Discharged In The Dark: Immigrant GIs Fight For Due Process

By **RJ Vogt** | February 24, 2019, 8:02 PM EST

Kaung Htet, a Myanmar national who was recently discharged from the U.S. Army due to "foreign ties," stands outside the U.S. Citizenship and Immigration Services New York field office. (Annie Pancak | Law360)

It's a crisp February day in New York City, and Kaung Htet was supposed to be an American by now.

The 28-year-old Myanmar national enlisted in the U.S. Army back in April 2016 through a program offering a fast track to citizenship for foreigners with special language or medical skills. At the time, recruiters told him he'd become a naturalized citizen within six to nine months.

"I thought I'd made it," he remembers.

But he never even made it to basic training. Like at least 531 other noncitizen soldiers who enlisted in the Military Accessions Vital to the National Interest program before it was shut down in June 2016 over security concerns, Kaung Htet spent years wading through background checks only to be ultimately discharged without warning.

No officer told him why, but he said he learned through a records request that his June 2018 discharge was due to "foreign ties" revealed during a national security screening: his mom and dad live in Myanmar.

"That these young immigrant soldiers have parents still living in foreign countries should not surprise anybody," said Kaung Htet's attorney, Beverly Cutler. "They were recruited ... for their language and knowledge of other cultures."

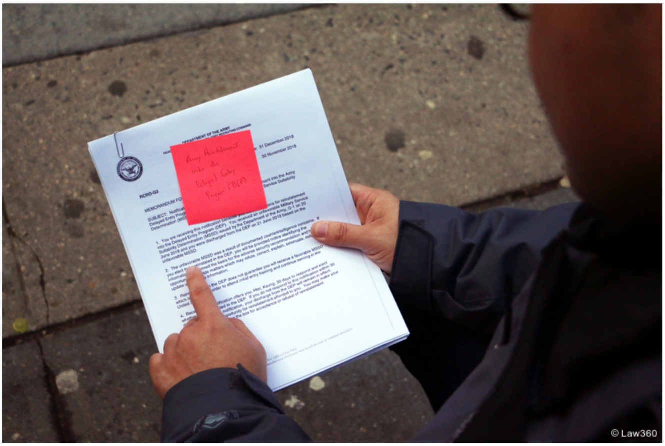
Now the soldier who signed an eight-year enlistment contract finds himself in immigration limbo. He has until the end of April before he technically becomes an illegal alien.

Relief could come via Calixto v. U.S. Army, a proposed class action filed in Washington, D.C., federal court. Army regulations require that discharges provide written explanations and opportunities to reply, but the suit claims those who entered the program, known as MAVNIs, often don't find out they're being let go, or why, until after the fact. It also contends the Army may be misstating the reasons for hundreds of discharges.

Jennifer Wollenberg, a Fried Frank Harris Shriver & Jacobson LLP attorney representing the discharged soldiers pro bono, told Law360 that she believes the government's failure to provide due process is part of a larger scheme to "summarily and en masse discharge most of the enlisted MAVNIs who had not yet been naturalized as of mid-2017."

After the suit was filed in June, the Army promised to reinstate soldiers who were forced out due to "unfavorable" security findings. An October memo said reinstatement would allow those soldiers to pursue the due process they should have received before being cut loose, but did not guarantee they'd be able to reverse their discharges.

Kaung Htet's reinstatement offer came in November; he accepted, but he hasn't heard from the government since.



Kaung Htet points to his unfavorable security finding, which came after a background check revealed his parents live in his home country, Myanmar. (Annie Pancak | Law360)

"I have no idea what's going on behind closed doors," he said.

As the clock ticks down on his legal status, Kaung Htet, who fears his oath to America's military could invite persecution if he returns to Myanmar, has applied for asylum. He's also looking into potential lawful permanent residency in Canada.

"I would love to be here," he said, gesturing to New York's bustling streets, where he'd hoped to one day open a Burmese restaurant. "But if push comes to shove, I have no other option."

Unsuitable or Unwanted?

The 532 discharged soldiers are just a slice of more than 4,200 MAVNIs who had enlisted but not yet naturalized when the program shut down. More than 1,000 have since become citizens thanks to Fried Frank's litigation, but hundreds more have been found unsuitable to serve or have not yet heard about their suitability.

