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' RESPONSE TO DEFENDANTS' SUPPLEMENTAL STATUS REPORT

Plaintiffs respectfully submit this response to Defendants' Supplemental Status Report (Dkt. 253) regarding implementation of the Court's Memorandum Opinion (Dkt. 249) and in further support of Plaintiffs' implementation proposal (Dkt. 252).

Defendants' Supplemental Status Report apprises the Court of "significant new developments" relevant to the implementation of the Court's May 22, 2019 Memorandum Opinion. According to Defendants, the main new development is that, notwithstanding what they stated to the Court two days earlier and what they repeatedly presented to Plaintiffs' counsel during the preceding meet and confer discussions regarding this matter, Defendants (1) do not need to negotiate a Memorandum of Agreement between USCIS and DoD in order for DoD to share class member background investigation information with USCIS, and (2) USCIS may not need to send personnel to DoD CAF to review such information. This unexplained about-face by Defendants, however, is further evidence that USCIS never had a plan to implement its July 2017 Policy of reviewing the DoD background information and is only now scrambling to cobble one – or at least the appearance of one – together.

Unfortunately, even as they present their "significant" new information, Defendants do nothing to solve the core flaw with their implementation plan. In particular, Defendants still provide no estimate of how long it will take to make the information available to USCIS so that USCIS can adjudicate the naturalization applications of the several hundred remaining class members and schedule them for oath ceremonies (assuming a grant decision). Instead, without any clear definition as to timing, they simply claim in their papers that the two agencies will act "promptly" and "as soon as practicable" to share information or provide contact information to USCIS so that USCIS can they reach out to *other* governmental agencies to request permission to see information. Defendants do not describe the information that will be shared with USCIS, they do not describe what means they will use to mitigate the need for USCIS to review classified information, and they do not describe the resources each agency will commit to this effort.[1] And, in some ways, their process seems more arduous and will lead to further delays, with USCIS able to claim that other agencies – non-parties to this action – are the hold-up.[2]

For Plaintiffs, the uncertainty and open-endedness are unacceptable. All of the DoD background information on all of these class members was gathered well over a year ago. And even if USCIS had just reviewed the information for one class member a day since that time,

1 For example, Defendants do not address what Plaintiffs recently have heard from many MAVNIs: DoD assured MAVNIs at the outset of the CI interviews that the information provided by MAVNIs would be used *only* for the purpose of the DoD security and clearance determinations. Plaintiffs suspect that it is this information, that DoD likely cannot provide to USCIS for naturalization application purposes, which is considered "classified" (although not at the highest levels, which Defendants have failed to explain to the Court as well).

2 The Court may recall Defendants' failure in supposed efforts to streamline the process that includes a second, redundant FBI check. Plaintiffs fear that the same excuses soon are going to be heard, substituting "OPM" for "FBI." But, of course, the FBI check is standard and Congressionally-imposed for naturalization applicants, while the same cannot be said for the SSBI/Tier 5. Also, there is no mention of the circumstances under which information will be requested from a third party, even though Plaintiffs suspect, with good reason, that the vast majority of MAVNI SSBI/Tier 5 reports were coded by OPM as "F – no issues" and were *not* identified by DoD CAF as the basis for any so-called "derogatory" information.

they would have the review done by now. It simply cannot be the case that USCIS can now – because it put an arbitrary and capricious policy in place and because it never intended to review the information that it told the Court warranted the policy – be justified in delaying the final adjudication of the remaining class members for more than a few additional weeks.

And, indeed, with appropriate resources and incentives, both USCIS and DoD should be able to accomplish this task. In fact, following findings of unlawful policies or practices, federal courts routinely impose deadlines for agencies, including USCIS, to implement the necessary remedial measures. *See, e.g., Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1035 (D.C. Cir. 1983) (setting a 60-day schedule for Commission to reach a final decision "despite the possible displacement of agency resources"); *Am. Acad. of Pediatrics v. FDA.*, 2019 WL 1047149 (D. Mass. 2019) (rejecting defendant's lengthy proposal and ordering FDA to complete a study, proposed rule, and final rule by dates certain); *Yan Wu v. Rodriguez*, 142 F. Supp. 3d 594 (S.D. Ohio 2015) (remanding to USCIS for adjudication "as soon as possible" and no later than 120 days following the order); *Alawieh v. Att'y General*, 2009 U.S. Dist. LEXIS 15129 (E.D. Mich. 2009) (ordering USCIS to make a naturalization application determination within 45 days and further ordering USCIS, within 10 days of the order, to provide a "detailed written explanation as to why Plaintiff's naturalization application has been pending for what appears to be an unreasonably long period of time"); *Reddy v. Mueller*, 551 F. Supp. 2d. 952 (N.D. Cal. 2008) (ordering USCIS to adjudicate naturalization application by a specified date because "although this court appreciates the administrative burden faced by defendants, it does not find that assertions of overwork alone are sufficient to justify substantial delays"); *Hussein v. Gonzales*, 474 F. Supp. 2d 1265 (M.D. Fla. 2007) (directing the FBI to promptly complete background check and directing USCIS to act on application within 54 days of order);

Zaigang Liu v. Novak, 509 F. Supp. 2d 1 (D.D.C. 2007) (granting summary judgment in favor of plaintiff and ordering USCIS to complete adjustment of status adjudication within 90 days); *Yong Tang v. Chertoff*, 493 F. Supp. 2d 148 (D. Mass. 2007) (ordering USCIS to adjudicate adjustment of status application within 42 days); *Alhassan v. Gonzales*, 2006 U.S. Dist. LEXIS 89018 (D.C. Col. 2006) (ordering the FBI to complete name check within 60 days and ordering USCIS to adjudicate naturalization application within 60 days of name check completion); *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 115 (D.D.C. 2003) (requiring agency to respond to petition within 60 days after vacating final rule as arbitrary and capricious).

While Plaintiffs' counsel repeatedly has offered to provide assistance and suggestions regarding streamlining of Defendants' process, Plaintiffs are not attempting to dictate how Defendants implement the plan. But Plaintiffs do believe that it is reasonable to set a 60-day deadline for Defendants to accomplish this task and to require Defendants to provide interim and final reports establishing their progress toward completing this job. As this Court has noted, USCIS does not have discretion to leave naturalization applicants in an indefinite "state of limbo." *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 51 (D.D.C. 2007).

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Respectfully submitted,

/s/ Douglas W. Baruch

Douglas W. Baruch (D.C. Bar No. 414354)
Jennifer M. Wollenberg (D.C. Bar No. 494895)
Kayla Stachniak Kaplan (D.C. Bar No. 996635)
Neaha P. Raol (D.C. Bar No. 1005816)
Katherine L. St. Romain (D.C. Bar No. 1035008)
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, D.C. 20006
Telephone: (202) 639-7000
Facsimile: (202) 639-7003
Email: douglas.baruch@friedfrank.com
Email: jennifer.wollenberg@friedfrank.com

Counsel for Plaintiffs and the Certified Class