

Hon. Richard A. Jones

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8 UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 DO HOON KIM,

10 Plaintiff,

11 v.

12 DEPARTMENT OF HOMELAND  
13 SECURITY; UNITED STATES  
CITIZENSHIP AND IMMIGRATION  
14 SERVICES; KIRSTJEN NIELSEN,  
Secretary of the Department of Homeland  
15 Security; L. FRANCIS CISSNA,  
Director of United States Citizenship and  
16 Immigration Services; DANIEL  
RENAUD, Associate Director, Field  
17 Operations Directorate, United States  
Citizenship and Immigration Services;  
18 ANNE ARRIES CORSANO, Director of  
the United States Citizenship and  
19 Immigration Services District 20, Seattle  
District Office; CYNTHIA MUNITA,  
20 Field Office Director, Seattle Field Office  
of the United States Citizenship and  
21 Immigration Services,

22 Defendants.

No. 2:18-cv-01520-RAJ

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:  
NOVEMBER 16, 2018

23 PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT - 1  
Case No. 2:18-cv-01520-RAJ

**American Civil Liberties Union of  
Washington Foundation**  
901 5<sup>th</sup> Ave, Suite 630  
Seattle, WA 98164  
206-624-2184

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**I. INTRODUCTION**

3 Plaintiff Specialist Do Hoon Kim (“Plaintiff” or “SPC Kim”) has honorably served in the  
4 U.S. Army for almost four years. SPC Kim, who was born in South Korea, came to the United  
5 States in 2006 as a fourteen-year-old and was raised in Southern California. In 2015, SPC Kim  
6 enlisted in the U.S. Army through the U.S. Department of Defense’s (“DoD’s”) Military  
7 Accessions Vital to the National Interest (“MAVNI”) program, available to noncitizens holding  
8 skills critical to the needs of the U.S. military. SPC Kim’s fluency in Korean filled a critical  
9 language need of the military.

10 SPC Kim is eligible to naturalize as a U.S. citizen under 8 U.S.C. 1440 due to his  
11 honorable service during a period of declared hostilities and his good moral character. Although  
12 he submitted a naturalization application on May 24, 2017, over 500 days ago, the United States  
13 Citizenship and Immigration Services (“USCIS”) has yet to process his application.

14 SPC Kim brought this action on October 16, 2018 to compel the adjudication of his  
15 naturalization application. USCIS has a duty to adjudicate N-400 naturalization applications  
16 within a reasonable timeframe. Congress has generally stated “that the processing of an  
17 immigration benefit application,” which includes naturalization, “should be completed not later  
18 than 180 days after the initial filing of the application.” 8 U.S.C. § 1571(b). Federal law and  
19 policies require that military naturalization applications be processed on an expedited basis. *See*  
20 *Exec. Order No. 13269*, 3 C.F.R. 13269 (2003) (*Expedited Naturalization of Aliens and*  
21 *Noncitizen Nationals Serving in An Active-Duty Status During the War on Terrorism*), 2002 WL  
22 1833360, at \*1 (July 3, 2002); *Kirwa v. United States Dep’t of Def.*, 285 F. Supp. 3d 21, 28

1 (D.D.C. 2017) (describing expedited handling of military applications). After more than 500  
2 days, SPC Kim’s application has not been adjudicated.

3 USCIS’s prolonged delay in adjudicating SPC Kim’s naturalization application is  
4 unreasonable in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 555, 706 ,  
5 and the Mandamus Act, 28 U.S.C. § 1361.

6 Because there are no genuine disputes of material facts in this case, SPC Kim is entitled  
7 to summary judgment as a matter of law.

## 8 II. STATEMENT OF FACTS

### 9 A. SPC Kim’s Honorable Service in the Military

10 Although an applicant must typically be a lawful permanent resident (“LPR”) or U.S.  
11 citizen to enlist in the U.S. military, the Secretary of Defense is authorized to enlist those without  
12 LPR or citizen status if their enlistment is vital to the national interest. *See* 10 U.S.C. § 504(b).  
13 Pursuant to that authority, in 2008, the DoD created the MAVNI recruitment program to enlist  
14 certain noncitizens who are lawfully present and who have critical skills, including expertise in  
15 certain foreign languages.<sup>1</sup>

16 In January 2015, SPC Kim enlisted in the U.S. Army through the MAVNI program.  
17 Declaration of Do Hoon Kim (“Kim Decl.”) ¶ 6. SPC Kim was authorized to enlist under the  
18 MAVNI program because he was physically and lawfully present in the United States on an F-1  
19 student visa and could speak Korean fluently. *Id.* In January 2015, SPC Kim began his honorable  
20 active duty service in the U.S. Army as an automated logistics specialist with the rank of Private

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21 <sup>1</sup> *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. §  
22 504(b)(2), the Secretary of Defense authorized the creation of the MAVNI Pilot Program, which allowed non-  
23 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.’”).

