The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT and THE ADVOCATES FOR HUMAN RIGHTS;
Wilman GONZALEZ ROSARIO, L.S., K.T., A.A., Karla DIAZ MARIN, Antonio MACHIC YAC, Faridy SALMON, Jaimin SHAH, Marvella ARCOS-PEREZ, Carmen OSORIO-BALLESTEROS, and W.H., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants.

Case No. 2:15-cv-00813-JLR

ORAL ARGUMENT REQUESTED

NOTED ON CALENDAR: May 13, 2016

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
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INTRODUCTION

Plaintiffs (i) William Gonzalez Rosario, (ii) L.S., (iii) K.T., (iv) A.A., (v) Karla Diaz Marin, (vi) Machic Yac, (vii) Faridy Salmon, (viii) Jaimin Shah, (ix) Marvella Arcos-Perez, (x) Carmen Osorio-Ballesteros, and (xi) W.H., (together, the "Individual Plaintiffs") seek certification of a class (with three sub-classes) under Federal Rule of Civil Procedure 23. They seek appointment as representatives of a sprawling proposed class, defined as follows:

> Noncitizens who have filed or will file applications for employment authorization that were not or will not be adjudicated within the required regulatory timeframe, comprising those who:
>
> 1. Have filed or will file applications for employment authorization under 8 C.F.R. § 274a.13, excluding initial applications based on pending asylum applications or requests to renew Deferred Action for Childhood Arrivals, but who have not received or will not receive a grant or denial of their EAD applications within 90 days of filing, and who are entitled or will be entitled to interim employment authorization under 8 C.F.R. § 274a.13(d), but who have not received or will not receive interim employment authorization. Applications for employment authorization based on Deferred Action for Childhood Arrivals, U or T visa applications, and self-petitions under the Violence Against Women Act are excluded until USCIS has determined eligibility for the underlying immigration benefit or granted deferred action (the "90-Day Subclass"); or
>
> 2. Are asylum applicants who have filed or will file initial applications for employment authorization under 8 C.F.R. § 208.7, but who, absent any applicant-caused delay, have not received or will not receive a grant or denial of their EAD applications within 30 days of filing, and who have not received or will not receive interim employment authorization (the "30-Day Subclass"); or
>
> 3. Have filed or will file applications for employment authorization under 8 C.F.R. § 274a.13 on the basis of requests to renew Deferred Action for Childhood Arrivals, but who have not received or will not receive a grant or denial of their EAD applications within 90 days of filing, and who are entitled or will be entitled to interim employment authorization under 8 C.F.R. § 274a.13(d), but who have not received or will not receive interim employment authorization (the "DACA Renewal Subclass").

ECF No. 59 at 2.

The Court should deny the Individual Plaintiffs' motion for class certification. First, certain of the Individual Plaintiffs lack standing and cannot properly serve as a class representative. Second, regarding the merits of the motion for class certification, the Individual Plaintiffs cannot demonstrate commonality because individualized inquiry is required for each

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case of alleged employment authorization delay in order to determine eligibility for relief. Third, the Individual Plaintiffs likewise cannot show typicality because they are subject to unique defenses that distinguish their claims from the potential claims of other putative class members. Finally, the Individual Plaintiffs cannot show that they are adequate class representatives because their interests may conflict with other putative class members if the Court were to grant the class relief sought in this lawsuit. Stated otherwise, the Individual Plaintiffs cannot show that they are adequate representatives of three subclasses where the regulations define at least 40 different categories of differently situated aliens who are eligible to seek an EAD.

FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 2015, Plaintiffs filed this lawsuit, alleging violations of the immigration regulations and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* ECF No. 1. On August 10, 2015, Defendants moved to dismiss Plaintiffs' claims for lack of standing and lack of subject-matter jurisdiction. ECF No. 34. On February 10, 2016, the Court held that it lacked subject-matter jurisdiction to consider the claims of individual plaintiffs Marvella Arcos-Perez and Carmen Osorio-Ballesteros and dismissed their claims. Order at 20, 29, ECF No. 55. The Court also held that Northwest Immigrant Rights Project ("NWIRP") and The Advocates for Human Rights ("The Advocates") did not allege sufficient injury to their organizations to establish standing and dismissed their claims. *Id.* at 34. However, the Court found that it had jurisdiction over W.H.'s claims under the APA and the Mandamus Act, 28 U.S.C. § 1361, and that, although his application for an EAD had been granted, his claim was not moot as it related to the putative class W.H. represents. *Id.* at 26, 31.

