

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUNAY MIRIYEVA, *et al.*,

Plaintiffs,

v.

U. S. CITIZENSHIP AND IMMIGRATION
SERVICES, *et al.*,

Defendants.

Civil Action No.: 19-3351 (ESH)

**DEFENDANTS' STATEMENT OF MATERIAL FACTS
ABOUT WHICH THERE IS NO GENUINE DISPUTE AND RESPONSE
TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS**

Pursuant to Local Civil Rule 7(h), Defendants submit the following statement of material facts about which there is no genuine dispute:

Army Separations and the MAVNI Program

1. Enlisted administrative separations from the Army Reserve fall into one of two categories: (1) “[s]eparation with characterization of service as honorable, general (under honorable conditions), or under other than honorable conditions;” and (2) “[s]eparation with an uncharacterized description of service[.]” Army Reg. (“AR”) 135-178, ¶ 2-7(a); AR 635-200, ¶ 3-9(a) (governing Active Duty Enlisted Administrative Separations).

2. A separation will be “with an uncharacterized description” when the separation occurs while the person is “[i]n an entry level status.” AR 135-178, ¶ 2-7(a); *see also id.* ¶ 2-11(a) (“Service will be described as uncharacterized if separation processing is initiated while a Soldier is in an entry level status”).

3. A soldier remains in “entry level status” during “[t]he first 180 days of continuous active military service.” *Id.*, Glossary ¶ 2.

4. There are only two exceptions to this rule: (1) “[w]hen characterization under other than honorable conditions is authorized under the reason for separation and is warranted by the circumstances of the case; or (1) the Secretary of the Army . . . , on a case-by-case basis, determines that characterization of service as honorable is clearly warranted by the presence of unusual circumstances involving conduct and performance of military duty.” *Id.* ¶ 2-11(a).

5. Absent one of those conditions, a soldier discharged while in an entry-level status will receive an “uncharacterized” discharge. *Id.* ¶ 2-7(a); *see also* AR 635-200, ¶ 3-9(a).

6. A person seeking naturalization under § 1440 must submit an application for naturalization (Form N-400) to USCIS. *See* USCIS Policy Manual, Vol. 12, Part I, Ch. 5, § A.

7. The applicant must submit a Form N-426, which “confirms whether the applicant served honorably” and, where a person has been separated, a copy of DD Form 214 or an equivalent discharge order. *Id.*; Form N-426, Instructions at 2; *Nio v. USCIS*, No. 17-cv-0998 (ESH) (*Nio* ECF No. 171) (explaining that “USCIS has determined that it will treat . . . discharge orders listing an uncharacterized discharge as the functional equivalent of a DD Form 214.”).

8. DD Form 214 is the “Certification of Release or Discharge from Active Duty.” *See, e.g.,* Pls.’ MSJ, Ex. 5.

9. Where an individual separates from the Army while in entry level status, the DD Form 214 states that the “Character of Service” is “Uncharacterized.” *See, e.g.,* Pls.’ MSJ, Ex. 5; AR 135-178, ¶ 2-7(a).

10. If USCIS denies a naturalization application, the individual may appeal that denial by submitting a Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings. *See* 8 U.S.C. § 1421(c).

11. None of the Plaintiffs was discharged for cause. *See* Pls.’ MSJ, Exs. 5, 10, 15, 21.

Plaintiff Miriyeva

12. Plaintiff Miriyeva submitted her N-400 application on March 29, 2018. Pls.’ MSJ, Ex. 2 at 1.

13. Plaintiff Miriyeva enlisted in the Army Selected Reserve of the Ready Reserve on March 14, 2016. *See* Pls.’ MSJ, Ex. 3 at 2.

14. She submitted her N-400 application on March 29, 2018. Pls.’ MSJ, Ex. 2 at 1. She was subsequently discharged on December 21, 2018. Pls.’ MSJ, Ex. 5 at 1.

15. The Army stated that her “Character of Service” upon discharge was “uncharacterized” and that the reason for her separation was “Failed Medical/Physical/Procurement Standards.” Pls.’ MSJ, Ex. 5.

16. Miriyeva’s N-400 was initially approved prior to her discharge, but was later reopened and denied on July 11, 2019, based on the uncharacterized discharge. Pls.’ Statement of Facts (“Pls.’ SOF”) ¶¶ 28, 35–36.

17. Miriyeva appealed this determination, submitting a Form N-336 on August 16, 2019. Decl. of G. Miriyeva ¶ 24 (ECF No. 2-23).

18. That appeal remains pending. *Id.*

19. In August 2019, the Army informed USCIS that Ms. Miriyeva’s discharge was not properly effectuated, which would have meant that she had not been fully discharged from the Army and did not have an “uncharacterized” discharge. Pls.’ SOF ¶ 39.

20. Based on that information, USCIS issued a Motion to Reopen and approved Ms. Miriyeva’s N-400 on August 13, 2019. *Id.* ¶ 38.

21. Before Ms. Miriyeva was administered the Oath of Allegiance to complete the naturalization process, the Army notified USCIS that Ms. Miriyeva was in fact properly

discharged. USCIS issued another Motion to Reopen on November 20, 2019, based on the latest information from the Army. *See* Agency Mot. to Reopen (Nov. 20, 2019) (Defs.’ Cross-Mot. for Summ. J., Ex. E).