1 First Class (“PFC”). *Id.* at ¶ 7. During his military service, SPC Kim has been stationed at Camp  
2 Casey in South Korea and Joint Base Lewis-McChord in Washington, where he is currently  
3 stationed. *Id.* at ¶¶ 7-10.

4 As an automated logistics specialist in Camp Casey, SPC Kim was assigned to the 70th  
5 Brigade Support Battalion and served the Army’s Supply Support Activity (“SSA”). *Id.* at ¶ 8.  
6 He assisted in managing millions of dollars of equipment on behalf of the Army and used his  
7 language skills to help his unit work with Korean contractors on a daily basis. *Id.*; *see also* Kim  
8 Decl. Ex. M (Character Statement by Michael B. Eack and Gerald Hughes). SPC Kim was  
9 selected over numerous senior soldiers to conduct research for Inventory Adjustment Reports  
10 because of his attention to detail and trustworthiness. Kim Decl. ¶ 8; *see also* Kim Decl. Ex. M  
11 (Character Statement by David J. Paddock). In June 2016, SPC Kim received orders to transfer  
12 to Joint Base Lewis-McChord to begin service in the Hammer Company, First Battalion, 17th  
13 Infantry Regiment. He continues to receive, process, account for, and ship millions of dollars of  
14 equipment repair parts that increase his battalion’s state of readiness and proficiency. Kim Decl.  
15 ¶¶ 2, 10.

16 SPC Kim earned an Army Achievement Medal and a Good Conduct Medal, both of  
17 which speak to his exemplary service on behalf of the Army. *Id.* at ¶¶ 9, 12. His Army  
18 Achievement Medal certificate lauds his “unwavering dedication to duty and commitment to  
19 excellence[.]” Kim Decl. Ex. D (Army Achievement Medal). SPC Kim’s supervisors and peers  
20 have noted his willingness to teach others and his potential for further leadership. Kim Decl. Ex.  
21 M (Letters of Commendation). He was promoted to the rank of Specialist on September 1, 2016  
22 and recently graduated from a Basic Leadership course, which is required training to become a  
23 Non-Commissioned Officer. Kim Decl. ¶¶ 11, 13.

1 SPC Kim continues to serve honorably in the Army. *Id.* at ¶ 14. He reenlisted for active  
2 duty in the Army on April 10, 2018. *Id.*; Kim Decl. Ex. F (Oath of Reenlistment). An honorable  
3 discharge certificate issued on that date for purposes of his reenlistment testifies to his “Honest  
4 and Faithful Service[.]” Kim Decl. Ex. F (Certificate of Honorable Discharge). As one of SPC  
5 Kim’s superiors recently wrote in a character statement: “SPC Kim has proven time and time  
6 again that he is a person worthy of wearing the uniform ... an asset to the unit, the Army, and  
7 this Nation at large.” Kim Decl. Ex. M (Character Statement by Macarthur D. Ocampo).

### 8 **B. Naturalization Through Honorable Military Service**

9 The military naturalization statute, 8 U.S.C. § 1440, authorizes the naturalization of any  
10 noncitizen who has served honorably in active-duty status in the U.S. Armed Forces during a  
11 period of hostilities (as designated by Executive Order) if they enlisted while in the United  
12 States. *See* 8 U.S.C. § 1440(a). By Executive Order, the United States has been designated as in a  
13 period of hostilities since the September 11, 2001 terrorist attacks.<sup>2</sup>

14 Unlike other forms of naturalization, no age, residence, or physical presence requirements  
15 for naturalization apply to service members during a period of designated hostilities. 8 U.S.C. §  
16 1440(b). Generally, to qualify for naturalization, a military applicant under 8 U.S.C. § 1440 must  
17 still meet other requirements, including that the applicant “[h]as been, for at least one year prior  
18 to filing the application for naturalization, and continues to be, of good moral character, attached  
19 to the principles of the Constitution of the United States, and favorably disposed toward the good  
20 order and happiness of the United States.” 8 C.F.R. § 329.2(d).

