

**UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE**

HIREN KORAT

Plaintiff,

v.

Case No.: _____

**KIRSTJEN NIELSEN, Secretary,
Department of Homeland Security;**

**UNITED STATES DEPARTMENT OF
HOMELAND SECURITY;**

**L. FRANCIS CISSNA, Director, United
States Citizenship and Immigration
Services;**

**DENIS RIORDAN, District 1 District
Director, United States Citizenship and
Immigration Services;**

**ANDREA ROGERS, Manchester Field
Office Director, United States Citizenship
and Immigration Services;**

**UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES;**

**PATRICK M. SHANAHAN, Acting
Secretary, Department of Defense;**

**ROBERT WILKIES, Under Secretary of
Defense for Personnel and Readiness;**

**UNITED STATES DEPARTMENT OF
DEFENSE;**

Defendants.

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY
INJUNCTION**

INTRODUCTION

SPC Korat is a lawfully present immigrant from India. He entered the United States lawfully on an F1 (student) visa and currently holds an H1B visa (temporary working status). In 2016, while in lawful status, he enlisted in the United States Army through the Military Accessions Vital to the National Interest (“MAVNI”) program of the Department of Defense (“DoD”), which recruits immigrants like SPC Korat who have demonstrated medical or language skills deemed by the military to be vital to our nation’s defense. Under the law, his military service renders him eligible, on an expedited basis, to become a naturalized United States citizen.

SPC Korat fulfilled his end of the bargain, but the United States government has not. He has honorably served in the Army for more than two years, and he has impressed his colleagues and superior. The Commanding Officer of SPC Korat’s unit, states that he has “demonstrated the skills, dedication, and moral character of a good soldier” and is “an important member of [the] unit and his education and skills are highly sought after in the U.S. Army.” *Exhibit 2*. In exchange for his sacrifice, service, and contribution to filling what was identified as a need in our military vital to national security, SPC Korat was promised to be given expedited consideration for citizenship. At the time that SPC Korat enlisted in the military, military applications for naturalization (and particularly MAVNI naturalization applications) generally were processed – start to finish – in just a few months.

Specialist Korat fulfilled his end of the bargain, but the government has not. On July 6, 2016, SPC Korat enlisted in the U.S. Army – Reserve as a General Dentist through the MAVNI program, available to noncitizens holding skills critical to the needs of the U.S. military. SPC Korat is eligible to naturalize as a U.S. citizen under 8 U.S.C. § 1440 due to his honorable service

during a period of declared hostilities. He submitted a naturalization application as a military member on July 12, 2017.

Furthermore, all of his background checks – many of which were newly required by USCIS and DoD since SPC Korat’s enlistment – including FBI checks, Defense Clearance Investigative Index (“DCII”), the Counterintelligence Security Review (“CI-Review”), and the Tier 5 Single Scope Background Investigation (“SSBI”) were completed in 2017. Yet, despite the fact that he is entitled to naturalize without delay, and despite the fact that he meets all of the eligibility conditions for naturalization, the United States Citizenship and Immigration Services (“USCIS”) has refused to consider his naturalization application. Because of the delay, SPC Korat 1) cannot naturalize, 2) cannot become a commissioned officer in the Army (he was told he would be promoted to the rank of Captain upon commissioning), and 3) cannot become an oral surgeon.

SPC Korat is likely to succeed on the merits of his claims to compel USCIS to adjudicate his naturalization application without further delay. This case satisfies the other criteria for a Preliminary Injunction. Absent relief, SPC Korat faces serious irreparable harm because he is losing out on the benefits that accompany naturalization. Further, he may soon lose his immigration status, H1B temporary working visa, if his employer does not wish to retain him. In addition, he is only able to work lawfully with the current employer or with another employer who would file an immigration petition for him to stay in this country.

The balance of equities and public interest are also in SPC Korat’s favor, as temporary relief will simply require Defendants to comply with the law. Furthermore, all of SPC Korat’s background checks are complete. Hence, any national security concerns would have been identified more than a year ago. Lastly, the purported derogatory information that the Army discovered does not prevent SPC Korat from being eligible naturalization.

SPC Korat, therefore, requests that this Court issue an order to require USCIS (1) to hold a naturalization interview for SPC Korat within twenty (20) days, and (2) to provide a final determination on SPC Korat's naturalization application within thirty (30) days from the filing of this Motion for Preliminary Injunction.

FACTS

A. SPC Korat's Honorable Service in the U.S. Army

While an individual typically must be a lawful permanent resident ("LPR") or U.S. citizen to enlist in the U.S. military, the Secretary of Defense is authorized to enlist other persons without that status if their enlistment is vital to the national interest. *See* 10 U.S.C. § 504(b). Pursuant to that authority, in 2008, DoD authorized the MAVNI recruitment program to enlist certain noncitizens if they are lawfully present and hold critical skills, including physicians, nurses, and experts in certain foreign languages.¹

In 2015, an Army recruiter approached SPC Korat to recruit him upon graduation from Case Western Reserve University Dental School. *Korat Decl.* ¶ 6. The recruiter initially suggested SPC Korat join the non-medical MAVNI program. *Id.* However, after SPC Korat explained his interest in health care as a holder of a dental degree, he was passed along to a medical career path recruiter. *Id.* at ¶ 7. The medical recruiter told SPC Korat that the naturalization process would take only 10 to 15 weeks. *Id.* Furthermore, the recruiter told SPC Korat that the Army would support his education in oral surgery. *Id.* SPC Korat relied on these promises and decided to enlist in the Army. *Id.* at ¶ 8.

