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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TONY N., et al., Plaintiffs, v. U.S. CITIZENSHIP & IMMIGRATION SERVICES, et al., Defendants.	CASE NO. 3:21-cv-08742 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** **Hearing Noticed for December 17, 2021 at 9:00am**

TABLE OF CONTENTS

INTRODUCTION....1

BACKGROUND....1

LEGAL STANDARDS....3

I. Work Authorization Process....3

II. The "TRAC" Factors....5

III. Class Certification Standards....6

ARGUMENT....8

I. THE REQUEST FOR PROVISIONAL CLASS CERTIFICATION SHOULD BE DENIED....8

A. Plaintiffs Cannot Establish Sufficient Commonality To Warrant Provisional Class Certification....8

1. The Proposed Class Definition Is Impermissibly Overbroad....10

2. Plaintiffs' Proposed Class Lacks Commonality and Typicality....12

3. The Proposed Representatives Will Not Fairly and Adequately Protect Class Interests....16

CONCLUSION....17

TABLE OF AUTHORITIES

CASE LAW

Califano v. Yamasaki,
442 U.S. 682 (1979) 7

Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat'l Forest,
304 F. Supp. 3d 916 (E.D. Cal. 2018) 6

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 7

Gen. Tel. Co. v. Falcon,
457 U.S. 147 (1982) 8

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 16, 17

In re A Cmty. Voice,
878 F.3d 779 (9th Cir. 2017) 6, 13

In re California Power Exch. Corp.,
245 F.3d 1110 (9th Cir. 2001) 6

In re Google AdWords Litigation,
No. 5:08-cv-03369 EJD, 2012 WL 28068 (N.D. Cal. Jan. 5, 2012) 9

Independence Min. Co., Inc. v. Babbitt,
105 F.3d 502 (9th Cir. 1997) 6

Islam v. Heinauer,
32 F. Supp. 3d 1063 (N.D. Cal. 2014) 6

Jennings v. Rodriguez,
138 S. Ct. (2018) 9

Mazza v. Am. Honda Motor Co.,
666 F.3d 581 (9th Cir. 2012) 10, 12, 16

NRDC v. United States EPA (In re NRDC),
956 F.3d 1134 (9th Cir. 2020) 6, 13

Ramirez v. TransUnion LLC,
951 F.3d 1008 (9th Cir. 2020) 10

Rodriguez v. W. Publ'g Corp.,
563 F.3d 948 (9th Cir. 2009) 17

Rutledge v. Elec. Hose & Rubber Co.,
511 F.2d 668 (9th Cir. 1975) 8

Telecommunications Research & Action v. FCC,
750 F.2d 70 (D.C. Cir. 1984) 5

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... passim

Zinser v. Accufix Research Inst., Inc.,
253 F.3d 1180 (9th Cir. 2001) 7

FEDERAL STATUTES

5 U.S.C. § 706(1) 1

8 U.S.C. § 1158(d)(2) 3

28 U.S.C. § 1361 1

FEDERAL REGULATIONS

8 C.F.R. § 103.2(b)(10)(i) 1, 5, 13, 14

8 C.F.R. § 208.7 3

8 C.F.R. § 208.7(a) 4

8 C.F.R. § 208.7(a)(1)(i) 3

8 C.F.R. § 208.7(a)(ii) 3

8 C.F.R. § 208.7(a)(iii) 3

8 C.F.R. § 208.7(a)(iv) 3

8 C.F.R. § 208.7(b) 1

8 C.F.R. § 208.7(b)(1) 3, 4

8 C.F.R. § 274a.12(c)(8) 1, 3

8 C.F.R. § 274a.13(b) 3

8 C.F.R. § 274a.13(d) 1

8 C.F.R. § 274a.13(d)(1) 1, 4, 11

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 23(a) 2, 7, 8, 9, 17

Fed. R. Civ. P. 23(a)(1) 16

Fed. R. Civ. P. 23(a)(2) 8

Fed. R. Civ. P. 23(a)(3) 9

Fed. R. Civ. P. 23(b) 7

Fed. R. Civ. P. 23(b)(1) 7

Fed. R. Civ. P. 23(b)(2) 7, 9, 16

Fed. R. Civ. P. 23(b)(3) 7

MISCELLANEOUS

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 8, 9

INTRODUCTION

The Federal Defendants respectfully submit this opposition to Plaintiffs' Motion for Class Certification. ECF No 16. Plaintiffs seek to certify:

