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' AUGUST 7, 2019 REPORT TO THE COURT

Within their August 7, 2019 submission to the Court, Defendants wrote the following: "the Government requests this Court either summarily decertify the class or set a briefing schedule at the status conference on August 14, 2019, for a motion to decertify, or for briefing under either Rule 12 or 56 leading to final resolution of whatever claims Plaintiffs contend remain unresolved in this case by the Court's rulings." Dkt. 264 at 3-4. Herein, Plaintiffs (1) respond to that request and (2) identify important questions raised by the class-wide information in Defendants' August 7, 2019 report.

I. The Further Briefing and Litigation Proposed By Defendants is Not a Wise or Efficient Use of the Parties' or Court's Resources

A. Class Certification

As discussed below, Plaintiffs do not believe that there are any grounds to decertify the class for all purposes in this litigation, nor do Plaintiffs understand the Court to have made such a

suggestion at a hearing held two months ago on June 17, 2019.[1] In any event, wholesale decertification of the class is not as simple as Defendants propose.

In order to de-certify the class for all purposes in this litigation, the Court would have to analyze each claim/count as to each Department of Defense ("DoD") and USCIS policy at issue and whether the elements for class certification remain viable for each defendant as to each policy. That said, Defendants offer no rationale for revoking class certification on the various claims for which this Court already has ordered relief on a class-wide basis, including the preliminary injunction with respect to DoD's October 2017 policy of rescinding or revoking N-426 forms issued to soldiers and the Court's grant of partial summary judgment on Plaintiffs' APA §706(2) claim with respect to the July 2017 MSSD policy. As such, there is no reason to consider or schedule briefing on class de-certification for these claims.

B. **Individualized 706(1) Claims**

Plaintiffs understand the Court's comment at the June 17, 2019 hearing with respect to class decertification to have pertained to Plaintiffs' class-wide "unreasonable delay" claims under APA §706(1). *See, e.g.*, Dkt. 264-3 at 28 ("I would invite the government to consider decertifying the class now. I don't think you have a class claim under 7061 at this point. So, I'm not going to treat this as if there has been unreasonable delay"). During the colloquy on this subject, the Court expressed concern as to whether continued class certification as to this claim may somehow impede individual class member's ability to pursue their individual unreasonable delay claims. *Id.* at 29 ("I think you are doing your class a disservice, the gentlemen out there and ladies who have applied, because four or five of them have gone to court and judges are saying they're a member

[1] The Court made the statement relied on by Defendants at a June 17, 2019 hearing, not a June 7, 2019 hearing.

of the class, I'm not going to do anything for them."). This has become an issue in certain federal cases brought by individual soldiers complaining about their delays, where the Government has moved to either stay or dismiss those cases due to this pending class action. Plaintiffs understand and share the Court's concern that individual class members may be disadvantaged by the Government's tactics in those cases, but Plaintiffs respectfully submit that there are a number of more efficient ways to address this concern than via a motion for class decertification, which Plaintiffs would contest.[2] Further, class de-certification briefing, much less class de-certification for any of the pending claims, is likely to create mass confusion – for MAVNIs, USCIS and DoD, the Court, and Plaintiffs' counsel and class representatives, all resulting in further delays in the processing of class member naturalization applications.

Indeed, this Court already offered one solution that would avoid class decertification: "I will work with you to come up with some kind of system, so we can get it done." Dkt. 264-3 at 28. That is Plaintiffs' goal, too: we want to "Get it done!" And the opportunity to do so is at hand. Defendants claim that they are implementing the Court's partial summary judgment decision and moving class members through the naturalization process. Assuming Defendants' intentions have

[2] As noted at the hearing on June 17, 2019, Plaintiffs believe that class certification with respect to the § 706(1) claims is appropriate as unreasonable delay associated with Defendants' unlawful policies is a common, typical, and solvable problem on a class-wide basis. The "unreasonable delay" factors that relate to the harm individuals are suffering due to the delay are more acute for most MAVNIs than for more typical LPR naturalization applicants, who have lawful status and work authorization (*i.e.*, under the *TRAC* factors, delays experienced by MAVNIs may be determined unreasonable even though the same length of delay for an LPR applicant may have been determined reasonable). Further, given that unreasonable delay can be found when a policy is considered to be lawful (*i.e.*, not arbitrary and capricious), logic would dictate that unreasonable delay would be established more readily when a policy is determined to be unlawful. Or, at the very least, a party is entitled to the equivalent or more relief when delay is being caused under a policy that is considered unlawful (if not, agencies could create arbitrary policies for the purpose of delay but avoid having to provide the relief associated with unreasonable delay). Of course, individual MAVNI soldiers may face these class-wide unreasonable delays as well as other unreasonable delays based on their individual circumstances.

not changed from those stated to the Court, the majority of class members, including soldiers with individual cases pending in other federal courts, will be "mooted" from this lawsuit in the next two to three months through a naturalization application decision (which we expect for most soldiers will result in naturalization). In fact, one soldier with an "unsuitable" MSSR and an individual lawsuit became a naturalized U.S. citizen in the last few weeks as a result of the Court's partial summary judgment decision. Of course, to the extent that this recently-naturalized class member had an individual "unreasonable delay" claim against USCIS, that claim is now moot as a result of the naturalization decision. And, if the soldier has and wishes to pursue any contractual claims against the Army that remain viable post-naturalization, the Government would be hard-pressed to seek a stay or dismissal of that individual claim on the basis of the *Nio* class action. Moreover, Plaintiffs are aware that several other class members with "unsuitable" MSSRs and individual lawsuits recently have been interviewed for naturalization. Thus, the Court's concern about individuals being precluded from pursuing individualized unreasonable delay claims against USCIS is resolving itself through implementation of the Court's partial summary judgment order.