¹ *See Kirwa v. United States Dep't of Def.*, 285 F.Supp. 3d 21, 29 (D.D.C. 2017) ("In 2008, pursuant to 10 U.S.C. § 504(b)(2), the Secretary of Defense authorized the creation of the MAVNI Pilot Program, which allowed non-citizens who were not lawful permanent residents to enlist in the United States military if it was determined that enlistment would be vital to the national interest because they were 'health care professionals' in certain specialties or possessed 'critical foreign language skills.'").

On June 18, 2016, the Army Medical Recruiting Selection Board selected SPC Korat to be an “Army Legal Immigrant Healthcare Professional Officer Candidate.” This designation would allow SPC Korat, upon naturalization, to be commissioned as an officer with the rank “Captain” in the Army. *Id.* at ¶10; Exhibit 1. On July 6, 2016, SPC Korat enlisted in the U.S. Army Reserve through the MAVNI program. Korat Decl. ¶ 11. SPC Korat was authorized to enlist because he was lawfully present in the United States on an F-1 student visa. *Id.*; Exhibit 1. He has been assigned to the 7249th Medical Support Unit in Houston, Texas, as a Specialist (E-4), which is an enlisted rank, since March 2017 and continues to serve honorably with his unit. He must serve as an E-4 until he is naturalized as a United States citizen because non-citizens cannot be military officers. Korat Decl. ¶ 14.

As a General Dentist Healthcare Professional Officer Candidate, SPC Korat has not been able to perform accordingly because of the significant delay of his naturalization. *Id.* ¶ 20. Despite this delay, SPC Korat has been drilling routinely for two years with the assigned unit. *Id.* ¶ 14. SPC Korat was even injured at the most recent physical training. *Id.*

SPC Korat has been serving honorably since his enlistment, and he has impressed his colleagues and superior. Exhibit 2. The Commanding Officer of SPC Korat’s unit states that he has “demonstrated the skills, dedication, and moral character of a good soldier” and is “an important member of [the] unit and his education and skills are highly sought after in the U.S. Army.” *Id.*

B. Naturalization Through Honorable Military Service

The military naturalization statute, 8 U.S.C. § 1440, authorizes the naturalization of any noncitizen who has served honorably in active-duty or Selected Reserve status in the U.S. Armed Forces during a period of hostilities as designated by Executive Order if they enlisted while in the

United States. *See* 8 U.S.C. § 1440(a). Pursuant to Executive Order 13269, the United States has been in a period of hostilities since the September 11, 2011 terrorist attacks.² (“EO 13269”).

Unlike other forms of naturalization, no age, residence, or physical presence requirements for naturalization apply to service members during a designated period of hostilities. 8 U.S.C. § 1440(b). A military applicant under 8 U.S.C. § 1440 also must demonstrate that he “[h]as been, for at least one year prior to filing the application for naturalization, and continues to be, of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed toward the good order and happiness of the United States.” 8 C.F.R. § 329.2(d).

C. SPC Korat’s Naturalization Application and Background Checks

When SPC Korat enlisted in the Army under the MAVNI program, his enlistment contract required that he apply for naturalization as soon as the Army had certified his honorable service. *Exhibit 1*. To become a reserve officer, an individual must be a U.S. citizen or a permanent resident. 10 U.S.C. § 12201(b)(1). In March 2017, his background check was cleared, and the U.S. Army subsequently assigned him a unit. *Exhibit 3; Korat Decl.* ¶ 14. In April 2017, the Army certified his honorable service on USCIS Form N-426. *Korat Decl.* ¶ 15. On July 12, 2017, SPC Korat applied for naturalization by submitting his N-400 application to USCIS. *Exhibit 7*.

On June 12, 2017, the U.S. Office of Personnel Management Investigations Service completed part of the “enhanced” background investigation newly required by DoD after SPC Korat’s enlistment, including the SSBI and FBI background check, and forwarded it to DoD. *Exhibit 4*. On August 24, 2017, DoD completed SPC Korat’s CI-Review. *Exhibit 5*. Finally, in

² *See* Executive Order 13269 – Expedited Naturalization of Aliens and Noncitizen Nationals Serving in An Active-Duty Status During the War on Terrorism, 2002 WL 1833360, at *1.