22. Ms. Miriyeva responded to that Motion on or about December 2, 2019 and the decision on the Motion to Reopen is currently pending. *See id.*

Plaintiff Tum

23. Plaintiff Tum submitted her N-400 application on August 2, 2018. Defs.’ Cross-Mot. for Sum. J., Ex. H.

24. Tum was discharged on February 19, 2019. Pls.’ MSJ, Ex. 10 at 1.

25. The Army stated that her “Character of Service” upon discharge was “uncharacterized” and that the reason for her separation was “Failed Medical/Physical/Procurement Standards.” Pls.’ MSJ, Ex. 10 at 1.

26. USCIS denied Tum’s naturalization application on May 28, 2019. *See* Pls.’ MSJ, Ex. 12.

27. Accordingly, USCIS stated that Tum had not met her burden of “demonstrate[ing] that [she was] discharge[d] from the U.S. Armed Forces under honorable conditions.” Pls.’ MSJ, Ex. 12 at 2.

28. Tum appealed this determination, submitting a Form N-336 on June 24, 2019. *See* Decl. of A. Tum ¶ 14 (ECF No. 2-26).

29. That appeal remains pending. *See id.*

Plaintiff Kulkarni

30. Plaintiff Kulkarni submitted her N-400 application on December 21, 2018. Pls.’ MSJ, Ex. 17 at 2. Kulkarni was discharged on December 7, 2018. Pls.’ MSJ, Ex. 15 at 1.

31. The Army stated that her “Character of Service” upon discharge was “uncharacterized” and that the reason for her separation was “Condition, Not a Disability.” Pls.’ MSJ, Ex. 15 at 1.

32. USCIS denied Kulkarni’s naturalization application on June 5, 2019. Pls.’ MSJ, Ex. 17 at 1.

33. USCIS stated that it denied the application because Kulkarni received an “uncharacterized” discharge and had not “demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions.” Pls.’ MSJ, Ex. 17.

34. Kulkarni appealed this determination, submitting a Form N-336 on or about July 5, 2019. *See* Decl. of S. Kulkarni ¶ 15 (ECF No. 2-25).

35. USCIS affirmed the denial on October 17, 2019. *See id.*

Plaintiff Kadel

36. Plaintiff Kadel submitted his N-400 on July 24, 2017. Pls.’ MSJ, Ex. 22 at 2.

37. Kadel was discharged from the Army on August 4, 2017. Decl. of B. Kadel ¶ 5 (ECF No. 2-24).

38. The Army stated that his “Character of Service” upon discharge was “uncharacterized” and that the reason for his separation was “Maximum DEP time has been exceeded.” Pls.’ MSJ, Ex. 21.

39. USCIS denied Kadel’s naturalization application on July 10, 2019. *See* Pls.’ MSJ, Ex. 22.

40. USCIS stated that it denied the application because Kadel received an “uncharacterized” discharge and had not “demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions.” Pls.’ MSJ, Ex. 22 at 2.

41. Kadel appealed this determination, submitting a Form N-336 on or about August 15, 2019. Kadel Decl. ¶ 14.

42. Since then, the Army stated that it would offer reinstatement to Kadel. *See id.* ¶ 17.

Pursuant to Local Civil Rule 7(h), Defendants respectfully respond to Plaintiffs' Local Civil Rule 7(h) Statement ("Plaintiffs' Statement").

As a threshold matter, Plaintiffs' Statement does not comply with Local Civil Rule 7(h) because it consists largely of immaterial facts and argument. Thus to the extent Defendants deny the assertions in Plaintiffs' Statement, those denials do not preclude the Court from granting Defendants' Motion for Summary Judgment. Likewise, Defendants object to the allegations in Plaintiffs' Statement to the extent they assert conclusions of law, opinion, speculation, and other matters immaterial to the legal issues in this matter. Thus, any failure to further respond to such assertions should not result in the assertion being deemed conceded because, pursuant to Local Civil Rule 7(h), the Court may assume a fact to be admitted only to the extent it is properly deemed a "material" fact and supported by competent evidence. *See Williams v. Court Servs. & Offender Supervision Agency*, 110 F. Supp. 3d 111, 115 (D.D.C. 2015) ("Both of Mr. Williams' statements violate the Local Rule because, at 86 pages, they are certainly not 'concise statement[s] of genuine issues setting forth all material facts.' LCvR 7(h). His statements are replete with argument, speculation, conjecture, and assumptions. The alleged facts are largely 'not material to [his] substantive claims,' ... or merely 'describ[e] in lengthy detail the contextual and structural background surrounding Defendant's stated facts.'").

The following responds to each numbered paragraph included in Plaintiffs' Statement of Material Facts in Genuine Dispute, using the same numbering:

1. Section 329 of the Immigration and Nationality Act (“INA”), which is codified at 8 U.S.C. § 1440, enables soldiers who have served honorably as a member of the Selected Reserve of the Ready Reserve or in active-duty status during periods of military hostilities to become naturalized U.S. citizens:

(a) Any person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States . . . during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment, reenlistment, extension of enlistment, or induction such person shall have been in the United States . . . whether or not he has been lawfully admitted to the United States for permanent residence . . . The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions . . .

(b) A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

- (1) he may be naturalized regardless of age, and notwithstanding the provisions of section 1429 of this title as they relate to deportability and the provisions of section 1442 . . .
- (2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required;
- (3) service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving . . . and was separated from such service under honorable conditions . . .

8 U.S.C. § 1440.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ conclusions of law. As such, no response is

required and Defendants respectfully refer the Court to Part II of their accompanying memorandum in support of cross-motion for summary judgment (“Defs.’ Mot.”) for Defendants’ legal arguments regarding this statute. Additionally, Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents and deny any statement in this paragraph that is inconsistent therewith. Defendants further respond, denying that Plaintiffs’ introductory statement accurately describes the cited statute as Plaintiffs fail to account for the statute’s additional requirement that any separated soldier also demonstrate that she was discharged “under honorable conditions.” 8 U.S.C. § 1440(a).

2 Section 1440 states that the military service criteria for naturalization (honorable service and/or “separation . . . under honorable conditions”) “shall be proved by a duly authenticated certification from the executive department” under which the applicant is serving or served. 8 U.S.C. § 1440(b)(3).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their legal arguments regarding this statute. Additionally, Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents and deny any statement in this paragraph that is inconsistent therewith. Defendants further respond, noting that Plaintiffs mischaracterize the text of the statute by using “and/or.” The statutory text is conjunctive. *See* 8 U.S.C. § 1440(a); *see also* Defs.’ Cross-Mot. for Summ. J., Part II.

3 The USCIS Policy Manual on “Application and Filing for Service Members” instructs that an applicant under § 1440 should submit an N-400 Application for Naturalization and an N-426 Request for Certification of Military or Naval Service. USCIS Policy Manual,

Vol. 12, Part I, Ch. 5(A) (“USCIS Policy Manual”), *available at* <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-5> (last visited Nov. 18, 2019).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument and conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for Defendants’ arguments regarding the USCIS Policy Manual. Additionally, Defendants respectfully refer the Court to the cited Manual for a full and accurate statement of its contents and deny any statement in this paragraph that is inconsistent therewith.

4. Form N-426 includes a section that enables the certifying military official to “[s]tate whether the requestor served honorably or is currently serving honorably” and, if answered “No,” to provide details in Part 7. Part 7 asks for the certifying military official to provide any remarks on “any derogatory information” or “other than honorable discharges.” USCIS Form N-426, Request for Certification of Military or Naval Service, *available at* <https://www.uscis.gov/n-426> (last visited Nov. 18, 2019).

Response: Defendants do not dispute this paragraph, other than to respectfully refer the Court to Form N-426 and dispute any portion of this paragraph that is inconsistent therewith.

5. Per the USCIS Policy Manual:

The military must complete and certify (sign) the [N-426] Request for Certification of Military or Naval Service before it is submitted to USCIS. USCIS, however, will accept a completed but uncertified form submitted by an applicant who has separated from the U.S. armed forces if:

- The applicant submitted a photocopy of his or her Certificate or Release from Active Duty (DD Form 214) or National Guard Report of Separation and Record of Service (NGB Form 22) for applicable periods of service listed on Form N-426; and

- The DD Form 214 or NGB Form 22 lists information on the type of separation and character of service.

USCIS Policy Manual, Vol. 12, Part I, Ch. 5(A), *available at* <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-5> (last visited Nov. 18, 2019).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' characterization of the USCIS Policy Manual. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their arguments regarding the Policy Manual. Defendants further respectfully refer the Court to the contents of that manual for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

6 Form DD-214 has sections for "Type of Separation" and "Character of Service." *See, e.g.,* Miriyeva DD-214 (Dkt. 2-5), at 1.

Response: Defendants do not dispute this paragraph.

7 USCIS accepts discharge orders, such as U.S. Army Reserve Command discharge orders on a Form 500, "as the functional equivalent of a DD Form 214" for purposes of naturalization under § 1440. Defendants' Notice (Dkt. 171), at 2, *Nio v. United States Dep't of Homeland Security*, No. 1:17-cv-00998 (D.D.C. July 23, 2018).

Response: Defendants do not dispute this paragraph.

8 Form 500 has a section for "Type of Discharge." *See, e.g.,* Kadel Form 500 (Dkt. 2-21), at 1.

Response: Defendants do not dispute this paragraph.

9 Department of Defense Instruction ("DoDI") 1332.14, in effect since January 2014, governs "Enlisted Administrative Separations" for both active-duty soldiers and reservists. DoDI 1322.14 (Dkt. 2-1), at 1.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' conclusions of law and characterization of DoDI 1332.14. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their arguments regarding DoDI 1332.14. Defendants further respectfully refer the Court to the contents of the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

10. Under this DoDI, the Department of Defense authorizes "separation with characterization of service as honorable, general (under honorable conditions), or under other than honorable conditions," but also separately authorizes an "entry-level separation," which can be uncharacterized. DoDI 1322.14, Enclosure 4, Section 3, at 29, *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133214p.pdf?ver=2019-03-14-132901-200> (last visited Nov. 18, 2019).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument, conclusions of law, and characterization of DoDI 1332.14. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their arguments regarding DoDI 1322.14. Defendants further respectfully refer the Court to the contents of the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

11. Army Regulation 135-178, which applies to U.S. Army reservists, likewise provides for: (1) a "separation with characterization of service as honorable, general (under honorable conditions), or under other than honorable conditions," or (2) a separation "with an uncharacterized description of service," which generally is used for entry-level separations.

