

DOD Can't Renege On Service Member Expedited Citizenship

By Jennifer Doherty

Law360 (August 21, 2020, 6:56 PM EDT) -- A D.C. federal judge permanently barred the U.S. Department of Defense from enacting a 2017 rule that retroactively disqualified foreign-born military recruits' applications for expedited naturalization in a final order issued Thursday.

District Judge Ellen S. Huvelle's ruling solidified a preliminary injunction that had been in place for almost three years, preventing the military from yanking back N-426 Forms from a class of service members recruited under the Military Accessions Vital to the National Interest program. An N-426, which certifies the member's honorable service, is necessary for a MAVNI naturalization application.

As of Thursday, the DOD has been "permanently enjoined from decertifying, rescinding, recalling, revoking, or otherwise invalidating plaintiffs' or the class' existing and duly issued Form N-426s, except as related to the conduct of a class member and based on sufficient grounds generally applicable to members of the military," Judge Huvelle said in an order that validated the service members' central claim and dismissed the rest.

The order was not a surprise, as both sides encouraged the judge to issue a final ruling in the long-running suit that kicked off in May 2017, saying they could not come to an agreement in their last status report earlier this month.

Douglas Baruch of Morgan Lewis & Bockius LLP, co-lead counsel for the foreign-born members of the military, called the ruling a "complete victory and a vindication," in a statement to Law360.

"Since the launch of the litigation, almost 2,000 class members have become naturalized U.S. citizens and the injunctions remain in place to ensure that any remaining class members get their benefit," Baruch said.

The agencies named in the suit, which include the DOD, the U.S. Department of Homeland Security and U.S. Citizenship and Immigration Services said as much in the Aug. 12 joint status report.

In footnotes supporting their argument for decertifying the MAVNI class as an alternative to issuing a permanent, appealable injunction, the government agencies said that all of the service members named in the suit had since become citizens. They added that of the 36 remaining members whose applications had been pending for over a year, 25 had reached the final interview stage of the naturalization process.

In May 2019 Judge Huvelle blocked a USCIS policy referred to as the "MSSD requirement," which delayed MAVNI service members' citizenship applications by requiring final Military Service Suitability Determinations for processing, finding it arbitrary and capricious.

MAVNI, the program from which the dispute stems, was initiated in 2008 to bolster U.S. military recruitment in key skill areas, including certain foreign languages and medical expertise. The program granted participants access to expedited U.S. citizenship through military service.

After a 2016 review of the program, the Pentagon concluded that participants posed a higher risk than other service members of having connections with foreign intelligence services. As a result, the DOD suspended MAVNI recruitment and collaborated with USCIS to delay processing MAVNI participants' naturalization applications while it conducted high-level security clearance investigations as a precondition for participation in the program.

Kusuma Nio and nine other Army reservists recruited under MAVNI sued the government in May 2017, arguing they had held up their end of the bargain by serving in the military and had wrongly — and contrary to statute — been denied the expedited citizenship that should have come along with that service.

Nio and the other service members are represented by Jennifer M. Wollenberg, Douglas W. Baruch, Neaha P. Raol and Kayla S. Kaplan of Morgan Lewis & Bockius LLP.

The government is represented by Ethan P. Davis, C. Frederick Sheffield, William C. Peachey, Colin A. Kisor and Elianis N. Perez of the U.S. Department of Justice.

The case is Nio et al. v. U.S. Department of Homeland Security et al., case number 1:17-cv-00998, in the U.S. District Court for the District of Columbia.

--Additional reporting by Steven Trader. Editing by Jack Karp.