September 2017, DoD Consolidated Adjudication Facility (CAF) determined “No Determination Made” and recommended that DoD discontinued SPC Korat’s military service suitability determination (“MSSD”) because of purported derogatory information identified from the background investigations. Exhibit 6. However, after this determination, DoD Defendants have failed to adjudicate SPC Korat’s MSSD without any explanation.

According to the CI-Review, SPC Korat presents a “moderate” security risk (for security clearance purposes) due to purported “financial,” “loyalty,” and “foreign ties” issues. Exhibit 5. With respect to the supposed “financial” issue, the report indicates that SPC Korat could inherit property from his mother as long as he is an Indian citizen and that he is in considerable debt. *Id.* At the time of his interview, he was not employed. Korat Decl. ¶ 28. Subsequently, SPC Korat obtained employment and has remained employed ever since. *Id.* With respect to debt, while SPC Korat has student loans, he has never missed payments and he has an excellent credit score. *Id.*; Exhibit 10.

With respect to “foreign ties,” the report indicates that SPC Korat’s parents were involved in a local political party in India, and he communicates with them often via phone calls and social media. Exhibit 5. However, his father, Mr. Savjibhai Korat who was a local politician in India, passed away in November 1998. Korat Decl. ¶ 29. SPC Korat communicates with his mother because she is his mother. *Id.* His mother was a local politician in India until 2012, but had no authority or influence over intelligence or foreign policy. *Id.*

Even if these “risk” factors were accurate and relevant for military security clearance purposes, none of them would render SPC Korat ineligible for naturalization, nor would they justify USCIS’s failure to act on his application.

On or about August 10, 2017, USCIS also initiated its own background checks for

naturalization, and SPC Korat had his biometrics taken at the USCIS Application Support Center in Sugarland, Texas. Exhibit 7. SPC Korat understands, based on communication with USCIS, that the USCIS-ordered background checks also are complete. Exhibit 8. The only inaction is DoD's transfer of his background investigation with USCIS. *Id.* A USCIS Military Naturalization Immigration Officer told SPC Korat on November 13, 2018, "You can check with your chain of command to see what they can do to get information to USCIS to clear your application for further processing, but until the DoD gets the information to USCIS, your case will not proceed any further." *Id.*

SPC Korat's naturalization application has been pending for more than one year and six months. Korat Decl. ¶ 17. USCIS has yet to schedule SPC Korat for a naturalization interview. *Id.*

SPC Korat has continued to serve honorably in the U.S. Army, remains eligible for naturalization, and continues to be a person of "good moral character." *Id.* As SPC Korat's current superior officer has written: "SPC Korat has been serving honorably since his enlistment. Under my supervision, SPC Korat has demonstrated the skills, dedication, and moral character of a good soldier." Exhibit 2. He further states: "The delay in the N-400 process is preventing SPC Korat from utilizing his valuable medical skills in his unit. SPC Korat is an important member of our unit and his education and skills are highly sought after in the U.S. Army." *Id.*

SPC Korat has inquired about the status of his naturalization application at least 30 times. Exhibit 8.

D. SPC Korat is Harmed by USCIS's Failure to Adjudicate His Naturalization Application

USCIS's failure to adjudicate SPC Korat's naturalization application and DoD's failure to adjudicate MSSD and transfer his background investigation information to USCIS have caused

him irreparable harm. Despite the completion of all of his background checks, by unlawfully delaying SPC Korat's statutory right to naturalize, USCIS has prevented him from enjoying other rights and responsibilities of U.S. citizenship, including the opportunity to live and work in the United States as a U.S. citizen, to travel freely as a U.S. citizen, to vote in elections, and to serve on juries.³

He could also lose his immigration status at any time. His current status is H1B, a temporary working visa that requires an employer sponsor. *Exhibit 11*; see 8 C.F.R. 214.2(h)(1)(ii)(B) (regulation governing H-1B); 20 C.F.R. 655.700(b) (procedure for obtaining an H-1B visa classification). He could lose his immigration status if his employer wishes to terminate the employment contract. See generally 8 C.F.R. 214.1(l)(2) (allowing H1B worker a grace period of 60 days based upon cessation of the employment).

LEGAL STANDARD

In considering whether to grant a preliminary injunction, district courts in this Circuit look to: “(A) the movant’s likelihood of success on the merits of its claims; (B) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (C) the balance of hardships as between the parties; and (D) the effect, if any, that an injunction (or the withholding of one) may have on the public interest.” *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013); *W. Holding Co., Inc. v. AIG Ins. Co.-Puerto Rico*, 748 F.3d 377, 383 (1st Cir. 2014) (“Whether a mandatory preliminary injunction should issue typically depends on the exigencies of the situation, taking into account [the] four familiar factors . . .”). Courts may grant mandatory preliminary injunctions where “the exigencies of the situation demand such relief.” *Massachusetts*

³ See USCIS, Citizenship Rights and Responsibilities, <https://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities>.

