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' MOTION TO STRIKE PORTIONS OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (DKT. 219)

Plaintiffs Haendel Crist Calisto Alves de Almeida, Prashanth Batchu, Lucas Calixto, Shu Cheng, Seung Joo Hong, Wanjing Li, Ye Liu, Kusuma Nio, Jae Seong Park, and Emeka Udeigwe (collectively, "Plaintiffs"), for themselves and the Class, by and through undersigned counsel, respectfully move this Court to strike portions of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross Motion for Summary Judgment in Favor of Defendants ("Cross Motion") (Dkt. 219).

As set forth in the accompanying Memorandum of Points and Authorities, the Cross Motion does not conform to applicable rules and this Court's orders concerning the current partial summary judgment briefing. The Cross Motion (a) inappropriately cites to materials outside of the administrative record and those additional materials allowed by this Court, (b) incorporates by reference all or portions of previous defense motions, from this case and another case, thereby circumventing page limits and introducing additional material outside of the administrative record, and (c) misstates administrative record "facts." Plaintiffs submit that

the appropriate remedy is for the Court to strike those portions of Defendants' Opposition and Cross-Motion, including related arguments.

For the reasons set forth in the accompanying Memorandum of Points and Authorities, Plaintiffs respectfully request that the Court grant Plaintiffs' motion.

Dated: December 21, 2018

Respectfully submitted,

/s/ Douglas W. Baruch

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v.	)	**Case No. 1:17-cv-00998-ESH-RMM**
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PORTIONS OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (DKT. 219)

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On November 8, 2018, this Court granted Plaintiffs' motion to strike Defendants' original cross-motion for summary judgment and ordered Defendants to re-file their pleading with a conforming statement of facts and "with references to the USCIS administrative record." Dkt. 215 at 1-2. The Court subsequently amended its Order, permitting Defendants to reference certain, limited documents outside of the administrative record, but only "if necessary to rebut plaintiffs' arguments." Dkt. 217 at 1.

Despite these Orders, and extensive conferences with the Court leading up to these Orders, Defendants' re-filed pleading (Dkt. 219) (the "Cross Motion") continues to be non-conforming. Although the Cross Motion now includes a separate "Statement of Facts" section, the Cross Motion as a whole (a) continues to cite non-Record documents or otherwise unauthorized material, (b) continues to incorporate by reference previous defense briefs, thereby circumventing page limits and introducing – via such incorporation – even more non-Record and unauthorized material, and (c) includes purported factual statements – with citations to the USCIS CAR or other approved materials – that are unsupported by the underlying documents. For these reasons, the Court should strike portions of the Cross-Motion as specified below.

I. APPLICABLE LEGAL STANDARDS

As Plaintiffs detailed in their motion to strike Defendant's original cross-motion (Dkt. 204) and accompanying reply (Dkt. 211), where judicial review of a cause of action is limited to an administrative record, "motions for summary judgment and oppositions thereto shall include a statement of facts with references to the administrative record." L. Civ. R. 7(h)(2). And if a party inappropriately treads outside of that administrative record (or any Court-approved extra-administrative record material), the appropriate sanction is to strike. *See Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 49 (D.D.C. 2009) (Huvelle, J.) (granting motion to strike due to reliance on a document outside the administrative record). This is so because "LCvR 7(h)(2) 'recognizes that

in cases where review is based on an administrative record the court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action ***against the administrative record***.'" *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 92 (D.D.C. 2008) (emphasis added) (quoting comment to Local Civil Rule 7(h)). *See also Coe v. McHugh*, 968 F. Supp. 2d 237, 239 (D.D.C. 2013) ("[T]he function of the district court is to determine whether or not as a matter of law ***the evidence in the administrative record*** permitted the agency to make the decision it did." (emphasis added) (quotations and citations omitted)); *Bloch v. Powell*, 227 F. Supp. 2d 25, 30-31 (D.D.C. 2002) ("Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision ***when review is based upon the administrative record***." (emphasis added) (quoting *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995))).

