

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANGE SAMMA, *et al.*,

Plaintiffs,

v.

**UNITED STATES DEPARTMENT OF
DEFENSE, *et al.*,**

Defendants.

Civil Action No. 20-cv-1104 (ESH)

ORDER

Pursuant to Federal Rule of Civil Procedure Rule 23, plaintiffs have filed a Motion for Class Certification and Appointment of Counsel, ECF No. 5. For the reasons stated in an accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiffs' Motion for Class Certification and Appointment of Counsel, ECF No. 5, as modified by plaintiffs' Amended Complaint, ECF No. 24, Pls.' Reply in Support of Plaintiffs' Motion for Class Certification, ECF No. 26, and Pls.' Supplemental Brief in Support of Plaintiffs' Motions for Summary Judgment and Class Certification, ECF No. 33, is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED¹ that, pursuant to Fed. R. Civ. P. 23(a), (b)(1)(A), and (b)(2), the Court certifies a Class consisting of all individuals who:

(a) are non-citizens serving in the U.S. military;

¹ "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B).

(b) are subject to Section I of the October 13, 2017 N-426 Policy (AR 6-9) (“N-426 Policy”), as updated by DOD’s April 24, 2020 Memorandum (AR 1);

(c) have not received a certified N-426²; and

(d) are not Selected Reserve MAVNIs in the class certified in *Kirwa v. U.S. Dep’t of Defense*, No. 17-cv-1793 (D.D.C. Dec. 1, 2017).³

The Class shall be divided into two subclasses:

Active Subclass: The Active Subclass shall include all individuals in the Class who are non-citizens serving in an Active Component of the U.S. military who have not satisfied the Minimum Service Requirements in Section I.3.a of the N-426 Policy. Plaintiffs Timotius Gunawan and Rafael Leal Machado are appointed as Class Representatives for the Active Subclass. This Subclass is certified to bring claims under the APA that challenge the requirement in Section I.3.a of the N-426 Policy that in order to obtain a Certification of Honorable Service (USCIS Form N-426), “Service Members in an Active Component” must have “successfully completed the basic training requirements of the armed force of which he/she is a member” and “[c]ompleted at least 180 consecutive days of active duty service, inclusive of the successful completion of basic training.” (AR 7.)

Reservist Subclass: The Reservist Subclass shall include all individuals in the Class who are lawful permanent residents (LPRs) serving in the Selected Reserve of the Ready Reserve who have not satisfied the Minimum Service Requirements in Section I.3.b of the N-426 Policy,

² The phrase “certified N-426” means a United States Customs and Immigration Services (“USCIS”) Form N-426 that has been completed and signed by the appropriate military official.

³ The certified class in *Kirwa* includes “all persons who have (1) have enlisted in the U.S. military through the Military Accessions Vital to the National Interest (“MAVNI”) program prior to October 13, 2017, (2) served in the Selected Reserve of the Ready Reserve (“Selected Reserve”), and (3) not received a completed and duly authenticated Form N-426.” Order, *Kirwa v. U.S. Dep’t of Defense*, No. 17-cv-1793 (D.D.C. Dec. 1, 2017).

excluding the plaintiff in *Kotab v. U.S. Dep't of the Air Force*, No. 2:18-cv-2031, 2019 WL 4677020 (D. Nev. Sept. 25, 2019).⁴ Plaintiff Ahmad Isiaka is appointed as Class Representative for the Reservist Subclass. This Subclass is certified to bring claims under the APA that challenge the requirement in Section I.3.b of the N-426 Policy that in order to obtain a Certification of Honorable Service (USCIS Form N-426), “Service Members in the Selected Reserve of the Ready Reserve” must have “successfully completed the basic training requirements of the armed force of which he/she is a member” and “[c]ompleted at least one year of satisfactory service towards non-regular retirement in accordance with Department of Defense Instruction 1215.07, “Service Credit for Non-Regular Retirement,” as a member of the Selected Reserve, inclusive of the member’s successful completion of basic training.” (AR 8.)

Both Subclasses are certified to bring claims challenging the applicable Minimum Service Requirements as arbitrary and capricious, *see* 5 U.S.C. § 706(2)(A); not in accordance with law, *see* 5 U.S.C. § 706(2)(A); in excess of statutory jurisdiction, *see* 5 U.S.C. § 706(2)(C); resulting in unlawfully withheld and unreasonably delayed agency action, 5 U.S.C. § 706(1); and having been enacted without notice and comment, *see* 5 U.S.C. § 553; 5 U.S.C. § 706(2)(D).⁵

It is further

ORDERED that no class is certified to challenge the O-6 requirement in the N-426 Policy because none of proposed class representatives has standing to challenge the O-6 requirement as updated by the April 24, 2020 policy update. It is further

⁴ The plaintiff in *Kotab v. U.S. Dep't of the Air Force*, Thomas X. Kotab, if he is currently serving in the Selected Reserve, is excluded from the Reservist Subclass because the district court in Nevada denied him the relief that plaintiffs in this lawsuit are seeking. *See Kotab*, 2019 WL 4677020, at *9-10 (dismissing APA claims as unreviewable).

⁵ These claims correspond to Counts II, III and IV in plaintiffs’ Amended Complaint. Plaintiffs agree that Count I, which is styled as a claim brought directly under the 8 U.S.C. § 1440, is subsumed by Count III, the claim under § 706(2)(A) & (C) of the APA. (*See* 7/16/20 Tr. at 79.)

ORDERED that plaintiffs' counsel are appointed to represent the Class and Subclasses.



Ellen S. Huvelle

ELLEN SEGAL HUVELLE
United States District Judge

Date: August 4, 2020