> All individuals (a) who filed applications to renew their employment authorization documents pursuant to 8 C.F.R. §§ 208.7(b); 274a.12(c)(8); and (b) who received a 180-day automatic extension of their employment authorization pursuant to 8 C.F.R. § 274a.13(d); and (c) whose applications have a processing time of at least 180 days pursuant to 8 C.F.R. § 103.2(b)(10(i).

ECF No. 16 at 2.

This Court should deny Plaintiffs' request for class certification because the class proposed in the motion is impermissibly broad, especially when considered in light of the central harm Plaintiffs allege in their complaint. Plaintiffs' far-reaching proposed class encompasses a broad range of dissimilarly-situated individuals whose claims are not common, whose injuries are not typified by the claims of the putative class representatives, and who have different factual bases for their claims.

BACKGROUND

The named Plaintiffs in this action are non-citizens with pending asylum applications whose authorization to work in the United States expired before USCIS completed adjudication of their renewal applications. On November 10, 2021, Plaintiffs, on behalf of themselves and the putative class they seek to represent, filed a complaint in this Court for class certification and declaratory and injunctive relief under the Mandamus Act, 28 U.S.C. § 1361, or, alternatively, the Administrative Procedure Act (APA), 5 U.S.C. § 706(1). *See generally*, ECF No. 8. Plaintiffs' complaint alleges that USCIS has unreasonably delayed adjudicating their applications to renew employment authorization documents (EADs) beyond the 180-day automatic extension for employment authorization granted at 8 C.F.R. § 274a.13(d).[1] *See* ECF No. 8 ¶¶ 114-124. The

[1] As discussed below, the 180-day automatic extension for EAD renewal applications starts on the day the prior EAD expires, provide the renewal application was filed with USCIS prior to the current EAD expiration date. See 8 C.F.R. § 274a.13(d)(1). For example, if the applicant is

named Plaintiffs are: (1) Tony N., asserting an EAD renewal application pending for 323 days, 180-day automatic extension expired October 11, 2021[2]; (2) Plaintiff Dr. Muradyan, asserting an EAD renewal application pending for 219 days, 180-day automatic extension expired October 13, 2021; (3) Plaintiff Karen M., alleging an EAD renewal application pending for 221 days, 180-day automatic extension expired November 15, 2021; (4) Plaintiff Jack S., asserting an EAD renewal application pending for 244 days, 180-day automatic extension expired October 18, 2021; (4) Plaintiff Vera de Aponte, alleging an EAD renewal application pending for 259 days, 180-day automatic extension expired November 9, 2021. ECF Nos. 8 ¶¶ 15-19. Plaintiffs request that the Court order the Department of Homeland Security (DHS) and USCIS to adjudicate their EAD renewal applications for Plaintiffs and the putative class within the 180-day automatic extension period. ECF No. 8 (Request for Relief).

On November 11, Plaintiffs filed a motion for class certification pursuant to Federal Rule of Civil Procedure ("Rule") 23(a),(b)(2). ECF No 16. In their motion, Plaintiffs again highlight their employment histories; the impacts (and anticipated impacts) of their continued unemployment; and the number of days their renewal EAD applications have remained pending with USCIS, including how many days in excess of the 180-day automatic extension period to argue that their claims that USCIS has unreasonably delayed the adjudication of their EAD renewal applications merit classwide treatment. *See* ECF No. 16 at 3-4 (description of named Plaintiffs), ECF No. 16; *see also* Fed. R. Civ. P. 23(a), (b)(2). That same day, Plaintiffs filed a motion for preliminary injunction and provisional class certification, requesting that the Court enter a preliminary injunction compelling Defendants to adjudicate Plaintiffs' renewal applications within the 180-day automatic extension period. ECF No. 17. Plaintiffs also asked the Court to certify a

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employment authorized through January 1, 2022, and files a renewal application on November 1, 2021, the current EAD is automatically extended 180 days from January 1, 2022 to June 30, 2022.

