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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND 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

REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Judge Maxine M. Chesney
Hearing: December 17, 2021, 9:00 am

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PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Defendants' attempts to defeat commonality, typicality, and standing, misstate Ninth Circuit law and misapprehend the nature of Plaintiffs' claims. First, under Ninth Circuit law, in an injunctive class action, only the named Plaintiffs—not all unnamed class members—need to establish standing. Nevertheless, Plaintiffs can establish class-wide standing. Second, Defendants' commonality and typicality arguments focus on immaterial differences between class members—the Service Center at which their application is pending, the differences in the type of harm class members suffer, and whether they received a "Request for Evidence"—instead of engaging with the common questions of fact and law set forth in Plaintiffs' Motion for Class Certification. Dkt. 16. Class members share common legal questions pertaining to USCIS's obligations to timely adjudicate their claims, and common factual questions about whether, in fact, the agency is doing so. These factual and legal questions are shared amongst all proposed class members, and the resolution of the truth or falsity of the claims will resolve the issues in this case "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Accordingly, Plaintiffs have demonstrated that they satisfy requirements to certify a class under Federal Rules of Civil Procedure 23(a) and (b)(3).

II. ARGUMENT

A. Contrary to Defendants' Incorrect Statement of Law, Only Named Plaintiffs Need to Show Standing in an Injunctive Class Action

Defendants argue that the class definition is impermissibly overbroad because it encompasses class members who lack Article III standing. Dkt. 48, 15-18. But under Ninth Circuit law, only the named Plaintiffs need to show standing, not each unnamed class member. *See Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citation

omitted). Applying the correct Ninth Circuit standard—that only the named Plaintiffs must prove standing—Defendants' standing argument necessarily fails.

In *Bates v. United Postal Service*, the Ninth Circuit held that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements." 511 F.3d at 985 (citation omitted); *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (when determining standing in a class action "our law keys on the representative party, not all of the class members, and has done so for many years").[1] Following *Bates* and *Stearns*, the Ninth Circuit seemingly reversed course in the context of class actions for monetary damages, stating that "[n]o class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). However, *Mazza* did not purport to overrule the *en banc* decision in *Bates* or other Ninth Circuit precedent on class standing—in fact, the *Mazza* court did not cite any Ninth Circuit precedent to support this statement. *Id.* Moreover, the Ninth Circuit subsequently explained that the statement, in context, "signifies only that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016). As a result, many courts in recent years have required only the named plaintiff to establish Article III standing even when the class action seeks monetary damages. *See, e.g.*, *Sharma v. BMW of N. Am., LLC,* No. C-13-

[1] Defendants do not contend that the named Plaintiffs lack standing. Nor can they. Each of the named Plaintiffs have easily shown that that they meet the Article III standing requirements of injury, redressability, and that their injuries are fairly traceable to Defendants' conduct, as described in Plaintiffs' Complaint and Motion for Preliminary Injunction. *See* Compl., Dkt. 8, ¶¶ 15-19, 82-87; 93-99; Mot. Prelim. Inj., Dkt. 17, 14-16; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

2274 MMC, 2015 WL 82534, at *1 (N.D. Cal. Jan. 6, 2015) ("[A] plaintiff may proceed on behalf of a class if the named plaintiff has standing").

Further, neither *Mazza* nor *Ramirez v. Trans Union LLC*, cited by Defendants, were injunctive class actions under Rule 23(b)(2). *See* Dkt. 49 at 15; *Mazza*, 666 F.3d at 594; *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir.), *cert. granted in part*, 141 S. Ct. 972 (2020), and *rev'd and remanded*, 141 S. Ct. 2190 (2021).[2] Both cases address the question of standing at the final stage of a money damages class action when the bar for class member standing is higher. In *Ramirez*, the Court *specifically limited* its holding to money damages cases, ("Our holding does not apply to class actions involving only injunctive relief,"), and noted that the showing would be lesser at an earlier stage of the case ("Nor does our holding alter the showing required at the class certification stage or other early stages of a case"). 951 F.3d at 1023 n.6. Here, at the class certification stage in an injunctive class action, *Mazza* and *Ramirez* are inapplicable. *See MadKudu Inc. v. U.S. Citizenship & Immigr. Servs.*, No. 20-CV-02653-SVK, 2020 WL 7389419, at *5 (N.D. Cal. Nov. 17, 2020) (granting class certification in a class action seeking injunctive relief where "Defendants all but concede that at least one named plaintiff . . . has standing").