On March 10, 2016, Plaintiffs filed an Amended Complaint challenging alleged delay by U.S. Citizenship and Immigration Services ("USCIS") in adjudicating applications for employment authorization and failure to issue interim employment authorization. ECF No. 58. Plaintiffs include the eleven Individual Plaintiffs, all aliens with moot claims as all of their employment authorization applications have been adjudicated. *Id.* ¶¶ 18-28. The Individual Plaintiffs seek to represent a nationwide class, which consists of three sub-classes. *Id.* ¶ 88. The

Amended Complaint includes six counts, each of which the Individual Plaintiffs purport to bring on behalf of a particular sub-class.

In Counts One and Four, on behalf of the 90-Day Subclass, Individual Plaintiffs allege that USCIS fails to timely adjudicate employment authorization document ("EAD") applications and issue interim EADs, in violation of 8 C.F.R. § 274a.13(d). ECF No. 58 ¶¶ 104-110, 125-28. They allege that they are entitled to relief under the Mandamus Act and the APA 5 U.S.C. § 702. *Id*.

In Counts Two and Five, on behalf of the 30-Day Subclass, Individual Plaintiffs likewise allege that USCIS fails to timely adjudicate EAD applications and issue interim EADs, in violation of 8 C.F.R. §§ 208.7(a), 274a.13(a)(2), and 274a.13(d), and the Form I-765 instructions. ECF No. 58 ¶¶ 111-17, 125-28. They again allege that this delay and inaction entitles them to relief under the Mandamus Act and the APA. *Id.*

In Counts Three and Six, on behalf of the DACA Renewal Subclass, Individual Plaintiffs likewise allege that USCIS fails to timely adjudicate EAD applications and issue interim EADs, in violation of 8 C.F.R. § 274a.13(d). ECF No. 58 ¶¶ 118-24, 133-36. They again allege that this delay and inaction entitles them to relief under the Mandamus Act and the APA. *Id.* On March 11, 2016, one day after they filed the Amended Complaint, Individual Plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(a) and (b)(2). ECF No. 59.

On April 18, 2016, Defendants filed a motion to dismiss Plaintiffs' Amended Complaint for lack of standing, lack of subject-matter jurisdiction, mootness, and failure to state a claim upon which relief may be granted. ECF No. 69. More specifically, Defendants argued: (i) Ms. Arcos and Ms. Osorio's claims should be dismissed for lack of subject matter jurisdiction because they failed to allege action that the agency was required to take; (ii) Plaintiffs' claims regarding interim EAD's for initial applications based on pending asylum applications should be dismissed because they have not alleged actions USCIS was required to take; (iii) the claims of the Individual Plaintiffs, even assuming standing, are moot; and (iv) the organizational plaintiffs lack standing and fail to establish that Defendants owe them a duty. *See id*.

Defendants oppose the motion for class certification (ECF No. 59) for the reasons discussed below.

LEGAL STANDARD FOR CLASS CERTIFICATION

"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*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, Plaintiffs "must affirmatively demonstrate compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The party seeking certification of a proposed class must establish the following required elements: (1) the class must be "so numerous that joinder of all members is impracticable" ("numerosity"); (2) there must be "questions of law or fact common to the class" ("commonality"); (3) the claims or defenses of the named plaintiffs must be "typical of claims or defenses of the class" ("typicality"); and (4) the named plaintiffs must "fairly and adequately protect the interests of the class" ("adequacy of representation"). *See* Fed. R. Civ. P. 23(a).

A class should be narrowly tailored to include only aggrieved parties.[1] *Mazur v. eBay Inc.*, No. 07-03967, 2009 WL 1203937, at *4 (N.D. Cal. May 5, 2009) ("Because the class as currently defined would include these non-harmed auction winners, this portion of the class definition is both imprecise and overbroad."); *see also Simon v. Am. Tel. & Tel. Corp.*, No. 99-11641, 2001 WL 34135273, at *3 (C.D. Cal. Jan. 26, 2001) (holding that class certification was inappropriate because the proposed class definitions included persons who had not yet been aggrieved).

It is the Plaintiff's burden to establish a cognizable class and to demonstrate to the Court that "a class action is the superior method of pursuing plaintiffs' claims." *Facciola v. Greenberg Traurig, LLP*, No. 10-cv-1025, 2012 WL 1021071, at *9 (D. Az. March 20, 2012). A party

[1] While the Court has authority to narrow a class, *see In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1093-94 (C.D. Cal. 2015) (quoting *National Federation of the Blind v. Target Corp.*, No. CV 06-01802 MHP, 2007 WL 1223755, at *3 (N.D. Cal. Apr. 25, 2007)), for the reasons discussed below, Defendants assert that this is not feasible in this case.