[2] Asserted date calculations for each putative class representative are contained in Plaintiffs' class certification motion and reflect dates current as of the time of Plaintiffs' complaint, November 11, 2021. *See* ECF No. 16 at 3-5.

provisional class and provide the class with preliminary injunctive relief.

LEGAL STANDARDS

I. Work Authorization Process

The Immigration and Nationality Act (INA) states that "[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General." 8 U.S.C. § 1158(d)(2). The regulations state that asylum applicants may apply for employment authorization, but not "earlier than 365 days after the date USCIS or the immigration court receives the[ir] asylum application." 8 C.F.R. § 208.7(a)(ii). The regulations do not require USCIS to issue an employment authorization. *See* 8 C.F.R. § 208.7. But they do prohibit the issuance of initial employment authorization if: the applicant has been convicted of an aggravated felony, particularly serious crime, or a serious non-political crime outside the United States; the applicant failed to establish that they are not subject to a mandatory denial of asylum; the application was denied before the initial employment authorization application was adjudicated; or the applicant entered or attempted to enter the United States other than lawfully through a U.S. port of entry. *See* 8 C.F.R. § 208.7(a)(iii). Similarly, if the asylum applicant requests or causes a delay in the adjudication of the asylum claim prior to filing the employment authorization application that remains unresolved at the time of adjudication, the initial application will be denied. *See* 8 C.F.R. § 208.7(a)(iv). If the initial employment authorization application is granted, the asylum applicant is issued an EAD, *see* 8 C.F.R. § 274a.13(b), that is valid "for a period USCIS determines is appropriate at its discretion, not to exceed two years." 8 C.F.R. § 208.7(a)(1)(i); *see also* 8 C.F.R. § 274a.12(c)(8).

USCIS may renew employment authorization "in increments determined by USCIS in its discretion, but not to exceed increments of two years." 8 C.F.R. § 208.7(b)(1). If an EAD renewal application is filed prior to the expiration of the current EAD and has not been adjudicated when

the current EAD expires, the current EAD will be automatically extended "for an additional period not to exceed 180 days from the date of [the EAD]'s . . . expiration." 8 C.F.R. § 274a.13(d)(1). While a renewal application may be filed at any time prior to the expiration of a current EAD, USCIS recommends that asylum applicants "not file for a renewal EAD more than 180 days before [the] original EAD expires." *See* U.S. Citizenship & Immigr. Servs., Employment Authorization Document, *available at* https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document. Critically, no statute or regulation requires USCIS to adjudicate renewals within a specified time frame. Nor does any statute or regulation bar USCIS from allowing authorizations to expire without granting a renewal.

In order to renew an asylum-based EAD, an applicant must complete and file a Form I-765, Application for Employment Authorization, with USCIS. USCIS, Form I-765 Instructions, *available at* https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf. This standard form collects basic information (*e.g.*, biographic, immigration-related, contact) and includes a number of questions for determining a renewal applicant's continued eligibility for employment authorization. Form I-765 also requires the applicant to submit proof that of a pending asylum application before DHS or EOIR as well as any police or court records for any criminal charges, arrests or conviction. *See also* 8 C.F.R. § 208.7(b)(1) (requiring renewal applicants to demonstrate that they continue to meet with eligibility criteria for employment authorization set forth in 8 C.F.R. § 208.7a)).