Testing the agency action – namely, the USCIS MSSD Policy for present purposes – against the Administrative Record becomes an impossible task for the Court and prejudices Plaintiffs where Defendants persist in relying on material outside of that Administrative Record, even after they repeatedly have confirmed its completeness and have eschewed opportunities to present grounds for supplementation. Indeed, this Court recently reminded Defendants that the content of the Administrative Record was a product of their decision-making and they could not now circumvent the rules and standards of review:

> So the government has caused an enormous amount of headaches here. One, you didn't file a proper statement of facts based on the administrative record. Administrative record by your choice is very limited. It's very small. All the fighting over it was at the urging of the plaintiffs which produced several orders by the Court to expand the record or put things in appendices. But how can you now use these affidavits?

Nov. 7, 2018 Tr. 8:13-22.

II. THE COURT SHOULD GRANT THE REQUESTED RELIEF

Defendants have continued to violate Local Rule 7(h)(2) in defense of their MSSD Policy. These tactics are improper. The fact that the agency's certified administrative record does not reference any consideration for the MSSD Policy does not give Defendants license to slip in a short Statement of Facts (that never mentions MSSDs) but then dump in and resort to extra-record evidence in the remainder of their Cross Motion to try and defend their position.

A. Defendants Continue to Rely on Extra-Administrative Record Evidence

In granting in part Plaintiffs' original motion to strike, the Court ordered that "Defendants may not cite the March 22, 2018 Renaud declaration (ECF No. 128-1), the July 28, 2017 Miller declaration (ECF No. 25-2), or documents from the DoD administrative record (*see* ECF No. 81) to explain the USCIS July 7 Policy." Dkt. 215 at 2. At a subsequent hearing, the Court clarified that Defendants could cite to the July 28, 2017 Miller Declaration (Dkt. 25-2) because it reflected "process that they envision as being part and parcel of this policy," but reiterated that Defendants could not cite to the March 22, 2018 Renaud Declaration (Dkt. 128-1) because it was a "litigation" document and nothing more than hearsay. Nov. 14, 2018 Tr. 59:24-60:1, 60:6-10.

But the Court made clear that Defendants could only cite to certain documents outside the USCIS Administrative Record in order "to rebut the plaintiff's arguments wherever the plaintiff goes beyond July 7," such as by showing that factors not considered did not occur and thus were not truly at issue. *Id.* at 75:9-11, 82:11-83:22. *See also* Dkt. 217 at 1 ("[D]efendants may cite the July 28, 2017 Miller declaration (ECF No. 25-2) and documents from the DoD administrative record (*see* ECF No. 81) ***if necessary to rebut plaintiffs' arguments***. Defendants also may cite any portion of the July 7, 2018 Miller declaration (ECF No. 19-7) ***if necessary to rebut plaintiffs' arguments***." (emphasis added)).

In other words, extra-administrative record evidence cannot supply a rationale for the challenged policy. This is precisely what this Court explained to Defendants at the November 7, 2018 hearing: "You know, if they say, well, you're not processing people for naturalization, obviously you're going to be able to respond to recent data if they make that kind of accusation. ***But in terms of justifying what you did on July 7th, you're limited to the administrative record***." Nov. 7, 2018 Tr. 37:10-14 (emphasis added).

Yet, in their Cross Motion, Defendants rely on evidence outside of the USCIS Administrative Record for purposes beyond what the Court authorized. Indeed, Defendants pronounce as much at the outset of their Cross Motion, proclaiming that it is based "on USCIS's and DoD's respective Certified Administrative Records."[1] Cross Motion at 3. Defendants' Cross Motion then sets forth six-and-a-half pages of "Background," replete with non-rebuttal references to the DoD Administrative Record and the July 7, 2017 Miller Declaration (Dkt. 19-7), before inserting their two-page "Statement of Facts." Defendants even cite to documents which they have admitted to this Court "were not materials that [the USCIS official] had read or considered" and thus "are not properly part of the administrative record for the USCIS action" (Apr. 11, 2018 Tr. 142:19-23 (referring to, *inter alia*, the August 17, 2010 Memo)). *See, e.g.*, Cross Motion at 8 (citing "DoD CAR" at 0138-0143, the August 17, 2010 Memo).

Elsewhere, Defendants cite to a "recent criminal complaint" to "further illustrate[] the security concerns that prompted the July 7 Guidance," while at the same time admitting that the complaint is "not part of the administrative record." Cross Motion at 22 n.12. Nor could this document be a part of the Record since it post-dates the July 7 Policy by more than one year.

