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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TONY N., et al.,

Plaintiffs,

v.

U.S. CITIZENSHIP & IMMIGRATION SERVICES, et al.,

Defendants.

No. 3:21-cv-8742-MMC

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND PROVISIONAL CLASS CERTIFICATION

Judge: Hon. Maxine M. Chesney
Hearing: December 17, 2021, 9:00 a.m.
Place: San Francisco U.S. Courthouse,
Courtroom 5, 17th Floor

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I. INTRODUCTION

Plaintiffs are five asylum applicants who allege that U.S. Citizenship and Immigration Services (USCIS) has unreasonably delayed adjudication of their applications to renew their employment authorization documents (EAD). Plaintiffs purport to represent a class of similarly situated asylum applicants and seek a mandatory injunction on behalf of a proposed nationwide class that would require USCIS to adjudicate all EAD renewals based on an underlying asylum application before the applicant's prior employment authorization lapses. As a threshold matter, the class defined by Plaintiffs necessarily includes people who have suffered no lapse in their employment authorization. Because the class includes individuals who lack an injury sufficient to confer standing, and is fatally flawed for reasons further explained in Defendants' Opposition to Class Certification, classwide injunctive relief is wholly inappropriate.

But more importantly no statute, regulation, or any other authority imposes any deadline on USCIS for the adjudication of these EAD renewals. The only support Plaintiffs raise for such a sweeping and rigid injunction are: (1) their expectation, based on past experience, that USCIS can and should be able to adjudicate their renewals within the time frame they propose; and (2) comments USCIS made during the rulemaking process that, at most, *imply* a potential time frame for adjudication. But comments made by USCIS during rulemaking do not carry the force of law. Moreover, Plaintiffs' interpretation that the comment creates a firm deadline is directly at odds with USCIS's statement, during the same rulemaking process Plaintiffs cite, *expressly* declining to adopt the bright-line standard they propose. In the absence of any binding authority, or any authority whatsoever, imposing a firm deadline for adjudication of EAD renewals, Plaintiffs cannot show that the law and facts clearly favor their position (as they must) to justify the broad mandatory injunction they request.

Nor can Plaintiffs make any of the other requisite showings to justify a permanent injunction. A nationwide injunction imposing a bright-line rule that Congress and the agency have expressly declined to create violates well-established principles of federalism, and would force the agency to reorder its priorities to prevent and correct temporary breaks in employment

authorization. Such an injunction is not in the public interest. And a temporary break in employment authorization does not constitute the "extreme or very serious damage" necessary to justify a mandatory injunction. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009).

For these reasons the Court should deny the motion.

II. LEGAL BACKGROUND

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 current regulations provide that asylum applicants may apply for initial employment authorization, but not "earlier than 365 days after the date USCIS or the immigration court receives the[ir] asylum application," and establish numerous other eligibility criteria for initial and renewal applications. *See* 8 C.F.R. §§ 208.7, 274a.12(c)(8). A number of these requirements have been enjoined for members of two organizations—Casa de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP)—who apply for employment authorization, including the 365-day wait time for initial EAD applicants, and a biometrics submission requirement for both initial and renewal EAD applicants. *See Casa de Maryland v. Wolf*, 486 F. Supp. 3d 928, 973-74 (D. Md. 2020). The regulations do not require USCIS to issue an EAD, and in fact prohibit issuance in a variety of circumstances. *See* 8 C.F.R. § 208.7.

To apply for initial employment authorization, an asylum applicant must submit a properly completed form with signature, two identical passport style photographs, photo identification, proof of their asylum applicant status, and full biometrics from an Application Support Center (ASC), with the exception of CASA and ASAP members who are exempt from the biometrics requirements. *See Casa de Maryland v. Wolf*, 486 F. Supp. 3d 928, 974 (D. Md. 2020). *See also* Decl. of Connie Nolan ¶¶ 5-6 ("Nolan Decl."); USCIS, Form I-765 Instructions, *available at* https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf. If the initial application is granted, the asylum applicant is issued an employment authorization document (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). To obtain a renewal of their employment authorization, an asylum applicant must submit new biometrics and a biometrics fee (except CASA and ASAP members), a filing fee, and evidence that the applicant still has a pending asylum application. While a renewal application may be filed any time, USCIS recommends that asylum applicants "not file for a renewal EAD more than 180 days before [the] original EAD expires." *See* USCIS, Employment Authorization Document, https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document (last visited Dec. 2, 2021). If the EAD renewal application has been filed before the prior EAD expires and it has not been adjudicated when the prior EAD expires, the prior EAD is automatically extended "for an additional period not to exceed 180 days from the date of [the EAD]'s . . . expiration," not the date the renewal application was filed. 8 C.F.R. § 274a.13(d)(1).

Critically, no statute or regulation requires USCIS to adjudicate EAD renewals within a specified timeframe. Nor does any statute or regulation bar USCIS from allowing authorizations to expire without granting a renewal.