Moreover, to the extent that individuals' claims are not being mooted by naturalization application adjudications, the Government has an obligation to provide updated and accurate information about the *Nio* case to the courts in which those individual claims are filed and pending. Accordingly, if individual soldiers are experiencing delays in their naturalization application processing that are not attributable to the class-wide delays caused by the unlawful policies that this Court has preliminarily enjoined or set aside, the Government can and should readily inform those courts of that fact. Thus, an easy way to ensure that soldiers in those cases are not disadvantaged as a result of this class action is for the Government to inform those courts that individualized 706(1) delay claims, breach of contract claims, claims under the INA based on

USCIS's failure to make a decision 120 days after an individual's interview, and such other claims are not within the scope of this class action.

C. **Bringing This Case To A Close**

Defendants also propose a Rule 12 or 56 briefing schedule, but that would not be productive or efficient. While it is true, as Plaintiffs explained at the June 17 hearing, that certain complaint causes of action remain pending in this case, Plaintiffs also noted that the fastest path to resolving those claims is for them to become moot through implementation of the Court's partial summary judgment decision. As USCIS makes naturalization decisions on class members and named Plaintiffs, there will be no need for Plaintiffs to pursue the remaining APA or Constitutional claims. And based on Defendants' reporting and representations to the Court regarding the processing of the remaining class member naturalization claims, this case should become substantially moot in the coming weeks and months. Certainly, on the current path, that processing will be complete for most class members in a shorter time span than it would take to fully adjudicate – including necessary (a) discovery with respect to the named Plaintiffs' individual claims which would not be affected by any decertification, (b) briefing, and (c) argument – the remaining claims so that the Court can decide them on the merits and enter a final order.

Further, in the related *Kirwa* action, the parties were tasked by the Court to discuss ways to bring that case to a close, and came to the conclusion that working towards a substantial mooting of that case was the logical solution. Plaintiff submit that the parties' time would be better suited to combining the efforts in both cases towards mooting the remaining claims, rather than litigating them through costly, distracting, and time-consuming discovery, briefing, and argument. Thus, as an alternative to Defendants' briefing schedule proposal, Plaintiffs propose that Defendants' counsel here work with defendants' counsel in *Kirwa* and with Plaintiffs' counsel to identify which

claims have been mooted in both cases and determine how the parties can work together and with the Court over the next few months to bring both cases to a close.

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Finally, as noted at the outset, any class decertification would create substantial confusion and chaos among the MAVNI population, as would further litigation over any of the remaining claims. MAVNI soldiers, and others, would not readily understand the consequences of decertification or further litigation on their ability to obtain relief. The Court's brief "decertification" comment at the June 17, 2019 hearing alone caused extensive concern and confusion. Anything more than that comment will have the immigration bar, USCIS, DoD, and Plaintiffs' counsel inundated with questions, and federal courts across the country likely will see individual claims filed as MAVNI soldiers seek to ensure that they remain on the path to a naturalization decision. The result of any decertification and unnecessary briefing at this point would be more anxiety and more uncertainty and more overall litigation, not less.

II. Important Questions Raised By Defendants' Report

- What does it mean in Dkt. 264-2 that "Within 5 Days of Receiving Case, Field Office Schedules Interview with Applicant and/or Reviews File. Interview will be Scheduled to Take Place Within 30 Days."?
    - USCIS previously left Plaintiffs and the Court with the impression that field offices would schedule the interview within 5 days of receipt of the file. *See, e.g.*, Dkt. 264-3 at 29 (THE COURT: ". . . once they do the interview in five days."). Is USCIS now refusing to commit to actually scheduling a naturalization interview even after a file arrives at the field office?

- Is USCIS committing that every interview – even if not scheduled within 5 days of field office receipt of a file – will take place within 30 days of the field office's receipt of the file?

- Why are there 43 entries with an "Effective Discharge Date"?
  - These entries include Zeyuan Li and Yisheng Dai, who are named plaintiffs in the *Calixto* action where the Army has stated that those soldiers were never discharged, as well as a number of soldiers on the Army's "no discharge" list of 349.
  - This list should contain no more than 18 entries (*see Calixto*, Dkt. 125) plus the entries for (if any) MSSD-discharged soldiers who did not accept the offer of reinstatement.
- For the 30 (previously identified as 21) entries where the "Naturalization Case Status" entry is something other than "pending" or "approved" (e.g., denied, withdrawn, closed), what is USCIS doing to assess whether Defendants' misinformation resulted in denial/closure of those files?
  - In the *Calixto* hearing on July 31, 2019, counsel for the Army represented that USCIS was most concerned about these naturalization applicants.
  - Those entries include Zeyuan Li and soldiers on the "no discharge" list of 349, and Plaintiffs' counsel has reviewed the USCIS denial letters for several of the 30 entries where USCIS's *only* basis for denial was a purported discharge from the Army.

Dated: August 13, 2019

Respectfully submitted,

/s/ Jennifer M. Wollenberg

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