B. Assuming For the Sake of Argument That Each Class Member Must Establish Article III Standing, Class Members Have Suffered the Requisite Injuries

Should the Court agree with Defendants that each class member must establish Article III standing—despite case law to the contrary—unnamed class members can establish standing, including those class members who are still within the 180-day auto-extension

[2] On certiorari review, the Supreme Court upheld the Ninth Circuits' holding that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

period who will imminently lose their employment authorization. In *TransUnion LLC v. Ramirez*, the Supreme Court recently affirmed decades of Supreme Court precedent recognizing prospective harm for the purpose of Article III standing. 141 S. Ct. at 2210 (2021). "As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013); *Los Angeles v. Lyons*, 461 U.S. 95, 102, (1983)). Indeed, it is well established that "a plaintiff 'does not have to await the consummation of threatened injury to obtain preventive relief.'" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Inland Empire - Immigrant Youth Collective v. Nielsen*, No. 172048, 2018 WL 4998230, at *7–8 (C.D. Cal. Apr. 19, 2018) [hereinafter "Inland Empire"] ("Their alleged injury—a credible threat of unlawful [DACA] revocation—is clearly traceable to Defendants' practices that are challenged in this suit, and can be redressed through an injunction enjoining the allegedly unlawful conduct."). Because of USCIS' systemic delays, USCIS has not processed class members' renewal applications within a 180-day period from submission, meaning they are at imminent risk of their auto-extension period lapsing and losing work authorization. Thus, there is a "credible threat" that they will lose work authorization. *See Inland Empire*, 2018 WL 4998230, at *8. Accordingly, those asylum seekers who are facing imminent loss of their work authorization can show concrete, substantial, imminent risk of harm sufficient to establish Article III standing. *See Lujan*, 504 U.S. at 560–61.

Additionally, those class members who have been awaiting their work authorization renewal for more than 180 days, but whose work authorization has not yet lapsed, are currently experiencing emotional distress and anxiety due to the delays and the prospect of imminently losing their employment authorization. *See* Vera De Aponte Decl. ¶¶ 8, 18, Dkt. 16-6 (describing how her employer reminded her weekly that her work authorization would expire and sharing that this caused emotional distress); Jack S. Decl. ¶¶ 9, 11, Dkt. 16-5 (describing anxiety due to his employer's repeated inquires on the status if his renewal application); Gilbert Decl. ¶ 8, Dkt. 17-10 (describing how delays lead to "significant stress and deterioration" of clients' mental health); Reddy Decl. ¶ 30, Dkt. 16-8 (describing the "significant mental health consequences for ASAP members, including extreme anxiety"); *id.* ¶¶ 12-15 (describing receiving hundreds of emails from ASAP members concerned about delays in adjudication of their EAD renewal applications); Karen M. Decl. ¶¶ 7-9, Dkt. 16-4 (expressing fear about the hardship of her impending loss of work authorization). Such anxiety and emotional distress stemming from that threat "may constitute an injury-in-fact for purposes of standing." *See Davis v. Astrue*, 874 F. Supp. 2d 856, 862-63 (N.D. Cal. 2012); *see also Larson v. Trans Union, LLC*, 201 F. Supp. 3d 1103, 1108 (N.D. Cal. 2016) (finding that emotional distress may constitute "concrete harm" for the purposes of Article III standing).

Accordingly, all class members—whether they have already lost their employment authorization or face imminent loss of employment authorization—are injured for purposes of Article III standing.

C. Plaintiffs and Class Members Share Common Questions of Fact and Law and Are Typical of the Class

Defendants argue that the class does not share common questions of fact and law

because of class members' differing circumstances with regards to the validity of their employment authorization. *See* Dkt. 49 at 17-21. But those differing circumstances have no bearing on the commonality of the claims Plaintiffs make (*viz.*, that USCIS is unreasonably and unlawfully adjudicating work permit renewals for asylum seekers) or the relief they seek (*viz.*, a declaration of that violation and an injunction to timely adjudicate). Both the legal claims and relief are common to all members of the proposed class and are therefore "capable of classwide resolution," such that the resolution of the truth or falsity of the claims will resolve the issue "in one stroke." *Dukes*, 564 U.S. at 350.

Regardless of whether a class member has already lost their employment authorization, proposed class members have been or will be forced to suffer the consequences of USCIS' failure to timely adjudicate their EAD renewal applications. *See infra* Part B. And whether a class member has already lost their employment authorization or is facing imminent loss does not bear upon the common questions of law: whether USCIS has a duty to adjudicate the applications to renew the EADs of asylum applicants within the 180-day automatic extension at 8 C.F.R. § 274a.13(d), and whether it is unreasonable for these applications to be pending for more than 180 days pursuant to 8 C.F.R. § 103.2(b)(10)(i). Nor does it bear upon the common questions of fact: whether USCIS has delayed the adjudication of asylum EAD renewals, and whether USCIS has a policy and practice of failing to adjudicate asylum EAD renewals within the automatic 180-days renewal period set forth in the regulations. Perhaps most importantly, a common answer regarding the existence and legality of each challenged policy and practice will "drive the resolution of the litigation," *Dukes*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev., 132 (2009)), regardless of

the present state of each class members' work authorization. A common remedy—a declaration of illegality and an injunction to timely adjudicate—will resolve all of class members' claims "in one stroke." *Dukes*, 564 U.S. at 350. The remedy would restore work authorization for those asylum seekers who have already lost it, and it would ensure a continuity of work authorization for those who are imminently about to lose their work authorization. That the type of harm that class members are experiencing may differ does not defeat the commonality of the legal questions and the commonality of the remedy. *See* Part C.3, *supra.*