III. PROCEDURAL AND FACTUAL BACKGROUND

USCIS's EAD Renewal Processing. EAD renewals are submitted and processed at a USCIS Lockbox facility for ingestion into USCIS's Electronic Immigration System (ELIS), which assigns each EAD renewal application to a specific service center based on the applicant's state of residence. Nolan Decl. ¶¶ 12, 14. ELIS parses each application into a series of tasks, including several pre-processing tasks that must be completed before the application is sent to the service center's case review queue where it is adjudicated by an officer in the order in which it was received, based on the receipt date of the application. *Id.* ¶¶ 14-15. Many tasks can be completed systematically, but any discrepancy, even a minor one, requires manual review, which delays the application's arrival in the case review queue. *Id.* ¶ 16. For example, applications can be held up

in preprocessing if manual review is required to identify alternate names and dates of birth for background checks, ensuring the applicant and A-number match, and reviewing photos for identification and card production quality. *Id.*

Moreover, the injunction in *Casa de Maryland* exempts CASA and ASAP members from any biometrics requirements, *see* 486 F. Supp. 3d at 973-74, making it necessary for USCIS to bifurcate its biometrics collection, which has significantly disrupted normal processing. Nolan Decl. ¶ 6. The two-track biometrics process for applicants who must abide by the biometrics requirements and ASAP and CASA members who are exempt limits the number of pre-processing tasks that can be automated. *Id.* ¶ 23. For example, the placement of applicants in the ASC appointment queue for biometrics processing was done automatically through the e-processing platform. *Id.* Because a final decision cannot be issued on a renewal application for a non-CASA or ASAP without biometrics, an officer must make a manual determination of CASA or ASAP membership and schedule an ASC appointment if necessary. *See id.*

Because of the potential for delay with pre-processing tasks, particularly those that were automated prior to the *Casa de Maryland* injunction, applications may be adjudicated out of order with respect to *the receipt date*, even though they are adjudicated based on their filing date once they reach the case review queue. Nolan Decl. ¶ 16.

USCIS Challenges Contributing to the Backlog. Since early 2020, a number of factors beyond the agency's control have adversely impacted its capacity to process EAD renewal applications. The pandemic forced USCIS to close its ASCs on March 18, 2020 and the agency was only able to begin a phased reopening at a significantly reduced capacity in July 2020. Nolan Decl. ¶ 18. Over the course of several months USCIS was able to gradually increase capacity, reaching full capacity at almost all ASCs as of November 2020, the closures created an adjudicative backlog, peaking at 1.4 million in January 2021. *Id.* USCIS took steps to reduce the backlog including allowing reuse of biometrics submissions and expanding hours for ASCs, which helped whittle the backlog down to 86,000 as of November 22, 2021. *Id*. But the backlog continues to affect EAD renewal processing. *Id.* ¶ 17 as has an increase in the number of EAD renewal applications beginning in March 2021. *Id.* ¶ 21.

Also due to the pandemic, USCIS faced significant budgetary constraints that forced it to implement a hiring freeze from May 1, 2020 through March 31, 2021. *See* Nolan Decl. ¶ 19-20. USCIS relies on filing fees for its funding. Due to the COVID-19 pandemic, USCIS saw a 50 percent drop in receipts and incoming fees starting in March 2020. *Id.* ¶ 19. The budget constraints created by the drop in receipts forced USCIS to implement a hiring freeze. *Id.* The freeze made it impossible for USCIS to backfill positions left vacant due to transfer, resignation, or retirement. *Id.* ¶ 20. And even though the freeze has been lifted, it takes significant time to announce and fill those positions, and there is no guarantee that USCIS will reach its prior staffing levels. *Id.* Further, it takes time to train employees to process these specific EAD adjudications. These staffing challenges contributed significantly to the backlog of EAD renewal applications. *Id.*

Procedural Background. Plaintiffs are five asylum applicants who have obtained an initial EAD, have received an automatic 180-day extension under 8 C.F.R. § 274a.13(d)(1), but whose renewal application had not been adjudicated prior to the expiration of their EAD. *See* Compl. ¶¶ 15-19. USCIS received Plaintiff Tony N.'s EAD renewal application on December 23, 2020. Compl. ¶ 15. He received a 180-day automatic extension of his work authorization, which did not expire until October 11, 2021—292 days after his application was received. *Id.* USCIS approved his EAD renewal on November 29, 2021. Nolan Decl. ¶ 25. USCIS received Plaintiff Karen M.'s EAD renewal application on April 2, 2021. Compl. ¶ 16. She received an automatic 180-day extension of her work authorization, which did not expire until November 15—227 days after her application was received. Compl. ¶ 16. USCIS received Plaintiff Jack S.'s EAD renewal application on March 8, 2021. Compl. ¶ 17. He received an automatic 180-day extension of his work authorization, which did not expire until October 18, 2021—224 days after his application was received. Compl. ¶ 17. USCIS received Plaintiff Muradyan's EAD renewal application on April 6, 2021. Compl. ¶ 18. She received an automatic 180-day extension of her work authorization, which did not expire until October 13, 2021—190 days after her application was

received. Compl. ¶ 18. USCIS approved her EAD renewal on November 23, 2021.[1] Nolan Decl. ¶ 25. USCIS received Plaintiff Vera de Aponte's EAD renewal application on February 25, 2021. Compl. ¶ 19. She received an automatic 180-day extension of her work authorization, which expired on November 9, 2021—257 days after her application was received. Compl. ¶ 19.