[1] Moreover, Plaintiffs have never had the opportunity or reason to challenge and/or supplement the DoD Administrative Record for the October 13, 2017 DoD Policy.

As another example, Defendants abuse their license to cite to the July 7, 2017 Miller Declaration. Whereas the Court authorized Defendants to cite to it if necessary to rebut Plaintiffs' "failed-to-consider" arguments, Defendants use it for another purpose, namely as an alternate rationale for the USCIS Policy. Cross Motion at 29 (citing Dkt. 19-7 ¶ 14) (citing ***DoD employee*** Miller for the proposition that "it is also reasonable for USCIS to await the results of an MSSD"). Notably, Defendants' Cross Motion contains no USCIS Administrative Record evidence demonstrating that USCIS – as opposed to a DoD witness – held this view.

Further, Defendants try to avoid one of the factors they failed to consider – the DoD "time-out" policy – not by citing to anything in the Administrative Record showing it was considered or by providing post-Policy rebuttal data about the lack of time-out discharges, but by citing to various documents that post-date the July 7 Policy and reflect nothing more than litigation damage control by Defendants. *See* Cross Motion at 33-34 (citing Dkt. 157 (06/15/18 filing), Dkt. 26 (07/27/17 Memo)).

Because "[t]he court is not empowered to substitute its judgement for that of the agency," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), it would be improper for the Court to consider extra-record evidence solely with an eye toward propping up an agency action lacking "substantive soundness." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (stating "the familiar rule that judicial review of agency action is normally to be confined to the administrative record ... exerts its maximum force when the substantive soundness of the agency's decision is under scrutiny"). In other words, any "'new materials should be merely explanatory of the original record and should contain no new rationalizations' for the agency decision." *Pettiford v. Sec'y of the Navy*, No. 05-2082 (ESH), 2008 U.S. Dist. LEXIS 20140, at *2 (D.D.C. Mar. 17, 2008) (Huvelle, J.) (quoting

Envtl. Defense Fund v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981)). *See also Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 476, 510 n.24 (9th Cir. 2018) (explaining that new memorandum issued after the policy in question "cannot possibly be a part of the administrative record in this case" and "to the extent the [] memorandum is offered as an additional justification … we do not consider it in our review of [the agency] decision because it is well-settled that 'we will not allow the agency to supply post-hoc rationalizations for its actions'" (quoting *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014))). The problem here, of course, is that Defendants, through their extra-Administrative Record citations, inappropriately proffer new rationalizations. All citations to and arguments based on these extra-Administrative Record citations therefore should be stricken.

B. Defendants Incorporate Other Briefing "by Reference," Violating Page Limitations and Going Further Outside the Administrative Record

In another repeat of their past practice, Defendants import extra-Administrative Record material by incorporating prior government briefs that were not themselves cabined to the evidence contained in the Administrative Record. This incorporation-by-reference also circumvents the page limits established by the Court, adding hundreds of additional pages to this round of briefing, as the following examples illustrate:

- "As Defendants have explained to the Court in prior filings …." Cross Motion at 33-34 (citing two pages of briefing and an exhibit in Dkts. 157, 26).
- "Defendants also hereby renew their Motion to Dismiss and incorporate those arguments by reference rather than repeat them here." Cross Motion at 3 (citing 68 pages of briefing in Dkts. 49, 80).[2]

[2] This Court previously denied Defendants' motions to dismiss because they were not based on the Administrative Record. *See* Dkt. 98 (denying Motion to Dismiss (Dkt. 80) without prejudice and ordering Defendants to comply with Local Civil Rule 7(h)(2)); Jan. 23, 2018 Tr. 70:9-12, 75:8-11 ("And you keep filing motions to dismiss under 12(b)6. And I can't figure out what the record is. You have to file under the local rules, a statement of facts that are supported by the record. …

- "Defendants also incorporate by reference the Statutory and Regulatory Backgrounds of the naturalization process, 8 U.S.C. § 1440, and the MAVNI Program, as set forth in Defendants' Opposition to Plaintiffs' preliminary injunction motion." Cross Motion at 4 n.3 (citing 85 pages of briefing and 66 pages of exhibits in Dkts. 19, 31).

