

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFFS’ MEMORANDUM IN RESPONSE TO THE COURT’S
JUNE 17, 2018 MINUTE ORDER**

Pursuant to the Court’s July 17, 2018 Minute Order, Plaintiffs respectfully submit this memorandum addressing the three topics identified in the Order.

I. THE COMPLETENESS AND ACCURACY OF DEFENDANTS’ REPORTING WITH REGARDS TO OMITTED *NIO* CLASS MEMBERS

Defendants continue to provide the Court with inaccurate reports and summaries due to the Defendants’ failure to account for *Nio* class members. These omissions remain notwithstanding Defendants having received repeated notices from Plaintiffs and having been afforded “extra” time and Plaintiffs’ assistance between reports to get it right. As a result, Defendants are (a) providing unreliable data to the Court in terms of overall numbers and average delays and processing time, but equally significantly, (b) failing to track and report on many individual soldiers who are getting “lost” in the system, to the soldiers’ severe detriment.¹

¹ Plaintiffs do not know the full extent of the omissions because Defendants (here and in the related *Kirwa* action) have never provided Plaintiffs or the Court with a complete list of non-citizen Selected Reserve MAVNIs, who make up the universe of the *Kirwa* and *Nio* classes.

As Plaintiffs' counsel has become aware of these omissions from the class reporting – typically through interactions with class members who have contacted Plaintiffs' counsel² – they have been bringing them to Defendants' attention and asking them to supplement, amend, or update the reports to include these individuals and to take remedial action to ensure that similarly-situated omissions are identified and corrected. These notices began informally more than four months ago. Yet, Defendants' most recent July 20, 2018 report continues to omit class members. These omissions are particularly disconcerting because they follow the Court's extended reporting cycle (requested by Defendants), by which Defendants first provide a draft of the report to Plaintiffs' counsel to facilitate corrections before the report is filed two weeks later. Indeed, on July 15, 2018, Plaintiffs identified multiple errors (including several specific soldier omissions) and irregularities with the draft Defendants provided on July 6 and asked Defendants either to correct them (including the root cause) or explain them. *See* Exhibit 1 at 1-5 (July 15, 2018 email).³

While Defendants have begun to report on some of the individually-identified soldiers Plaintiffs have brought to their attention, Plaintiffs are unaware (despite having asked repeatedly) of any efforts by Defendants to investigate and correct the root causes of the omitted class members. This is shown by the example of AMEDD (or health care professional) class members regularly being omitted from the reports, in spite of their two-plus years serving as Selected Reservists and many of them having naturalization applications pending for months or even a year. *See, e.g.*, Exhibit 1 at 1 (July 19, 2018 email). In other words, to Plaintiffs' knowledge, Defendants are being purely *reactive* and limiting their response just to the specific, individual soldiers

² Because Defendants have not provided the universe of class members, and have not provided adequate contact information for most of the class members who actually have been identified, Plaintiffs' counsel cannot reach out to all class members directly.

³ The emails in Exhibit 1 have been redacted to remove references to soldiers' names and personally identifiable information.

Plaintiffs brought to their attention. Plaintiffs have seen no evidence that Defendants are being *proactive* and attempting to account for all class members, in spite of the Court's orders that they do just that. *See, e.g.*, Dkt. 135 (Apr. 12, 2018 Order); Dkt. 159 (June 20, 2018 Order).

These ongoing omissions cannot be readily explained, let alone justified. While Defendants often protest that the monthly reporting is difficult, time-consuming, and error-prone as a result, Judge Huvelle has indicated that the reporting is an obligation Defendants should be able to meet without undue burden. *See* Apr. 11, 2018 Tr. at 140 (ordering that Defendants report on status of *Nio* class members every four weeks and maintaining the bi-weekly reporting for *Kirwa* class members). And, there is no reason, particularly now more than a year after this class action litigation was initiated, that Defendants cannot identify the very individuals who they claim are subjected to their USCIS hold and DoD background check policies. Certainly, Defendants cannot be properly applying their policies if they are unable to readily identify the individuals to whom the policies apply.

Whether due to Plaintiffs' constant reminders or based on their own assessment, Defendants are well aware that it is illogical and inefficient for them to begin the reporting process from scratch each month and run searches on USCIS's side for all military naturalization applications and winnow down the list from there to identify the Selected Reserve MAVNI soldiers within that larger group. Yet, this is what Defendants claim to be doing and, not surprisingly, it occupies much of their time and effort each reporting cycle. This methodology is not necessary. Instead, the Court-ordered reporting (here and in the related *Kirwa* action), would be more useful, accurate, and easily generated if Defendants began with the finite list of non-citizen Selected Reserve MAVNIs (that list is not growing as Defendants have suspended MAVNI enlistments for the past two years).

