1/19/2018
	2/14/2018
	9/27/2017
	9/15/2017
	2/23/2018
	1/13/2018
	2/14/2018
CHENG SHU	1/22/2018
[redacted]	9/22/2017
	1/13/2018
	9/11/2017
	9/15/2017
	9/27/2017
	10/11/2017
	2/2/2018
	2/5/2018
	1/17/2018
	2/7/2018
	2/14/2018
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	1/26/2018
	9/29/2017
	2/6/2018
	1/24/2018