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23 <sup>2</sup> *See* Exec. Order No. 13,269, 3 C.F.R. 13269 (2003) (Expedited Naturalization of Aliens and Noncitizen Nationals  
Serving in An Active-Duty Status During the War on Terrorism), 2002 WL 1833360, at \*1.

### C. SPC Kim's First Naturalization Application

On January 22, 2015, SPC Kim filed his first N-400 naturalization application, soon after entering military service. Kim Decl. ¶ 15. A USCIS officer conducted SPC Kim's naturalization interview in Fort Sill, Oklahoma on March 18, 2015. SPC Kim passed the language, history, and government portions of his naturalization interview, and the USCIS officer recommended him for naturalization on the same day. *Id.* at ¶ 16.

In reviewing SPC Kim's first naturalization application, USCIS alleged that SPC Kim had submitted false information and materials. Specifically, USCIS alleged that SPC Kim's application for his F-1 student visa included an I-94 Arrival/Departure Form and stamp that erroneously indicated that he last arrived in the United States on November 11, 2007, when in fact he arrived in August 2006. *Id.* at ¶ 18; Kim Decl. Ex. H (USCIS Denial).

Upon information and belief, an inaccurate Form I-94 and stamp had been inserted into his passport sometime before he was granted an E-2 Dependent visa at the age of 15. Kim Decl. ¶¶ 18-19. SPC Kim's family was represented by immigration attorney Mihae Park for purposes of their E-2 visa applications. Kim Decl. Ex. B (E-2 Visa Approvals). The federal government has since alleged that Ms. Park engaged in mail fraud, wire fraud, and/or visa fraud by "knowingly and willfully submitting USCIS immigration petitions . . . that contained false material facts and fraudulent documents, in order to obtain . . . employment-based visa petitions from the USCIS."<sup>3</sup>

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<sup>3</sup> Verified Complaint for Forfeiture at 4-11, *United States v. \$234,824.81*, No. 8:18-cv-00626 (C.D. Cal. Apr. 16, 2018), ECF No. 1 (requesting forfeiture of property involved or traceable with unlawful activity alleged to have been committed by Mihae Park); Stipulation and Request to Stay Civil Forfeiture Case, *United States v. \$234,824.81*, No. 8:18-cv-00626 (C.D. Cal. Aug. 9, 2018), ECF No. 15 (noting that claimant Mihae Park "is the subject of an ongoing criminal investigation arising out of the same conduct alleged in the civil forfeiture action.").

1 When another attorney filed SPC Kim's I-539 F-1 visa application, the attorney relied the  
2 old passport and facially valid Form I-94 containing the inaccurate date of entry. That attorney  
3 did not alert him to any defects in the application materials. Kim Decl. ¶ 20. Moreover, before  
4 SPC Kim applied for naturalization, DHS affirmed that he was in valid F-1 status and approved  
5 his enlistment in the Army on Form G-845. *Id.*

6 Based on the inaccurate date of entry, USCIS denied SPC Kim's naturalization  
7 application on June 11, 2015 and denied his appeal on May 10, 2016. Kim Decl. Exs. H, I.  
8 USCIS found that SPC Kim was not a person of "good moral character" because he provided  
9 false testimony when he stated that the information in his naturalization application was true and  
10 correct, and when he stated that he had never previously given false information to obtain an  
11 immigration benefit. Kim Decl. Ex. H (USCIS Denial). But USCIS permitted SPC Kim to apply  
12 for naturalization again, after having demonstrated "good moral character" for at least one year.  
13 *See* 8 C.F.R. §329.2(d) (stating requirement that applicant "[h]as been, for at least one year prior  
14 to filing the application for naturalization, and continues to be, of good moral character").