Coal. of Citizens with Disabilities v. Civil Def. Agency & Office of Emergency Preparedness of Commonwealth of Massachusetts, 649 F.2d 71, n.7 (1st Cir. 1981) (denying a motion for a mandatory preliminary injunction); Rober Haig, 3d *Bus. & Comm'l Litig. in Fed. Cts.* § 17:26 (2011) (“Nonetheless, the court may still grant a mandatory preliminary injunction when necessary to protect the movant from irreparable harm and to preserve the court’s ability to render a meaningful decision.”).

ARGUMENT

A. SPC Korat is Likely to Prevail on His APA, Mandamus Act, Statutory Right, and Constitutional Claims

1. USCIS’s Failure to Adjudicate SPC Korat’s Naturalization Application Violates the APA

The APA requires administrative agencies to conclude matters presented to them “within a reasonable time.” 5 U.S.C. § 555. A district court reviewing agency action may “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The court may also hold unlawful agency action that is found to be: “not in accordance with the law,” 5 U.S.C. § 706(2)(A); “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(D). “Agency action” includes, in relevant part, “an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

A number of courts have found that the APA establishes that the government has a nondiscretionary duty to act upon an immigration or naturalization petition without unreasonable delay. *Litvin v. Chertoff*, 586 F.Supp.2d 9, 14 (D. Mass 2008); *King v. Office for Civil Rights*, 573 F. Supp. 2d 425, 429 n.2 (D. Mass. 2008) (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997)); *Tang v. Chertoff*, 493 F. Supp. 2d 148, 154 (D. Mass. 2007); *Morgovsky v. Dep’t of Homeland Security*, 517 F. Supp.2 d 581, 584 (D. Mass. 2007); *Vorontsova v. Chertoff*,

2007 U.S. Dist. LEXIS 81522, at *3 (D. Mass. Nov. 2, 2007). The APA requires that “agency actions be completed within a reasonable time.” *Litvin*, 586 F. Supp. 2d at 15.

Courts in the First Circuit generally apply the so-called “*TRAC*” factors in deciding whether to order relief in claims of agency delay brought under the APA. *See Wellesley v. Federal Energy Regulatory Com.*, 829 F.2d 275, 277 (1st Cir. 1987) (discussing the *TRAC* factors to petitioner’s claims of unreasonable delay by federal agency) (citing *Telecommunications Research & Action Center v. FCC* (“*TRAC*”), 750 F.2d 70, 80 (D.C. Cir. 1984)); *Caswell v. Califano*, 583 F. 2d 9, 16 (1st Cir. 1978) (indicating that courts may look to statutory text to provide a reasonable time limit on agency action).

The *TRAC* factors are: “(1) the time agencies take to make decisions must be governed by a ‘rule of reason’[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason [;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake [;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.’” *TRAC*, 750 F.2d at 80 (D.C. Cir. 1984).

All of the *TRAC* factors support the determination that USCIS has unreasonably delayed SPC Korat’s naturalization application by failing to adjudicate the application for more than one year and six months.

a. Rule of Reason and Congressional Intent (Factors 1 & 2)

The first two *TRAC* factors weigh strongly in SPC Korat's favor. Under federal law and policies, military naturalization applicants are required to be processed on an expedited basis – at the minimum, faster than civilian naturalization process. 8 U.S.C. § 1440 provides that SPC Korat is eligible for naturalization because the President determined by Executive Order that the military is engaged in armed conflict for the statutory purposes. Executive Order 13269 – Expedited Naturalization of Aliens and Noncitizen Nationals Serving in An Active-Duty Status During the War on Terrorism, 2002 WL 1833360, at *1 (July 3, 2002). This Order has remained in effect through the present. Also, the U.S. Army's own published guidance that “explains the procedures for Soldiers to apply for citizenship” expressly notes that “[t]he goal is to streamline and expedite the handling of their applications.” *Kirwa v. United States Dep't of Def.*, 285 F. Supp. 3d 21, 28 (D.D.C. 2017).

Indeed, until the provision sunset date of 2013, Congress had mandated that, within six months of receiving a military naturalization application under 8 U.S.C. § 1440, USCIS was required to “process and adjudicate the application” or “provide the applicant with ... an explanation for its inability to meet the processing and adjudication deadline [and] an estimate of the date by which the application will be processed and adjudicated.” Military Personnel Citizenship Processing Act, Pub. L. 110-382, 122 Stat. 4087 (2008).

Congress has generally stated “that the processing of an immigration benefit application,” which includes naturalization, “should be completed not later than 180 days after the initial filing of application.” 8 U.S.C. § 1571(b). While this statute does not include a mandatory timetable for processing naturalization applications, courts have found that this “sense of Congress” highly relevant for the second factor of *TRAC*. See *Khan v. Johnson*, 65 F. Supp. 3d 918, 930 (C.D. Cal. 2014); *Daraji v. Monica*, No. Civ.A. 07-1749, 2008 U.S. Dist. LEXIS 4288, at *5 (E.D. Pa. Jan.

18, 2008); *Liu v. Chertoff*, 2007 U.S. Dist. LEXIS 65687, at *9 (D. Or. Aug. 29, 2007).