Plaintiffs filed suit on behalf of themselves and a putative class of 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); (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). *See* Compl. ¶ 105. Plaintiffs allege that USCIS has unreasonably delayed adjudication of their EAD renewal applications and ask for declaratory and injunctive relief under the Mandamus Act and the Administrative Procedure Act. Compl. ¶¶ 114-124. Specifically, they ask the Court to "[c]ompel Defendants to adjudicate Plaintiffs' and class members' applications to renew their EADs within the 180-day automatic extension period." Comp. 32-33. On November 11, 2021, Plaintiffs filed a motion seeking to certify the putative class, ECF No. 16, and the instant motion seeking a preliminary injunction and provisional class certification, ECF No. 17. Plaintiffs' motion asks the Court to grant a "preliminary injunction compelling Defendants to adjudicate Plaintiffs' and class members' renewal applications within the 180-day automatic extension period at 8 C.F.R. § 274a.13(d) and to adjudicate renewal applications already pending beyond the 180-day automatic extension period within 14 days." Mot. for Prelim. Inj. 25.

IV. LEGAL STANDARDS

Preliminary Injunctions. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs seeking this extraordinary remedy must establish: (1) that they are "likely to succeed on the merits"; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief"; (3)

[1] Because USCIS has approved Plaintiff Tony N. and Plaintiff Muradyan's EAD renewals the court cannot grant them effective relief and their claims are moot. *See Nw. Envtl. Def. Ctr. v. Gordon,* 849 F.2d 1241, 1244 (9th Cir.1988).

"that the balance of equities tip[] in [their] favor"; and (4) "that an injunction is in the public interest." *Id.* at 20. These last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Ninth Circuit has adopted a sliding scale approach whereby "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

But plaintiffs who seek a mandatory injunction—one that goes beyond simply maintaining the status quo during litigation—bear a "doubly demanding" burden: "[they] must establish that the law and facts clearly favor [their] position, not simply that [they are] likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). Because this is a threshold inquiry for mandatory injunctions, the Court need not consider the other *Winter* factors if the plaintiff cannot meet this element. *See id.* The Ninth Circuit has cautioned that mandatory injunctions are "particularly disfavored" and "should not issue in doubtful cases." *Id.* Nor should they be granted "unless extreme or very serious damage will result." *Marlyn Nutraceuticals,* 571 F.3d 878-79.

V. ARGUMENT

A. Classwide Injunctive Relief is Inappropriate Because the Putative Class Necessarily Includes People Who Lack Standing.

Assuming the Court finds injunctive relief appropriate here, such relief must be limited to the named Plaintiffs because the class defined by Plaintiffs necessarily includes individuals who have yet to suffer a lapse in their employment authorization, and therefore lack *any* injury for the Court to remedy.

Plaintiffs seek injunctive relief on behalf of a putative class of all individuals: (a) who filed applications to renew their EADs; (b) who received an automatic 180-day extension of their employment authorization; and (c) *whose applications have a processing time of at least 180 days. See* Mot. for Prelim. Inj. 24. But the automatic extension provision extends the employment authorization 180 days from the date the EAD expires, not from the date the application is filed. *See* 8 C.F.R. § 274a.13(d)(1). And EAD renewals must be submitted *before* the EAD is set to

expire and the automatic 180-day extension kicks in. *See id.* This means that 180 days after the renewal application is filed, a putative class member will have a valid EAD because they are still within the 180-day automatic extension window. And they will have suffered no injury whatsoever as a result.

Named Plaintiffs' own experience clearly illustrates the issue. Plaintiff Tony N.'s employment authorization did not lapse until 292 days after he filed his renewal application. *See* Compl. ¶ 15. For Karen M. it was 227 days. Compl. ¶ 16. Jack S.'s employment authorization lapsed 224 days after his application was received. Compl. ¶ 17. Plaintiff Muradyan and Plaintiff Vera de Aponte's employment authorizations lapsed 190 days and 257 days respectively after USCIS received their applications. *See* Compl. ¶¶ 18-19. When Plaintiffs' applications for renewal had been pending for 181 days, the threshold for class membership here, *none* had suffered a lapse in their employment authorization. The Court cannot provide injunctive relief to a class that necessarily includes individuals who have suffered *no* injury, much less an irreparable injury necessary to justify the extraordinary remedy of a preliminary injunction. *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).