Army Regulation 135-178, “Army National Guard and Reserve: Enlisted Administrative Separations,” Chapter 2, Sections 2-7(a), 2-11, *available at* https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3941_AR135-178_WEB_Final.pdf (last visited Nov. 18, 2019).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ characterization of Army Regulation 135-178. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their legal arguments regarding this regulation. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

12. USCIS has a policy of denying naturalization to an applicant for citizenship under 8 U.S.C. § 1440 if the applicant has received an “uncharacterized” discharge from the military on a Form DD-214 or other discharge order (the “Policy”).

Response: Plaintiffs failed to identify any portion of the record that supports this statement, as required by Local Rule 7(h)(1). Moreover, this paragraph contains only Plaintiffs’ argument and legal conclusions. Accordingly, no response is required.

13. USCIS has articulated and applied this Policy, including in written decisions. *See, e.g.*, Letter from USCIS to Gunay Miriyeva, “Agency Motion to Reopen,” June 6, 2019 (Dkt. 2- 2), at 3 (“Longstanding USCIS policy provides that only a discharge specifically characterized as either ‘honorable’ or ‘general (under honorable conditions)’ qualifies as a separation ‘under honorable conditions.’ *See* USCIS Policy Manual Vol. 12, Part I, Chap. 3.”); Letter from USCIS to Counsel, “Notice of Decision,” Oct. 17, 2019 (Dkt. 2-19), at 2 (same, without internal citation). *See also* Letter from USCIS to Ann Tum, “Decision,” May 28, 2019

(Dkt. 2-12), at 1-2 (“[Y]ou received an uncharacterized discharge from the U.S. Arm[ed Forces]. . . . You have not demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions; therefore, you are not eligible for naturalization under INA 329.”); Letter from USCIS to Siddhi Kulkarni, “Notice of Decision,” June 5, 2019 (Dkt. 2-17), at 2 (same); Letter from USCIS to Counsel, “Notice of Decision,” July 10, 2019 (Dkt. 2-22), at 2 (same).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their arguments regarding Plaintiffs’ naturalization application denials.

14. In judicial proceedings, USCIS has confirmed the existence of the Policy, including through the following representations:

- Applicants “were denied naturalization because the evidence before USCIS is that they have a discharge order, an uncharacterized discharge order.” *Nio*, 9/23/19 Status Hearing, Tr. at 61:12-14.
- “[U]ncharacterized doesn’t count as meeting the honorable service requirement.” *Nio*, 3/20/19 Status Hearing, Tr. at 106:12-14.
- “Sure, yes [an uncharacterized discharge is sufficient to deny a naturalization application].” *Id.* at 108:24-109:3.
- “[T]his person would be ineligible to be naturalized because he has an uncharacterized discharge. . . . With an uncharacterized discharge, one is not eligible to naturalize under section 1440 which is the military naturalization program. You have to have an honorable discharge if you are discharged.” *Nio*, 8/23/17 Status Hearing, Tr. at 25:12-24.
- “THE COURT: Do you deny naturalization to people who had medical problems so they didn’t finish the Army? [USCIS Counsel]: The denial is based solely on the fact that her discharge is uncharacterized. We don’t look beyond the uncharacterized nature of the discharge. . . . If the condition is uncharacterized, the USCIS interpretation is that does not meet the definition for naturalization under 1440. THE COURT: . . . You mean to tell me, if somebody is in there and they get sick and they can’t continue to serve, that means they can’t be naturalized? [USCIS Counsel]: Yes, Your Honor, that is the USCIS position.” *Nio*, 9/23/19

Status Hearing, Tr. at 74:16-75:5.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument and characterization of various proceedings. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

15. Section 1440 specifies that military naturalization is dependent upon a soldier's honorable service *as designated by the military*. 8 U.S.C. § 1440(b)(3).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument and conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their arguments regarding this statute. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

16. If an applicant for naturalization under 8 U.S.C. § 1440 has been discharged from the military, eligibility is established through a *determination by the military* that the applicant "was separated under honorable conditions." 8 U.S.C. § 1440(a).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument and conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their legal arguments regarding this statute. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in

this paragraph that is inconsistent therewith.

17. The Department of Defense, in its instructions for “Enlisted Administrative Separations,” specifies under its sub-heading for “Uncharacterized Separation” that “[w]ith respect to administrative matters outside this instruction that require a characterization as honorable or general, *an entry-level separation will be treated as the required characterization.*” DoDI 1322.14, Enclosure 4, Section 3 (Dkt. 2-1), at 32 (emphasis added).

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial. *See* Defs.’ Mot., Part II.

18. 10 U.S.C. § 12685, enacted in 1994, provides:

A member of a reserve component who is separated for cause, except under section 12684 of this title, is entitled to a discharge under honorable conditions unless—

(1) the member is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned; or

(2) the member consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board.

10 U.S.C. § 12685.

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial. *See* Defs.’ Mot., Part II.