USCIS has also had the policy to expedite the naturalization applications of MAVNI enlistees like SPC Korat. As a standard term of their enlistment contracts, MAVNI enlistees, including SPC Korat, agreed “to apply for U.S. citizenship as soon as the Army has certified [their] honorable service.” *Kirwa*, 285 F. Supp. 3d at 31; *Exhibit 1*. In conjunction with the U.S. Army, USCIS established that “Naturalization at Basic Training Initiative” to “provide expedited processing of naturalization applications for non-citizen enlistees” once they arrived at basic training with the goal that MAVNI recruits be naturalized before basic training completed. *Kirwa*, 285 F. Supp. 3d at 29. In fact, in public relations documents touted by DHS, the first MAVNI naturalized – a dentist from Pakistan who also came to the U.S. on a student visa and then later received a temporary work visa – had his naturalization application processed by USCIS in less than one month.⁴

For civilian applicants for naturalization and other immigration benefits, many courts have found delays of “around two years” “presumptively unreasonable as a matter of law under *TRAC*.” *Daraji*, 2008 U.S. Dist. LEXIS 4288, at *5 (citing cases). In the normal course of business in the USCIS Field Office in Manchester, New Hampshire – where SPC Korat requested his naturalization interview take place – USCIS’s website represents that the current estimated time range for processing *civilian* naturalization applications is between 11.5 to 18.5 months.⁵

In this case, despite the completion of all of SPC Korat’s background investigations including the FBI checks and all of additional, non-required, DoD’s enhanced background investigations, USCIS has not processed his military naturalization for more than 18.5 months,

⁴ Dr. Brown (2009), <http://www.dhs.gov/blog/2009/07/25/dr-brown> (last visited January 26, 2019).

⁵ See USCIS, Check Case Processing Times, <http://egov.uscis.gov/processing-times/>.

longer than any civilian naturalization. Even if SPC Korat had submitted a *civilian* naturalization application, it should have been adjudicated by now, according to USCIS's own processing times. SPC Korat filed his military naturalization application in July 2017. *Korat Decl.* ¶ 15. Because SPC Korat has filed a military naturalization application based on his honorable service in the U.S. Army, his application should have received expedited treatment and have been adjudicated much sooner. Therefore, the delayed adjudication of his naturalization application is unreasonable under the first two *TRAC* factors.

b. Human Health and Welfare and the Interests Prejudiced by the Delay (Factors 3 & 5)

Courts analyzing delays in adjudicating immigration benefits may analyze the third and fifth factors together. *See Khan*, 65 F. Supp. 3d at 930; *see, e.g., Islam v. Heinauer*, No. C 13-02316 RS, 32 F. Supp. 3d 1063, 2014 U.S. Dist. LEXIS 31458, at *6 (N.D. Cal. Mar. 7, 2014). These factors also weigh heavily in favor of SPC Korat. There are serious human health and welfare issues at stake for SPC Korat, and the delay has significantly prejudiced his interests. By failing to adjudicate his naturalization application, USCIS has caused significant harm to SPC Korat, as he has to rely on a temporary work visa, which could be revoked at any time. *See generally* 8 C.F.R. 214.1(l)(2) (allowing H1B worker a grace period of 60 days based upon cessation of the employment). He also is deprived of the significant benefits and protections of U.S. citizenship, including to travel freely as a U.S. citizen, to vote in elections, and to serve on juries. For these and similar reasons, other courts have consistently found that factors 3 and 5 weigh in favor of the applicant in naturalization delay cases. *See, e.g., Khan*, 65 F. Supp. 3d at 930-31 (“[P]laintiffs’ interests in pursuing ... citizenship, or at least a final determination on their application so as to end a stressful waiting period, are compelling[.]”); *Daraji*, 2008 WL 183643, at *6 (noting that Plaintiffs “are barred from applying for any jobs which require United States

citizenship” and “cannot partake in the benefits of citizenship, such as voting and jury service”).

c. Effect on the Agency (Factors 4)

The fourth *TRAC* factor also weighs heavily in favor of SPC Korat. In this case, there is no “higher or competing priority” on DHS and DoD Defendants’ activities that would be affected by processing SPC Korat’s naturalization application. Indeed, because SPC Korat filed a military naturalization application under 8 U.S.C. § 1440, USCIS already should have expedited his application but has failed to do so. *See supra* pp. 9-11; *see also Khan*, 65 F. Supp. 3d at 931-32 (noting that the fourth factor weighs in a plaintiff’s favor where he “merely seeks a ruling on his Application . . . and does not otherwise seek to change the USCIS policy”) (internal citation omitted). Furthermore, there can be no legitimate national security concern given that all of his background checks were completed in August 2017 without any serious national security risk factors. Having relative in a foreign county and keeping in contact with one’s parent are not national security concerns and do not equate to a “higher or competing priority.”

d. Bad Faith (Factor 6)

