

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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DR. KUSUMA NIO, *et al.*, )  
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 Plaintiffs, )  
 ) Civil Action No. 1:17-00998-ESH-RMM  
 v. )  
 )  
 UNITED STATES DEPARTMENT OF )  
 HOMELAND SECURITY, *et al.*, )  
 )  
 Defendants. )  
 )  
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**NOTICE OF FILING OF STATEMENT OF MATERIAL FACTS**

In compliance with Local Rule 7(h)(2), and this Court’s Order (ECF No. 124),  
Defendants provide notice of the filing of the “Statement of Material Facts.”

Dated: April 2, 2018

Respectfully Submitted

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ATTORNEYS FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

Civil Action No. 1:17-00998-ESH-RMM

I HEREBY CERTIFY that on this **2nd day of April, 2018**, a true copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing via e-mail to the following:

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**UNITED STATES DISTRICT COURT  
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	)	
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	)	
	)	

**DEFENDANTS’ STATEMENT OF MATERIAL FACTS**

This Administrative Procedure Act (“APA”) review case does not present any disputed issues of material fact because the Court’s review is limited to the Administrative Record (“AR”) on which the agency based its decision. *See* 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Under the APA narrow standard of review, which encourages courts to defer to an agency’s expertise, agency is required to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A); *see Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81 (D.D.C. 2014), *aff’d*, 816 F.3d 119 (D.C. Cir. 2016). In compliance with Local Rule 7(h)(2), and this Court’s Order (ECF No. 124), Defendants provide the following “Statement of Material Facts:”

**A. The USCIS's July 7, 2017, Guidance.**<sup>1</sup>

1. On September 30, 2016, the Department of Defense (“DoD”) issued a policy memorandum, “Military Accessions Vital to the National Interest Pilot Program Extension,” (“September 2016 Memo”) which required certain enhanced security checks for individuals in the MAVNI program. Excerpts from DoD Certified Administrative Record (“DoD CAR”), at 0125.
2. On October 4, 2016, United States Citizenship and Immigration Services (“USCIS”) headquarters Field Office Directorate (“FOD”) personnel transmitted the DoD September 2016 Memo to the Field. *See* ECF No. 19-6, July 1, 2017 Declaration of Daniel Renaud, ¶ 20.
3. In the September 2016 Memo, DoD instructed its components not to permit MAVNI recruits to ship to Basic Training or serve for any period of time on active duty before they satisfactorily complete all DoD security screening requirements. DoD CAR at 0125; Excerpts from USCIS’s Certified Administrative Record (“USCIS CAR”), at 7.
4. In early 2017, USCIS began noticing a new population of MAVNI recruits filing applications for naturalization: specifically MAVNI recruits who were drilling with the U.S. Army Reserve on a voluntary basis as part of the Delayed Training Program (“DTP”), in which the Army permitted them to take part while their background investigations were pending, but before they could attend Basic Training or serve in an

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<sup>1</sup> The relevant background is set out in detail in the Court’s prior opinions, *see* ECF Nos. 44, 72, 73. 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, ECF Nos. 19, 31, and as laid out by the Court in its Memorandum Opinion denying the preliminary injunction, ECF No. 44.

active-duty status under the terms of the September 2016 Memo. *See* ECF No. 19-6, ¶ 21.

5. Before the September 2016 Memo, USCIS had received few, if any, applications from MAVNI recruits who were drilling in the DTP. *See* ECF No. 19-6, ¶ 21; USCIS CAR at 7.
6. After the September 2016 Memo, this new population of MAVNI recruits filing applications for naturalization before they had entered Basic Training raised several concerns. First, USCIS questioned whether drilling *with* the Selected Reserve Ready Reserve (“SRRR”) constituted service “as a member of the SRRR,” as required for naturalization under Section 1440(a). *See* ECF No. 19-6, ¶¶ 21-22; USCIS CAR at 7.
7. Second, in light of the September 2016 Memo, USCIS questioned the validity of the Forms N-426 certifying honorable service, which were issued before DoD completed the necessary background checks determining that no derogatory information existed that would lead to the characterization of a recruit’s service as other than honorable. ECF No. 19-6, ¶ 22; USCIS CAR at 7.
8. Third, USCIS did not know whether many of the Forms N-426 it was receiving were actually signed by individuals authorized by the Army to certify honorable service. ECF No. 19-6, ¶ 22; USCIS CAR at 5.
9. These concerns led USCIS to institute a temporary national hold on affected naturalization applications. ECF No. 19-6, ¶ 23; ECF No. 23-1, Defendants’ Response to the Court’s July 14, 2017 Order, at 6; USCIS CAR at 7.
10. On or about February 28, 2017, USCIS headquarters FOD advised field offices and the National Benefits Center (“NBC”) to hold applications filed by MAVNI recruits who

were drilling in the SRRR and had no ship date for Basic Training, in anticipation of requesting and receiving guidance from DoD about the definition of “honorable service” as a “member of the SRRR” and about who in the Army was authorized to certify a recruit’s honorable service. ECF No. 19-6, ¶ 23; ECF No. 23-1, at 6; USCIS CAR at 7.

11. The “hold” was a moratorium on adjudicating applications to completion, but did not prevent USCIS from completing pre-processing and background checks. ECF No. 19-6, ¶ 23.

12. USCIS raised its concerns to DoD in approximately March 2017 and learned that DoD had not previously been aware that the Army was certifying service for this population of MAVNI recruits.<sup>2</sup> ECF No. 19- 6, ¶ 24.