#### 15 **D. SPC Kim's Current Naturalization Application**

16 On May 24, 2017, SPC Kim filed his second N-400 naturalization application with  
17 USCIS's Nebraska Service Center. Kim Decl. ¶ 22; Kim Decl. Ex. J (Excerpts of N-400  
18 Application). USCIS acknowledged receipt of SPC Kim's second N-400 application on May 25,  
19 2017. Kim Decl. ¶ 23; Kim Decl. Ex. K (USCIS Receipt Notice). SPC Kim subsequently  
20 received a notice to capture his biometrics from USCIS. SPC Kim completed his biometrics  
21 check at USCIS's Seattle Field Office on June 15, 2018. Kim Decl. ¶ 24; Kim Decl. Ex. L  
22 (USCIS Biometrics Notice). Since then, and although SPC Kim's naturalization application has

23 been pending for over 500 days, Defendants have yet to schedule SPC Kim for a naturalization  
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1 interview, and he has not received any additional correspondence from Defendants regarding his  
2 naturalization application. Kim Decl. ¶ 25. SPC Kim continues to serve honorably in the U.S.  
3 Army and remains eligible for naturalization. *Id.* at ¶ 14, 25-26; Kim Decl. Ex. M (Letters of  
4 Commendation). He continues to be a person of good moral character. *Id.* In a character  
5 statement written on September 26, 2018, SPC Kim's Platoon Sergeant, Wilfred Aguiar Jr.,  
6 remarked that "SPC Kim is a very reliable and trustworthy individual and his honesty and  
7 integrity speak volumes about his character." *Id.*

8 **E. SPC Kim has been Harmed by USCIS's Failure to Adjudicate His**  
9 **Naturalization Application**

10 USCIS's failure to adjudicate SPC Kim's naturalization application has caused him  
11 serious harm. Because SPC Kim's F-1 student visa expired by operation of law upon his  
12 enlistment in the military, he currently lacks any valid immigration status. Kim Decl. ¶ 27. SPC  
13 Kim is currently at risk of being discharged from military service and placed in deportation  
14 proceedings.<sup>4</sup>

15 SPC Kim's lack of status also interferes with his ability to deploy abroad. Kim Decl. ¶  
16 28. On July 20, 2016, upon his reentry into the United States from assignment at Camp Casey in  
17 South Korea, SPC Kim was detained at the airport by Customs and Border Patrol and was  
18 questioned about his immigration status. *Id.* at ¶ 10. In addition, delays in processing SPC Kim's  
19 naturalization application have stymied his opportunities for advancement in the Army. As a  
20 non-citizen, he is barred from obtaining a security clearance necessary for certain positions. *Id.* at

21 \_\_\_\_\_  
22 <sup>4</sup> See Dave Philipps, *The Army Stopped Expelling Immigrant Recruits. But an Email Suggests It's Still Trying*, N.Y.  
23 TIMES, Sept. 19, 2018; Lolita C. Baldor, *Problems for Pentagon's Immigrant Recruit Program*, AP NEWS, Sept. 30,  
2018; Martha Mendoza and Garance Burke, *Army Expelled 500 Immigrant Recruits in 1 Year*, WASHINGTON POST,  
Oct. 11, 2018; Alex Horton, *ICE Is Moving to Deport a Veteran After Mattis Assured That Would Not Happen*,  
WASHINGTON POST, Apr. 5, 2018. Kim Decl. Exs. N-Q.



1 ¶ 28. The delay in processing prevents SPC Kim from living and working in the United States as  
2 a U.S. citizen, to travel freely as a U.S. citizen, to vote in elections, to serve on juries, and to  
3 enjoy other rights and responsibilities of U.S. citizenship. *Id.* at ¶ 30.<sup>5</sup>

### 4 III. LEGAL STANDARD

5 Defendants have unreasonably delayed adjudication of SPC Kim's naturalization  
6 application as a matter of law. The Court should grant summary judgment where, as here, the  
7 moving party establishes that there is "no genuine dispute as to any material fact" and that it "is  
8 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The Supreme Court has  
9 explained that '[s]ummary judgment procedure is properly regarded not as a disfavored  
10 procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are  
11 designed to secure the just, speedy and inexpensive determination of every action.'" *Van Asdale*  
12 *v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S.  
13 317, 327 (1986)).

