UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' STATUS REPORT IN ACCORDANCE WITH THE COURT'S MAY 22, 2019 ORDER

In accordance with the Court's May 22, 2019 Order, Defendants submit the following status report setting forth: 1) what steps are necessary to effectuate the Court's Memorandum Opinion of May 22, 2019, *see* ECF No. 249; and 2) claims that remain to be considered, and future proceedings necessary to resolve these claims. *See* ECF No. 250. Defendants met and conferred by telephone with Plaintiffs on June 6, 2019, and again telephonically on June 10, 2019, but were unable to reach an agreement on a joint response to the Court's inquiries.

I. Steps Necessary to Effectuate the Court's Memorandum Opinion

U.S. Citizenship and Immigration Services ("USCIS") has advised the Department of Justice that, in accordance with the District Court's May 22, 2019 Memorandum Opinion, it will no longer await an MSSR or an MSSD before adjudicating a class member's naturalization application and will proceed with adjudicating the application once it has reviewed the materials generated during what has been labeled the "investigatory phase" of the Department of Defense ("DoD") background check process. In analyzing these materials, and consistent with Defendants' representations to the Court throughout this case, USCIS officers will determine how the information affects the applicant's

eligibility for naturalization pursuant to the relevant statutes and regulations. This approach is consistent with the Court's Memorandum Opinion, which did not disturb the "DoD investigatory phase" of the July 7 Guidance, and in fact "recognize[ed] the principle that courts should not second-guess executive matters of national security." *See* ECF No. 249, at 37, n.16. Affording USCIS an opportunity to review the materials that resulted from the "investigatory phase" of the DoD background check process is particularly important given that, as the Court recently observed, approximately 500 of the 550 class members who are still awaiting an MSSD have already received a "non-recommend" MSSR from the DoD Consolidated Adjudications Facility ("CAF"). ECF No. 249, at 22.[1] USCIS must therefore have a reasonable opportunity to review the results of the "investigatory phase" of the DoD background check process in order to ensure "strict compliance with all congressionally imposed requirements to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981).

As stated in Defendants' April 3, 2019 status report, *see* ECF No. 246, the sharing of information at the MSSR stage presents challenges. Most significantly, much of the material generated during the "investigatory phase" of the DoD background check is classified and may only be accessed by individuals with a Top Secret/Sensitive Compartmentalized Information ("TS/SCI") security clearance. Moreover, some materials have been classified by agencies other than the Army, in which case the information cannot be released without consultation with the appropriate designating agency. In view of these complications, USCIS and DoD have engaged in ongoing discussions and are now are finalizing a Memorandum of Agreement governing a process by which USCIS will review information stored at the CAF. Upon finalizing this memorandum, USCIS plans

[1] Although the standards and guidelines employed by the CAF in making an MSSR are not entirely coterminous with naturalization requirements, a CAF MSSR considers several National Security Adjudicative Guidelines that do overlap with naturalization requirements, including "Allegiance to the United States," "Foreign Influence," "Foreign Preference," "Personal Conduct," and "Criminal Conduct." *See* ECF No. 219.

to send at least two officers with the requisite TS/SCI level clearance to the CAF two to three times per week to review and assess the relevant derogatory information to determine how it affects an applicant's naturalization eligibility. USCIS made a preliminary visit to the CAF in late May, and anticipates beginning this review process in July.

In reviewing a soldier's file, the USCIS officer will assess how the derogatory information bears on naturalization eligibility. Generally, USCIS officers will start by looking at information that DoD has flagged as derogatory, but there may be cases where more thorough review is needed. If the derogatory information does not bear on eligibility, USCIS will route the case to the appropriate USCIS field office where the soldier will be scheduled for an interview, and the application will then be adjudicated in accordance with 8 U.S.C. § 1440. Once the A-file arrives at the appropriate field office, USCIS will attempt to schedule the interview within five days of receiving it. Field offices will generally conduct interviews within 30 calendar days. After the interview, USCIS will adjudicate the application promptly in accordance with statutory and regulatory requirements.[2] If the USCIS officer reviewing the information at the CAF determines that derogatory information does bear on naturalization eligibility, USCIS will work with DoD and/or any relevant third agency that provided the information, as needed, to determine how the information can be used and will then work with the field office to move the case forward. In these instances, issues of national security are of utmost importance to both agencies.[3]

In the parties' discussions leading up to the preparation of this report, Plaintiffs questioned why USCIS is unable to send more personnel to the CAF to participate in the review. In response,

[2] If USCIS does not adjudicate a naturalization application within 120 days of an "examination," the applicant may bring an action under 8 U.S.C. § 1447(b).

[3] Naturally, if an applicant disagrees with USCIS's decision regarding his or her eligibility for naturalization, the appropriate course of action is to request a hearing on the denial of the application within USCIS. 8 U.S.C § 1447(a); 8 C.F.R. § 336.2. If the application remains denied after this administrative hearing, the applicant can seek judicial review pursuant to 8 U.S.C. § 1421(c).