Finally, the sixth *TRAC* factor also weighs in favor of SPC Korat. While a court “need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed,” *TRAC*, 750 F. 2d at 80, the delay in SPC Korat’s case fits a troublesome pattern where the Government has unlawfully delayed and prevented MAVNI enlistees, like SPC Korat, from obtaining U.S. citizenship. For example, in October 2017, DoD attempted to institute a new policy to create additional restrictions to prevent MAVNI enlistees from naturalizing on an expedited basis. In *Kirwa*, the court struck down that policy, finding that it unreasonably delayed the expedited citizenship to which MAVNI recruits are entitled. *See Kirwa*, 285 F. Supp. 3d at 42. More recently, news reports indicate that DoD is discharging MAVNI recruits who were promised

U.S. citizenship.⁶ This impropriety “lurking behind” Defendants’ decision to unreasonably delay SPC Korat’s naturalization application weighs in favor of granting SPC Korat’s APA claim. For these reasons, SPC Korat is likely to succeed on the merits of his APA claim.

2. The Mandamus Act Requires USCIS to Adjudicate SPC Korat’s Naturalization Application Without Unreasonable Delay.

The Mandamus Act provides district courts with mandamus power “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361. Courts may grant mandamus relief ordering an agency to act under the Mandamus Act if the three elements of the general mandamus test are satisfied: “(1) the individual’s claim is clear and certain; (2) the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available.” *In re City of Fall River, Mass.*, 470 F. 3d 30, 32 (1st Cir. 2006); *In re Bluewater Network & Ocean Advocates*, 344 U.S. App. D.C. 175, 234 F. 3d 1305, 1315 (D.C. Cir. 2000).

SPC Korat has met the three elements of the mandamus test. *First*, his claim is clear and certain: he requests this Court to grant mandamus relief to compel USCIS to adjudicate his naturalization application. *See* Compl. 73-77. *Second*, USCIS has a nondiscretionary and ministerial duty to adjudicate naturalization applications within a reasonable time frame. Congress has generally stated “that the processing of an immigration benefit application,” which includes naturalization, “should be completed not later than 180 days after the initial filing of the application.” 8 U.S.C. § 1571(b). In SPC Korat’s case, all of his background investigations, including the additional ones conducted by DoD, have been complete for a considerable period of

⁶ *See, e.g.,* Vanessa Romo, *U.S. Army Is Discharging Immigrant Recruits Who Were Promised Citizenship*, NPR (July 9, 2018), <https://www.npr.org/2018/07/09/626773440/u-s-army-is-discharging-immigrantrecruits-who-were-promised-citizenship>.

time. Exhibits 5, 6, 7. Therefore, for the same reasons that the delay of SPC Korat's naturalization application is unreasonable under the APA, it is also unreasonable under the Mandamus Act. *See supra* pp. 11-15. Finally, SPC Korat does not have another adequate remedy available to him, as the naturalization statutes only provide for a remedy for post-interview delays. *See* 8 U.S.C § 1447. SPC Korat has yet to have an interview scheduled. For these reasons, SPC Korat is likely to succeed on the merits of his Mandamus Act claim.

3. USCIS's Failure to Perform the Clear Duty to Lawfully Adjudicate SPC Korat's Naturalization is in Violation of the Immigration and Nationality Act and Applicable Regulations

The Immigration and Nationality Act ("INA") and applicable regulations set forth the exclusive statutory and regulatory criteria governing applications for naturalization. *See* 8 U.S.C. §§ 1427 and 1446(a) and 8 C.F.R. §§ 316.2 and 335.2, and 335.3 (criteria for naturalization); *see also* 8 U.S.C. § 1440; EO 13269 (expedited military naturalization). Federal regulations provide that a naturalization applicant "*shall* appear in person before a USCIS officer" after the filing of his application for naturalization. 8 C.F.R. § 335.2(a) (emphasis added). For the interview, USCIS "*will* notify the applicant . . . only after the USCIS has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed." 8 C.F.R. § 335.2(b) (emphasis added). Also, if an applicant has complied with all requirements for naturalization, USCIS "*shall* grant the application." 8 C.F.R. § 335.3(a) (emphasis added).

In this case, SPC Korat's all of the non-statutory DoD's enhanced background checks and FBI checks were completed. Yet, USCIS has failed to even schedule an interview for SPC Korat. Therefore, for the same reasons that the delay of his naturalization application is unreasonable under the APA, USCIS's inaction of scheduling SPC Korat's naturalization interview is in

violation of the INA and applicable regulations. *See supra* pp. 11-15.