Notably, Defendants have that information readily at hand. A year ago, Defendants identified internally approximately 2,500 Delayed Training Program (“DTP”) class members and internally circulated a list of 2,513 class members. *See* Dkt. 26 (July 27, 2017 Army Memorandum identifying 2,513 DTP soldiers). Defendants simply need to confirm that their list of 2,513 included AMEDD MAVNIs (or, if not, add the list of AMEDD MAVNIs waiting for initial training) and then identify the much smaller number of non-DTP class members (*i.e.*, non-citizen Selected Reserve MAVNIs who already accessed to initial training or beyond and non-citizen Selected Reserve MAVNIs who are identified as “discharged” – whether properly or not – in the military’s record system).

It has been established in the record that the complete list of *Nio* class members is available to Defendants. They affirmatively have represented as much. A Pentagon declarant in this case (and in the related *Kirwa* case), Captain Alicia Glanz, testified on two occasions as to the existence of an Army database which tracks all MAVNIs. *See* Dkt. 93-4 at ¶ 2 (Capt. Glanz testimony that she is responsible for maintaining “a security information portal” that is shared by the Army and DoD); *Kirwa* Dkt. 13-1 at ¶ 1 (Capt. Glanz testimony that her duties consist of “maintaining a roster that accounts for the assignment and duty status of all individuals enlisted under the MAVNI program”). This list of non-citizen Selected Reserve MAVNIs easily could be, and in any event should be, the starting point for tracking class members (and ensuring that no soldier is omitted and that no soldier is “lost” from the processes that Defendants are obliged to provide) here and in the related *Kirwa* action.

The resulting list – again a finite set of soldiers that will not grow larger due to the MAVNI enlistment suspension – would include all potential *Kirwa* and *Nio* class members. That consolidated list could then be the basis for reporting on the progress of these class members

through what Defendants claim is the current naturalization process – DoD N-426 issuance, N-400 submission to USCIS, DoD background check and MSSD completion, USCIS interview, and USCIS naturalization.⁴ Plaintiffs know of no reason why Defendants here would object to a consolidated list, particularly given that the DoD defendants proposed it themselves in *Kirwa*. See *Kirwa* Dkt. 80 at 6 (proposing “consolidating the reporting in *Kirwa* and *Nio* so that all reporting information for both cases is contained in one report,” and noting 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 to USCIS”).⁵

It is critical that Defendants’ reporting provide an accurate and complete record for all class members. First, the reports provide critical information for each soldier in the class, including how close each class member is to potentially being discharged simply because they have reached the three-year mark from enlistment date, a data point about which Judge Huvelle repeatedly has made inquiry. See Dkt. 159 at 2 (June 20, 2018 Order) (ordering “that defendants will begin including . . . a number of and list of class members who come within the DTP’s 3-year timeout mark within the next (1) 90 days, and (2) six months” and further ordering “that defendants will provide the Court notice of any class members who could be discharged from DTP for timeout

⁴ At the April 11 hearing, Judge Huvelle recognized that there should be, at a minimum, a complete class list. See Apr. 11, 2018 Tr. at 135:9-20 (“THE COURT: But aren’t you going to agree on a class list at some point? I don’t get it. MR. KISOR: It’s changing all the time and it has to be redone from scratch, is the problem, because you have to re-run the numbers, the people. THE COURT: Nothing changes except the people that have naturalized. MR. KISOR: Well, and the *Kirwa* people that, then, join the class. Right. So there’s people coming in and people going out and they’re coming in faster than they’re going out. THE COURT: That’s the problem here.”).

⁵ Starting with the complete list and consolidating the tracking likely would help with “lost” class members on the *Kirwa* side as well, where Selected Reserve MAVNIs have not received the Court-ordered notice *Kirwa* Defendants were to send last December and class members are not being tracked accurately. See Exhibit 2 (June 4, 2018 email to *Kirwa* Defendants’ counsel (without attachments)).

reasons within three weeks of the expected discharge”).⁶ Second, there is a substantial risk that class members omitted from Defendants’ reports are slipping through the cracks and not moving through the process, either with respect to their DoD background checks being conducted, their N-400s being adjudicated, or both.⁷ Third, with class members omitted from Defendants’ reports, the processing times, used to calculate length and averages of delays, are not accurate. It is indeed possible that this skews the delays – in a manner that is more favorable for Defendants – such that the inaccurate and incomplete data ultimately has unwarranted, negative implications for Plaintiffs’ claims.

