

**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’ NOTICE REGARDING IMPLEMENTATION OF THE COURT’S
PARTIAL SUMMARY JUDGMENT DECISION**

Plaintiffs respectfully submit this notice regarding implementation of the Court’s Memorandum Opinion (Dkt. 249). Plaintiffs have identified an efficient means by which a substantial number of MAVNI naturalization applications can proceed quickly to interviews and adjudications. Rather than having the Army go through the time-consuming process of partially de-classifying CI reports and then providing those to USCIS for a classified review prior to any information being provided to a naturalization adjudicator at USCIS, USCIS adjudicators directly should review the MSSR Notifications the Army has prepared. As noted at the June 24, 2019 *Calixto* hearing, the Army already has issued 191 MSSR Notifications (and presumably will soon be issuing the remainder). These MSSR Notifications should satisfy USCIS’s purported need to understand what so-called “derogatory” information has been identified by DoD/Army.

As reflected in the attached email exchange at Exhibit 1, Plaintiffs’ counsel explained and proposed this method to Defendants’ counsel on June 26, 2019. As of this filing, however, Defendants have not meaningfully engaged with Plaintiffs regarding this alternative.

Plaintiffs are concerned that, instead, Defendants are planning to exploit the lengthier declassification route they have proposed by proceeding with “uncharacterized” discharges of these soldiers in the interim. And, as the Court is well aware, USCIS’s current (and, in Plaintiffs’ view, unlawful) policy is to deny MAVNI naturalization applications on the grounds that uncharacterized discharges render soldiers ineligible for citizenship under 8 U.S.C. § 1440. Any such strategy or result would severely prejudice class members who are entitled to have their naturalization applications adjudicated now.

Moreover, the MSSR Notifications should satisfy USCIS’s claimed need for information. At the hearing on June 17, 2019, Defendants stated that USCIS needs to obtain both MSSR Memos from DoDCAF and CI Reports from the Army before proceeding with MAVNI naturalization interviews and decisions. When the Court questioned Defendants about the need for CI reports, Defendants claimed that the MSSR Memos alone were not adequate because “most of the MSSR memos simply refer to the CIs.” *Nio*, 6/17/19 Hearing Transcript at 14. Defendants’ counsel was referring to the memos created by DoDCAF and sent to the Army G-1. Plaintiffs previously provided examples of those memos to the Court. Dkt. 241-5, 241-6.

The MSSR Notification is something else. It is the notice that the Army has to provide to the soldier in advance of discharge pursuant to the October 26, 2018 Policy. And, the latest iteration of that notice does not provide references to CI or SSBI report pages, but instead is considered by the Army to be all-inclusive, satisfying the Army requirement that the soldier be furnished with the “information that formed the basis of the MSSR.” Dkt. 50-1. As such, the Army must believe that the information in the MSSR Notification is enough for the individual soldier to, within thirty days, submit matters to “refute, correct, explain, extenuate, mitigated or update the unfavorable information.” *Id.* If so, that same information must be sufficient for

USCIS to evaluate whether the so-called “derogatory” results implicate naturalization. The examples below are illustrative. They are the entirety of the “derogatory” results provided to two MAVNI soldiers via their individual MSSR Notifications:

- “In the course of your background investigation, you revealed that you maintain routine contact with your father and mother who are citizens of and reside in China.” Exhibit 2.
- “In the course of your background investigation, it was revealed that you are financially dependent on your mother and sister who are both citizens of India.” Exhibit 3.

Even ignoring the fact that these soldiers’ naturalization applications were delayed for over two years to allow a DoD investigation and adjudication to “reveal” that a non-citizen MAVNI soldier keeps in contact with his/her parents, the information in these MSSR Notifications provides an opportunity to prevent further delays. Clearly, USCIS and DoD cannot plausibly claim that these summaries are sufficient for a MAVNI soldier to meaningfully respond to the threat of military discharge but not enough information for USCIS to proceed with a naturalization interview and adjudication. As shown by the attached examples, the “derogatory” information readily is available without layers of classified review.

If Defendants have not adopted the MSSR Notification as a substitute for the arduous CI report process they described on June 17, 2019 (at least with respect to the *Nio* class members who are among the 191 reported in the *Calixto* matter), they should have to explain why, including why the MSSR Notifications are not satisfactory for USCIS purposes but are considered satisfactory under the Army’s October 26, 2018 Policy.

