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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TONY N., KAREN M., JACK S., HEGHINE MURADYAN, DAYANA VERA DE APONTE, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

U.S. CITIZENSHIP & IMMIGRATION SERVICES; DEPARTMENT OF HOMELAND SECURITY; ALEJANDRO MAYORKAS, Secretary of Homeland Security; UR JADDOU, Director of USCIS

Defendants.

Case No. 3:21-cv-08742-MMC

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND PROVISIONAL CLASS CERTIFICATION

District Judge Maxine M. Chesney
Hearing: December 17, 2021, 9 am

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND PROVISIONAL CLASS CERTIFICATION

I. INTRODUCTION

Defendants do not dispute that USCIS is routinely failing to adjudicate EAD renewal applications for asylum seekers before their 180-day automatic extension expires and nor do they offer any time frame within which USCIS will adjudicate these applications. Rather they maintain, notwithstanding USCIS' own rulemaking to the contrary, that USCIS is under no obligation to avoid gaps in Plaintiffs' and class members' employment authorization by adjudicating their applications within the automatic extension. While Defendants dispute Plaintiffs' proposed "rule of reason," they offer no substitute rule. Rather, they provide a series of vague excuses that do not adequately explain the delays Plaintiffs challenge. And they belittle the severe harms Plaintiffs suffer as a result. But Defendants' arguments fail to refute that Plaintiffs and class members are entitled to a prohibitory (or in the alternative, a mandatory) preliminary injunction ordering that Defendants adjudicate EAD applications for asylum seekers within the 180-day automatic extension.[1]

II. ARGUMENT

A. Plaintiffs and Class Members Are Severely Harmed by USCIS' Delays

Throughout their pleadings, Defendants minimize the harms Plaintiffs suffer as merely a "temporary loss of income." Dkt. 48 at 21. This is belied by the substantial record in this case. *See* Dkt. 17 at 22-29. The failure to timely adjudicate Plaintiffs' and class members' renewal applications has undermined their economic security, deprived them of professional opportunities, health insurance, and government identification, and caused

[1] Plaintiffs will address Defendants' arguments regarding class standing, Dkt. 48 at 7-8, in their reply in support of class certification.

significant mental health consequences. Although Plaintiffs need only show they are suffering from irreparable harm, *see infra* Part II.E, their injuries meet the standard of "extreme or very serious damage" required for a mandatory injunction.

Because many asylum seekers lack networks of support and financial resources, even brief gaps in employment will bring on a "cascade of negative consequences," including housing and food insecurity. Kafele Decl. ¶¶ 12-13, Dkt. 17-7; *see, e.g.*, Reddy Decl. ¶ 34, Dkt. 17-8 (discussing an asylum seeker's fear of losing their home due to delays); Karen M. Decl. ¶¶ 6, 9-10, Dkt. 17-4 (discussing inability to care for children and afford rent). For many Plaintiffs, the disruption in employment not only deprives them of a source of income but has major long-term professional consequences. *See* Vera De Aponte Decl. ¶¶ 11-12, Dkt. 17-6 (discussing risk of losing Medicaid provider number); Muradyan Decl. ¶¶ 11-12, Dkt. 17-3 (discussing potential loss of her medical licenses and the risk of being required to repeat a year of residency training); Gilbert Decl. ¶ 10, Dkt. 17-10 (describing a client who lost the OSHA and employer certification to operate a forklift); Reddy Decl. ¶ 33, Dkt. 17-8 (discussing a software engineer prevent from securing a new position).