II. THE COMPLETENESS AND ACCURACY OF DEFENDANTS’ REPORTING WITH REGARDS TO EQUATING MSSD COMPLETION DATES WITH THE DATE DOD UPLOADS MSSDS TO SHARED PORTAL WITH USCIS

Several months ago, Plaintiffs highlighted to the Court the importance of Defendants separately tracking and reporting the date when DoD makes its MSSD determination for each class member *and* the date when USCIS is notified of the MSSD completion. At that time, Plaintiffs were concerned that DoD was not promptly notifying USCIS of the MSSD completion, thereby creating additional delays in the naturalization process.⁸ *See, e.g.*, Dkt. 112 at 14; Dkt. 119 at 5;

⁶ Having a consolidated list would allow this data point to be tracked for *Kirwa* class members (who are future *Nio* class members), as the three-year discharge policy has the same, and even more grave, implications for *Kirwa* class members as it does for current *Nio* class members.

⁷ Or, in the related *Kirwa* case, the risk is that omitted class members are not being provided the required Notice, not having their N-426 request acknowledged and tracked, not receiving an N-426 on request (or for many months following the request), and/or being discouraged by military personnel from applying for naturalization.

⁸ This aspect of the post-MSSD completion, on the DoD side, precedes and is in addition to the delay on the USCIS side *after* the MSSD completion information finally is uploaded to the portal, including the delay while that information is processed and transferred to the right USCIS personnel. The post-USCIS notification delay is a substantial delay in its own right that has yet to be corrected by Defendants.

Dkt. 121 at 6-7. Defendants continue to merge these two distinct events for reporting purposes, resulting in inaccurate and misleading reports.

Plaintiffs have brought numerous examples to Defendants and the Court's attention illustrating that the MSSD dates being reported by Defendants are not accurate. Those examples include specific instances in which soldiers were informed by DoD/Army of their MSSD completion well before the notification to USCIS (and thus the MSSD date Defendants later reported to the Court after Defendants began equating the two in order to mask the extent of the post-MSSD delays). *See, e.g.*, Dkt. 112 at 14 & n.4 (Plaintiffs' briefing includes examples, such as named Plaintiff Shu Cheng); Dkt. 121 at 6-7 & nn. 7, 8 (same); Dkt. 170 at Ex. 2 (showing, among other examples, named Plaintiff Shu Cheng's MSSD completion date incorrectly as March 1 instead of the correct date of January 22). In fact, many of these soldiers were sent to basic training and a few were even naturalized in advance of the MSSD completion date reflected in the recent monthly reports to the Court. *See, e.g.*, Dkt. 170 at Ex. 2 (reflecting 25 class members with "negative" amounts of time between the MSSD as reported by Defendants and naturalization, including one class member who reportedly was naturalized 138 days *prior* to her MSSD being completed, because Defendants continue to incorrectly report MSSD completion).

Rather than accurately report this post-MSSD gap – the weeks and months that are wasted because USCIS has not received "official" notification of MSSD completion – Defendants have been masking that gap/delay by equating the MSSD completion date with the date when DoD makes an upload to the USCIS portal. *See* Dkt. 118-2 at ¶ 4 (Decl. of Christopher Arendt stating that "once a final MSSD has been made, DoD or Army personnel routinely notifies USCIS that a memorandum/memorandums have been transmitted via secured shared portal with email notification that documents have been deposited for review. ***The date of the MSSD thus serves***

as an approximation for the date on which DoD notifies USCIS that a final MSSD has been made.”) (emphasis added).⁹ As Plaintiffs explained to the Court during the May 14, 2018 conference, this fiction allows Defendants to claim that there are no delays between the MSSD completion and USCIS being notified of the completion. *See* May 14, 2018 Tr. at 9 (Defendants’ counsel stating that “there isn’t a delay between an MSSD getting completed, it being uploaded to the portal and USCIS being able to check that, at least not right now”); *id.* at 16-17 (Plaintiffs’ counsel explaining that “[t]here is a fiction that’s being created by the Government where they said: For purposes of this reporting they’re going to treat it as the military suitability is not really done until it’s uploaded to the USCIS portal; but that’s absolutely incorrect . . . because soldiers are hearing from the recruiters and from other people in the military that [their] military suitability is done. And they start making preparations for these people to ship . . . , but they’re not making arrangements to tell USCIS”).

