

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

Civil Action No. 1:17-cv-998-PLF

**DECLARATION OF BEVERLY W. CUTLER
IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND
EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

I, Beverly W. Cutler, declare as follows:

1. I am a member of the state bar of Alaska and I am admitted to federal district court in the District of Columbia. I am currently a semi-retired practitioner with residence in Alaska and Virginia. I previously served as a State of Alaska general jurisdiction trial court judge for nearly four decades. I am a graduate of Yale Law School and have been admitted to the practice of law since 1975. I received my undergraduate degree from Stanford University.
2. I have spent significant work time in the last four years providing pro bono assistance in various locations. Since 2017, I have represented individually more than 300 non-citizen service members in the Military Accessions Vital to the National Interest ("MAVNI") program. I have represented these service members in a variety of enlistment and immigration matters. It was in that capacity that I started voluntarily attending hearings in *Nio v. U.S. Dept. of Homeland Security* in July 2017. At that time, I did not know class counsel, or indeed anyone at counsel's firm.

I attended simply because I was representing separately many members of what was then the putative class. I wanted to be poised to help my clients out as best I could with their various dilemmas. I followed *Nio* and the related *Kirwa v. U.S. Dept. of Defense* cases closely until the Court entered its judgment in favor of the plaintiffs in the cases, reading all the significant filings, and attending most hearings. When I was not able to attend hearings in the cases, it was my practice to read the hearing transcript.

3. From the first *Nio* hearing onward, I witnessed the plaintiffs' lawyers to be devotedly and diligently pursuing in as straight a line as they could the much-deserved relief they were seeking for their clients.
4. I began speaking with plaintiffs' counsel after hearings to get updates on what I could do to keep helping my pro bono clients, as well as to try to gain insight on when the ultimate citizenship and other issues might be solved. The lawyers were generous with their time, and these discussions were helpful in my efforts to protect the interests of my clients who were also *Nio* class members.
5. I also reached out to counsel for the Defendants on a number of occasions in an effort to learn more about my clients' situations and if there were solutions that could be reached for them. My outreach to Defendants generally was rebuffed.
6. From the beginning, it was obvious to me that the plaintiffs' lawyers had a much better handle on the facts, and made it their job to really know the facts, which the government often failed to do throughout the years of litigation. The DoD and DHS defendants to my view never really tried to solve the problems that were right in front of their faces, rather than talk or motion their way around them, and in doing

so made the case longer and more complex than it would have been if the government had truly wanted to do right by the MAVNIs. Plaintiffs' counsel's extensive and diligent efforts from beginning to end were necessary to ultimately deliver justice for the thousands of class members, especially as the government kept coming up with new strategies/policies that did not come to fruition or were themselves illegal. Plaintiffs' counsel's diligence, quality research, writing, claim articulation, argument presentation, and persistence were the main things that finally positioned the case for injunctive relief and ultimately summary judgment.

7. I do not believe any of the MAVNIs, on their own or with individual lawyers, could have filed or presented claims with the legal merit or magnitude or pointedness of the claims Plaintiffs' counsel were able to bring before Judge Huvelle. The MAVNIs needed this type of "Big DC litigation firm" with its expertise and capabilities to make the presentations. I say this noting I also sought out and volunteered with a different D.C. law firm in pursuit of a different form of related MAVNI relief from DHS, made necessary by the failure to timely grant citizenship and/or grant immigration status relief for those waiting to ship to training. A big D.C. law firm was needed for that endeavor, too. When government is slow to recognize unlawful policies—or worse, pretends not to—or when the government declines to fix systemic problems, individual small voices are not enough.
8. Further, the struggles to get compliance with the *Nio* and *Kirwa* decisions still remain. For example, recently I filed an individual federal mandamus lawsuit for one *Nio* class member who still has not received a citizenship interview after four years, as that soldier's file has been "returned to his city's USCIS Field Office" since

about a year ago. *See* Complaint, *Ao Ju v. U.S. Citizenship and Immigration Services, et al.*, No. 2:21-cv-02240 (C.D. Cal. Mar. 12, 2021). This appears to be directly contradictory to the government’s representations to the Court about the process by which *Nio* class members naturalization applications will be addressed. *See, e.g.*, “*Nio*/MAVNI Background Check and Review Process Flowchart” (ECF 264-2) (filed Aug. 7, 2019).

9. In another example of recent “order ignoring,” I represent several individual soldiers who are members of the class in *Samma v. U.S. Dept. of Defense*, No. 20-cv-1104-ESH, who now have shipped and are serving at training bases. The Army still refuses to sign my client’s N-426 paperwork within the time frame ordered by Judge Huvelle, notwithstanding the Court’s August 2020 permanent injunction. *See Nio v. U.S. Dept. of Homeland Security*, No. 17-cv-0998, 2020 WL 6266304 (Aug. 20, 2020). This illustrates how Defendants often behave toward these non-citizen soldiers, even after being ordered by a court to behave differently, and the diligence required of the soldiers’ counsel to ensure the soldiers receive the relief to which they are entitled.
10. Without the diligence exercised by Plaintiffs’ counsel in this case, after the preliminary injunction, following the summary judgment decision, and even following final judgment, Defendants likely would have continued to trod on class member rights and the relief provided by the Court’s orders would be rendered meaningless. During several of my pro bono representations of individual class members at their individual hearing or interviews, I have witnessed several instances when military and immigration representatives were not following the Court’s

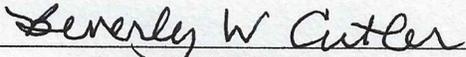
orders even after a generous amount of time had passed for them to be aware of the orders, and did not live up to the promises and representations that Defendants made during hearings in this case (and the related cases).

11. In my many years of presiding over criminal and civil courts, I have considered the merits of a multitude of attorney fee requests and awards (albeit not necessarily fees under the EAJA). The rules of jurisdictions and their statutory provisos vary, of course, but for the most part our justice systems appear to provide compensation in order to improve the justice system, not to deprive the losing side of money. The government should be discouraged from trodding on non-citizen soldiers' rights with impunity.
12. Society wants all litigants to have to think twice before throwing out a time-consuming position in court, and society realizes the power of financial motive. Society should agree that awarding reasonable attorneys' fees after protracted unreasonable disputes should make a difference, fomenting a justice system that works better for all. But, beyond that, it is worth noting that the disputes in this case were between military enlistees and the very government who recruited and enlisted them but then changed the rules after contracts already had been signed and relied on. Further, the government made no realistic effort to search for solutions.
13. At a minimum, to improve the justice system, there should be appropriate compensation to the lawyers who altruistically and with great competence litigated solutions for those in the weaker position against the governmental agencies who were declining all responsibility for the problems wrought. Any attorney fee award here may

serve to motivate better litigant behavior in the future, as well as spark reasonable problem solving instead of allowing officials or others with power to turn deaf ears.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2021.


Beverly W. Cutler