To file, a renewal applicant mails the Form I-765, accompanying documents, and the filing fee (if not waived) to a USCIS Lockbox facility. Declaration of Connie Nolan ("Nolan Decl.") ¶ 12, attached as Exhibit A. Once received, the Lockbox will accept or reject the application, send receipt notices for accepted applications to the applicant or return rejected applications, and

transmit application files to the appropriate USCIS service center or field office for further processing. *Id*. USCIS issues a Notice of Action, Form I-797C, referred to as a "receipt notice," to acknowledge receipt of asylum applicants' EAD renewal applications. The receipt notice showing a timely filed EAD renewal application, presented together with an individual's EAD that on its face appears to be expired, is sufficient proof for an employer that the renewal applicant is entitled to a 180-day automatic extension of their work authorization. USCIS Handbook for Employers M274, 4.4 Automatic Extensions of Employment Authorization Documents (EADs) in Certain Circumstances *available at* https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/40-completing-section-2-of-form-i-9/44-automatic-extensions-of-employment-authorization-documents-eads-in-certain-circumstances; *see also* Nolan Decl. ¶ 11. Lastly, if necessary to process the application, a USCIS adjudicator may issue a Request for Evidence (RFE) requesting that a renewal applicant submit required initial evidence or supplemental evidence. *See* 8 C.F.R. § 103.2(b)(10)(i); *see also* "Nolan Decl." ¶ 14.

II. The "TRAC" Factors

Because no statutory or regulatory deadline exists for USCIS to adjudicate EAD renewals, Plaintiffs rely in their complaint on the "TRAC" factors laid out in *Telecommunications Research & Action v. FCC (TRAC),* to establish USCIS' supposed unreasonable delay in adjudicating their EADs. *See* ECF No. 8 ¶ 88-103; 750 F.2d 70, 80 (D.C. Cir. 1984). To determine whether an agency's delay in adjudicating a benefit is unreasonable, the *TRAC* factors guide the Court's analysis. They include: (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." *See Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (internal quotations and modifications omitted). The third and fifth *TRAC* factors are frequently considered together. *Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1073 (N.D. Cal. 2014). "The most important [*TRAC* factor] is the first factor, the rule of reason." *NRDC v. United States EPA (In re NRDC)*, 956 F.3d 1134, 1139 (9th Cir. 2020) (internal citations and quotation omitted); *see In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017) (same). Under a rule of reason analysis, courts treat the length of delay by an agency adjudicating a benefit as a critical consideration to determine reasonableness. *See Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat'l Forest*, 304 F. Supp. 3d 916, 951 (E.D. Cal. 2018) ("The Ninth Circuit's unreasonable delay mandamus cases have made clear that the cases in which courts have afforded relief have involved delays of years, not months." (citing *In re California Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) (collecting circuit-court cases involving delays of between four and ten years that were held to be unreasonable and comparing with cases involving delays of 14 months to five years where court declined to grant mandamus) (internal quotations omitted); *see also Yavari v. Pompeo*, No. 19-cv-0252, 2019 U.S. Dist. LEXIS 216070, at *21-22 (C.D. Cal. Oct. 10, 2019) ("District courts have generally found that immigration delays in excess of five, six, seven years are unreasonable, while those between three to five years are often not unreasonable.") (internal citation).

III. Class Certification Standards.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, Plaintiffs "must affirmatively demonstrate [their] compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A party seeking certification of a proposed class must establish the four elements set forth in Rule 23(a). Specifically, the moving party must show that: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and (4) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation"). *See* Fed. R. Civ. P. 23(a); *see also Dukes*, 564 U.S. at 345 (2011) ("Class certification is governed by Federal Rule of Civil Procedure 23.").

In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Dukes*, 564 U.S. at 345; *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs seek certification under Rule 23(b)(2). ECF No. 8 ¶ 104, ECF No. 16 at 1. Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that generally apply to the class." Fed. R. Civ. P. 23(b)(2). The "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (citation omitted).