Recently, when questioned by Judge Huvelle about one of the starkest examples of this erroneous reporting (*i.e.*, soldiers who were naturalized before their reported MSSD completion), Defendants’ walked back their prior acknowledgement and asserted that the disparity was due to their being *two* MSSD completion dates – one “formal” and one “informal.” Dkt. 156 at 2-3. But even accepting this distinction, it makes no difference here. Clearly, whatever label Defendants seek to place on it, the MSSD is complete enough by the “informal” date for the military to act on it – *i.e.*, by issuing basic training shipment orders and informing the soldier and the soldiers’ unit of the completion – and for USCIS to act on it, *i.e.*, in the few instances when USCIS received the supposed “informal” MSSD completion notice from Defendants and proceeded with the soldiers’

⁹ The MSSD memoranda provided to USCIS themselves include effective dates, which often are much earlier than when the memoranda are actually provided to USCIS, but Defendants continue to report the latter as the MSSD completion date.

naturalization on that basis. Thus, it appears that Defendants created an artificial distinction as a *post hoc* rationale for not reporting the *actual* MSSD completion date, and are now claiming that it is too hard for them to track anything but the formal date. *See id.* (Defendants' stating that "DoD provided informal notice to USCIS . . . when describing the favorable completion of the enhanced background check to USCIS" but DoD then "stopped providing informal notice to USCIS" and instead began providing "a formal MSSD").

Defendants' most recent report reflects additional disparities. Notwithstanding Defendants having claimed all along that USCIS is notified immediately upon MSSD completion, the July 20, 2018 report shows 13 MSSD completions on June 8 but those completions not being reported to USCIS until weeks later, on June 22. Defendants do not explain this disparity or how their record-keeping now allows for these different dates to be reported (when they previously insisted that (1) there was no difference between those dates and (2) the "informal" MSSD date could not be tracked). Nor do Defendants explain why it took two weeks to report the MSSD completion to USCIS.

Defendants also fail to explain why the previously incorrect MSSD dates have not been corrected in the reports. For example, DoD completed the MSSD for one of the named Plaintiffs from the *Kirwa* action, Mahlon Kirwa, no later than November or December 2017, which is when DoD told Mr. Kirwa that he was cleared and would be shipped to basic training. Yet, the MSSD completion date that Defendants report for Mr. Kirwa is March 1, 2018 – 3 to 4 months later.¹⁰

¹⁰ On February 28, 2018, and in response to this Court's January 23, 2018 Order (Dkt. 98), Defendants filed a list of "DoD Individuals with Completed Background Checks and MSSDs" that included Mr. Kirwa and noted that he had a "DODCAF Suitability Date" of September 13, 2017. Dkt. 109-1. How could it be the case that Mr. Kirwa was identified as having his MSSD completed in a submission to the Court in February, but Defendants' July 20 report represents that his MSSD was not completed until March?

Notably, by the reported MSSD completion date, Mr. Kirwa had nearly completed his stint at basic training which, per military policy, he would not have been able to start without that MSSD clearance. And today, Mr. Kirwa still is waiting for his naturalization interview (and oath ceremony), *even though it has now been at least eight months since his MSSD was complete.*

Once again, the actual MSSD completion date is knowable, known, and should be accurately reported. MSSD completion triggers multiple events within DoD, including plans/orders to ship soldiers with favorable MSSDs to basic training. The data being reported by Defendants skews MSSD completion information improperly and incorrectly to their advantage (by masking post-MSSD delays), thereby prejudicing Plaintiffs' claims. But, more importantly, there is an obvious disconnect between what actually is happening and what Defendants are reporting, which has real world negative impact on soldiers whose naturalizations are delayed even further (sometimes until after basic training) because DoD will not "officially" tell USCIS – and USCIS will not insist on DoD telling them – promptly when the MSSDs are complete.