Defendants also ignore the numerous non-economic harms that are not "incidental," Dkt. 48 at 24, but the direct result of losing work authorization, such as loss of eligibility for health insurance and government identification like drivers' licenses. [2] *See* Gilbert Decl. ¶ 7; Sheridan Decl. ¶ 7; Kafele Decl. ¶¶ 12, 14. Without a driver's license, everyday tasks are often impossible, such as attending necessary prenatal appointments in her last month of

[2] In arguing that Plaintiffs have not shown "extreme or very serious damage," Defendants mischaracterize the holding in *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1181 (D. Or. 2018). The court did *not* hold that loss of drivers' licenses does not meet the harm threshold, but instead held that it could not remedy the harm because even if the court granted relief the plaintiffs' licenses would remain suspended for other reasons. *Id.*

pregnancy, in the case of Karen M., or assisting a partner with disabilities, in the case of Jack S. *See* Karen M. Decl. ¶¶ 9-10; Jack S. Decl. ¶ 16, Dkt. 17-5.

Defendants also fail to acknowledge the mental and emotional suffering that renewal delays have inflicted on asylum seekers, including depression and anxiety. *See*, *e.g.*, Kafele Decl. ¶ 15; Muradyan Decl. ¶ 14; Gilbert Decl. ¶ 8; Sheridan Decl. ¶ 7.

Plaintiffs' and class members' harms extend beyond temporary economic harm from loss of employment and warrant a remedy.

B. Plaintiffs Tony N., Dr. Muradyan, and Jack S.'s Claims On Behalf of Themselves and the Class Are Not Moot

Contrary to Defendants' unargued assertion, Dkt. 48 at 11 n.6, Plaintiffs Tony N., Dr. Muradyan, and Jack S.'[3] claims are not moot. Plaintiffs' individual claims qualify for the "capable of repetition, yet evading review" exception to mootness. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173–75 (9th Cir. 2002) (describing the exception as requiring a showing that "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again") (quotation omitted). Here, notwithstanding Defendants' delays, EAD renewal applications that have been pending for more than 180 days are almost certain to be adjudicated before full litigation can be completed and there is a reasonable expectation that Plaintiffs will be subjected to similar delays when they seek subsequent renewals of their EADs. In fact, Defendants' central argument is that there is no time limit for the adjudication of EAD renewal applications. Dkt. 48 at 6.[4]

[3] By submitting an inquiry to USCIS' online case status tool, class counsel learned that Jack S.' EAD renewal application was approved on December 9, 2021.

[4] Even if their individual claims were moot, Plaintiffs can continue as class representatives because their EADs were renewed after the commencement of litigation and after the filing

C. Plaintiffs Are Likely to Win on the Merits and the Law and Facts Clearly Favor Plaintiffs

The parties agree that the six-factor *TRAC* test provides the legal framework. Dkt. 48 at 15. From there, the parties part ways. In essence, Defendants maintain that they are under no obligation to adjudicate EAD renewal applications within the automatic extension period or within any period—notwithstanding rules and rulemaking to the contrary—and that the only "rule of reason" necessary is an identifiable application processing system. Dkt. 48 at 11-15. Beyond this, Defendants offer excuses that lack real detail and are largely tied to the COVID-19 pandemic, *see* Nolan Decl. ¶¶ 18-23, Dkt. 48-1, which was in full swing when USCIS stated it was "unnecessary" for asylum applicants to apply for their renewals 90 days in advance because the automatic extension period would "prevent gaps in employment authorization." Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 Fed. Reg. 37502, 37509 (June 22, 2020). Finally, Defendants attempt to minimize the prejudice to Plaintiffs and class members as merely "temporary loss of income." Dkt. 48 at 21. Defendants are mistaken. It is unreasonable for USCIS to fail to adjudicate EAD renewal applications within the 180-day automatic extension period, this failure has caused severe harm to Plaintiffs and class members, and Defendants have not identified any higher or competing priority that would suffer if they were forced to complete this ministerial task within the 180-day automatic extension period.

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of the motion for class certification, such that their claims relate back to the date of filing of the motion for class certification because the lawsuit involves "inherently transitory claims." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (collecting cases).

