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' NOTICE AND PROPOSAL REGARDING IMPLEMENTATION OF THE COURT'S MEMORANDUM OPINION (DKT. 249)

Pursuant to the Court's May 22, 2019 Order (Dkt. 250), Plaintiffs respectfully submit their position regarding the implementation of the Court's Memorandum Opinion (Dkt. 249) and the disposition of the claims remaining in this case.[1]

Plaintiffs' Implementation Proposal

In formulating a plan for implementing the Court's Order, context is critical. In July 2017, USCIS established a policy to suspend the adjudication of MAVNI naturalization applications pending completion of enhanced DoD background checks purportedly because such checks might reveal adverse information that USCIS would consider relevant to the naturalization determination. Now, nearly two years later, USCIS admits that it never has had, and still does not have, any agreement in place with DoD that would allow USCIS to access – let alone utilize – the background check information that formed the justification for its original

[1] In accordance with the Order, Plaintiffs' counsel met and conferred with Defendants' counsel and exchanged emails in attempts to reach a joint proposal to present to the Court. Those efforts did not result in an agreed proposal by the deadline for this submission.

policy. For every soldier in the Class, nearly 18 months has been wasted.[2] For many in the class, the delay has well exceeded that time frame. In the Memorandum Opinion, the Court made clear that the USCIS policy that has led to this delay was unlawful.

Given these circumstances, Plaintiffs' position with respect to implementation of the Court's Order is straightforward. Plaintiffs simply seek to ensure that USCIS adjudicates the remaining class members' naturalization applications without any further delays. Proper implementation of the Court's Order should involve specific goals and targets for completing the remaining adjudications in a timely manner and reporting mechanisms that will permit the Court to monitor progress against such goals and targets. Plaintiffs do not seek to micromanage or dictate the manner in which USCIS meets these reasonable goals and targets. Instead, Plaintiffs view their role at this juncture as offering assistance and ensuring that Defendants move with all deliberate speed to towards naturalization interviews and decisions, and has made multiple suggestions to Defendants in this regard.

As set forth below, if Defendants devote appropriate resources, avoid cumbersome new policies and practices, and process these applications in the normal course for military applicants, Plaintiffs believe that it is reasonable to expect USCIS to process the vast majority of the remaining applications – including the naturalization interviews and decisions (and, assuming approval, scheduling these class members for oath ceremonies) – within 60 days following the June 17, 2019 status hearing.

[2] As the Court is aware through Defendants' reporting and DoD testimony in the *Tiwari* case, DoD finished gathering the background information *no later than early 2018*. And, it should be noted that, although Defendants' reporting reflects that DoD continued to gather information concerning some class members past early 2018, these later dates merely reflect the DoD's decision to "renew" some of the already-completed reports, such as the NIAC.

Defendants are proposing an opposite approach to implementation. It is our understanding that they propose to assign minimal resources to the process (one or two USCIS personnel) on a part-time basis (two to three times per week) to review the files at the DoD CAF and then, at some later point in time, set up a separate process to transmit any relevant information identified from these CAF visits to the local field office for naturalization adjudication. Defendants have not assessed or estimated how long it will take for USCIS to review the information or complete the process, nor have they otherwise committed to completing the process within any timeframe. Indeed, according to Defendants, the review process would not even begin until sometime in July at the earliest. Thus, Defendants' "plan" is open-ended, ill-defined, and unacceptable.

With appropriate resource allocation, commitment, and senior leadership, and proper adjustments along the way, there is no reason why USCIS cannot complete its review of the DoD background information well within the 60-day period Plaintiffs propose. Previously, USCIS completed the *entire* naturalization process, including FBI background check and the USCIS adjudication, within eight to twelve weeks. While it is possible that a few applications will require additional review time, those should be the exception, not the rule.

In all events, it is extremely unfair and prejudicial to now force class members to wait an undetermined amount of additional time while USCIS first negotiates an agreement to get access to the DoD information, and then devotes minimal resources to review the information that DoD has gathered.[3] In the absence of a deadline – and a USCIS requirement to report on its

[3] Plaintiffs also are concerned that Defendants will claim that the presence of "classified" information within the DoD background information is cause for further delays. Plaintiffs submit that this would not be a valid excuse. When USCIS instituted the MSSD Policy, it should have known and accounted for this possibility. Moreover, based on the MSSR Memos and CI

progress – Plaintiffs fear that Defendants simply will not allocate the resources to finish the job and that the result will be the practical equivalent of the MSSD Policy: USCIS will prolong the naturalization application process to the point where USCIS will again defer to DoD's standards and adjudications, by way of USCIS's policy concerning an "uncharacterized" discharge or through another DoD effort to "revoke" MAVNI N-426s.

Accordingly, Plaintiffs request that the Court direct Defendants to (a) complete class member naturalization adjudications as quickly as possible but no later than August 16, 2019 (60 days from the June 17 hearing) and (b) submit an interim progress report on July 17, 2019, specifying for each class member who was not identified as naturalized on Defendants' last six-week reporting: (i) the status of USCIS's review of the DoD information (pending or completed), (ii) the date the naturalization application was sent to the field office, (iii) the date of the naturalization interview (scheduled or completed), (iv) the naturalization decision (grant or denial), and (v) the date of the oath ceremony (scheduled or completed). For the few, if any, class members facing unique circumstances making it impossible for USCIS to complete their naturalization application adjudication within 60 days, on August 19, 2019, Defendants shall provide the Court and Plaintiffs' counsel an explanation of the unique, individualized circumstances and USCIS's efforts to move those cases forward, along with a report containing the same categories of information as the July 17 interim progress report for each class member.

Plaintiffs' Position Regarding Remaining Claims

Following the Court's partial summary judgment decision, a number of the claims and requests for relief identified in the Second Amended Class Action Complaint remain. *See* Dkt. 61 at 47-65. For example, Plaintiffs' claims under APA § 706(1) are unresolved, and the length

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Reports that Plaintiffs' counsel have seen, most class members will have little, if any, classified information in their files that will be relevant to naturalization eligibility.

of delay Class members already have faced, particularly under the MSSD Policy, and continue to face, as a result of additional delays imposed by implementation of USCIS's undefined process for reviewing DoD's collected background information, warrant relief from the Court.[4]

However, Plaintiffs are not proposing that the Court schedule any further proceedings on the remaining claims at this time because the claims should become substantially moot assuming Defendants' timely actions in accordance with the Court's partial summary judgment decision. Plaintiffs would prefer that the parties' and Court's resources not be directed to further proceedings but rather to "mooting" the claims through fair and timely naturalization adjudications for class members and then dealing with any ancillary issues that remain and closure of the case. If, however, Defendants fail to effectuate fair and timely naturalization adjudications for the Class, the Court should set a schedule for the provision of additional information or discovery and briefing on the remaining claims.

Dated: June 11, 2019

Respectfully submitted,

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[4] Although Plaintiffs' delay claim could be mooted through Defendants' compliance with the Court's partial summary judgment decision concerning the MSSD Policy, this claim is not dependent on the Court's finding that the MSSD Policy is arbitrary and capricious. Even if the July 7, 2017 Policy was not in violation of APA § 706(2), this Court still could find that it violates APA § 706(1).