III. CHANGES NECESSARY TO ENSURE REPORTS REFLECT THE EXACT NUMBER OF NIO CLASS MEMBERS SINCE DEFENDANTS' LAST REPORT WHO HAVE NATURALIZED, HAVE BEEN SCHEDULED FOR A USCIS INTERVIEW, AND/OR HAVE HAD THEIR MSSDS LOADED TO SHARED PORTAL WITH USCIS

Defendants' tally of the total number of class members who have naturalized, have been scheduled for an interview, and/or have had USCIS notified as to their MSSD completions since Defendants' previous report should be a useful tool to help track overall class member progress (or lack thereof) with respect to the completion of DoD background checks and the adjudication of naturalization applications. *See* Dkt. 150 at 2 (June 4, 2018 Order). However, while Defendants provide summary information in their July 20, 2018 report (*see* Dkt. 170 at 2), those summaries

likely are inaccurate, to the extent that they are the product of incomplete source data (as explained in Section I above).

Additionally, the accuracy of these summaries also depends on the accuracy of the USCIS interview date reporting. Plaintiffs are aware of numerous examples showing that the reported interview dates are not correct, including reports of interviews that did not happen on the reported date. Plaintiffs suspect that a partial reason for this inaccuracy stems from USCIS scheduling the interview on a date when the soldier is at basic training or AIT.¹¹ Thus, the interview does not happen (even though the report indicates that it did). Plaintiffs notified Defendants of these discrepancies and their likely causes but Defendants continue to schedule interviews that cannot be attended and report the inaccurate dates. Similarly, for some unexplained reason, USCIS scheduled a number of interviews for Saturdays, but then did not conduct the interview on that date, telling the soldiers that the interview could not proceed for “unforeseen circumstances.” *See* Exhibit 1 at 4. Yet, those Saturday dates remain on the Defendants’ reporting. Defendants should not get progress “credit” for scheduling interviews that they know cannot occur on the scheduled dates.

¹¹ This has been a problem for months. For example, on February 12, 2018, Defendants’ counsel, with respect to one class member, said that “The interview is scheduled for February 27, 2018, at 10:15 AM, at the Baltimore Field Office. If [the soldier] will be unable to attend this interview because he will be at Basic Training, he should contact the Baltimore Field Office to arrange to reschedule the interview.” However, over one month *earlier*, on January 23, 2018, this soldier’s naturalization lawyer informed Defendants that he had been shipped to basic training on that same day. So, when the interview was scheduled, USCIS was on notice that the soldier already was at basic training and would not be able to attend the interview (and, in fact, could not readily reschedule the interview because he did not have email or phone access while he was at basic training). The same is true for a number of other soldiers on Defendants’ reporting. Here, too, the basic training dates and interview dates are both completely controlled by and known to the Defendants.

Defendants do not provide any information as to whether a class member is at (or will be scheduled to be at) basic training or AIT on the scheduled interview date, if the interview is scheduled for a day when the USCIS office is not open and the interview will not be conducted, and if their summary update accounts for these periods of unavailability (or any other rescheduling) such that their interview dates and naturalization/oath ceremony dates are not accurate. Defendants also do not explain if the statistics account for re-scheduled interviews that did not actually occur as previously reported to the Court. And, Defendants do not explain why they have not corrected the reporting to identify interview dates that they must know are incorrect, as Plaintiffs have provided specific examples to Defendants.

With respect to the MSSD upload aspect of the statistics/progress summaries, beyond the concerns described in Section II above, Plaintiffs also have concerns about the integrity of the data being reported by Defendants. Defendants' reporting on named Plaintiff Lucas Calixto illustrates troubling inconsistencies:

- On June 14, in response to June 12 and June 13 emails from Plaintiffs' counsel, Defendants' counsel wrote the following: "Yes, Mr. Calixto received an [] MSSD by the Army on June 7, 2018. The Army notified USCIS of its determination on June 8th. USCIS is currently working on Mr. Calixto's N-400 application. We will notify the Court of these developments in our bi-weekly report." And, the most recent bi-weekly report (Dkt. 169) reflects those same MSSD and USCIS notification dates.
- But, the July 20 class-wide report submitted to the Court provides two different dates for Mr. Calixto's MSSD and notification to USCIS of the same – June 8 for the MSSD and June 22 for notification to USCIS.

- More importantly, on July 19, a USCIS supervisor on the military hotline informed Mr. Calixto that there have been *no* updates made to his naturalization application file since June 1 (and that USCIS is not “working on” Mr. Calixto’s N-400 application as previously represented by Defendants’ counsel).

Even though these issues have been brought to Defendants’ attention, corrections have not been made to the reporting and explanations have not been provided to Plaintiffs’ counsel.