1. *TRAC* Factors One and Two

Contrary to Defendants' characterization, an "identifiable rationale" for processing EAD renewal applications does not constitute a "rule of reason." Dkt. 48 at 16. Rather, in this circuit, the "rule of reason" asks "whether the time for agency action has been reasonable." *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020). With respect to EAD renewal applications for asylum seekers, the content for the rule of reason comes from USCIS' own notice and comment rulemaking, supported by the sense of Congress, to require adjudication within the 180-day automatic extension. Dkt. 17 at 16-19.

By final rule in November 2016, Defendants eliminated the requirement that it adjudicate EAD applications within 90 days of receipt while simultaneously creating the 180-day automatic extension for "timely" filed applications in order "[t]o prevent gaps in employment for such individuals and their employers." Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82405, 82456 (Nov. 18, 2016). USCIS' primary defense against commenters who felt eliminating the 90-day processing requirement was unreasonable was the protection afforded by the automatic extension. *Id.* at 82456. In addition, Defendant DHS stated that it was "committed to current processing timeframes and expects to adjudicate Form I–765 applications within 90 days." *Id.* at 82462.

Despite the elimination of the 90-day processing time for all EADs, there remained a regulation that guaranteed continuity of employment authorization for asylum seekers who applied for renewal of their employment authorization, so long as their renewal application was received 90 days before expiration. Former 8 C.F.R. § 208.7(d) (1997) instructed asylum applicants that "[i]n order for employment authorization to be renewed before its expiration,

the application for renewal must be received by the [INS, subsequently USCIS] 90 days prior to expiration of the employment authorization."

But in June 2020—during the height of the COVID-19 pandemic— Defendants eliminated as "unnecessary" the requirement that asylum seekers file their renewal applications 90 days in advance in order to maintain their employment authorization. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 Fed. Reg. 37502, 37509 (June 22, 2020). USCIS reasoned that the 90-day deadline was unnecessary "[b]ecause [the 180-day automatic extension] effectively prevents gaps in work authorization." *Id.* In response to comments, Defendants similarly stated that there was no "need to set an adjudicative timeframe," especially given the protection provided by the automatic extension.[5] *Id.* at 37524. Thus, according to Defendants themselves, the reasonable time for adjudicating renewal applications is—if not the promised 90 days—then adjudication within the 180-day automatic extension.

This timeframe is entirely reasonable. It is consistent with, and supported by, the sense of Congress that "an immigration benefit application" should be adjudicated within 180 days, 8 U.S.C. § 1571(b), and even the underlying asylum application should be processed within that time, 8 U.S.C. § 1158(d)(5)(A)(iii). *See Doe v. Risch*, 398 F. Supp. 3d 647, 657 (N.D. Cal. 2019).[6]

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[5] Contrary to Defendants' arguments, Dkt. 48 at 20, the fact that Defendants found it unnecessary to issue another new rule setting an adjudicatory timeframe from receipt to decision does not undermine the rule of reason supported by the rulemaking it did issue.

[6] Defendants' attempt to distinguish *Risch* is unavailing. There, as here, "[t]here is no congressionally-mandated timetable" for adjudicating the relevant application, nevertheless the sense of Congress "tip[s]" the second *TRAC* factor in Plaintiffs' favor. *Id.*