The party seeking class certification bears the burden of demonstrating that it has met all four Rule 23(a) prerequisites and that the class lawsuit falls within one of the three types of actions

permitted under Rule 23(b). *Zinser*, 253 F.3d at 1186. Moreover, the failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *Dukes*, 564 U.S. at 350 (Rule 23 "does not set forth a mere pleading standard."). A court should only certify a class "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 564 U.S. at 350-51 (internal quotation omitted). When reviewing a motion for class certification, it "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). This is because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (internal quotation omitted)

ARGUMENT

I. THE REQUEST FOR PROVISIONAL CLASS CERTIFICATION SHOULD BE DENIED.

Plaintiffs fail to justify class certification is warranted under Rule 23(a), (b)(2). Consequently, after applying the requisite rigorous analysis, the Court should deny Plaintiffs' request for provisional class certification.

A. Plaintiffs Cannot Establish Sufficient Commonality To Warrant Provisional Class Certification.

To obtain class certification, Plaintiffs must demonstrate that the proposed class is entitled to common relief as to each count on which certification is sought. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). To establish commonality, the Supreme Court has repeatedly held that "what matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the

litigation." *Dukes*, 564 U.S. at 350 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (citation omitted).

The commonality requirement is especially rigorous where, as here, Plaintiffs seek class certification under Rule 23(b)(2), which requires that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As the Supreme Court recently noted, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Jennings*, 138 S. Ct. at 852 (quoting *Dukes*, 564 U.S. at 360). For certification under Rule 23(b)(2), plaintiffs must show that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360. Accordingly, as with commonality, Plaintiffs bear the burden of demonstrating that any factual differences among the proposed class members are unlikely to affect their entitlement to relief. *See id; see also In re Google AdWords Litigation*, No. 5:08-cv-03369 EJD, 2012 WL 28068 *15-16 (N.D. Cal. Jan. 5, 2012) ("The question of which advertisers among the hundreds of thousands of proposed class members are even entitled to restitution would require individual inquiries."). If the factual differences have the likelihood of changing the outcome of the legal issue, then class certification is generally not appropriate.

The commonality and typicality requirements of Rule 23(a) are interrelated and, in some instances, merge. *Dukes*, 564 U.S. at 349 n.5. "Both [requirements] serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id*. The

typicality requirement of Rule 23(a)(3) ensures that the interests of the named representatives align with the interests of the class. *See id*.

1. The Proposed Class Definition Is Impermissibly Overbroad

Plaintiffs seek class certification of all asylum applicants who have filed an application to renew their EADs before the expiration of their current EADs and "*whose applications have a processing time of at least 180 days* pursuant to 8 C.F.R. § 103.2(b)(10(i)." (emphasis added). ECF No. 16 at 2-3. Plaintiffs' proposed class, however, is substantially overbroad because it necessarily includes renewal applicants who are still authorized to be employed or are not at imminent risk of having a gap in their employment authorization. As such, an undetermined number of putative class members would lack the required injury-in-fact required for Article III standing. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing.") (internal citation omitted; *see also Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1017 (9th Cir. 2020) (holding that all class members "must satisfy the requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages"). For Article III purposes, the fundamental harm Plaintiffs complain of is not that USCIS failed to adjudicate an asylum applicant's EAD renewal request within 180 days from filing of the EAD renewal request itself, as the class definition suggests. Rather, the alleged harm is that USCIS' adjudicatory process sometimes results in a gap in employment authorization for renewal applicants. *See, e.g.*, ECF No. 8 ¶¶ 15-19 (describing each named Plaintiff as unemployed due to a lapse in employment authorization), 82-86 (detailing alleged adverse effects for each named Plaintiff resulting from expired employment authorization), 93 (arguing that the third *TRAC* factor is satisfied because "Plaintiffs and class members have lost jobs and the ability to support themselves and their families because of Defendants' delays"). The proposed class definition, however, is not reasonably