19. In a separate sub-provision from the one identified in Paragraph 17 above, the Department of Defense in its instructions for “Enlisted Administrative Separations” specifies under its sub-heading for “Uncharacterized Separation” that, “[i]n accordance with section 12685 [10 U.S.C. § 12685], an entry-level separation of a Service member of a Reserve Component for cause, except under [10 U.S.C. § 12684], *will be ‘under honorable conditions.’*”

DoDI 1322.14, Enclosure 4, Section 3 (Dkt. 2-1), at 33 (emphasis added).

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial. *See* Defs.’ Mot., Part II.

20. Thus, the challenged Policy, which refuses to recognize an “uncharacterized” discharge as an “under honorable conditions” discharge, is contrary to both provisions of DoDI 1322.14, as well as 10 U.S.C. § 12685.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument and conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

21. The USCIS Policy Manual section on “Honorable Service” under § 1440 does not use the term “uncharacterized.” USCIS Policy Manual, Vol. 12, Part I, Ch. 3(B), *available at* <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3> (last visited Nov. 18, 2019).

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial. *See* Defs.’ Mot., Part II.

22. Instead, the USCIS Policy Manual states:

Honorable service means only service in the U.S. armed forces that *is designated as honorable service by the executive department under which the applicant performed that military service.*

Both “Honorable” and “*General-Under Honorable Conditions*” *discharge types qualify as honorable service for immigration*

purposes. Other discharge types, such as “Other Than Honorable,” do not qualify as honorable service.

Id. (emphases added).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ characterization of the USCIS Policy Manual. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

23. In accordance with 10 U.S.C. § 12685 and the above-described DoDI 1322.14 provisions, the U.S. Army treats an “uncharacterized” discharge as demonstrating “honorable service” and/or a discharge “under honorable conditions” for naturalization purposes. *See, e.g.,* U.S. Army Human Resources Command, “The Soldier’s Guide to Citizenship Application,” at 4 (quoted in *Kirwa v. United States Dep’t of Defense*, 285 F. Supp. 3d 21, 28 (D.D.C. 2017) (“[A] Soldier is considered to be serving honorably unless a decision has been made, either by the Soldier’s commander or a court martial, to discharge him/her under less than honorable conditions. In the rare cases where the character of a Soldier’s service is questionable, ONLY the Soldier’s commander can decide this issue, and the sole criterion for the decision is: If the Soldier were being discharged today, based on his/her record, what type of discharge would the Soldier receive? If Honorable or General [] Under Honorable Conditions, the character of service on the N-426 will read ‘Honorable’. If Under Less Than Honorable Conditions, the N-426 character of service item will NOT read ‘honorable.’”); *Miriyeva* N-426 (Dkt. 2-6), at 2 (post-discharge N-426 certifying “Honorable Period of Military Service”); *Miriyeva* N-426 (Dkt. 2-8), at 2 (post-discharge N-426 certifying “Honorable Period of Military Service”); *Tum* N-426

(Dkt. 2-11), at 2 (post-discharge N-426 certifying “Honorable Period of Military Service”); Kulkarni N-426 (Dkt. 2-18), at 2 (post- discharge N-426 certifying “Honorable Period of Military Service”); Kadel N-426 (Dkt. 2-20), at 2-3 (N-426, certifying “Honorable Period of Military Service,” dated twelve days before effective date of discharge).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument and conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

24. Each of Plaintiff’s DD-214 or Form 500 listing an “uncharacterized” discharge is a further designation by the U.S. Army of an “under honorable conditions” discharge. *See* Statement of Facts ¶¶ 5-8, 17-19, *supra*.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument and conclusions of law. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

25. Thus, the challenged Policy, which refuses to recognize an “uncharacterized” discharge as an “under honorable conditions” discharge, even though that is the relevant military department’s position, is not in accordance with 8 U.S.C. § 1440 (or even with the USCIS Policy Manual as written).

Response: Plaintiff failed to identify any portion of the record that supports this statement, as required by Local Rule 7(h)(1). Additionally, this paragraph fails to comply with Local Civil Rule 7(h), as it contains Plaintiffs' argument. As such, no response is required.

26. USCIS applied the challenged Policy to Ms. Miriyeva, Ms. Tum, Ms. Kulkarni, and Mr. Kadel.

Response: Plaintiff failed to identify any portion of the record that supports this statement, as required by Local Rule 7(h)(1). As such, no response is required.

27. Gunay Miriyeva applied for naturalization in March 2018 on the basis of her military service in the U.S. Army Selected Reserve of the Ready Reserve. Miriyeva Decl. (Dkt. 2-23), ¶ 4.

Response: Defendants do not dispute this paragraph.

28. On October 4, 2018, USCIS approved Ms. Miriyeva's naturalization application. Miriyeva Decl. (Dkt. 2-23), ¶¶ 5-6; Miriyeva Annotated N-400 and Adjudication Decision History (Dkt. 2-4), at 1-2.

Response: Defendants do not dispute this paragraph.

29. However, USCIS did not promptly schedule Ms. Miriyeva for an oath ceremony after October 4, 2018. Miriyeva Decl. (Dkt. 2-23), ¶ 6.

Response: Defendants do not dispute this paragraph.

30. The Army discharged Ms. Miriyeva from the Army. On December 21, 2018, the U.S. Army issued Form DD-214, which lists Ms. Miriyeva's discharge type as "uncharacterized." Miriyeva Decl. (Dkt. 2-23), ¶ 12; Miriyeva DD-214 (Dkt. 2-5), at 1.