Defendants have two primary responses to this rule of reason. Neither have merit. First, Defendants dismiss the content of its own rulemaking as "informal agency pronouncement[s]" that "lack the force of law." Dkt. 48 at 19-20. But Defendants misconstrue Plaintiffs' legal claims. Plaintiffs are not arguing that Defendants have unlawfully withheld action under the APA. *See South Carolina v. United States*, 907 F.3d 742, 755 (4th Cir. 2018) (citing *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001)) (noting that where "[t]he applicable statute contained 'no deadlines'" it should be analyzed for unreasonable delay and not the unlawful withholding of action); *see also Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1160–61 (W.D. Wash. 2018) (citing *Biodiversity Legal Found.* , 309 F.3d 1166). Rather, the law Plaintiffs seek to enforce is the prohibition against unreasonable delay under the Mandamus Act, 28 U.S.C. § 1361, or the APA, 5 U.S.C. §§ 555(b), 706(1). Dkt. 8 ¶¶ 10, 114-124.[7] To determine whether that delay is unreasonable, this Circuit applies the *TRAC* factors which require, among other things, courts to determine the "rule of reason" governing the adjudicatory timeframe. *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1139. Defendants' own rulemaking is clearly relevant to that determination. *See Rosario*, 365 F. Supp. 3d at 1161-62 (holding alternatively that a regulation may provide the content for a rule of reason). Rulemaking and its contents are not merely "informal agency pronouncements." Dkt. 48 at 20. They constitute the "reasoned decisionmaking" required to issue a final rule and are necessary to meet Defendants' obligation to "articulat[e] a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of U.S., Inc. v.*

[7] Defendants' cited cases are irrelevant. In *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000), the Ninth Circuit rejected the INS' claim that an interpretation in the Foreign Affairs Manual (FAM) was entitled to *Chevron* deference. In *W. Radio Servs. Co. v. Espy,* 79 F.3d 896, 900 (9th Cir. 1996), the plaintiff argued that an agency manual and handbook had "the independent force and effect of law" requiring overturning an agency action. In neither case was the court of appeals considering whether agency delay was unreasonable.

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52 (1983). It is disingenuous for the agency to argue that its rulemaking cannot provide the content for a rule of reason.

Defendants' second attack on their own rule of reason—arguing that the agency intended to caveat the protection provided by the automatic extension by also requiring applicants to file some variable, unspecified time in advance of expiration—is likewise unavailing. Dkt. 48 at 20. The only rationale DHS offered to justify eliminating the requirement and protection afforded at 8 C.F.R. § 208.7(d) (1997) was that it was rendered "unnecessary" by the automatic extension at 8 C.F.R. § 274a.13(d). 85 Fed. Reg. at 37509. Defendants' proposed reading of the rulemaking—that the agency meant the automatic extension would protect against gaps in work authorization only so long as applicants also filed sufficiently in advance of the EAD's expiration (sometimes even more than 90 days in advance, as was the case for Plaintiff Tony N.[8])—is contrary to the agency's stated rationale that the automatic extension itself made advance filing "unnecessary . . . to prevent gaps in employment authorization."[9] *Id.* Moreover, the Court should not embrace Defendants'

[8] Tony N. Decl. ¶ 4.

[9] Defendants seize upon the final clause of the sentence that follows DHS' stated rationale for rulemaking. Dkt. 48 at 20. That sentence reads in full: "In order to receive the automatic extension, applications may be filed before the employment authorization expires, though it is advisable to submit the application earlier to make allowance for the time it takes for applicants to receive a receipt acknowledging USCIS' acceptance of the renewal application, which can be used as proof of the extension, and to account for current Form I–765 processing times." 85 Fed. Reg. at 37509. As discussed above, this final phrase cannot be read to undo the rationale for the rulemaking and, given the context, does not advise applicants that they may actually be required to file significantly in advance of expiration in order to benefit from the protection from employment lapses that the agency has just asserted the automatic extension provides. This is especially true in a rulemaking where the agency affirmatively removed an advance filing requirement. Moreover, Defendants' argument that an applicant's review of "current processing times" reliably provides notice of the need for advance filing, Dkt. 48 at 20, is belied by the fact that such processing times do not reveal how long it will take USCIS to adjudicate a newly filed application, as shown by the facts of this case. *See* Kafele Decl. ¶ 21.

suggestion that notwithstanding this "reasoned decisionmaking," *Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Rels. Bd.*, 522 U.S. 359, 374 (1998), Defendants "kn[ew] full well" that this was untrue. Dkt. 48 at 20. This overstates the record. 85 Fed. Reg. at 37524 (stating that certain cases "may occasionally pend longer than 180 days due to unusual facts or circumstances or applicant-caused delays" and pointing to processing times for EAD applications excluding those filed by asylum applicants).[10] But even if it were accurate, it simply cannot be the case that the agency's own misrepresentation vitiated its stated rule of reason, especially given that advocates relied on the rulemaking. *See* Kafele Decl. ¶ 23: Reddy Decl. ¶ 27; *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2125–26 (2016).