B. Plaintiffs' Proposed Injunction is Mandatory and Must Meet the Doubly Demanding Standard for Such Injunctions.

Although Plaintiffs argue the proposed injunction is prohibitory, *see* Mot. for Prelim. Inj. 14, it is in fact mandatory because it asks the Court to "order [USCIS] to take action," *Marlyn Nutraceuticals,* 571 F.3d at 879. Plaintiffs move for an injunction "*compelling* Defendants to adjudicate Plaintiffs' and class members' renewal applications within the 180-day automatic extension period." Mot. for Prelim. Inj. 25. The nature of Plaintiffs' claims also demonstrates the mandatory nature of the relief sought in the motion and this action writ large. Plaintiffs raise two causes of action—one for mandamus relief, and another under the APA, seeking to compel agency action unreasonably delayed. Compl. ¶¶ 114-24. But to vindicate these claims, the Court must order USCIS to take action. Indeed, granting the proposed injunction does not preserve the status quo, but grants the named Plaintiffs ultimate relief in this case as the prayer for relief in the

Complaint is identical to the relief requested in the instant motion—adjudication of their renewal applications within 14 days. *See* Compl. ¶ 32-33; Mot. for Prelim. Inj. 25. Once granted, the court cannot provide any additional relief and the case is over. Such an injunction is patently mandatory. *See, e.g.*, *Fallini v. Hodel*, 783 F.2d 1343, 1344-45 (9th Cir. 1986) (characterizing injunctive relief granted pursuant to a mandamus and APA claim for unreasonable delay as a "mandatory injunction").

Plaintiffs argue that the injunction is prohibitory because it seeks to preserve the "legally relevant relationship *between the parties* before the controversy arose." Mot. for Prelim. Inj. 14 (quoting *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (*ADAC*)) (emphasis in original). But Plaintiffs' argument is premised on a "status quo" that never existed and does not exist now. In Plaintiffs' view, the status quo was "USCIS adjudicating EAD renewals for asylum applicants within the 180-day extension" and the "retention of [asylum seekers'] authorization to work." Mot. for Prelim. Inj. 15. In support, Plaintiffs cite to declarations stating that USCIS used to adjudicate EAD renewals more quickly. *See id.* (citing Castillo Decl. ¶10; Kafele Decl. ¶ 16; and Jack S. Decl. ¶ 4). But even if past experience created an *expectation* of adjudication within a certain timeframe, that expectation has no bearing on the "legally relevant relationship between the parties." *ADAC*, 757 F.3d at 1061. There is no regulation, statute, or other binding authority compelling adjudication of Plaintiffs' renewal applications within a set timeframe. Rather, Plaintiffs' proposed injunction asks the Court to alter the status quo and create for Plaintiffs a legal right nowhere recognized in the INA or the Code of Federal Regulations—the right to have their renewals adjudicated before their employment authorization expires.

Because the proposed injunction cannot be understood as anything other than mandatory, Plaintiffs must show that "the facts and the law *clearly* favor [their] position" that USCIS must adjudicate all EAD renewals within the 180-day automatic extension window and that failure to do so causes "extreme and very serious damage." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc); *Marlyn Nutraceuticals*, 571 F.3d at 878-79. They have not done so.

C. Plaintiffs Cannot Meet the Standard For a Prohibitory Injunction, Let Alone the Doubly Demanding Standard to Justify their Mandatory Injunction.

Leaving aside the obvious issues with Plaintiffs' proposed class, the Court should deny the motion in its entirety because Plaintiffs cannot show they are likely to prevail on the merits, much less that the law and facts clearly favor their position as required for a mandatory injunction.

Equitable relief under the APA's unreasonable delay provision "is an extraordinary remedy [and requires] similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process." *In re United Mine Workers*, 190 F.3d 545, 549 (D.C. Cir. 1999). An injunction to remedy unreasonable delay is appropriate only upon a showing that the delay is "egregious." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001). In cases alleging unreasonable delay, the Ninth Circuit applies the six-factor test set forth in *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*). *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1138 (9th Cir. 2020). Under the test, courts consider:

> (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 delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Id. While the Ninth Circuit has held that the first factor—the rule of reason—is the most important factor, neither it nor any other factor is determinative. *See In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017). Courts must consider each factor. *Id.*

The *TRAC* factors tip in Defendants' favor, including the most important factor—rule of reason. Thus, Plaintiffs cannot show a likelihood of success on the merits, much less that the law and the facts clearly favor their position as required to grant a mandatory injunction.

(a) The Time USCIS Takes to Make Decisions is Governed by a "Rule of Reason."