1. The Fact That Processing Times Vary Does Not Defeat Commonality or Typicality Because The Class Includes Only Those Who Have Had Their Applications Pending 180 Days

Defendants attempt to defeat commonality by noting that class members' work permit renewal applications may be pending at different USCIS Service Centers. Dkt. 49 at 17-18. But membership in the class requires that the application has been pending for 180 days, regardless of the service center. *See* 8 C.F.R. § 103.2(b)(10)(i). Thus, the difference in delays between the two Service Centers is immaterial.

Defendants incorrectly state that the length of time it takes a particular Service Center to adjudicate an asylum EAD renewal application forms the rule of reason under the first *TRAC* factor. Dkt. 49 at 13; *see Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 79–80 (D.C.Cir.1984) ("TRAC"). 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 rule of reason is not derived from how long it is currently taking USCIS to adjudicate asylum EAD renewal

applications; it comes from USCIS's own notice and comment rulemaking, supported by the sense of Congress, to require adjudication within the 180-day automatic extension.

Further, USCIS blames the delays on system-wide issues, undercutting their argument that the Court should examine the delays at a Service Center level. *See* Nolan Decl. ¶ 17, Dkt. 49-1 (adjudications "have been impacted by a variety of challenges which are categorized below as general agency-wide challenges and c8-specific challenges"). In an effort to avoid liability, Ms. Nolan describes the agency-wide challenges affecting all adjudications, and the agency-wide challenges specifically affecting asylum EAD renewals. *Id.* at ¶¶ 18-23. But Ms. Nolan's declaration does not discuss factors that have affected adjudications at individual Service Centers, such that class members with applications pending at different service centers lack commonality or typicality. *See generally* Nolan Decl.

Accordingly, the fact that class members' applications are pending at different Service Centers does not defeat commonality where each class member's application has been pending for 180 days or more. *See* Compl. ¶ 105, Dkt. 8.

2. Whether USCIS Issues a Request for Evidence (RFE) For an EAD Renewal Application Is Irrelevant Because the Class Definition Excludes the Time For Processing the RFE

The commonality of Plaintiffs' proposed class is not affected by whether an EAD renewal applicant receives an RFE or whether it takes additional time for USCIS to process the RFE response. Defendants acknowledge that Plaintiffs "tie the 180-day processing time in their class definition to 8 C.F.R. § 103.2(b)(10)(i)." Dkt. 49 at 19. But then Defendants ignore how and why this regulation ensures commonality and erroneously claim that differences in RFE processing times "fatally undermines" commonality. *Id.*

In reality, EAD renewal applications filed by asylum applicants that "have a processing time of at least 180 days pursuant to 8 C.F.R. § 103.2(b)(10)(i)" reach 180 days by excluding time for processing an RFE. Compl. ¶ 105, Dkt. 8. If USCIS sends an RFE for required initial evidence, the processing time restarts when USCIS receives the required initial evidence. 8 C.F.R. § 103.2(b)(10)(i). If USCIS sends an RFE for supplemental evidence, then the processing time pauses and does not resume (the day-count does not continue) until USCIS receives from the applicant either supplemental evidence or a request that USCIS decide the application based on the initial evidence. *Id*.

While the Nolan Declaration tries to reframe the operation of 8 C.F.R. § 103.2(b)(10)(i) as "tak[ing] into account certain delays," (Dkt. 49-1 at ¶ 15), her description of its operation shows that in fact RFE processing is irrelevant to counting the 180 days because that time is excluded: "For example, the processing time period stops when an officer issues an initial request for evidence and starts over once a response is received from the applicant. If an officer issues a request for additional evidence, the processing time period is suspended until a response is received from the applicant, at which point it will resume." *Id*.

By requiring class membership to include that asylum applicant EAD renewal applications "have a processing time of at least 180 days pursuant to 8 C.F.R. § 103.2(b)(10)(i)," RFE processing is irrelevant and the class members have commonality in the delay they have or will experience.