Not only do Defendants fail to undermine Plaintiffs' position on the rule of reason, they also fail to identify an adequate substitute. Defendants describe their proposed rule of reason in two parts. First, they outline the process of adjudicating EAD renewal applications for asylum seekers. Dkt. 48 at 16-17. But that process does not speak to the relevant question of timeliness, and is, rather, a tautology. In fact, the process does not prioritize speed, because applications are assigned to Service Centers based on the state of residence, not the capacity of the particular Service Center, *see* Nolan Decl. ¶ 14, leading to discrepancies in processing times across regions, *see* Dkt. 8 ¶¶ 58-60. Otherwise, the description of the adjudication process reveals almost nothing about how long it should reasonably take to adjudicate these applications. Notably, USCIS has previously identified a completion rate of on average .2 hours (or 12 minutes) to adjudicate a Form I-765. Fee Schedule and Changes to

[10] In addition, "unusual facts" and "applicant-caused delays" are accounted for in Plaintiffs' class definition, which excludes time related to Requests for Evidence (RFEs). Dkt. 16 at 10-11.

Certain Other Immigration Benefits, 84 Fed. Reg. 62280, 62292 (Nov. 14, 2019) (proposed rule).

Next, Defendants provide a series of excuses for their admitted delays. Dkt. 48 at 17; Nolan Decl. ¶¶ 18-23. These excuses fall within three buckets, none of which justify or adequately explain USCIS' delays:

(1) Defendants point to the closure of Application Support Centers, where biometrics are collected, due to the COVID-19 pandemic, and other biometrics-related delays. Nolan Decl. ¶¶ 18, 22-23. But it is entirely unclear whether any significant number of class members require biometrics appointments sufficient to account for the challenged delays, because members of CASA and ASAP (who collectively number over 280,000[11]) do not and neither do many (if not most) applicants who have previously submitted biometrics (a requirement for an asylum application[12]). *Id.* ¶¶ 6, 8, 18, 23 (noting "minimal delay" where a new biometrics appointment is not necessary).

(2) Defendants point to a hiring freeze at USCIS because of a 50% drop in receipts due to the COVID-19 pandemic. *Id.* ¶ 19. But USCIS has failed to identify how many (if any) positions were left unfilled due to the hiring freeze, how long those positions were left unfilled, and whether those positions were necessary to timely process EAD renewal applications for asylum applicants. *See id*. USCIS has also left unanswered why an application backlog developed when there was an overall 50% reduction in receipts and significantly fewer EAD renewal applications from asylum applicants. *See id*. ¶¶ 19, 21.

[11] Reddy Decl. ¶ 6 (ASAP has 185,000 members); *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 941 (D. Md. 2020) (CASA has over 100,000 members).

[12] Instructions for Form I-589, Application for Asylum and Withholding of Removal, 8 (Aug. 25, 2020), https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf.

(3) Defendants point to an increase in EAD renewal applications in the Spring of 2021. *Id.* ¶ 21. But while USCIS notes a spike in cases in March and April 2021, the numbers have since leveled off as compared to the pre-pandemic number of applications. *See id.*