While not dispositive, the rule of reason is the most important factor in the *TRAC* analysis. *In re A Cmty. Voice*, 878 F.3d at 786. This factor requires the Court to identify whether there is "any rhyme or reason" for the agency's delay. *See Ctr. for Sci. in the Pub. Interest v. FDA*, 74 Supp. 3d 295, 300 (D.D.C. 2014). In other words, the Court must assess "whether the agency's response . . . is governed by an identifiable rationale." *Id.* The rule of reason factor requires a fact-specific inquiry and the length of delay alone is not dispositive. *See Gelfter v. Chertoff*, No. 06-cv-6724-WHA, 2007 WL 90238, at *2 (N.D. Cal. Mar. 22, 2007). Instead courts must look to the sources of the delay, including the "complexity of the task at hand, [and] the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003); *see also Qureshi v. Napolitano*, Case No. 11-cv-5814-YGR, 2012 WL 2503828, at *4 (N.D. Cal. June 28, 2012).

This factor tips strongly in Defendants' favor. The agency has an identifiable rationale that governs its handling of EAD renewal applications. Further, Plaintiffs' injury is limited and temporary, and any delays are attributable to resource constraints and other factors beyond the agency's control. *See Amir v. Blinken*, No. 21-cv-1960, 2021 WL 5331446, at *7 (N.D. Cal. Nov. 16, 2021) (holding that the first *TRAC* factor favors the government the delay was created by the "lack of processing capacity to accommodate the large backlog of cases . . . and the reduced appointment capacity due to the ongoing COVID-19 restrictions.") (quoting *Mohammad v. Blinken*, No. 1:20-CV-03696 (TNM), 2021 WL 2866058, at *4 (D.D.C. July 8, 2021). To the extent any delay exists here, it is thus reasonable.

USCIS has an "identifiable rationale" for adjudicating EAD renewal applications. Applications are initially processed at Lockbox facilities overseen by USCIS's Management Directorate. Nolan Decl. ¶¶ 12-16. At the Lockbox facility, renewal applications are ingested into ELIS for e-processing and adjudication. *Id.* ¶ 14. Upon ingestion, ELIS parses each renewal application into a series of tasks, including pre-processing tasks that must be completed before the application is routed to a service center based on the applicant's state of residence. *Id.* ¶ 14. When

applications reach the service center's case review queue, they are adjudicated based on the date of filing, with the earliest filed applications being adjudicate first. *Id.* ¶ 16. While a number of pre-processing tasks are automated, any discrepancy in the application submitted requires manual review. *Id*. And due to the *Casa de Maryland* injunction, certain pre-processing tasks that were previously automated now must be done manually due to the different requirements for CASA and ASAP class members relative to other applicants. *Id.* ¶ 23. These manual review requirements in many instances delay the arrival of an application to the case review queue, which *may* cause it to be reviewed "out of order" with respect to the receipt date, but not with respect to the date it arrives in the case review queue. *Id.* ¶ 16.

Although USCIS works to adjudicate EAD renewals expeditiously, several factors beyond the agency's control—chief among them the COVID-19 pandemic—have contributed to a backlog in the adjudication of EAD renewal applications. The agency faced a precipitous decline in the number of immigration-related applications, petitions, and other requests—and their related fees—received during the first months of the pandemic, which the agency relies on for funding. Nolan Decl. ¶ 19. These budgetary constraints forced USCIS to initiate a hiring freeze in May 2020, which lasted through April 1, 2021. *Id.* ¶¶ 19-20. Further, COVID-19 restrictions forced ASCs to close, which created a biometrics appointment backlog that continues to impact USCIS application processing, reaching 1.4 million in January 2021. *Id.* ¶ 16. These COVID-related budgetary, staffing, and resource constraints contributed to the creation of a backlog of I-765 renewals as have court orders requiring USCIS to give priority to employment authorization applications filed by other classes of noncitizens. *See Casa de Maryland* (initial EAD applicants); *Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156 (W.D. Wash. 2018) (same); Nolan Decl. ¶¶ 20, 23.

Beyond these resource constraints, the limited and temporary nature of the harm to Plaintiffs counsels against a finding that any delay whatsoever is unreasonable. USCIS is adjudicating EAD renewals, albeit not pursuant to the strict constraints Plaintiffs propose. As a result, any harm incurred is temporary. And while Plaintiffs' renewal applications (in some cases) have been pending for months, the harm is offset by the automatic 180-day extension. For example,

Plaintiff Karen M.'s EAD renewal application has been pending since April 2, 2021, but her employment authorization just expired on November 15. Compl. ¶ 16. So although her application has been pending for 238 days, she has only been without employment authorization for 21 days. Such a delay falls well within the "weeks or months" that the Ninth Circuit has held to be "a reasonable time for agency action." *In re A Cmty. Voice*, 878 F.3d at 787.

(b) There is No Statutory or Regulatory Timetable that Supplies Content for the Rule of Reason.