14 Inferences drawn from facts are to be viewed in the light most favorable to the non-  
15 moving party, but the non-moving party must do more than show that there is some  
16 "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475  
17 U.S. 574, 586-87 (1986). The non-moving party cannot rely on conclusory allegations alone to  
18 create an issue of material fact, *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993), and  
19 must respond with something more than conclusory allegations, speculation, or argumentative  
20 assertions that unresolved factual issues exist. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th  
21 Cir. 1994). There is no issue for trial "unless there is sufficient evidence favoring the non-

22 \_\_\_\_\_  
23 <sup>5</sup> See *Citizenship Rights and Responsibilities*, USCIS.GOV (last visited Oct. 17, 2018),  
<https://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities>.

1 moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477  
 2 U.S. 242, 249 (1986). Thus, a mere "scintilla of evidence" in support of the non-moving party's  
 3 position is insufficient to defeat a motion for summary judgment. *Id.* at 252.

#### 4 IV. ARGUMENT

##### 5 A. USCIS's Failure to Adjudicate SPC Kim's Naturalization Application 6 Violates the Administrative Procedures Act

7 The APA requires administrative agencies to conclude matters presented to them "within  
 8 a reasonable time." 5 U.S.C. § 555(b). A district court reviewing agency action may "compel  
 9 agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "Agency  
 10 action" includes, in relevant part, "an agency rule, order, license, sanction, relief, or the  
 11 equivalent or denial thereof, or failure to act." 5 U.S.C § 551(13).

12 Courts have consistently found that the APA "establish[es] a duty on the part of USCIS  
 13 to adjudicate N-400 applications within a reasonable time frame." *Abdulmajid*, 2008 WL  
 14 2625860, at \*2; *see also Sidhu v. Chertoff*, No. 1:07CV1188AWISMS, 2008 WL 540685, at \*5  
 15 (E.D. Cal. Feb. 25, 2008) (holding that, under the APA, USCIS "has a non-discretionary duty to  
 16 act on [naturalization] applications before it by processing them"); *Jiang v. Chertoff*, No. C08-  
 17 00332 SI, 2008 WL 1899245, at \*3 (N.D. Cal. Apr. 28, 2008) ("[T]he APA . . . establish[es] a  
 18 clear and certain right to have [naturalization] applications adjudicated, and to have them  
 19 adjudicated within a reasonable time frame"); *Wang v. Mukasey*, No. C-07-06266RMW, 2008  
 20 WL 1767042, at \*3 (N.D. Cal. Apr. 16, 2008).

21 When deciding whether to order relief in claims of agency delay under the APA, courts in  
 22 the Ninth Circuit generally apply the "TRAC" factors. *Indep. Min. Co. v. Babbitt*, 105 F.3d 502,  
 23 507 (9th Cir. 1997). The TRAC factors are: "(1) the time agencies take to make decisions must be

1 governed by a ‘rule of reason’[;] (2) where Congress has provided a timetable or other indication  
 2 of the speed with which it expects the agency to proceed in the enabling statute, that statutory  
 3 scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the  
 4 sphere of economic regulation are less tolerable when human health and welfare are at stake[;]  
 5 (4) the court should consider the effect of expediting delayed action on agency activities of a  
 6 higher or competing priority[;] (5) the court should also take into account the nature and extent  
 7 of the interests prejudiced by the delay[;] and (6) the court need not ‘find any impropriety lurking  
 8 behind agency lassitude in order to hold that agency action is unreasonably delayed.’” *Id.* at 511  
 9 n.7 (quoting *Telecommunications Research & Action Center v. FCC* (“TRAC”), 750 F.2d 70, 80  
 10 (D.C. Cir. 1984)).

11 All of the *TRAC* factors indicate that USCIS has unreasonably delayed SPC Kim’s  
 12 naturalization application by failing to adjudicate his application for over 500 days. Dkt. # 1 at ¶  
 13 52-56 (Compl.).

#### 14 **1. Rule of Reason and Congressional Intent (TRAC Factors 1 and 2)**

15 The first two *TRAC* factors weigh strongly in SPC Kim’s favor. Congress has generally  
 16 stated “that the processing of an immigration benefit application,” which includes naturalization,  
 17 “should be completed not later than 180 days after the initial filing of the application.” 8 U.S.C.  
 18 § 1571(b). Although this statute does not include a mandatory timetable for processing  
 19 naturalization applications, this 180-day timeframe is “highly relevant” when determining the  
 20 reasonableness of a delay. *Khan v. Johnson*, 65 F. Supp. 3d 918, 930 (C.D. Cal. 2014); *see also*  
 21 *Daraji v. Monica*, No. CIV.A. 07-1749, 2008 WL 183643, at \*5 (E.D. Pa. Jan. 18, 2008) (noting  
 22 that “the 180-day timetable may provide the Court with general guidance”). Furthermore, USCIS