Thus, none of this adequately explains the drastic increase in processing times for EAD renewal applications filed in or after December 2020. *See* Kafele Decl. ¶¶ 16-21. Nor does it establish that the agency has taken all reasonable steps to address these delays. *See* U.S. Gov't Accountability Off. (GAO), GAO-21-529, *U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload* 24-38 (Aug. 2021), https://www.gao.gov/assets/gao-21-529.pdf (USCIS "has not implemented the plans or identified the resources and funding that would be needed to address the pending caseload" and has not established timeliness performance metrics). Moreover, to the extent the agency blames COVID-19 for these delays, it is notable that in June 2020—three months into the pandemic—Defendants assured the public that the 180-day automatic extension would protect against gaps in employment authorization and filing 90 days in advance of expiration was unnecessary. 85 Fed. Reg. at 37509 (published June 22, 2020). For these reasons, *TRAC* factors one and two weigh in Plaintiffs' favor.

2. *TRAC* Factor Four

Defendants do not refute Plaintiffs' position that an EAD application is inherently a high priority for prompt adjudication. *See* Dkt. No. 17 at 20-21. Rather, they assert, without citation, that class-wide relief would impact other competing priorities. Dkt. No. 48 at 20-21. With no factual evidence to support this conclusion, the Court should reject it. As discussed above, Defendants have not established that they have taken all reasonable steps to address delays in EAD renewal applications such that other higher priorities would *necessarily* be

significantly impacted. *See supra* Part II.C.1. Moreover, the agency's discretion to manage its own resources does not cancel its obligations under the Mandamus Act or the APA to adjudicate in a reasonable amount of time. "Taken to its logical conclusion, the Government's argument would eliminate federal judicial review of any agency action and wipe the APA off the books." *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 14 F.4th 462, 489 (6th Cir. 2021).[13] Thus *TRAC* factor four weighs in favors of timely adjudicating these high priority EAD applications.

3. *TRAC* Factors Three and Five

Defendants characterize Plaintiffs' harm as mere economic harm involving a temporary loss of income. Dkt. 48 at 21. But as discussed at length above, this is a mischaracterization of the serious harm Plaintiffs and class members suffer due to Defendants' failure to adjudicate within the automatic extension period. *Supra* Part II.A. Courts have found that these types of harms weigh in favor of plaintiffs when evaluating the third and fifth TRAC factors, including in class actions (notwithstanding the inherent variation in degree of harm between class members[14]). *See Rosario*, 365 F. Supp. 3d at 1162 (finding the *TRAC* factors supported a class-wide permanent injunction and that *TRAC* factors three and five "strongly weigh in favor of an injunction" because "[a]sylum seekers are unable to obtain work when their EAD applications are delayed and consequently, are unable to financially support themselves or their loved ones"); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1084 (N.D. Cal. 2005) (holding the *TRAC* factors weighed

[13] There is also no merit to Defendants' argument that the timely processing of named Plaintiffs' EAD applications would harm other class members, Dkt. 48 at 21, especially given USCIS' previous representations that it takes 12 minutes to adjudicate such applications. 84 Fed. Reg. at 62292.

[14] To the extent Defendants argue that some class members may never suffer any injury at all, Plaintiffs discuss standing in their reply in support of class certification.

in favor of class-wide relief, including *TRAC* factors three and five, "where the failure to present documentation [of legal permanent resident status] precludes lawful employment and obtaining certain state benefits").

4. *TRAC* Factor Six

Defendants misinterpret the sixth *TRAC* factor and argue that it favors them. *TRAC* factor six, to the extent it constitutes a factor at all, merely states that the absence of bad faith does not weigh against a plaintiff, but does not support the assertion that good faith does. *See Latifi v. Neufeld*, No. 13-CV-05337-BLF, 2015 WL 3657860, at *8 (N.D. Cal. June 12, 2015) (declining to find *TRAC* six weighed in defendant's favor even though "USCIS is diligently processing applications pursu[ant] to applicable policy"). Moreover, as evidence of their good faith, Defendants state that they have reduced the ASC appointment backlog, Dkt. 48 at 22, but do not explain what, if any, effect this reduction may have on the backlog of EAD renewals, particularly when many class members do not need to attend an ASC appointment. *See* Nolan Decl. ¶¶ 6, 8, 18. Thus, judicial intervention remains necessary despite any purported good faith on the part of Defendants and the sixth TRAC factor is neutral.