- "Defendants incorporate the arguments in *Kirwa* …." Cross Motion at 46 n.23 (citing arguments spanning three pages of briefing in *Kirwa* Dkt. 72).

By these means, Defendants overshoot the Court's page limits. *See* Dkt. 159 at 1; *see also* *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) (declining to permit incorporation of arguments presented to the district court, as this would circumvent the court's rules on the briefing length). More significantly, if this incorporation is permitted, it would result in the inclusion of multiple exhibits (and argument based on exhibits) that fall outside the Administrative Record or other authorized material. These pleading tactics violate the Court's Order and the Local Rules and prejudice Plaintiffs in multiple ways, including by making it unclear to Plaintiffs (and presumably the Court) which arguments and evidence within those incorporated briefs Defendants are now relying on to seek or stave off summary judgment. *See, e.g.*, Cross Motion at 2 (claiming that something is "explained in Defendants' prior filings" without reference to the Administrative Record or to a filing name or docket entry number).

Courts rightly reject this style of briefing. *See Robertson v. Am. Airlines*, 239 F. Supp. 2d 5, 8 (D.D.C. 2002) ("Past decisions emphasize that the movant's statement must specify the material facts and direct the court and the non-movant to those parts of the record which the movant believes support the statement. Merely incorporating entire affidavits and other materials without reference to the particular facts recited therein is not sufficient." (citation omitted)). Therefore,

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So I am going to deny the motion to dismiss that is pending at the moment without prejudice. I am going to give you the opportunity and the time to file a proper administrative record ….").

this Court should strike all incorporation by reference of prior briefing and exhibits and any of Defendants' arguments based on that incorporation.

C. Defendants Rely on Facts that are Not Supported by the Citations

Defendants acknowledge that, in accordance with this Court's November 8, 2018 Order, their Statement of Facts must be "limited to those facts reflected in the administrative record for the July 7 Guidance," Cross Motion at 10 n.7, but they fail to abide by that standard. Further, Defendants fail to cite to their Statement of Facts in their "Argument" section. Instead, not only is there a complete disconnect between the Statement of Facts and the Argument sections of the Cross Motion, but many "facts" used in the Argument section of the Cross Motion suffer from the same problem – the supposed "fact" is not accurate/supported by the citation material. Since the administrative record and other approved documents are the facts in an APA "arbitrary and capricious" review, there is no room for error. Yet, Defendants' Cross Motion is replete with material misstatements of what the underlying document actually states, as evidenced by the following examples:

- Defendants cite to the July 7, 2017 Miller Declaration (Dkt. 19-7) and the April 3, 2018 Arendt Declaration (Dkt. 154-6) for the proposition that "[t]he CAF then renders an MSSD recommendation and forwards that recommendation to whichever Service the recruit is seeking to join." Cross Motion at 9. But neither declaration says this. In fact, every class member already is an enlisted, serving U.S. soldier. They are not "seeking to join" the military.

- The July 7, 2017 Memo (AR 4) refers to the end on all holds but, contrary to Defendants' factual assertion (Cross Motion at 12), does not mention "broadening existing background check resources" or "8 C.F.R. § 335.1."

- Defendants maintain that "MAVNI recruits … had violent behavior and court-imposed protective orders issued against them," Cross Motion at 19 (citing AR 18). Yet, the administrative record refers only to ***one*** recruit with ***one*** protective order against her. AR 18.

- The Administrative Record refers to suspicions or allegations, not convictions, and does not reveal that "certain MAVNI recruits ***were involved*** in international money laundering" or "***were engaged in*** visa fraud," Cross Motion at 19; *see also id.* at 23.

- Defendants assert as fact that "DoD regards the MSSD as the conclusion of its background check process," Cross Motion at 26 (citing Dkt. 154-6 (April 3, 2018 Arendt Declaration)). But the Arendt Declaration never says that DoD considers the MSSD in this manner. *See* Dkt. 154-6 ¶ 3 (stating simply that "[o]nce the Military Service completes its suitability determination, the result is shared with USCIS").

- The Administrative Record does not "contain several emails that DoD sent to USCIS in early 2017, which include information collected as part of the DoD background check process," Cross Motion at 27. *See also id.* at 33. Instead, most of this information was not collected as part of the DoD background check process and instead arose out of unrelated DCIS and Army CID criminal investigations. Even more importantly, not a single document in the Administrative Record is a document generated during the MSSR/NSD or MSSD ***adjudications*** process for MAVNIs.