According to Lt. Col. Carla Gleason, a spokesperson for the U.S. Department of Defense, the "issues with the MAVNI program are not about immigration, they are about national security." She noted that all recruits must undergo a background investigation to determine their suitability for military service.

"If a background investigation reveals information that disqualifies a MAVNI recruit, that recruit, like any other recruit with a similar disqualification, is ... released," she said.

But Margaret Stock, a retired lieutenant colonel in the Army Reserve who created the MAVNI program in 2008 and went on to write the book "Immigration Law & the Military," said there is no public data to support the idea that "foreigners as a group are a threat to the U.S. military."

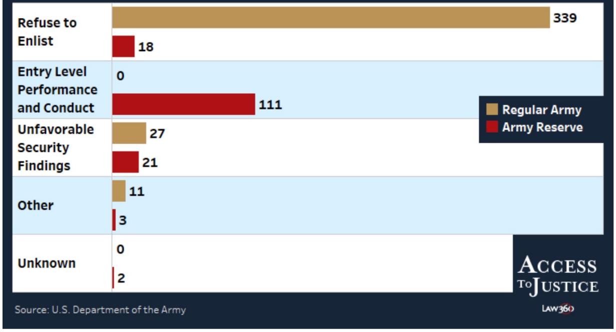
"The way they've handled everybody ... it's really coming from xenophobia," said Stock, who's helped scores of MAVNIs file for asylum.

She cited a Feb. 15 government filing in a separate Fried Frank suit, which showed one batch of 432 completed MAVNI security screenings returned 428 — 99 percent — unfavorable findings.

According to Stock, all of those soldiers underwent basic background checks required for enlistment as well as two more stringent ones specific to the MAVNI program, only to "fail" the third MAVNI-specific check.

Discharged For What Reason?

Of the 532 MAVNI discharges addressed in government court filings, only 48 were explicitly attributed to "unfavorable" security findings. But hundreds of other discharges with confusing labels like "refuse to enlist" have attorneys for the soldiers concerned about the Army's accuracy.



Source: U.S. Department of the Army

Although the filing did not explain why they were unfavorable, Stock said her clients have found that "having foreign ties causes failure." One was deemed unfavorable because she married someone from her home country, Stock said.

Traditionally, the military has welcomed noncitizens: They made up roughly 25 percent of the Union Army during the Civil War, and about about 100,000 immigrant soldiers earned naturalization through service in World War II.

In the wake of the Vietnam War, a new policy limited noncitizen enlistment to green card holders only, but the pool of recruitable immigrants shrunk as green cards became harder to get. During an enlistment slump in 2007, Stock proposed the Army recruiting command reverse the policy and allow all legal immigrants into service — even those on temporary visas, like students or workers.

The idea was well received. In November 2008, then-Secretary of Defense Robert Gates signed off on MAVNI, a program to attract skilled foreigners via the promise of naturalization. By signing up for the military, the recruits were technically violating their pre-existing visas, so the program was set up to provide an expedited path to citizenship.

Over the next eight years, more than 10,400 soldiers would join the armed forces as MAVNIs, including standouts like Sgt. Saral K. Shrestha, a Nepali immigrant named U.S. Army soldier of the year in 2012.

Louis Deli, an Australian who speaks Cantonese, also took advantage of the program. He had been working in Chicago on an H-1B visa when the 2008 recession hit and he lost his job. Needing a new way to stay stateside, he signed up for MAVNI in 2009 and experienced it the way it was initially designed.

"I enlisted in April and I shipped out to basic training in August," he told Law360. "There wasn't a ridiculous amount of security checks. I got naturalized when I graduated basic training."

'A Considerable Burden'

Everything changed in November 2009, when an Army psychiatrist named Nidal Hasan gunned down 13 people at Fort Hood in Texas. Within two months, the MAVNI program was halted.

It didn't matter that Hasan was American-born and had nothing to do with the new program — one federal judge overseeing MAVNI litigation noted in a recent order that "if Hasan had had a surname common in the United States ... the horrific acts that he committed might not have affected the MAVNI program so singularly and significantly."

By the time the program was reinstated in 2012, the Pentagon had settled on a three-tiered background check required for naturalization, including a top-secret security determination not required of other entry-level soldiers.