Dated: July 5, 2019

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)
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Email: jennifer.wollenberg@friedfrank.com

Counsel for Plaintiffs and the Certified Class

Exhibit 1

From: Baruch, Douglas W.
Sent: Thursday, June 27, 2019 7:41 PM
To: Sheffield, C. Fred (CIV); Kisor, Colin (CIV); Perez, Elianis (CIV)
Cc: Wollenberg, Jennifer; Martens, Roberto (USADC)
Subject: RE: Nio v. DHS

Counsel --

In addition to "passing along" our message to your clients, we would like to know what action they are taking (if any), whether they agree with our suggestion, and, if not, why not? Also, we are asking for answers to our questions below. Are Defendants declining to provide them? Are Defendants committed to answering them, but only in their July 11 status report? Please explain your response so that we can assess our options.

Regards,

Douglas W. Baruch

Douglas.Baruch@friedfrank.com | Tel: +1 202 639 7052 | Fax: 202 639 7003 | Mobile: +1 202 669 0270

Fried, Frank, Harris, Shriver & Jacobson LLP

801 17th Street, NW Washington, DC 20006

friedfrank.com

From: Sheffield, C. Fred (CIV) <Carlton.F.Sheffield@usdoj.gov>
Sent: Thursday, June 27, 2019 5:24 PM
To: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>; Kisor, Colin (CIV) <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV) <Elianis.Perez@usdoj.gov>
Cc: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>; Martens, Roberto (USADC) <Roberto.Martens@usdoj.gov>
Subject: RE: Nio v. DHS

Counsel,

We have passed along your message to the agencies for their consideration. With respect to your other inquires, as you know, Defendants will be providing a status report regarding Defendants' progress in these matters on July 11.

Thank you.

C. Frederick Sheffield
Senior Litigation Counsel
Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington DC 20044
(202) 532-4737

From: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>

Sent: Wednesday, June 26, 2019 8:57 AM

To: Sheffield, C. Fred (CIV) <CSheffie@civ.usdoj.gov>; Kisor, Colin (CIV) <CKisor@civ.usdoj.gov>; Perez, Elianis (CIV) <EPerez@civ.usdoj.gov>

Cc: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>; Martens, Roberto (USADC) <RMartens@usa.doj.gov>

Subject: Nio v. DHS

Counsel -

During a hearing on Monday June 24 in the *Calixto* action, counsel for the Army (copied here) revealed that at least 190 adverse MSSR notifications have been sent out to MAVNI soldiers. How many of those are for *Nio* class members? And, has USCIS requested those notifications? We understand that receipt of these notifications should alleviate USCIS's need for MSSR memos from DoD-CAF and CI reports from the Army, as well as the extra layer of "classified" review at USCIS.

Regards,

Douglas W. Baruch

Douglas.Baruch@friedfrank.com | Tel: +1 202 639 7052 | Fax: 202 639 7003 | Mobile: +1 202 669 0270

Fried, Frank, Harris, Shriver & Jacobson LLP

801 17th Street, NW Washington, DC 20006

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Exhibit 2

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DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF G-1
300 ARMY PENTAGON
WASHINGTON DC 20310-0300

DAPE-MPA

18 June 2019

MEMORANDUM THRU Commander, U.S. Army Recruiting Command, 1307 Third Avenue, Fort Knox, KY 40121

FOR Specialist (SPC)

SUBJECT: Notification of Adverse Military Service Suitability Recommendation (MSSR) for SPC

1. References:

a. Department of Defense Instruction 1304.26 (Qualification Standards for Enlistment, Appointment, and Induction) 23 March 2015, Change 2, 11 April 2017.

b. Department of Defense Manual 5200.02, Procedures for the DoD Personnel Security Program (PSP), April 3, 2016.

c. Army Regulation (AR) 135–178, (Army National Guard and Reserve) Enlisted Administrative Separations, 7 November 2017.

d. Memorandum, Acting Assistant Secretary of the Army, (Manpower and Reserve Affairs), 27 October 2017, subject: Military Accessions Vital to the National Interest (MAVNI) Pilot Program Military Service Suitability Review and Determination (MSSD).

e. Memorandum, Deputy Chief of Staff, G-1, 1 May 2019, subject: Delegation of Authority to Make a Military Service Suitability Review and Determination (MSSD).

f. Memorandum, Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), 26 October 2018, subject: Resume Separation Actions Pertaining to Members of the Delayed Entry Program (DEP) and Delayed Training Program (DTP) Recruited through the Military Accessions Vital to National Interest (MAVNI) Pilot Program.

2. The Personnel Security Investigation process that you completed was returned with unfavorable results. Information identified during the security screening investigation by the DoD Consolidated Adjudications Facility (DoD CAF) indicates you received an adverse Military Service Suitability Recommendation (MSSR). The DOD CAF found that you did not satisfy the National Adjudicative Guidelines listed below.