4. DHS and DoD Defendants Have Violated SPC Korat's Substantive and Procedural Due Process Rights.

DHS Defendants' failure to adjudicate SPC Korat's military naturalization application and DoD Defendants' failure to adjudicate SPC Korat's MSSD and to provide his background information to USCIS violate his substantive and procedural due process rights under the Fifth Amendment of the U.S. Constitution. DHS Defendants' unauthorized and indefinite suspension of the adjudication of SPC Korat's naturalization violates his substantive due process rights. For a due process claim, there must be "a cognizable liberty or property interest at stake." *Jupiter v. Ashcroft*, 396 F. 3d 487, 492 (1st Cir. 2005). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. Of Regents of State Colls. V. Roth*, 408 U.S. 564, 577 (1972). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . that support claims of entitlement to those benefits." *Id.* at 577. An applicant for naturalization has a protected interest in being able to apply for United States citizenship. *Brown v. Holder*, 763 F. 3d 1141, 1147 (9th Cir. 2014); *see also Ching v. Mayorkas*, 725 F. 3d 1149, 1155 (9th Cir. 2013) (finding a constitutionally protected interest in nondiscretionary immigration applications).

DHS Defendants do not have the discretion to delay adjudicating naturalization to a statutorily eligible applicant. Federal regulations provide that a naturalization applicant "*shall* appear in person before a USCIS officer" after the filing of his application for naturalization. 8 C.F.R. § 335.2(a) (emphasis added). For the interview, USCIS "*will* notify the applicant . . . only after the USCIS has received a definitive response from the Federal Bureau of Investigation

that a full criminal background check of an applicant has been completed.” 8 C.F.R. § 335.2(b) (emphasis added). Also, if an applicant has complied with all requirements for naturalization, USCIS “*shall* grant the application.” 8 C.F.R. § 335.3(a) (emphasis added). The Supreme Court, nearly one hundred years ago, explained:

The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, Sec. 8, cl. 4. The opportunity having been conferred by the Naturalization Act, *there is a statutory right* in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, *to receive the certificate*.

Tutun v. U.S., 270 U.S. 568, 578 (1926) (emphasis added).⁷ As explained in the previous sections, DHS Defendants cannot delay the naturalization process when all of the personal investigation, specifically the FBI criminal investigation, of the person applying for naturalization are completed. *Supra* pp. 11-15.

In SPC Korat’s case, SPC Korat has complied with all requirements for naturalization. SPC Korat filed his naturalization application as soon as he received the certified N-426. *Korat Decl.* ¶ 15. The background check requirement by USCIS was completed long ago. *Exhibit 4*. Even all of the non-statutory DoD enhanced background checks have been completed for a considerable period of time. *Id.*; *Exhibits 6, 7*. He has demonstrated good moral character. *Korat Decl.* ¶ 17. Furthermore, DoD has failed to provide background information to USCIS. While USCIS’s demand of the completion of DoD’s enhanced background checks before processing naturalization is unconstitutional, even if DHS Defendants could consider DoD background checks, DoD Defendants have failed to provide the information with DHS Defendants. *Exhibit 8*.

⁷ See also *I.N.S. v. Pangilinan*, 486 U.S. 875, 884 (1988) (noting that there is no discretion to deny naturalization if an applicant is otherwise qualified).

Lastly, SPC Korat has not received any meaningful explanation for the suspension of DHS Defendants' adjudication of his naturalization application or the inaction of his background check information by DoD Defendants with DHS Defendants.

5. DHS Defendants' Requirement of the Completion of DoD's Enhanced Background Checks and Adjudications before Naturalization is in Violation of Article I, Section 8, Clause 4 of the U.S. Constitution.

Under the Uniform Rule of Naturalization Clause, the Constitution expressly assigns to Congress, not the Executive branch, the authority to establish the rules of naturalization. *See* U.S. Const. art. I, § 8, cl. 4. Congress set forth those rules in INA. *See generally* 8 U.S.C. §§ 1421-1458; 8 C.F.R. §§ 316.1-316.14. By imposing additional, non-statutory, substantive criteria that SPC Korat must meet prior to DHS Defendants processing his naturalization application, DHS Defendants' requirement of a separate DoD enhanced background investigation and suitability determination imposes extra-statutory preconditions to naturalization that are not authorized by Congress, thereby violating the Naturalization Clause. Several courts have expressly considered private litigants' claims premised on an underlying violation of the Naturalization Clause. *See, e.g., Nemetz v. I.N.S.*, 647 F. 2d 432, 435 (4th Cir. 1981) (discussing a private litigant's challenge of a state law under the Uniform Rule of Naturalization, and reasoning that such policies violate the clause "when the resulting inconsistencies undermine a uniform rule of naturalization"); *Petition of Lee Wee*, 143 F. Supp. 736, 738 (S.D. Cal. 1956) (discussing private litigant's claim that a federal statute violated the Uniform of Rule of Naturalization).

By adopting and applying the additional, non-statutory, substantive criteria of completing DoD's enhanced background check, which was not created by Congress, DHS Defendants' new requirement has injured SPC Korat, who otherwise would have a statutory right to expedited naturalization under the uniform rule Congress has established. SPC Korat, as a wartime military

naturalization candidate, only have to demonstrate “good moral character” in the year prior to his application. 8 C.F.R. 329.2(d). No United States law or regulations provide that DoD’s enhanced security clearance investigations and adjudications are required or can be made a precondition for obtaining citizenship through naturalization. Therefore, this requirement of the completion of DoD’s enhanced background check before naturalization is in violation of Article I, Section 8, Clause 4 of the U.S. Constitution.