The second *TRAC* factor looks to whether Congress "provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute," which may "supply content for the rule of reason." 750 F.2d at 80. But there is no statute or other congressional authority that requires USCIS to adjudicate an EAD renewal within a certain time frame. Here the enabling statute declares that an asylum applicant "is not entitled to employment authorization, but such authorization may be provided under regulation." *See* 8 U.S.C. § 1158(d)(2). Congress said nothing more about the speed with which USCIS must adjudicate such requests for discretionary employment authorization. The broad discretion delegated to the agency and the absence of any timetable in the statute or the regulations tip this factor in Defendants' favor. *See Ghadami v. DHS*, No. 19-cv-397, 2020 WL 1308376, at *8 (D.D.C. Mar. 19, 2020).

Plaintiffs' arguments to the contrary are unavailing. First, Plaintiffs argue that a rule of reason requiring adjudication of EAD renewals within the 180-day automatic extension period is consistent with "the *sense*" of Congress that "the processing of an immigration benefit application *should* be completed not later than 180 days after the initial filing…." Mot. for Prelim. Inj. 10 (citing 8 U.S.C. § 1571(b)) (emphasis added). But this argument fails for three reasons. *First*, the language cited does not come from the *enabling statute*, *see TRAC*, 750 F.2d at 80, but from a "2000 statute authorizing funds to eliminate a then-existing backlog of certain immigration petitions." *Jain v. Renaud*, No. 21-CV-03115, 2021 WL 2458356, at *5 (N.D. Cal. June 16, 2021) (discussing 8 U.S.C. § 1571). *Second*, the language is merely precatory, and the Ninth Circuit has held that policy statements made by Congress do not create binding, enforceable rights. *See Yang v. California Dep't of Soc. Servs*., 183 F.3d 953, 958 (9th Cir. 1999) ("[S]ection 5566(b) couples

the phrase 'sense of the Congress' with the term 'should,' yielding the conclusion that this provision is precatory and did not bestow on Hmong veterans any right to food stamp benefits."). *Third*, the precatory language does not even apply specifically to EAD renewal applications based on pending asylum applications. The statute itself defines "immigration benefit application" as "any application or petition to confer, certify, change, adjust, or extend any *status granted under the [INA]*." 8 U.S.C. § 1572 (emphasis added). An employment authorization does not confer status, and certainly not a status conferred under the INA. *See* 8 U.S.C. § 1158(d)(2) (stating that "such authorization may be provided *under regulation*") (emphasis added). An EAD is not even a benefit incident to a status granted under the INA; it is a benefit incident to an application for status. As a result, the precatory language cited is wholly irrelevant.

Plaintiffs' citation to *Doe v. Risch*, 398 F. Supp. 3d 647, 657 (N.D. Cal. 2019), offers no support for their statutory argument. Mot. for Prelim. Inj. 10. In *Risch*, the district court considered whether a delay in adjudicating a derivative asylum application was unreasonable. The court considered the precatory language at 8 U.S.C. § 1571(b) in conjunction with mandatory language requiring a *principal* asylum application to be completed within 180 days. *See Doe v. Risch*, 398 F. Supp. 3d 647, 657 (N.D. Cal. 2019) (citing 8 U.S.C. § 1158(d)(5)(A)(iii)). Considering both provisions, it held the Congressional timetable tipped in the plaintiffs' favor. *See id.* But it did not hold that the precatory language, in and of itself, was enough to tip the scales as Plaintiff suggests here. *See id.* Conversely, the enabling statute here grants almost total discretion over employment authorization for asylum seekers. *See* 8 U.S.C. § 1158(d)(2). It provides no timetable for when an employment authorization adjudication must, or should, be completed. *See id.*

And although some courts in this circuit have held that a *regulation* may supply content for the rule of reason, *see, e.g.*, *Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1161-62 (W.D. Wash. 2018), as Plaintiffs concede, no regulation "sets a mandatory processing time" for adjudication of EAD renewals. Mot. for Prelim. Inj. 10. Undeterred, Plaintiffs argue, yet cite no authority, that USCIS's non-binding statements may provide content for the rule of reason. Mot. for Prelim. Inj. 10-11. But as the Ninth Circuit has explained, agency pronouncements that lack the force of law do not create enforceable rights. *See Scales v.*

Immigration and Naturalization Serv., 232 F.3d 1159, 1166 (9th Cir. 2000); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 900-01 (9th Cir. 1996). The Court should decline to divert from that precedent by granting a mandatory, nationwide preliminary injunction based on nothing more than an informal agency pronouncement.