Response: Defendants do not dispute this paragraph.

31. Following her discharge, in January 2019, Ms. Miriyeva submitted to USCIS a second Form N-426, signed on January 11, 2019, on which the U.S. Army again certified that she had served honorably during her entire period of military service, beginning on March 14, 2016. Miriyeva Decl. (Dkt. 2-23), ¶ 13; Miriyeva N-426 (Dkt. 2-6), at 2-3.

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial.

32. On April 23, 2019, the U.S. Army issued a third Form N-426, certifying again that Ms. Miriyeva had served “honorably” during her entire period of military service, including on the day of her purported discharge on December 21, 2018. Miriyeva Decl. (Dkt. 2-23), ¶ 16; Miriyeva N-426 (Dkt. 2-8), at 2.

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial. *See* Defs.’ Mot., Part II.

33. On June 6, 2019, USCIS issued a written decision, entitled “Agency Motion to Reopen,” revoking USCIS’s prior approval of Ms. Miriyeva’s N-400. Letter from USCIS to Gunay Miriyeva, “Agency Motion to Reopen,” June 6, 2019 (Dkt. 2-2), at 3-4.

Response: Defendants dispute this paragraph, as the cited document is not a “decision.” *See* Pls.’ Mot., Ex. 2.

34. In that document, USCIS stated that Ms. Miriyeva was ineligible for naturalization on the sole basis that her “uncharacterized” discharge, as reflected on her DD-214, is not an “under honorable conditions” discharge for purposes of § 1440, and she failed to otherwise demonstrate that she was discharged “under honorable conditions” from the U.S. Army. *Id.*

Response: Defendants dispute this paragraph and respectfully refer the Court to the cited material for a full and accurate statement of USCIS' explanation. *See* Pls.' Mot., Ex. 2 and 2–3.

35. The June 6, 2019 “Agency Motion to Reopen” indicated that Ms. Miriyeva would have “15 days to respond” and “overcome” the information, otherwise her naturalization “application will be denied.” *Id.* at 1.

Response: Defendants do not dispute this paragraph.

36. On June 11, 2019, just five days after the date of the “Agency Motion to Reopen” and before Ms. Miriyeva’s time to respond had run, USCIS stamped Ms. Miriyeva’s N-400 application as “DENIED” as of that date. Miriyeva Annotated N-400 and Adjudication Decision History (Dkt. 2-4), at 1.

Response: Defendants do not dispute that on Plaintiff Miriyeva’s N-400 application, there is a stamp stating “DENIED” and dated June 11, 2019.

37. USCIS stated in the Decision Note to the Adjudication Decision History, dated July 11, 2019, that the denial was due to the fact that Ms. Miriyeva “Separated from military service without honorable discharge.” Miriyeva Annotated N-400 and Adjudication Decision History (Dkt. 2-4), at 2.

Response: Defendants do not dispute this paragraph.

38. On August 13, 2019, USCIS approved Ms. Miriyeva’s naturalization application for a second time, stamping her N-400 as “APPROVED” as of that date. Miriyeva Annotated N- 400 and Adjudication Decision History (Dkt. 2-4), at 1.

Response: Defendants do not dispute this paragraph.

39. This approval occurred after USCIS was informed by the U.S. Army that Ms. Miriyeva had not been discharged. Miriyeva Decl. (Dkt. 2-23), ¶ 20.

Response: Defendants do not dispute this paragraph.

40. However, USCIS subsequently represented in related litigation that it had reopened Ms. Miriyeva's application because her DD-214 indicated a final discharge. Miriyeva Decl. (Dkt. 2-23), ¶¶ 21-22.

Response: Defendants do not dispute this paragraph.

41. On September 27, 2019, in response to court direction in related litigation to provide information as to "whether [USCIS is] going to stick by [denial based solely on the fact that her discharge is uncharacterized]" and "whether [Ms. Miriyeva] will be scheduled for an oath," USCIS represented that it would not be scheduling a naturalization oath ceremony for Ms. Miriyeva "at this time." Miriyeva Decl. (Dkt. 2-23), ¶ 23; *Nio*, 9/23/19 Status Hearing, Tr. at 75:6-7, 77:6-8; Order (Dkt. 275) at 1, *Nio* (Sept. 24, 2019).

Response: Defendants do not dispute this paragraph.

42. Given Ms. Miriyeva's "uncharacterized" discharge, as reflected on her DD-214, there is no document or explanation that Ms. Miriyeva can provide that will change USCIS's decision to deny her application under the current Policy. *See* Letter from USCIS to Gunay Miriyeva, "Agency Motion to Reopen," June 6, 2019 (Dkt. 2-2), at 3-4 ("The third and final Form N-426 that USCIS later received . . . confirms that you were separated from service on December 21, 2018, but it does not indicate the characterization of your separation. Although it indicates that you served honorably, it does not indicate whether you were separated under honorable conditions."); Statement of Facts ¶¶ 46-51, *infra* (denying an application where DD-214 listed

“uncharacterized” discharge even though subsequent, post-discharge N-426 included Army certification that “Soldier received an honorable discharge”).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith. Further, Defendants dispute this paragraph as the document to which Plaintiffs cite does not support their legal conclusion that “there is no document or explanation that Ms. Miriyeva can provide that will change USCIS’s decision to deny her application under the current Policy.”