tailored to capture the complained-of harm. Specifically, because the 180-day automatic extension granted to renewal applicants extends the applicant's EAD *from the date it would otherwise expire*, 8 C.F.R. § 274a.13(d)(1), and because applicants may file to renew their EADs *180 days before its expiration*,[3] the actual processing time without a gap in employment authorization for renewal applicants is up to 360 days. *See* Nolan Decl. ¶¶ 10, 11. There is therefore no basis to conclude that applicants "whose applications have a processing time of at least 180 days" have suffered (or will imminently suffer) a gap in employment authorization. In fact, because an EAD renewal applicant can be entitled to work authorization for 360 days from the date of filing until such employment authorization lapses (180 days before the EAD expiration plus the 180-day automatic extension beginning at expiration), the only way for a putative class member here to accrue an injury at the 180-day mark contemplated in the proposed class definition is for the applicant to file for renewal *the same day* their EAD is set to expire. Only under those circumstances would the 180-day processing timeline Plaintiffs propose in their class definition match the 180-day automatic extension granted at the expiration of the original EAD, after which time, if the renewal application is not adjudicated, a gap in employment authorization would occur. In other words, except for the preceding scenario, there is no circumstance in which the primary injury alleged (a gap in employment) would accrue to a member of the proposed class after their renewal application has been pending for adjudication for 180 days. Further, for some members of the proposed class, a gap in employment authorization will never occur, despite having renewal applications pending

[3] *See* U.S. Citizenship & Immigr. Servs., Employment Authorization Document, *available at* https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document.

for more than 180 days.[4] Using the example of the representative class members Plaintiffs have identified in this case, and presuming for the sake of this pleading that the dates provided regarding the pendency of their renewal applications are correct, none of them experienced a gap in employment authorization after 180 days.[5] *See* ECF Nos. 8 ¶¶ 15-19.

In sum, Plaintiffs' proposed class definition includes renewal applicants with applications pending for at least 180 days but who, nevertheless, may be months away from a potential lapse in employment authorization (depending on the date they filed for EAD renewal and the automatic 180-day extension granted upon expiration of their existing employment authorization), and includes applicants who will never experience such a lapse. Because Plaintiffs' impermissibly broad class necessarily includes potential class members who remain authorized to work, and in light of the fact that no statute or regulation compels USCIS to complete adjudication of renewal EAD applications within 180 days, Plaintiffs have not shown that USCIS' "conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (citation omitted); *see also Mazza*, 666 F.3d at 594-95. Because it is impermissibly overbroad, Plaintiffs' proposed class should not be certified.

2. Plaintiffs' Proposed Class Lacks Commonality and Typicality

Because the putative class definition includes EAD renewal applicants whose legal and factual interests differ from each other and differ from the proposed class representatives, the

[4] By way of example, assume an EAD that is set to expire on January 1, 2022. The asylum applicant timely files a (c)(8) renewal application on October 1, 2021 (93 days before the expiration). That filing would automatically extend the EAD for 180 days, *i.e.*, to June 30, 2022 (180 days from January 1, 2022). Because the renewal application processing time is not measured from the date the 180-day automatic extension begins, but rather from the filing date of the (c)(8) application, it could take 200 or more days to process this hypothetical renewal application with no chance of a gap in employment authorization for the applicant.

[5] For example, if on November 11, 2021 when the Class Certification Motion was filed, Tony N's EAD renewal application had been pending for 323 days, and if his 180 day extension expired on October 11, 2021, then it would have been pending for approximately 292 days on October 11, 2021.

breadth of Plaintiffs' proposed class causes it to lack commonality and typicality. Specifically, Plaintiffs fail to show that the proposed class is entitled to common relief because application of the individualized, multi-factored *TRAC* analysis Plaintiffs rely on in an attempt to demonstrate unreasonable delay will necessarily differ from one class member to the next. As a result, what might be unreasonable delay by USCIS for one class member will not necessarily establish unreasonable delay as to each class member when viewed through the *TRAC* analysis. *See Dukes*, 564 U.S. at 350 (to merit classwide treatment, "the answer to a common legal problem must resolve an issue that is central to the validity of each one of the claims in one stroke"); *see also CRVQ v. United States Citizenship & Immigration Servs.*, No. CV 19-8566-CBM-(AGRx), 2020 U.S. Dist. LEXIS 252515, at *21 (C.D. Cal. Sep. 24, 2020) (emphasizing that "[t]he *TRAC* test is fact-intensive, and courts have declined to resolve whether the *TRAC* test has been satisfied at the pleading stage, including with respect to immigration applications.").