23 is required to grant or deny a naturalization application within 120 days of the date of the

1 naturalization interview. *See* 8 U.S.C. § 1447(b); 8 C.F.R. § 335.3. This timeframe is relevant,  
2 even where, as here, the applicant has yet to be scheduled for an interview. *See Daraji*, 2008 WL  
3 183643, at \*5 (“The 120-day rule articulated in Section 1447(b) also provides some guidance to  
4 the Court regarding what constitutes a reasonable period for USCIS to adjudicate a naturalization  
5 application.”).

6 Moreover, federal law and policies require that military naturalization applications be  
7 processed on an expedited basis. Executive Order 13269, which authorizes SPC Kim’s  
8 naturalization under 8 U.S.C. § 1440, is titled “Expedited Naturalization of Aliens and  
9 Noncitizen Nationals Serving in An Active-Duty Status During the War on Terrorism.” President  
10 George W. Bush issued this Executive Order “solely in order to provide expedited naturalization  
11 for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the  
12 United States.” Exec. Order No. 13269, 3 C.F.R. 13269 (2003) (Expedited Naturalization of  
13 Aliens and Noncitizen Nationals Serving in An Active-Duty Status During the War on  
14 Terrorism), 2002 WL 1833360, at \*1 (July 3, 2002). The U.S. Army’s own published guidance  
15 that “explains the procedures for Soldiers to apply for citizenship” expressly notes that “[t]he  
16 goal is to streamline and expedite the handling of their applications.” *Kirwa*, 285 F. Supp. 3d at  
17 28.

18 Indeed, until the provision sunset in 2013, Congress had mandated that, within six  
19 months of receiving a military naturalization application under 8 U.S.C. § 1440 (2012), USCIS  
20 was required to “process and adjudicate the application” or “provide the applicant with ... an  
21 explanation for its inability to meet the processing and adjudication deadline [and] an estimate of  
22 the date by which the application will be processed and adjudicated.” Military Personnel

23 Citizenship Processing Act, Pub. L. 110-382, 122 Stat. 4087 (2008). Even today, for military  
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1 applicants on active duty serving abroad, Congress requires that their naturalization applications  
2 “receive expedited processing and are adjudicated within 180 days of the receipt of responses to  
3 all background checks.” 8 U.S.C. § 1440f(e)(2).

4 USCIS has also had a policy to expedite the naturalization applications of MAVNI  
5 enlistees like SPC Kim. As a standard term of their enlistment contracts, MAVNI enlistees agree  
6 “to apply for U.S. citizenship as soon as the Army has certified [their] honorable service.”  
7 *Kirwa*, 285 F. Supp. 3d at 31. In conjunction with the U.S. Army, USCIS established the  
8 “Naturalization at Basic Training Initiative” in order to “provide expedited processing of  
9 naturalization applications for non-citizen enlistees” once they arrived at basic training with the  
10 goal that MAVNI recruits be naturalized before completing basic training. *Kirwa*, 285 F. Supp.  
11 3d at 29. The program addressed the “expensive, logistical nightmare of chasing service  
12 members around war zones to process their citizenship.”<sup>6</sup> Basic training “would be completed in  
13 ten to twelve weeks,” and by the end of that time period “USCIS would have adjudicated their  
14 N-400 naturalization applications, and the MAVNIs would be granted citizenship.” *Id.* at 31.

15 Because SPC Kim has filed a military naturalization application based on his almost four  
16 years of honorable service in the U.S. Army, his application should have received expedited  
17 treatment and been adjudicated within 180 days. Kim Decl. ¶ 14, 30 and this delay of more than  
18 500 days is unreasonable under the first two TRAC factors. *Id.* at ¶ 25; Dkt. # 1 at ¶ 53 (Compl.).