43. The Policy was the sole basis for the denial of Ms. Miriyeva’s naturalization application. Letter from USCIS to Gunay Miriyeva, “Agency Motion to Reopen,” June 6, 2019 (Dkt. 2-2), at 3-4; *Nio*, 9/23/19 Status Hearing, Tr. at 74:18-19 (“The denial is based solely on the fact that her discharge is uncharacterized.”); *see also Nio*, 3/20/19 Status Hearing, Tr. at 108:2-6, 108:17-19 (“[USCIS counsel:] USCIS wants to develop a record for assessing this person’s eligibility for all the criteria. Again, USCIS -- it is not USCIS’ view that, as soon as you get an uncharacterized discharge, the analysis stops there [T]he reason that the [denial] decision is written [to list one reason that we find that you don’t qualify] is because that was the only thing applicable.”).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their arguments

regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

44. Given the Policy, an administrative appeal by Ms. Miriyeva pursuant to § 336 of the INA, codified at 8 U.S.C. § 1447, would be futile. *See* Letter from USCIS to Counsel, “Notice of Decision,” Oct. 17, 2019 (Dkt. 2-19), at 1-3 (denying a § 336 appeal on the basis of the Policy).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ conclusions of law. As such, no response is required and Defendants respectfully direct the Court to their Motion to Dismiss for their argument regarding Plaintiff Miriyeva’s failure to exhaust her administrative remedies.

45. Ann Tum applied for naturalization in August 2018 on the basis of her military service with the U.S. Army Selected Reserve of the Ready Reserve. Tum Decl. (Dkt. 2-26), ¶¶ 2-3.

Response: Defendants do not dispute this paragraph.

46. Ms. Tum was discharged from the Army, and on February 19, 2019, the U.S. Army issued a Form DD-214 listing Ms. Tum’s discharge type as “uncharacterized.” Tum Decl. (Dkt. 2-26), ¶ 9; Tum DD-214 (Dkt. 2-10), at 1.

Response: Defendants do not dispute this paragraph.

47. On May 20, 2019, the U.S. Army issued Ms. Tum a second Form N-426, certifying that Ms. Tum had served honorably in the Selected Reserve, including through her day of discharge on February 19, 2019. Tum Decl. (Dkt. 2-26), ¶ 10; Tum N-426 (Dkt. 2-11), at 2.

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial.

48. The N-426 further states that Ms. Tum's "discharge type" was "Honorable." In the "Remarks" section of the Form, the U.S. Army confirmed: "No derogatory information found as Soldier received an honorable discharge." Tum Decl. (Dkt. 2-26), ¶ 10; Tum N-426 (Dkt. 2-11), at 3.

Response: Defendants do not dispute this paragraph.

49. On May 23, 2019, USCIS interviewed Ms. Tum for naturalization. At that interview, Ms. Tum provided USCIS with the N-426 dated May 20, 2019. Tum Decl. (Dkt. 2-26), ¶ 11.

Response: Defendants do not dispute this paragraph.

50. On May 28, 2019, USCIS issued a decision denying Ms. Tum's naturalization application on the sole grounds that her DD-214 reflects an "uncharacterized" discharge and that she did not prove that her discharge was under honorable conditions. Letter from USCIS to Ann Tum, "Decision," May 28, 2019 (Dkt. 2-12), at 1-2.

Response: Defendants do not dispute this paragraph.

51. The denial decision does not mention the N-426 in which the Army certified, three days prior to her naturalization interview, that Ms. Tum had served honorably and that her discharge was under "honorable" conditions. *Id.*

Response: Defendants do not dispute this paragraph.

52. The Policy was the sole basis for the denial of Ms. Tum's naturalization application. *Id.*; see also *Nio*, 3/20/19 Status Hearing, Tr. at 108:2-6, 108:17-19 ("[USCIS counsel:] USCIS wants to develop a record for assessing this person's eligibility for all the criteria. Again, USCIS

-- it is not USCIS' view that, as soon as you get an uncharacterized discharge, the analysis stops there [T]he reason that the [denial] decision is written [to list one reason that we find that you don't qualify] is because that was the only thing applicable.”).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

53. Given the Policy, an administrative appeal by Ms. Tum pursuant to § 336 of the INA would be futile. *See* Letter from USCIS to Counsel, “Notice of Decision,” Oct. 17, 2019 (Dkt. 2-19), at 1-3 (denying a § 336 appeal on the basis of the Policy).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' conclusions of law. As such, no response is required and Defendants respectfully direct the Court to their Motion to Dismiss for their argument regarding Plaintiff Tum's failure to exhaust her administrative remedies.

54. Siddhi Kulkarni applied for naturalization on December 21, 2018 on the basis of her active-duty military service in the U.S. Army. Kulkarni Decl. (Dkt. 2-25), ¶ 11.

Response: Defendants do not dispute this paragraph.

55. Previously, on December 7, 2018, the U.S. Army had discharged Ms. Kulkarni from active duty and issued a DD-214 listing the discharge type as “uncharacterized.” Kulkarni Decl. (Dkt. 2-25), ¶ 10; Kulkarni DD-214 (Dkt. 2-15), at 1.