Defendants advised Plaintiffs that the decision to send two USCIS officials (one from the Field Operations Directorate and one from the Fraud Detection and National Security Directorate) is based in part on the limited number of USCIS personnel who hold the security clearance necessary to review the relevant materials. Plaintiffs also demanded that Defendants provide a specific timeframe or deadline for when the review would be complete for all class members. As Defendants have explained to Plaintiffs, providing an estimate at this point is impossible because USCIS has not yet begun the process of reviewing the materials at the CAF; any effort to identify a specific timeframe for completion would thus be based on pure speculation.[4] Plaintiffs also proposed establishing a system whereby USCIS would limit its review to certain materials, such as the MSSR Memo, in order to streamline the process. As discussed above, although in some cases USCIS personnel may be able to make a determination about the relevance of "derogatory information" based on a review of relatively few documents, an MSSR Memo viewed in isolation may lack the requisite detail, and thus the agency must have the flexibility to review materials in manner consistent with the uniqueness of each case.

Defendants will endeavor to implement the Court's Memorandum Opinion as expeditiously as possible, and do not raise the concerns above lightly or for purpose of delay. The fact that USCIS has now adjudicated the vast majority of class members' applications apart from those with adverse MSSRs underscores the attention and resources Defendants have devoted to this matter.[5] Indeed, notwithstanding Plaintiffs' protestations of indefinite delay, as of May 1, 2019, 1,217 former class

[4] After two weeks of reviewing materials at the CAF, USCIS is willing to provide a status report regarding the pace of review if so requested by the Court.

[5] In an email correspondence, Plaintiffs suggested that they may request a monitor to oversee Defendants' implementation of the Court's Memorandum Opinion. Defendants' demonstrated progress in adjudicating class member naturalization applications dating back to well before the Court's Memorandum Opinion belies any claim that a monitor is necessary, even if the Court appointed one with an existing and active TS/SCI clearance. Moreover, as the Court is aware, USCIS has established a designated email inbox by which class counsel make inquiries individual cases. Plaintiffs have used this email inbox routinely since its creation, and USCIS will continue to make the inbox available to Plaintiffs' counsel during the implementation of the Court's Memorandum Opinion.

members have become U.S. citizens. Accordingly, although Defendants remain open to Plaintiffs' input regarding how to best effectuate the Court's order, Defendants also request a reasonable degree of latitude in formulating a process that functions as expeditiously as possible while also ensuring that USCIS has an opportunity to review all relevant information collected during the "investigatory phase" of the July 7 Guidance, which the Court's Memorandum Opinion did not disturb. *See* ECF No. 249; *see also Nio v. United States Department of Homeland Security*, 270 F. Supp. 3d 49, 64-65 (D.D.C. 2017) (acknowledging that the July 7 Guidance went into effect in response to "present national security concerns" after the Court's in-camera review of a classified report from DoD's Office of the Inspector General).

II. Claims That Remain to be Considered, and Future Proceedings Necessary to Resolve These Claims

Defendants' view is that all of Plaintiffs' remaining bases for challenging the MSSD phase of the July 7 Guidance are now moot because the Court has vacated that portion of the Guidance, and because as a consequence of this, USCIS is no longer awaiting the result of MSSDs (or MSSRs) before adjudicating MAVNI naturalization applications. During the parties' discussions, Plaintiffs indicated that they do not believe any of their remaining claims are moot and intend to preserve them indefinitely. Accordingly, Defendants propose that Plaintiffs identify their remaining "live" issues, and give Defendants an opportunity to address these claims. Alternatively, Defendants propose that Plaintiffs submit (or re-submit) summary judgment briefing on any claims they believe remain outstanding, and the Court set a final briefing schedule, so that the parties may have a final judgment as expeditiously as possible.[6]

[6] With respect to Plaintiffs' unreasonable delay claims under 5 U.S.C. § 706(1), which the Court ordered excluded from the recent round of summary judgment briefing, *see* ECF No. 159, at 1, Defendants' view is that these claims are not suitable for class-wide resolution. *See* ECF No. 48, at 21-23 (arguing that unreasonable delay claims involve fact-specific inquiries unique to each case). While the Court granted class certification over Defendants' objections, it did so based on the theory

DATED: June 11, 2019

Respectfully submitted,

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that "factual variations among the class members will not defeat the commonality requirement so long as a single aspect or feature of the claim is common to all proposed class members." ECF No. 73. Insofar as the Court has now vacated the MSSD requirement – and has ruled that Plaintiffs' challenge to the remainder of the July 7 Guidance is moot – there is no longer a basis for awarding class-wide relief on the basis of unreasonable delay.

CERTIFICATE OF SERVICE
Civil Action No. 1:17-00998-ESH

I HEREBY CERTIFY that on this 11th day of June, 2019, 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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