19  
20  
21 <sup>6</sup> Vera Bergengruen, *The US Army Promised Immigrants A Fast Track For Citizenship. That Fast Track Is Gone.*,  
BUZZFEED NEWS, Mar. 5, 2018, <https://www.buzzfeednews.com/article/verabergengruen/more-bad-news-for-immigrant-military-recruits-who-were>; see also Alex Horton, *The Pentagon Tried to Kill a Program for Immigrants. Mattis Thinks it Can Be Saved*, THE WASHINGTON POST, Oct. 13, 2017,  
22 [https://www.washingtonpost.com/news/checkpoint/wp/2017/10/13/the-pentagon-tried-to-kill-a-program-for-immigrants-mattis-thinks-it-can-be-saved/?noredirect=on&utm\\_term=.3db9de8802cb](https://www.washingtonpost.com/news/checkpoint/wp/2017/10/13/the-pentagon-tried-to-kill-a-program-for-immigrants-mattis-thinks-it-can-be-saved/?noredirect=on&utm_term=.3db9de8802cb). Cho Decl. ¶¶ 2-3; Cho Exs.  
23 A, B.

1                   **2. Human Health and Welfare and the Interests Prejudiced by the Delay**  
2                   **(TRAC Factors 3 and 5)**

3                   Courts analyzing delays in adjudicating immigration benefits under the APA “often  
4 analyze [the] third and fifth factors together.” *Khan*, 65 F. Supp. 3d at 930. “The third and fifth  
5 factors overlap, requiring the court to consider whether human health and welfare are at stake,  
6 and the nature and extent of the interests prejudiced by the delay.” *Id* (quoting *Islam v. Heinauer*,  
7 32 F. Supp. 3d 1063, 1073 (N.D. Cal. 2014)). These factors weigh heavily in favor of SPC Kim.

8                   USCIS’s delay in adjudication has put SPC Kim’s welfare at stake, and has significantly  
9 prejudiced his interests. By failing to adjudicate his naturalization application, USCIS has caused  
10 significant harm to SPC Kim because he now has no lawful immigration status. Kim Decl. ¶ 27.  
11 He is at risk of being discharged from the military, and is subject to arrest, detention, and  
12 deportation by immigration authorities. *Id.* at ¶¶ 27-30. He is barred from obtaining a security  
13 clearance necessary to take on certain jobs in the Army without citizenship, and is not able to  
14 work lawfully in the United States. *Id.* at ¶ 28, 30. SPC Kim also cannot partake in other benefits  
15 of U.S. citizenship, including the ability to travel freely as a U.S. citizen, to vote in elections, and  
16 to serve on juries. *Id.* at ¶ 30. For these and similar reasons, courts have consistently found that  
17 factors 3 and 5 weigh in favor of the applicant in naturalization delay cases. *See, e.g., Khan*, 65  
18 F. Supp. 3d at 930-31 (“[P]laintiffs’ interests in pursuing ... citizenship, or at least a final  
19 determination on their application so as to end a stressful waiting period, are compelling[.]”);  
20 *Daraji*, 2008 WL 183643, at \*6 (noting that Plaintiffs “are barred from applying for any jobs  
21 which require United States citizenship” and “cannot partake in the benefits of citizenship, such  
22 as voting and jury service”).

1                   **3.       Effect on the Agency (TRAC Factor 4)**

2                   The fourth TRAC factor, the effect of expediting delayed action on competing agency  
3 priorities, also weighs heavily in favor of SPC Kim. Here, there is no “higher or competing  
4 priority” on USCIS’s activities that would be affected by expediting SPC Kim’s naturalization  
5 application. *Indep. Min. Co.*, 105 F.3d at 511 n.7. Indeed, because SPC Kim filed a military  
6 naturalization application under 8 U.S.C. §1440, USCIS should have already expedited his  
7 application, but has failed to do so. *See supra* pp. 12-13; *see also Khan*, 65 F. Supp. 3d at 931-32  
8 (noting that the fourth factor weighs in a plaintiff’s favor where he “merely seeks a ruling on his  
9 Application . . . and does not otherwise seek to change the USCIS policy”) (internal citation  
10 omitted).