For example, the different estimated time ranges for the various USCIS Service Centers to adjudicate asylum EAD renewals undermines any finding that Plaintiffs have established the required elements of commonality and typicality for their proposed class. As Plaintiffs detail in their motion, USCIS Service Centers report estimated time ranges for processing EAD renewal applications anywhere from 5.5 months to 10 months. *See* ECF 16 at 10-11. Naturally, these various processing times (which Plaintiffs do not dispute) will be the critical factor the Court relies on to determine the first and most important *TRAC* factor: whether the time it takes USCIS to adjudicate asylum EAD renewal applications nationwide is governed by a rule of reason. *See In re NRDC*, 956 F.3d at 1139 ("The most important [*TRAC* factor] is the first factor, the rule of reason."); *see also In re A Cmty. Voice*, 878 F.3d at 786. Compounding the different time ranges for USCIS' geographically dispersed Service Centers to adjudicate asylum EAD renewal

applications is the fact that USCIS may issue an RFE for any given renewal application with the attendant effect of delaying adjudication. *See* 8 C.F.R. § 103.2(b)(10)(i) (authorizing USCIS adjudicators to issue a RFE requesting that a renewal applicant submit required initial evidence or supplemental evidence.); Nolan Decl. ¶ 14. In their motion seeking class certification, Plaintiffs likewise acknowledge and discuss the RFE process. *See* ECF No. 16 at 7 (observing that RFEs, once issued, impacts EAD renewal processing times). While Plaintiffs are careful to point out that "[n]one of the Individual Plaintiffs have received an RFE," ECF No. 16 at 7, that is of little consequence given that named Plaintiffs seek to represent a nationwide class of asylum EAD renewal applicants, a number of whom will have adjudicatory timelines directly impacted by USCIS' issuance of an RFE. *See* ECF No. 8 ¶ 45 (noting that recent survey found that "11 percent of [ASAP] members applying for renewal applications reported receiving an RFE."). Further, while Plaintiffs tie the 180-day processing time in their class definition to 8 C.F.R. § 103.2(b)(10)(i), *see* ECF No. 16 at 2-3, the fact remains that the RFE process, like the differing processing times at the various Service Centers, will directly impact the time USCIS requires to adjudicate any given asylum EAD renewal application. *See* Nolan Decl. ¶ 14. Under the *TRAC* analysis, the Service Centers' differing adjudicatory timelines, coupled with USCIS' regulatory authority to issue RFEs when necessary, fatally undermines Plaintiffs' claims to commonality and typicality. While some commonality among applicants will inevitably exist, the factual variations inherent in Plaintiffs' proposed class require individualized determinations to establish the length and reasons for any delay, and therefore whether USCIS has acted reasonably with respect to each individual asylum EAD renewal application.

Additionally, and again despite some degree of commonality, the various wait times across the Service Centers will naturally prejudice a class member's interests (the fifth *TRAC*

factor) differently according to the particular class member's individual circumstances. *See TRAC*, 750 F.2d at 80 (under *TRAC*, court should also take into account the "nature and extent of the interests prejudiced by the delay"). While the loss of employment is undoubtedly consequential for asylum applicants in many instances, the attendant hardships named Plaintiffs describe do not apply equally—or at all—to each purported class member. For instance, while Plaintiffs complain, in part, that they struggle to pay for necessities such as utilities and rent, lost health insurance (or have health conditions), or have dependents to support, the same would not be true of class members with ample savings, passive income sources, alternative health insurance, family support, a working spouse or partner, no dependents, free housing or good physical health. *See, e.g.*, *Vijetha Mulky Kamath v. Campagnolo*, No. 21-cv-01044, 2021 U.S. Dist. LEXIS 213298, at *8-9 (C.D. Cal. Aug. 13, 2021) (observing in the context of the third and fifth *TRAC* factors that plaintiff did not receive medical insurance through her employer and there is no indication that her insurance will be affected by her loss of employment).