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DAPE-MPA

SUBJECT: Notification of Adverse Military Service Suitability Recommendation (MSSR) for SPC

3. The principal objective of the DoD personnel security adjudicative function is to ensure individuals who are granted national security eligibility are reliable, loyal, and trustworthy. The DoD CAF adjudicates all military investigations using the national security adjudicative guidelines. National Security Adjudicative Guidelines are established as the single common criteria for all U.S. Government civilian and military personnel who require initial or continued national security eligibility screening. These guidelines are used by all Executive Branch Agencies when rendering any final national security eligibility determination.

4. Disqualifying conditions for SPC as per National Security Adjudicative Guidelines:

GUIDELINES B: Foreign Influence: Available information shows issues of Foreign Influence on the part of the Subject. Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. The Subject's foreign contacts and/or interests make them vulnerable to be manipulated or induced to help a foreign state and is not in the best interest of the United States and therefore is of a security concern.

In the course of your background investigation, you revealed that you maintain routine contact with your father and mother who are citizens of and reside in China.

5. Pursuant to procedures specified in reference 1.f., you are hereby notified that the DoD CAF made an adverse MSSR. **You have 30 days from receipt of this notification to submit matters which may refute, correct, explain, extenuate, mitigate, or update the unfavorable information detailed in paragraph 4 above.** Your response should be provided directly to the DCS G-1 MAVNI inbox at **usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil**. Your response should clearly address EACH of the disqualifying conditions listed above. You may provide supporting documentation.

6. Pursuant to procedures specified in reference 1.f., the Department of the Army DCS, G-1 will review any matters that are submitted in a timely manner and then render a Military Service Suitability Determination (MSSD). If the MSSD is unfavorable, Department of the Army will initiate administrative separation pursuant to reference 1.c. If the MSSD is favorable and/or a waiver to MSSD standards is granted, your case and any mitigating information will be forwarded to DoD CAF in order for DoD CAF to render a National Security Determination (NSD).

7. A copy of this memorandum will be placed in the individual's Army Military Human Resource Record.

DAPE-MPA

SUBJECT: Notification of Adverse Military Service Suitability Recommendation (MSSR)
for SPC

8. The point of contact for this action is DCS G-1 MAVNI inbox at usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil.

FOR THE DEPUTY CHIEF OF STAFF, G-1:


PAUL L. ASWELL
Chief, Accessions Division

DAPE-MPA

SUBJECT: Notification of Adverse Military Service Suitability Recommendation (MSSR) for SPC

Acknowledgement of Notice and Election

On _____ I received notification of the adverse Military Service Suitability Recommendation (MSSR) issued during my Military Service Suitability Screening.

Initial one of the following:

_____ I elect to submit written matters to refute, correct, explain, extenuate, mitigate, or update the unfavorable information within 30 days from today. I understand that if I do not submit matters within 30 days, I forfeit the opportunity to submit matters.

_____ I elect NOT to submit matters.

Name (Print)

Signature

Date

Exhibit 3



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DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF G-1
300 ARMY PENTAGON
WASHINGTON DC 20310-0300

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18 June 2019

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2. The Personnel Security Investigation process that you completed was returned with unfavorable results. Information identified during the security screening investigation by the DoD Consolidated Adjudications Facility (DoD CAF) indicates you received an adverse Military Service Suitability Recommendation (MSSR). The DOD CAF found that you did not satisfy the National Adjudicative Guidelines listed below.

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5. Pursuant to procedures specified in reference 1.f., you are hereby notified that the DoD CAF made an adverse MSSR. **You have 30 days from receipt of this notification to submit matters which may refute, correct, explain, extenuate, mitigate, or update the unfavorable information detailed in paragraph 4 above.** Your response should be provided directly to the DCS G-1 MAVNI inbox at **usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil**. Your response should clearly address EACH of the disqualifying conditions listed above. You may provide supporting documentation.

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8. The point of contact for this action is DCS G-1 MAVNI inbox at usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil.

FOR THE DEPUTY CHIEF OF STAFF, G-1:


PAUL L. ASWELL
Chief, Accessions Division

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DAPE-MPA

SUBJECT: Notification of Adverse Military Service Suitability Recommendation (MSSR)
for SPC

Acknowledgement of Notice and Election

On 19 JUN 2019 I received notification of the adverse Military Service Suitability Recommendation (MSSR) issued during my Military Service Suitability Screening.

Initial one of the following:

X I elect to submit written matters to refute, correct, explain, extenuate, mitigate, or update the unfavorable information within 30 days from today. I understand that if I do not submit matters within 30 days, I forfeit the opportunity to submit matters.

_____ I elect NOT to submit matters.

Name (Print)

Signature

19 JUN 2019
Date

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