Without accurate underlying data, the “statistics” or progress summaries reported by Defendants are unreliable and likely misleading.

Plaintiffs ask that the Court to ensure that Defendants make reasonable efforts to report accurately to the Court.

Respectfully submitted,

/s/ Joseph J. LoBue

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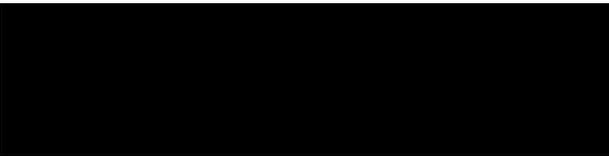
Counsel for Plaintiffs and the Certified Class

Exhibit 1

From: Wollenberg, Jennifer
Sent: Thursday, July 19, 2018 8:42 PM
To: Perez, Elianis (CIV); Vuong, Sarah L. (CIV); Adebonojo, Kenneth (USADC); Kisor, Colin (CIV); Sheffield, C. Fred (CIV)
Cc: Baruch, Douglas W.; LoBue, Joseph
Subject: RE: Nio v. DHS: Issues with Defendants' Monthly Report

Counsel –

We've been informed of two more AMEDD MAVNIs missing from Defendants' reporting:



Regards,

Jennifer M. Wollenberg
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Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW Washington, DC 20006
friedfrank.com

From: Wollenberg, Jennifer
Sent: Sunday, July 15, 2018 11:26 PM
To: Perez, Elianis (CIV) <Elianis.Perez@usdoj.gov>; Kisor, Colin (CIV) <Colin.Kisor@usdoj.gov>; Vuong, Sarah L. (CIV) <Sarah.L.Vuong@usdoj.gov>; Adebonojo, Kenneth (USADC) <Kenneth.Adebonojo@usdoj.gov>; Sheffield, C. Fred (CIV) <Carlton.F.Sheffield@usdoj.gov>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>; LoBue, Joseph <Joseph.LoBue@friedfrank.com>
Subject: Nio v. DHS: Issues with Defendants' Monthly Report

Counsel –

We continue to identify class members omitted from Defendants' monthly reporting and other problems with Defendants' reporting (see below). We have brought many of these problems to Defendants' attention many times. For example, we have asked Defendants to correct their tracking procedure in order to prevent class member omissions, and we have suggested efficient and easy solutions to this problem, including starting with a list of all potential Nio class members from the DoD/Army side where there is a knowable, definite starting point and then tracking each of the Kirwa and Nio class members through the DoD and USCIS

processes. Defendants have acknowledged errors with their reporting but we have seen no indication that Defendants are seeking to identify, remedy, and prevent the root cause of the errors. Under these circumstances, unless Defendants (along with the defendants in the Kirwa case) commit now to fully and properly identify, track, and report on all the non-citizen Selected Reserve MAVNIs who make up the Nio and Kirwa classes, Plaintiffs will have no choice by to raise these issues, along with Plaintiffs' suggestions for dealing with them, to the Court.

Issues/Questions/Concerns

- With respect to some of the names we previously provided to you, you acknowledged that you had looked into only “most” of those names. You have never responded with respect to some of them, including [REDACTED] and [REDACTED].
- Please note that Plaintiffs did not identify Regular Army soldiers as class members – those names where Defendants came back and said that they are Regular Army MAVNIs and not class members came from Defendants’ reporting, where Defendants provided inconsistent lists between USCIS reporting and DoD reporting and we questioned the inconsistencies. This type of inconsistency and inaccuracy with Defendants’ reporting is easily eliminated if Defendants would begin their reporting with the complete list of non-citizen MAVNI Selected Reservist list, as Plaintiffs repeatedly have proposed.
- While Defendants have addressed 14 of the soldiers we previously identified as existing on one Defendant’s class list but not the other’s, Defendants have yet to explain why many of those soldiers appeared on the one Defendant’s class list in May and not the other’s. And, we have identified 16 of those soldiers who do not appear on the July report. Please explain if the class list provided by Defendants in May was inaccurate for each of the following, or if the July report needs to be corrected to include these soldiers.

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]
7. [REDACTED]
8. [REDACTED]
9. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. [REDACTED]
13. [REDACTED]
14. [REDACTED]
15. [REDACTED]
16. [REDACTED]

- Also, please explain why the following soldiers were included on Defendants' June report but appear to be missing from the July report:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]

- In addition, we separately have been informed that the following class members are missing from Defendants' July report:

1. [REDACTED]
[REDACTED]
[REDACTED]
2. [REDACTED]
[REDACTED]
[REDACTED]
3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- The MSSD completion field is blank and therefore incorrect for the following, each of whom has been told by John Sheehy, recruiters, or through receipt of a ship date that his/her MSSD is complete. These soldiers need to be naturalized without further delay. So, in addition to correcting the report with respect to them, please provide interview dates for each as well.