Plaintiffs' proposed class definition, however, simply does not account for the above factual variations among the proposed class, each of which would bear on the individualized analysis required under *TRAC*. Instead of addressing these factual differences, and regardless of whether an applicant's EAD has even expired or will imminently expire, Plaintiffs ask the Court to assume that any processing time greater than 180 days is *per se* unreasonable for each class member, and thus requiring adjudication under the Mandamus Act or APA § 706(1). But Plaintiffs may not invoke the Mandamus Act and APA as general purpose statues that automatically grant relief to all asylum EAD renewal applicants with either expired (or soon-to-be expired) EADs, much less those whose applications have simply been pending for the 180 days Plaintiffs' class definition proposes.

Because application of the *TRAC* factors will necessarily vary depending on the class member's distinct circumstances, neither Plaintiffs nor the Court can conclude with certainty what the outcome of the unique *TRAC* analyses will be across the entire class. Consequently, each renewal applicant's claim to class membership must be decided on a case-by-case basis subject to unique considerations based on the individual facts and circumstances of each applicant. Because these differences go the heart of Plaintiffs' unreasonable delay claim, they conceivably alter the outcome of the *TRAC* analysis, and consequently any determination that USCIS did or did not unreasonably delay in adjudicating a particular EAD renewal application. It would be impractical, if not impossible, for the Court to order class relief that would take into account all of the different factual scenarios that putative class members might present under the multi-factored *TRAC* analysis. The Court should not, therefore, accept Plaintiffs' invitation to impute the particular hardships reflected in Plaintiffs' declarations to every member of the putative class. Because the proposed class will not generate common answers to common questions that are "apt to drive the resolution of the litigation," *Dukes*, 564 U.S. at 350, Plaintiffs have failed to satisfy Rule 23(a)(1) (commonality) or Rule 23(b)(2) (injunctive or declaratory relief appropriate to the class as a whole). *See generally Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 ("Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once."). Because plaintiffs cannot meet their burden, the Court must deny their motion to certify a class. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (common issues do not predominate where "an individualized case" must be made on behalf of each class member in order to obtain relief).

3. The Proposed Representatives Will Not Fairly and Adequately Protect Class Interests.

The adequacy requirement serves to protect the due process rights of absent class members who will be bound by the judgment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Dukes*, 564 U.S. 338. Assessing the adequacy of class representation turns on two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id*. "[U]ncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). Here, the proposed class definition creates an impermissible conflict of interest between named Plaintiffs, each of whom have expired EADS, and the much broader class of EAD applicants they seek to represent.[6] As discussed, a proposed class composed of EAD renewal applicants with "processing time[s] of at least 180 days" necessary includes applicants with current EADs. *See* discussion above at 9-11. That distinction—class representatives without access to lawful employment and class members who are lawfully employed—naturally creates an improper incentive for the unemployed class representatives to prioritize their relief over those of absent class members with potentially months of lawful employment authorized. *See Hanlon*, 150 F.3d at 1020. Accordingly, the named Plaintiffs' interests are not aligned with all members of the putative class, and, as with commonality and typicality, Plaintiffs have thus failed to establish adequacy of representation.

CONCLUSION

Because Plaintiffs have failed to satisfy the rigorous standards of Rule 23(a), (b)(2), they are not entitled to bypass individual litigation and receive classwide treatment. For the above reasons, the Court should deny Plaintiffs' Motion for Class Certification.

[6] Except for Karen M., whose EAD was set to expire under the 180-day extension four days after Plaintiffs filed their complaint on November 11, each putative class representative lacked a current EAD.

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Respectfully submitted,

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