3. Any Variation Between the Harms Class Members Suffer Is Irrelevant

Defendants do not meaningfully dispute that all class members will suffer harm—the loss of the ability to work lawfully—as a result of Defendants' failure to adjudicate EAD

renewal applications within the automatic extension period. Dkt. 49 at 20. Nor could they, because that harm, along with many others, including the loss of drivers' licenses, is an inherent consequence of Defendants' delay. *See* Dkt. 17 at 19–20 (citing record evidence of class-wide harms). In fact, in the one case Defendants cite, the court found that "Plaintiffs will suffer prejudice based on USCIS's delay" in adjudicating their EAD applications and therefore *TRAC* factors three and five "weigh[ed] slightly in their favor." *Kamath v. Campagnolo*, No. 21-01044, 2021 WL 4913298, at *3 (C.D. Cal. Aug. 13, 2021). Rather, Defendants maintain that class members will suffer a range of harm, some more severe than others. Dkt. 49 at 20. But these variations are immaterial to the claims in this case. As discussed in Plaintiffs' motion and reply in support of a preliminary injunction, the *TRAC* factors weigh in favor of the class, including the "most important" first *TRAC* factor. *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020); *see* Dkt. No. 17 at 16-21. Moreover, courts have weighed the *TRAC* factors and granted class-wide relief despite the inherent variability in *TRAC* factors three and five. *See Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1162–63 (W.D. Wash. 2018) (finding the *TRAC* factors supported a permanent injunction compelling USCIS to timely adjudicate initial EAD applications for asylum seekers 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 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"). That *TRAC* factors three and five may weigh more heavily in favor of some class members than others does not impact the outcome here and therefore does not defeat class certification. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."). Importantly, any variation of harm does not affect the common questions of law and fact: whether USCIS has a legal duty to adjudicate asylum EAD renewal applications in a certain timeframe and whether, in fact, the agency has breached that duty.

D. Class Representatives Will Adequately Represent the Class

Finally, Defendants' suggestion that class members without employment authorization are in conflict with class members at imminent risk of losing employment authorization is specious. Dkt. 49 at 22. Plaintiffs seek a permanent injunction compelling Defendants to adjudicate Plaintiffs' and class members' applications to renew their EADs within the 180-day automatic extension period at 8 C.F.R. § 274a.13(d)(1). Compl. at 33, Dkt. 8. This relief will indisputably benefit all class members equally. The claims here are materially different from cases involving a financial settlement agreement where some class members will receive less money than others and disparate financial incentives between class representatives and class members—the potential conflicts at issue in the two cases cited by the government. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020–21 (9th Cir. 1998), *overruled on other grounds by Dukes*, 564 U.S. 338 (discussing conflict at issue in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), where there was a dispute over settlement allocation decisions involving a finite amount of money for settling present and future claims); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–60 (9th Cir. 2009) (finding a conflict of interest where class representatives had incentive agreements with class

counsel in a financial settlement). It is hard to imagine the relief that those who have already lost employment authorization might pursue that would not equally benefit those at imminent risk of losing employment authorization, where the legal claim is the same. Proposed class representatives—one of whom had not yet lost her employment authorization at the time of filing suit[3]—will undoubtedly fairly and adequately represent the class.

E. The Court Can—and Should—Modify the Class Definition In the Event the Court Disagrees With Plaintiffs' Interpretation of the Rule 23 and Standing Requirements

Should the Court disagree with Plaintiffs' arguments on standing, commonality, and typicality, Plaintiffs alternatively ask the Court to exercise its discretionary authority to modify the class definition. *See Nevarez v. Forty Niners Football Co.*, 326 F.R.D. 562, 575 (N.D. Cal. 2018) (exercising "authority to amend the class definition" by shortening the time period for damages); *Montoya, et al. v. City of San Diego, et al.*, 19CV0054 JM(BGS), 2021 WL 5746476, at *3 (S.D. Cal. Oct. 20, 2021) ("[T]he court worked with the parties to craft a new class definition that took into consideration City's concerns and Plaintiffs' proposed modifications."). District courts have "broad discretion to modify class definitions." *Powers v. Hamilton Cnty. Public Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007); *see also Schorsch v. Hewlett–Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) (noting that "[l]itigants and judges regularly modify class definitions"); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) ("District courts are permitted to limit or modify class definitions to provide the necessary precision."); 7A Charles Alan Wright & Arthur R. Miller, Federal

[3] *See* Karen M. Decl. ¶ 4 (noting that her automatic extension would expire on November 15, 2021, five days after Plaintiffs filed suit).

Practice and Procedure § 1759 (4th ed.) ("[T]he court may construe the complaint or redefine the class to bring it within the scope of Rule 23 . . . .").

Should the Court disagree with Plaintiffs' Rule 23 and standing arguments, Plaintiffs respectfully ask the Court to modify the class definition as follows, rather than deny certification.

> "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); and
>
> d. whose 180-day automatic extension has expired or will expire within 30 days."

CONCLUSION

For the reasons stated above, Plaintiffs ask this Court to certify a class as defined in Plaintiffs' Complaint and Motion for Class Certification. *See* Dkts. 8, 16.

DATE: December 10, 2021

Respectfully submitted,

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