13. USCIS understood that DoD might act to revoke some of the Forms N-426 that had been submitted and decided to temporarily hold affected naturalization applications until it determined whether these individuals were eligible to naturalize. ECF No. 19- 6, ¶ 24.

14. On or about April 13, 2017, USCIS headquarters FOD issued a written hold on affected naturalization applications. ECF No. 19- 6, ¶ 24; ECF No. 23-1, at 8-9; USCIS CAR at 5.

15. The email putting the hold in place stated that it referred to “all SRRR N-400 case work.” ECF No. 19-6, ¶ 25; ECF No. 23-1, at 8-9.

16. Later in April and May 2017, USCIS headquarters FOD narrowed the scope of the hold in response to questions from the field. ECF No. 19- 6, ¶ 24; ECF No. 23-1, at 11-14; USCIS CAR at 5.

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<sup>2</sup> It appears that this class is comprised of only Army soldiers, and not Navy sailors or Air Force airmen.

17. USCIS also became aware that there was a classified DoD Inspector General Report detailing some of the problems with certain MAVNI soldiers' backgrounds. USCIS CAR at 2-3, 7.<sup>3</sup>
18. USCIS was also in regular communication with DoD, and had become aware of instances in which individuals with derogatory information, that may have affected eligibility for naturalizations, were naturalized before DoD background checks had been completed. USCIS CAR, at 2; 11-13.
19. It was also made aware of derogatory information uncovered in cases of individuals who applied or could have applied for naturalization, and in which derogatory information uncovered may have affected naturalization eligibility. USCIS CAR at 2, 8-10, 14-232.
20. On July 7, 2017, USCIS headquarters FOD issued new written guidance to the Field, stating that USCIS had determined that the completion of the DoD background checks is relevant to a MAVNI recruit's eligibility for naturalization. USCIS CAR, at 4-6.
21. As such, USCIS directed the Field not to complete naturalization adjudications under the Immigration and Nationality Act ("INA") § 329(a), 8 U.S.C. § 1440(a), for MAVNI recruits, until after those checks have been completed. USCIS CAR at 4-6.
22. The new guidance affected all then-pending and future MAVNI naturalization applicants applying for naturalization under INA § 329(a), 8 U.S.C. § 1440(a). USCIS CAR at 4-6. Additionally, on July 27, 2017, USCIS's FOD further clarified that the July 7, 2017 guidance was intended to end all holds, while broadening existing background check

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<sup>3</sup> This classified report has been provided to the Court *ex parte in camera*, see ECF No. 44, at 20, 22.



resources under 8 C.F.R. § 335.1, to include DoD enhanced security checks for MAVNI applicants. USCIS CAR at 4.

**B. DoD's October 13, 2017, Policy.**

23. In response to security concerns, DoD has periodically strengthened the background investigation and suitability requirements for MAVNI enlistees. In February 2010, for instance, DoD noted its “concerns” that “personnel on active duty under [the MAVNI Program] did not undergo counterintelligence-focused screening as of their security vetting process...[which] creates unacceptable vulnerability that could have serious impact of the safety and security personnel, equipment, and operations.” DoD CAR at 0151.
24. Thus, in August of 2010, DoD established provisions designed to strengthen the MAVNI program and mitigate potential counterintelligence and security concerns, to include initiating a Single Scope Background Investigation (now called a Tier 5 investigation) and counterintelligence-focused security review for all MAVNI applicants. DOD CAR at 0138-0143.
25. In 2016, in light of serious national security concerns, DoD added new requirements, including a National Intelligence Agency Check (“NIAC”) and an issue-oriented interview and/or polygraph. DOD CAR at 0125-133.
26. A MAVNI enlistee who fails to satisfy one of these security screens may be subject to discharge from the Armed Forces under other than honorable circumstances. DOD CAR at 0125-133.
27. On October 13, 2017, DoD noted that although it “has taken direct actions to mitigate security risks to mission presented by the previous practices vetting Service Members

accessed under the [MAVNI] Pilot Program. . . . continued progress depends on consistent, sustained, and responsive approach.” DoD CAR at 0001.

28. Thus, on that same day, DoD issued a Memorandum for Secretaries of the Military Departments, titled “Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization.” DoD CAR at 0004-0007 (“October 13 Policy”).<sup>4</sup>

29. The October 13 Policy set forth new guidance for N-426 certification as applied to three discrete groups of nonresident soldiers: those without certifications who enlisted/accessed *on or after* October 13, 2017 (Section 1); those without certifications who enlisted/accessed *before* October 13, 2017 (Section 2); and those whose forms had already been certified (Section 3). DoD CAR at 0004-0007.

30. Only Section 3 of the new policy is at issue in this case, which permits the military to recall and de-certification any Form N-426, which had been previously certified before the service member completed all application screening and suitability requirements. DOD CAR at 0007.

31. This Court issued a preliminary injunction enjoining DoD from implementing section III on a class-wide basis, with certain exceptions. *See* ECF No. 74.

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<sup>4</sup> As noted in the Certification of the Index of the Administrative Record (ECF No. 81), the unclassified DoD CAR provided to Plaintiffs does not include the two classified documents that were considered by Mr. Kurta, prior to signing the October 13, 2017, memo, and which were provided to the Court for review in camera. *See* ECF No. 44, at 20.

Dated: April 2, 2018

Respectfully Submitted

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