Even if the Court were inclined to look to non-binding statements to provide content for the rule of reason, the Court should look to USCIS's statement expressly declining to impose upon itself a deadline for renewal applications—a position reflected in the regulations themselves. *See* 85 Fed. Reg. 37502, 37524; 8 C.F.R. § 274a.13(d)(1). Plaintiffs point to comments made during rulemaking where the agency states that because the 180-day extension "effectively prevents gaps in work authorization for asylum applicants with expiring employment authorization," the agency "f[ound] it unnecessary to continue to require pending asylum applicants file for renewal of their employment authorization 90 days before the EAD's scheduled expiration." Mot. for Prelim. Inj. 10-11 (citing 85 Fed. Reg. 37502, 37509). Plaintiffs seize on this language and ask the Court to interpret it as a binding obligation on the agency to adjudicate all claims within the 180-day extension period. But in abandoning the 90-day restriction, the agency *expressly* declined to "set an adjudicative timeframe for adjudicating renewals." *See* 85 Fed. Reg. 37502, 37524. And it did so knowing full well that not all adjudications are completed within that window. *See id.* (providing processing statistics for EAD renewals for 2017-2020, including for fiscal year 2019 when just 81.5 percent of renewal applications were adjudicated within 180 days); *see also* 85 Fed. Reg. at 37509 ("[I]t is advisable to submit the [renewal] application earlier . . . *to account for current Form I–765 processing times*.") (emphasis added).

There is no authority requiring USCIS to adjudicate Plaintiffs' applications within a particular timeframe. To the contrary, Congress granted almost complete discretion to the agency to create rules for EAD applications. The agency expressly declined to use that authority to create a timetable for EAD applications. This factor clearly tips in the Government's favor.

(c) An Injunction Would Prejudice Higher or Competing Priorities.

The fourth *TRAC* factor considers the agency's higher or competing priorities. The D.C. Circuit has acknowledged that "[t]he agency is in a unique—and authoritative—position to view

its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991). The agencies' consideration of their own limitations and competing priorities are both permissible and entitled to deference. Even where agencies fail to meet a *statutory* deadline for action, the Court should hesitate to reset agency priorities. *See Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991, 994–95 (D.C. Cir. 1996).

Whether an injunction is applied to named Plaintiffs or to the entire class, this factor tips in Defendants' favor. USCIS adjudicates from the case review queue based on the date of filing. As a result, granting named Plaintiffs a preliminary injunction would unfairly prioritize their applications over others seeking the same benefit and allow them to cut the line. But even if injunctive relief could be granted to the class as whole, the Court must still consider the effect of imposing a bright-line processing rule for EAD renewals on other agency operations, including its impact on the agency's ability to meet obligations imposed by court order. *See, e.g.*, *Casa de Maryland*, 486 F. Supp. 3d at 973-74. In doing so, the Court should decline to manage USCIS's adjudication priorities.

(d) The Nature and Extent of the Interests Prejudiced By Delay Do Not Justify an Injunction.

The third and fifth *TRAC* factors are usually considered together. The third factor looks to whether the harm implicates health and welfare. The fifth factor looks to the nature and extent of the interests more generally. Plaintiffs argue that they have suffered "job joss, loss of government-issued identification cards, and driver's licenses, and employee benefits." Mot. for Prelim. Inj. 12. But a brief, *temporary* loss of income while USCIS adjudicates the applicant's EAD renewal is an economic harm. *See* Nolan Decl. ¶ 25 (identifying two named Plaintiffs have had their EAD renewals granted). To create an attenuated link between every economic injury and its potential downstream impact on human health and welfare would be to collapse the distinction articulated in the third factor.

And what's more, the harms cited cannot be imputed to an entire nationwide class based on anecdotal evidence provided by legal service providers. *See id.* (citing Decl. of Jenna Gilbert,

¶¶ 6-8; Decl. of Rachel Sheridan, ¶¶ 5-7; Castillo Decl. ¶¶ 13-14). Circumstances vary among individual applicants here and while a temporary lapse in employment authorization may have significant repercussions for some, the same is not necessarily true for all class members: the impact will vary depending on the applicant's financial resources, support network, and a variety of other factors that may mitigate the impact of a temporary loss of employment authorization. More importantly, any harms suffered by Plaintiffs (or the individuals referenced in Plaintiffs' declarations) cannot be imputed to an entire class that necessarily includes people who have suffered no lapse in employment authorization. *See supra* Part V.A.

Finally, even if the Court finds the third and fifth factors favor Plaintiffs, those factors are less important and carry less weight than the other *TRAC* factors, which favor the government. *See TRAC*, 750 F.2d at 80 (identifying Factor 1 as the most important); *Mashpee Wampanoag Tribal Council*, 336 F.3d at 1100 (emphasizing the importance of Factor 4).