D. The Balance of the Equities and Public Interest Favor Preliminary Injunctive Relief

To claim that these requirements favor them, Defendants ignore the damage caused by imminent or actual interruption of work authorization and that Plaintiffs seek to require USCIS to adjudicate within an existing timetable for adjudication. Dkt. 48 at 23. Plaintiffs have amply demonstrated the harm they and the class they seek to represent suffer when work authorization is not adjudicated within the 180-day auto-extension period. *See supra* Part II.A. Contrary to Defendants' claim, Dkt. 48 at 23-24, Plaintiffs are not asking that their

applications be adjudicated before other pending applications or asking this Court for a mandatory injunction imposing a timeframe not recognized by the agency. The relief requested is that USCIS adjudicate all EAD renewal applications by asylum seekers within the rule of reason. *See supra* Part II.C.1. Defendants' unsupported claim of "scarce resources," Dkt. 48 at 23, also does not outweigh the harm caused by the adjudication delay. In *Zhou v. FBI*, the court rejected the government's "limited resources" excuse: "It is not the aggrieved applicants [for permanent residence] who have created this problem, and it would not be appropriate for the courts to shift the burdens [of lack of sufficient resources] onto the shoulders of individual immigrants." No. 7-cv-238-PB, 2008 WL 2413896, at *7 (D.N.H. June 12, 2008).

Moreover, it is self-evident that when the United States is experiencing a labor shortage, the public interest is served when all workers, including asylum seekers, experience a continuity of employment. *See* U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover Report—October 2021, Economic News Release (Dec. 8, 2021), https://www.bls.gov/news.release/jolts.nr0.htm and Compl. ¶ 3, Dkt. 8 (for the DOL Aug. 2021 report) (reporting an increase in the number of job openings to 11 million as of October 31, 2021 from 10.4 million in August 2021).

E. The Relief Requested is Prohibitory

Defendants' argument that Plaintiffs seek a mandatory injunction relies on their erroneous claim that Plaintiffs ask the agency to do something new. Dkt. 48 at 14. Plaintiffs' requested relief is instead analogous to the relief requested by the plaintiffs in *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) ("*ADAC*"). The *ADAC* plaintiffs asked the court to enjoin a new policy under which DACA recipients would be ineligible for

drivers' licenses and return to the prior policy. *Id*. at 1061. Here, plaintiffs ask this Court to enjoin USCIS' deviation from its prior recognition that renewal EADs are to be adjudicated within the 180-day auto-extension period. *Supra* Part II.C.1; Dkt. 17, 17-18. For those asylum seekers who have lost their employment authorization, Plaintiffs seek to put them back in the position they were before their work authorization expired, and for those who are imminently about to lose their work authorization, it would ensure that the status quo is maintained. The relief requested is prohibitory because an injunction returns USCIS to adjudicating within the 180-day automatic extension time period rather than mandating the agency to take new, affirmative action. *ADAC*, 757 F.3d at 1061 (prohibitory injunction); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.,* 571 F.3d 873, 879 (9th Cir. 2009) (mandatory injunction because recall and restitution went beyond the parties' prior position); *Garcia v. Google, Inc.,* cited by Defendants, Dkt. 48 at 14, is distinguishable because the injunction required Google to take affirmative action by removing from the Internet any upload of a film that included the plaintiff. 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

Although Plaintiffs seek a prohibitory injunction, they also meet the higher standard for a mandatory injunction as they seek to avoid "extreme or very serious damage," *Marlyn Nutraceuticals*, 571 F.3d at 879, and the law and facts are clearly on their side. *Supra* Part II.A, C.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a preliminary injunction and provisional class certification.

DATE: December 10, 2021

Respectfully submitted,

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