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]
7. [REDACTED]
8. [REDACTED]
9. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. [REDACTED]

- Likewise, named Plaintiffs [REDACTED] have been informed that their MSSDs are complete, but the report does not accurately reflect the same. Please correct the report for them and identify when they will receive their naturalization interview.

- With respect to named Plaintiff Lucas Calixto, why is Defendants’ information about when his MSSD complete inconsistent? For example, the July report says the MSSD was complete on June 8 and USCIS was notified on June 22, but, on June 14, Elianis Perez wrote the following: “Yes, Mr. Calixto received an unfavorable MSSD by the Army on June 7, 2018. The Army notified USCIS of its determination on June 8th. USCIS is currently working on Mr. Calixto’s N-400 application. We will notify the Court of these developments in our bi-weekly report.” When was Mr. Calixto’s MSSD complete, when was USCIS notified, when did USCIS begin “working” on Mr. Calixto’s application again, and when will Mr. Calixto be interviewed for naturalization?
- Given Defendants’ prior statements to the Court about the correlation and timing between MSSD completion and USCIS notification, why were all the purported June 8 MSSD completions not reported to USCIS until June 22?
- Please identify what efforts, if any, Defendants have made to identify (1) class members who have accessed to basic training or beyond and (2) AMEDD class members.
- As we previously pointed out with respect to prior reporting, the interview dates provided in the reports are misleading. Among other things, the July report omits mention of the fact that the scheduled interview dates will occur when (or have passed while) soldiers are at BCT, and the report represents that some interviews are “complete” even though they did not occur.
- In addition, USCIS inexplicably has scheduled soldiers for interviews on Saturday knowing that Saturdays are not interview dates, only to have those dates rescheduled for “unforeseen circumstances.” This is misleading. We have identified at least six upcoming Saturday interviews on Defendants’ July reporting:
 - July 21: [REDACTED]
 - July 28: [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]
 - Aug 4: [REDACTED]

Are these interviews going to occur on the scheduled date? If not, when will they occur, has the soldier been informed of the changed date, and when will Defendants correct their reporting?

- 83 class members have an “N/A” or blank entry in the column entitled “CI Screening Results at DoDCAF.” What does each entry mean? Why would any entry be N/A? And, why would that data not be available to Defendants by now given that all CI interviews were complete by January 31, 2018?
- Please confirm the accuracy of the representation in the report that no CI screening results were sent to DoDCAF since May.
- Three of the CI screening results dates are December 2018 – should these be December 2017?
- Is the reporting accurate that over 500 class members had CI Screening Results sent to DoDCAF in 2017, over 7 ½ months ago and each of these soldiers still is waiting to be naturalized?
- Is the reporting accurate that nearly 1350 class members whose CI Screening Results were sent to DoDCAF more than three months ago still are waiting to be naturalized?

- There are 788 entries with a blank or “pending” entry in the MSSD complete column. What does “pending” (119 entries) mean and how is that different from a blank entry? Does “pending” indicate an unsuitable finding? If not, please identify those class members found “unsuitable” and any soldiers that are being or have been discharged.
- The reporting reflects that only 38 MSSDs were complete in June – is that accurate? Does that reflect the pace of the MSSD completions by DoD/Army?
- For the soldiers approaching the three-year mark (11 entries in July, August, September), what is DoD’s plan for each so that they are not discharged for that reason?
- Who are the upcoming Nio class members (i.e., Kirwa class members) who soon will be hitting the three-year mark and what is the plan for each of them?
- If Defendants are not going to address the items relating to their reporting that were discussed in the Court’s Order at Dkt. 150, Plaintiffs will have to raise those issues with Magistrate Meriweather.
 - Note that there are duplicate entries on Defendants’ reporting, which would make any count/statistics based on entries alone inaccurate.
- Note that Defendants’ comment about the “N/A” entries in the three-year column is not accurate as many of those soldiers have not been discharged nor have they gone to basic training. Are Defendants also including AMEDD MAVNIs in that column?
- Please identify the class members with “N/A” in the three-year column due to having attended basic training.
- Please identify the class members who have an “N/A” in the three-year column due to having been discharged.
 - For those soldiers, has USCIS re-commenced adjudication of their naturalization applications?
- Defendants previously made a point of noting the amount of time that had passed following the reported MSSD to naturalization – please identify the same now. Is the average still two months? How many soldiers have been waiting longer than two months following MSSD for naturalization?