- To the extent Defendants argue that the "DoD background check process" includes the MSSD or is not "complete" until an MSSD is issued, then Defendants cannot support their statement that, "[a]s of late November, the July 7 Guidance has resulted in the naturalization of over 850 MAVNI recruits, all of whom were vetted through the DoD background check process," Cross Motion at 30 (citing Dkt. 212). Defendants' December 13, 2018 Report shows 19 entries for naturalized individuals where the MSSD is nevertheless listed as blank or "pending." Dkt. 224-2.

Indeed, perhaps most egregious is Defendants' assertion that the administrative record shows that "[u]nder the July 7 Guidance, USCIS deems the MSSD to be the conclusion of the DoD background check process," Cross Motion at 26 (citing AR 5). The Administrative Record says no such thing. As Defendants well know, AR 5 refers to "enhanced DoD security checks," not MSSDs.[3] This was the gaping hole in the Administrative Record that the Court already identified: "[Defendants'] argument is, I think, that [the MSSD] was always part and parcel of what was anticipated, … So, if it were -- if the first time you learned about [the MSSD] was, you know, months after the July 7 policy, that's not particularly helpful. It doesn't tell me anything. It doesn't illuminate what was the goal of USCIS [o]n July 7th." Nov. 7, 2018 Tr. 14:1-10.

[3] Likewise, Defendants cite to AR 5 for the assertion that "[t]he CAF recommendation is based on many factors which plainly overlap with the good moral character and attachment to the U.S. Constitution naturalization requirements referenced in the July 7 Guidance." Cross Motion at 27-28. But the administrative record makes no mention of the DoD CAF or the factors used by DoD CAF or the Army.

In its prior filing, Defendants attempted to avoid this lack of an MSSD reference in the July 7 Policy by relying on the March 22, 2018 Renaud Declaration, *see* Nov. 7, 2018 Tr. 18:1-3, but the Court foreclosed any use of the post hoc litigation rationalizations in the Renaud Declaration. *See* Dkt. 217 at 1 ("Defendants may not cite the March 22, 2018 Renaud declaration (ECF No. 128-1) to explain the USCIS July 7 Policy."). Deprived of the Renaud Declaration, Defendants' Cross Motion misstates the actual content of the Administrative Record by repeatedly citing to AR 5 when AR 5 nowhere mentions the MSSD. *See, e.g.*, Cross Motion at 35 ("The July 7 Guidance … simply provides that USCIS will wait to adjudicate MAVNI naturalization applicants *under pre-existing* standards until DoD background checks, including the MSSD, are complete." (emphasis in original) (citing "USCIS CAR at 5")); Cross Motion at 20-21 ("[T]he record reflects that USCIS awaits conclusion of the DoD background check process – including the MSSD …. (citing "USCIS CAR at 5")).

Defendants attempt to skirt around this point by asserting that "the term 'MSSD' did not exist at the time the [July 7] Guidance was written" but that the military suitability determination referenced in the September 2016 Memo "has since become known as an MSSD," Cross Motion at 26 (citing Dkt. 154-6 (April 3, 2018 Arendt Declaration)).[4] This assertion is false. By way of example, Plaintiffs' Appendix of approved documents includes documents from FY2016 and FY2017 that refer to the "MSSD." *See* PA 155-157.

On an administrative record review, the facts are not supposed to be in dispute because they are to be based on the administrative record. Here, the Court cannot review the "facts" as

[4] Defendants made this same misstatement during the November 7, 2018 hearing. *See* Nov. 7, 2018 Tr. 11:2-9 (assertion by Defendants' counsel that "the process was a bit in flux in terms of the [naming] convention, though. I think the phrase 'MSSD' is a phrase that kind of fell into place right around the time of the July 7th guidance, and then, and even or it may be just after it. …. It's just that we didn't necessarily have this term 'MSSD' at the time.").

articulated by Defendants because they do not match up with the Administrative Record or the other documents the Court approved for use.

For these reasons, Plaintiffs object to the referenced portions of Defendants' submission that use unsupported or inappropriate "facts," and Plaintiffs request that the Court strike such material.

Respectfully submitted,

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