Defense officials would later contend the security checks weren't being properly implemented and pointed to soldiers who had relatives in foreign governments or bogus visas as evidence of porous screening. Those soldiers include one Chinese MAVNI who was arrested in September on charges of working with high-level Chinese intelligence.

The security concerns led the Army to effectively shutter the program during the summer of 2016. But that didn't take care of MAVNIs who were already recruited, waiting to be shipped to basic training and naturalized as citizens.

> *It's crazy that a U.S. government employee has to apply for asylum. They ought to have granted them some kind of blanket asylum status because they're in the U.S. military.*

If those MAVNIs presented a security risk, finding out presented a logistical nightmare. Executing the dizzying array of background checks became "a considerable burden on limited intelligence assets," according to a May 2017 memo prepared by

DOD Director of Military Accession Policy Stephanie Miller and later uncovered during litigation.

Because the scarcity of required resources made it "infeasible to continue to process" regular Army MAVNIs like Kaung Htet, the memo called for canceling all their contracts. It also said MAVNI Army Reserves, "except for individual cases deemed vital to the national interest," would be cut loose. Within weeks, the discharges began.

MARGARET STOCK
immigration lawyer who created MAVNI in 2008

Since then, court filings have explicitly attributed just 48 discharges to unfavorable security findings. But an amended Calixto complaint filed last month claims that hundreds of MAVNIs discharged for reasons like "refusal to enlist" or "entry-level performance and conduct" may have actually been discharged due to alleged security risks.

"We are aware of multiple instances in which 'refusal to enlist' was used, even though the soldiers in question had been enlisted for years already and never stated expressly or even hinted to the Army that they did not want to remain," Wollenberg told Law360.

Because the government last year only promised reinstatement to those who'd been discharged due to official unfavorable security findings, Stock said the "refusal to enlist" and other labels look like a cover for discharges that were really due to foreign ties.

"The Pentagon wants to get rid of people, but they can't summarily discharge them if they 'fail' a flawed background check, so they're trying to come up with some other excuse for getting rid of them," she said.

The Army is pushing to dismiss the suit, and officials refused to comment on ongoing litigation. Gleason said in a statement that while the vetting process takes time, it is essential to national security.

"We are working diligently and with all deliberate speed to complete all background investigations for the MAVNI population to honor the commitments we made to MAVNI recruits," she said.

Afraid to Go Home

Many Reserves and regular Army MAVNIs have been blocked from beginning their service for over two years, stuck in limbo while waiting to hear if their security screenings had favorable results. Desperate, a few eventually resorted to contacting their congressional representatives and requesting help.

Zheng Wang is one of those soldiers. The Chinese national enlisted as a reserve in December 2015 and has drilled with his unit 27 times. He filed his naturalization application in March 2017, but he didn't find out about his status for another year and a half, and even then only after he got then-U.S. Rep. Mia Love, R-Utah, to intervene on his behalf.

"Specialist Wang did not meet requirements established by law for retention in the Army," the October 2018 letter to Love stated. "Accordingly, Specialist Wang may receive an unfavorable military service suitability determination and will be provided the opportunity to respond to this action."

Zheng Wang attends Army Family Day with his unit in December 2018. He's been declared a security risk due to foreign ties. (Courtesy photo)

Wang showed Law360 the report explaining his unsuitability. It states that because his in-laws gave him and his Chinese wife Xi Guan a $20,000 advance to help them buy a house, he is a security risk.

Now he's awaiting a letter regarding his opportunity to respond, similar to the reinstatement offer Kaung Htet got in November. But without guarantee of when or how that process will begin, Wang figures he's either been discharged or will be soon. With his current visa set to expire in early March, he filed for asylum last month; returning to his home country is not an option for the recently converted Mormon.

"There's no freedom to practice religion in China," Wang said. "And also with a U.S. military background ... I might face detention."

Despite knowing he may never wear a uniform, Wang said he's still planning to attend his unit’s next drill.

"I am doing what I promised in the contract I signed," he said.

Have a story idea for Access to Justice? Reach us at accesstojustice@law360.com.

--Editing by Katherine Rautenberg.

© 2019, Portfolio Media, Inc.