Regards,

Jennifer M. Wollenberg

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Exhibit 2

From: Wollenberg, Jennifer
Sent: Monday, June 4, 2018 4:25 PM
To: Swinton, Nathan M. (CIV); Dugan, Joseph (CIV)
Cc: LoBue, Joseph; Baruch, Douglas W.
Subject: Kirwa v. DoD
Attachments: Ex A to 6 4 18 email.pdf; Ex B to 6 4 18 email.pdf

Counsel,

We write to inform Defendants of the following regarding MAVNI enlistees and N-426s.

Attached as Exhibit A is a list that we believe includes the names of 286 MAVNI Selected Reservists who have not been identified and accounted for by Defendants in their class list/notification or N-426 reporting. Because Defendants have not accounted for these soldiers, we assume that Defendants have not provided them with appropriate notice and N-426s. If that is the case, please confirm that Defendants are taking the steps necessary to do so without delay.

In addition, Plaintiffs understand that Defendants possess a list of 2,513 DTP MAVNIs who were in the delayed training program as of March 23, 2017 (*see Nio*, Dkt. 26). We request that Defendants identify and provide both appropriate notice and N-426s to any of those class members who have yet to receive an N-426 allowing him or her to successfully apply for naturalization. If Defendants prefer to provide the complete list of 2,513 to Plaintiffs, Plaintiffs will undertake the effort of attempting to compare that list to those previously provided by Defendants and by the defendants in the *Nio* litigation in order to identify class members who have yet to receive notice and N-426s.

In addition, if Defendants need assistance in identifying “holdover” MAVNIs who may be class members, in recent briefing Plaintiffs referenced an Army memorandum which notes that, for the population of holdover MAVNIs, commands should “ensure that [the naturalization] process is completed as soon as possible.” *Nio*, Dkt. 119-36 ¶ 4. Thus, there must be individuals in the Army who are tracking not only these soldiers but the status of their naturalization applications. If Defendants want to provide the list of holdovers to Plaintiffs, we’ll undertake the effort of comparing it to the *Nio* class list to identify (and eliminate) any names where naturalization applications already have been filed (indicating that it is likely that an N-426, signed by someone in the military, has been provided).

Also, we note that there are hundreds of MAVNI Selected Reservists who were identified on Defendants’ class list but have not been identified on Defendants’ reporting chart. Plaintiffs are concerned that these class members have requested N-426s from commanders but their requests have not been sent to OCAR, as has been the situation with a vast number of the soldiers who have made complaints to the Army regarding N-426s. Please explain why identified class members who (according to Defendants) have received the class notice (and, in most instances, notice from their commanders that they must request an N-426) are not identified on the Defendants’ reporting chart as having requested (and received) an N-426.

Attached as Exhibit B is a list of 480 MAVNI Selected Reservists who, according to the Army’s reporting in this case, have been provided N-426s, but according to a comparison to the defendants’ reporting in the *Nio* case, these soldiers have yet to apply for naturalization. If the Army has indeed provided N-426s to these soldiers, there is no justifiable reason why so many of them would have failed to apply for naturalization by now. That brings into question whether the N-426s are accessible to these soldiers, whether these soldiers are being discouraged from applying for naturalization, and/or whether USCIS refuses to recognize their naturalization applications/N-426s for some reason, or suggests that there is some other logistical reason for the disparity. We request that Defendants look into this issue.

In addition, there are 17 N-426 requests from December and January on Defendants' latest report that do not reflect an N-426 grant. Please explain.

Also, we would note that problems with the Army's N-426 process remain, as discussed in our recent briefing to the Court and as evidenced by the emails sent to MAJ Hollywood and MSG Fale. Since Defendants seem reluctant to accept our quotations from what you refer to as "anonymized complaints," we encourage you to discuss the same with the designated Army POCs or review the emails yourself. Then, we would like to meet and confer regarding potential solutions to these problems.

We ask that you respond to the issues raised above as soon as possible as the continuing hold-up of N-426s and the filing/USCIS recognition of naturalization applications has serious implications for these soldiers.

Regards,