B. SPC Korat is Suffering Irreparable Harm Absent Emergency Relief

SPC Korat will suffer irreparable harm in the absence of emergency relief because SPC Korat (as an applicant eligible for naturalization) is losing out on the benefits of citizenship and may lose his temporary immigration status because of DHS Defendants’ failure to adjudicate his naturalization application.

Harm is irreparable if it is “not accurately measurable or adequately compensable by money damages” See *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F. 3d 12, 19 (1st Cir. 1996); see also *Foxboro Co. v. Arabian Am. Oil Co.*, 805 F. 2d 34, 36 (1st Cir. 1986) (“We do not find irreparable injury where only money is at stake”). Courts have held that “delaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm.” *Kirwa*, 285 F. Supp. 3d at 42 (citing *Nio v. United States Dep’t of Homeland Sec.*, 270 F. Supp. 3d 49, 63 (D.D.C. 2017); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 51 (D.D.C. 2008); *Vargas v. Meese*, 682 F. Supp. 591, 595 (D.D.C. 1987)). Irreparable harm exists where “every day of delay leaves plaintiffs in limbo and in fear of removal. Plaintiffs live in constant fear that they will . . . be discharged, deported, and subject to harsh punishment in their country of origin for joining a foreign military.” *Kirwa*, 285 F. Supp. 3d at 43. Like the plaintiffs in *Kirwa* and *Nio*, SPC Korat’s naturalization application has been unreasonably delayed by

Defendants after he was promised an expedited path to citizenship as a MAVNI recruit.

Furthermore, because SPC Korat's immigration status, H1B, is temporary and could be terminated at any time if the sponsoring employer chooses to do so, he is at risk of losing his immigration status. *See generally* 8 C.F.R. 214.1(l)(2) (allowing H1B worker a grace period of 60 days based upon cessation of the employment). Even if he seeks to find another employer to sponsor his immigration status, he has to find a new employer who is cap-exempt. Otherwise, SPC Korat has to enter into the lottery selection system to be eligible for an H1B status with a new employer.⁸

C. The Balance of Equities and the Public Interest Favor SPC Korat

The balance of equities and the public interest also strongly favor SPC Korat. In this case, the equities strongly favor SPC Korat. "The public interest is served when administrative agencies comply with their obligations under the APA." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (2015); *see also Medina v. U.S. Dep't of Homeland Sec.*, 313 F. Supp. 3d 1237, 1252 (W.D. Wash. 2018) ("Public interest exists in ensuring that the government complies with its obligations under the law and follows its own procedures."). Therefore, the public interest is served by ensuring that USCIS complies with the APA and adjudicates SPC Korat's naturalization application in a timely fashion. Moreover, given SPC Korat's irreparable harm because of USCIS's delay, and USCIS has not justified its delay, the equities strongly weigh in favor of granting relief. *See Kirwa*, 285 Supp. 3d at 44 (concluding that the balance of equities favors the plaintiffs where they "will continue to suffer[] irreparable harm due to DOD's inaction" and "defendants have not offered

⁸ Ordinarily, the regular H1B visa cap dedicates 65,000 petitions to noncitizen workers. INA 214(g)(1)(A)(vii); 20 C.F.R. 655.700(a)(1)(iv). However, an exemption category is available to U.S. employers that fall into high education institutions, non-profit organization associated with a higher education institutions, and non-profit research or government organizations. INA 214(g)(5)(C). Regarding the transfer to another employer, if the original sponsoring employer is cap-exempt and the new employer is not cap-exempt, then the noncitizen worker must enter the lottery selection based on his education level.

sufficient justification for their policy change.”).

CONCLUSION

For the reasons stated above, SPC Korat respectfully requests that this Court grant a preliminary injunction and require USCIS (1) to hold a naturalization interview for SPC Korat within twenty (20) days, and (2) to provide a final determination on SPC Korat’s naturalization application within thirty (30) days from the filing of this Motion, or within such reasonable period of time as is determined by the Court.

Respectfully submitted,

HIREN KORAT,

By and through his attorneys affiliated with the
American Civil Liberties Union of New Hampshire
Foundation,

/s/ SangYeob Kim

Gilles R. Bissonnette (N.H. Bar. No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
SangYeob Kim (N.H. Bar No. 266657)
AMERICAN CIVIL LIBERTIES UNION OF NEW
HAMPSHIRE
New Hampshire Immigrants’ Rights Project
18 Low Avenue
Concord, NH 03301
Tel.: 603.333.2081
gilles@aclu-nh.org
henry@aclu-nh.org
sangyeob@aclu-nh.org

Ronald L. Abramson (N.H. Bar. No. 9936)
ABRAMSON IMMIGRATION+SOLUTIONS PLLC
764 Chestnut Street, Carriage House
Manchester, NH 03104
Tel.: 603.218.3276
r Abramson@immigrationsolutions.com

Date: January 29, 2019