(e) The Final TRAC Factor Favors Defendants Because the Agencies Have Acted in Good Faith to Eliminate the Backlog

While the final factor states only that "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," *TRAC*, 750 F.2d at 80, courts have looked to good faith efforts to reduce delays as a factor weighing against injunctive relief. *See Am. Fed'n of Gov't Emps.*, 837 F.2d 503, 507 (D.C. Cir. 1988) (finding it "would be inequitable" to impose an injunction to remedy delay in part because the agency had "shown marked improvement"). *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192–93 (D.C. Cir. 2016) ("[T]he Secretary's good faith efforts to reduce the delays within the constraints she faces . . . push in the same direction [against enjoining unreasonable delay.]"). Thus, this factor weighs heavily in Defendants' favor where the agency, notwithstanding significant resource constraints and significant challenges flowing from the COVID-19 pandemic, have worked diligently to reduce the backlog of EAD renewal applications, including by allowing reuse of biometrics and expanding ASC hours. Nolan Decl. ¶ 18. These efforts have led to a significant reduction of the backlog from a high of 1.4 million in January 2021 to just 86,000 as of November 22, 2021. *Id.*

D. Balance of the Equities and Public Interest Tip in Favor of Defendants

The balance of the equities and the public interest tip strongly in Defendants' favor. While Defendants do not wish to trivialize Plaintiffs' interest in continued and uninterrupted employment, this interest is slight when weighed against the impact of a mandatory injunction that creates and imposes a bright-line rule that both Congress and the agency have expressly declined to adopt. Beyond usurping the political branches' "plenary power to make rules for the admission of aliens," *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), such an order would have a profound impact on USCIS's operations, requiring it to reorder its priorities to comply with a judicially created deadline.[2] The agency should not be ordered to reallocate already scarce resources from other agency priorities, let alone on a nationwide basis, to meet an artificial deadline for adjudication of applications that, by Plaintiffs' own admission, are not "high stakes." Mot. for Prelim. Inj. 13.

Plaintiffs' economic argument that the *temporary* lapse in employment authorization "harms the public interest because the U.S. economy is severely impacted by a shortage of workers" is unpersuasive. Mot. for Prelim. Inj. 22. But Congress clearly considered whether asylum applicants should automatically receive employment authorization—and expressly declined to create an automatic entitlement. 8 U.S.C. § 1158(d)(2); *see also, e.g.*, *id.* § 1324a (strictly regulating the employment of noncitizens). Plaintiffs have made no showing that the class is numerous enough to significantly impact labor shortages or that preventing minor interruptions in an asylum applicants' employment authorization will have a demonstrable effect on curing such shortages. And although Plaintiffs claim their class numbers in the hundreds, *see* Castillo Decl. ¶ 6; Reddy Decl. ¶ 18, the class necessarily includes individuals who have suffered no lapse in their employment authorization at all. *See supra* Part V.A. Thus, the purely speculative economic benefit here does not outweigh the burden to the agency and the public interest of complying with

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[2] Nor would the agency be able to identify all affected applicants and clear the backlog within 14 days as requested by Plaintiffs. *See* Mot. for Prelim. Inj. 25. If the Court is inclined to ignore the fatal flaws with Plaintiffs' class definition and grant injunctive relief, USCIS respectfully requests the opportunity to present a reasonable implementation plan upon further consideration of available resources.

a mandatory, nationwide injunction that imposes a manufactured standard for processing EAD renewals.

Nor would an injunction limited to the named Plaintiffs be in the public interest. As this Court has recognized, "the balance of the equities and public interest do not favor issuance of an injunction" when the relief plaintiffs seek would put their applications ahead of those filed by the thousands of other . . . applicants, any number of which may be more compelling than [P]laintiffs." *Zafarmand v. Pompeo*, No. 20-CV-00803-MMC, 2020 WL 4702322, at *13 (N.D. Cal. Aug. 13, 2020) (Chesney, J.). *See also Varghese v. Campagnolo*, No. 21-CV-4082, 2021 WL 4353124, at *4 (C.D. Cal. June 4, 2021) ("Plaintiff has not demonstrated that the interests of justice require Defendants to adjudicate her applications before those filed earlier."); *Jain*, 2021 WL 2458356 at *8 ("The Court struggles to see how advancing plaintiffs' applications in line, ahead of other similarly situated applicants, will reinforce the interest they describe.").

E. Plaintiffs Are Not Likely to Suffer Extreme or Very Serious Damage Necessary to Justify a Mandatory Injunction.

To justify a mandatory injunction, Plaintiffs must show that they are likely to suffer "extreme" or "very serious" damage. First, as explained above, the class as defined necessarily includes people who have suffered and may never suffer *any* injury, much less "extreme or very serious damage." *Marlyn Nutraceuticals*, 571 F.3d at 878-79. And while named Plaintiffs have suffered a lapse in their employment authorization, which purportedly has resulted in incidental harms like "loss of government-issued identification cards and driver's licenses, and employee benefits," *see* Mot. for Prelim. Inj. 12, the lapse in employment authorization is temporary. And these types of harms do not satisfy the very serious or extreme standard for mandatory injunctions. *Compare Innovation Law Lab v. Nielsen* (holding that denial of counsel caused extreme or very serious harm); *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017) (holding detention constituted extreme or very serious damage), *with Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1181 (D. Or. 2018) (loss of drivers' licenses does not meet "serious and extreme damage" standard). Named Plaintiffs' circumstances are closer to *Mendoza* than *Hernandez* and they therefore cannot meet the extreme or very serious damage threshold required.

VI. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

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