11                   **4.       Bad Faith (TRAC Factor 6)**

12                   Finally, the sixth *TRAC* factor also weighs in favor of SPC Kim. Although a court “need  
13 not find any impropriety lurking behind agency lassitude in order to hold that agency action is  
14 unreasonably delayed,” *Indep. Min. Co.*, 105 F.3d at 511 n.7, SPC Kim’s circumstances are  
15 overwhelmingly similar to those of another former MAVNI recruit. Specialist Yea Ji Sea (“SPC  
16 Sea”), also a South Korean national, applied for military naturalization in 2014, but was denied  
17 citizenship after USCIS raised allegations that her student visa application contained fraudulent  
18 materials. The Army moved to discharge Sea as her second naturalization application stalled for  
19 a prolonged period. Like SPC Kim, SPC Sea filed suit against the government to compel action  
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1 on her naturalization application in July 2018. Shortly thereafter, USCIS scheduled SPC Sea for  
2 a naturalization interview and granted her citizenship in August 2018.<sup>7</sup>

3 SPC Kim’s and SPC Sea’s cases fit a troubling pattern where the Government has  
4 unlawfully delayed and prevented MAVNI enlistees from obtaining U.S. citizenship. Recent  
5 news reports indicate that Defendant DHS has stymied efforts by DoD to restart the MAVNI  
6 program by refusing “to protect new immigrant [MAVNI] recruits from being deported when  
7 their temporary visas expired after they signed a contract to join the military.”<sup>8</sup>

8 **B. The Mandamus Act Requires USCIS to Adjudicate SPC Kim’s**  
9 **Naturalization Application without Unreasonable Delay**

10 The Mandamus Act provides district courts with mandamus power “to compel an officer  
11 or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

12 28 U.S.C. § 1361. The court may order an agency to act under the Mandamus Act if the three  
13 elements of the general mandamus test are satisfied: “(1) the individual’s claim is clear and  
14 certain; (2) the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to be  
15 free from doubt, and (3) no other adequate remedy is available.” *Kildare v. Saenz*, 325 F.3d  
16 1078, 1084 (9th Cir. 2003).

17 SPC Kim has met the three elements of the mandamus test. First, his claim is clear and  
18 certain: he has requested that this Court grant mandamus relief to compel USCIS to adjudicate  
19 his naturalization application. *See* Dkt. # 1 at ¶¶ 69-76 (Compl.). Second, USCIS has a  
20 nondiscretionary and ministerial duty to adjudicate naturalization applications within a

21 <sup>7</sup> *See* Michael Balsamo, *Lawyers: Discharged Army Specialist Granted U.S. Citizenship*, THE ASSOCIATED PRESS,  
22 Aug. 17, 2018; *Specialist Facing U.S. Army Discharge Sues for Citizenship*, THE ASSOCIATED PRESS, July 20, 2018.  
Cho. Decl. ¶ 4; Cho Exs. C, D.

23 <sup>8</sup> Lolita C. Baldor, *Problems for Pentagon’s Immigrant Recruit Program*, THE ASSOCIATED PRESS, Oct. 1, 2018.  
Kim Decl. Ex. P.



1 reasonable time frame. *See, e.g., Abdulmajid*, 2008 WL 2625860, at \*2 (holding that “the  
 2 citizenship regulations establish a duty on the part of USCIS to adjudicate N-400 applications  
 3 within a reasonable time frame”); *Sidhu*, 2008 WL 540685, at \*8 (holding “that Defendants have  
 4 a clear and non-discretionary duty to adjudicate Plaintiff’s N–400 application within a certain  
 5 time period”); *Jiang*, 2008 WL 1899245, at \*5. When determining whether a delay is  
 6 unreasonable under the Mandamus Act, courts have “construed a claim seeking mandamus . . . ,  
 7 ‘in essence,’ as one for relief under § 706 of the APA.” *Indep. Min. Co.*, 105 F.3d at 507  
 8 (quoting *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986)).  
 9 Therefore, for the same reasons that the delay of SPC Kim’s naturalization application is  
 10 unreasonable under the APA, it is also unreasonable under the Mandamus Act. *See supra* pp. 10-  
 11 15. Finally, SPC Kim does not have another adequate remedy available to him, as the  
 12 naturalization statutes only provide for a remedy for delays after USCIS has held a naturalization  
 13 interview. *See* 8 U.S.C. § 1447(b). SPC Kim has yet to have an interview scheduled.

#### 14 V. CONCLUSION

15 For the reasons stated above, this Court should GRANT SPC Kim’s motion for summary  
 16 judgment.

17 DATED this 18th day of October, 2018.

18 Respectfully submitted,

19 By: /s/ Eunice H. Cho

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PLAINTIFF’S MOTION FOR SUMMARY  
 JUDGMENT - 17  
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