Response: Defendants do not dispute this paragraph, except to note that there is no designation of “discharge type” on the DD-214. Rather, the DD-214 lists “type of separation” as “discharge” and “character of service” as “uncharacterized.”

56. On June 5, 2019, USCIS issued a decision denying Ms. Kulkarni’s naturalization application on the sole ground that she failed to establish that she had received an “under honorable conditions” discharge from the U.S. Army because her separation was “uncharacterized.” Letter from USCIS to Siddhi Kulkarni, “Notice of Decision,” June 5, 2019 (Dkt. 2-17), at 1-2.

Response: Defendants do not dispute this paragraph.

57. The Policy was the sole basis for the denial of Ms. Kulkarni’s naturalization application. *Id.*; *see also Nio*, 3/20/19 Status Hearing, Tr. at 108:2-6, 108:17-19 (“[USCIS counsel:] USCIS wants to develop a record for assessing this person’s eligibility for all the criteria. Again, USCIS -- it is not USCIS’ view that, as soon as you get an uncharacterized discharge, the analysis stops there [T]he reason that the [denial] decision is written [to list one reason that we find that you don’t qualify] is because that was the only thing applicable.”).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs’ argument and legal conclusions. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants’ Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

58. On June 19, 2019, the U.S. Army issued a second Form N-426, certifying Ms. Kulkarni’s entire period of military service, including her day of discharge on December 7, 2018, as honorable. Kulkarni Decl. (Dkt. 2-25), ¶ 14; Kulkarni N-426 (Dkt. 2-18), at 2.

Response: Defendants do not dispute this paragraph.

59. On or about July 3, 2019, pursuant to § 336 of the INA, Ms. Kulkarni filed an administrative appeal of the denial of her naturalization application. Kulkarni Decl. (Dkt. 2-25), ¶ 15.

Response: Defendants do not dispute this paragraph.

60. On October 17, 2019, USCIS denied Ms. Kulkarni's § 336 appeal in a written decision, referencing the challenged Policy as the sole basis for the denial:

Because your character of service is listed as "uncharacterized" on your Certificate of Release or Discharge From Active Duty, and there is nothing on your Form DD-214 or Form N-426 to suggest that your separation was in fact characterized as "under honorable conditions," you have not met your burden to demonstrate that the Department of the Army designated your separation as "under honorable conditions."

Letter from USCIS to Counsel, "Notice of Decision," Oct. 17, 2019 (Dkt. 2-19), at 1-2.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument and legal conclusions. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

61. Bipin Kadel applied for naturalization on July 24, 2017 on the basis of his military service with the U.S. Army Selected Reserve of the Ready Reserve. Kadel Decl. (Dkt. 2-24), ¶¶ 2, 4.

Response: Defendants do not dispute this paragraph.

62. With his naturalization application, Mr. Kadel submitted a Form N-426, dated July 12, 2017, in which the U.S. Army certified his military service through that date as honorable. Kadel Decl. (Dkt. 2-24), ¶ 4; Kadel N-426 (Dkt. 2-20), at 2-3.

Response: Defendants do not dispute this paragraph, other than to note that it is immaterial.

63. On August 4, 2017, the U.S. Army Reserve Command issued an order discharging Mr. Kadel from the Army Reserve, with an effective date of July 24, 2017 (less than two weeks after his honorable N-426 certification). Kadel Decl. (Dkt. 2-24), ¶ 5; Kadel Form 500 (Dkt. 2- 21), at 1.

Response: Defendants do not dispute this paragraph.

64. The discharge order listed Mr. Kadel's "Type of Discharge" as "UNCHARACTERIZED." *Id.*

Response: Defendants do not dispute this paragraph.

65. On July 10, 2019, USCIS issued a decision denying Mr. Kadel's naturalization application on the sole ground that: "You have not demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions." Letter from USCIS to Counsel, "Notice of Decision," July 10, 2019 (Dkt. 2-22), at 2.

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

66. The Policy was the sole basis for the denial of Mr. Kadel's naturalization application. *Id.*; *see also Nio*, 3/20/19 Status Hearing, Tr. at 108:2-6, 108:17-19 (“[USCIS counsel:] USCIS wants to develop a record for assessing this person's eligibility for all the criteria. Again, USCIS -- it is not USCIS' view that, as soon as you get an uncharacterized discharge, the analysis stops there [T]he reason that the [denial] decision is written [to list one reason that we find that you don't qualify] is because that was the only thing applicable.”).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument and legal conclusions. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

67. Given the Policy, an administrative appeal by Mr. Kadel pursuant to § 336 of the INA would be futile. *See* Letter from USCIS to Counsel, “Notice of Decision,” Oct. 17, 2019 (Dkt. 2-19), at 1-3 (denying a § 336 appeal on the basis of the Policy).

Response: This paragraph does not include any statement of fact, as required by Local Civil Rule 7(h)(1), but rather contains Plaintiffs' argument and legal conclusions. As such, no response is required and Defendants respectfully refer the Court to Part II of Defendants' Motion for their legal arguments regarding this matter. Defendants further respectfully refer the Court to the cited material for a full and accurate statement of its contents and dispute any statement in this paragraph that is inconsistent therewith.

December 13, 2019

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