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seeking class certification must rigorously demonstrate compliance with the Rule 23 pleading requirements: "the court must undertake a 'rigorous analysis' to determine whether the party seeking class certification has done more than plead compliance with Rule 23, but instead has affirmatively demonstrated his or her compliance with the Rule." *Richey v. Matanuska-Susitna Borough*, No. 3:14-cv-00170, 2015 WL 1542546, at *2 (D. Ak. April 7, 2015).

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). If a court is not fully satisfied, the class cannot be certified. *Id*. "While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23." *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1186 (9th Cir. 2001); *see also Yamasaki*, 442 U.S. at 703 (1979); *Love v. Johanns*, 439 F.3d 723, 727-28 (D.C. Cir. 2006). 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,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 160-61).

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). Here, Plaintiffs ask the Court to certify a class under Rule 23(b)(2). ECF No. 59 at 21. 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).

LEGAL BACKGROUND

The Immigration and Nationality Act ("INA") and related regulations define different classes of aliens in the United States who are eligible to apply for, and receive, work authorization. Regulations define several categories of aliens who are authorized to work "incident to status" – meaning that employment is authorized as a result of the alien being granted a particular lawful immigration status. *See* 8 C.F.R. § 274a.12(a); *see also* 8 C.F.R. § 274a.12(b) (listing classes of aliens "authorized for employment with a specific employer

incident to status."). Regulations also allow several other categories of aliens to apply for work authorization, even though they are not automatically authorized to work incident to status. 8 C.F.R. § 274a.12(c). Under section 274a.12(c), some aliens without any status and some aliens who merely have an application for status pending may nonetheless apply for work authorization. *See, e.g.*, 8 C.F.R. § 274a.12(c)(9) (alien with application for adjustment of status to lawful permanent residence), (c)(11) (alien temporarily paroled into the United States), (c)(14) (alien *granted* deferred action). Approval of an application for employment authorization under section 274a.12(c) generally is within USCIS's sole discretion. *See* 8 C.F.R. § 274a.13(a)(1) ("The approval of applications filed under 8 C.F.R. § 274a.12(c), except for 8 C.F.R. § 274a.12(c)(8) [applicants with asylum or withholding of removal applications pending], are within the discretion of USCIS.").

For most applications for employment authorization, "USCIS will adjudicate the application within 90 days from the date of receipt of the application." 8 C.F.R. § 274a.13(d) (noting certain exceptions to the 90-day rule, including for aliens with asylum applications pending). The regulation further states that "[f]ailure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days." *Id.*

Different rules apply to applicants for asylum who seek employment authorization while their applications are pending. By statute, Congress directed as follows:

> An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

8 U.S.C. § 1158(d)(2). Congress further provided that "[n]othing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1158(d)(7). By regulation, an asylum applicant may apply for work authorization only after a complete asylum application has been pending for 150 days. 8 C.F.R. § 208.7(a)(1). If the

asylum application remains pending, USCIS "shall have 30 days from the date of filing of the request [for] employment authorization to grant or deny that application." *Id.* "Any delay requested or caused by the applicant shall not be counted as part of these time periods." 8 C.F.R. § 208.7(a)(2).

Aliens with pending asylum applications may also seek renewal of previously-granted employment authorization. 8 C.F.R. § 208.7(b). USCIS must receive the renewal application at least 90 days prior to the expiration of the employment authorization in order for such authorization to be renewed prior to its expiration. 8 C.F.R. § 208.7(d). For an initial asylum-related application for employment authorization, there is no regulatory requirement that USCIS grant any interim employment authorization, even if the application has been pending for more than 30 days. *See* 8 C.F.R. § 208.7 (omitting any reference to interim employment authorization); 8 C.F.R. § 274a.13(a)(2), (d) (exempting initial asylum-based EAD applications from the interim employment authorization provision).

In certain situations, the time periods for adjudicating employment authorization applications will start over or be suspended, regardless of the underlying eligibility category at issue. If a "benefit request is missing required initial evidence" or if the applicant asks to reschedule a necessary interview or fingerprint appointment, "any time period imposed on USCIS processing will start over from the date of receipt of the required initial evidence or request for fingerprint or interview rescheduling." 8 C.F.R. § 103.2(b)(10)(i). Similarly, "[i]f USCIS requests that the applicant or petitioner submit additional evidence or respond to other than a request for initial evidence, any time limitation imposed on USCIS for processing will be suspended as of the date of request." *Id.* The time period re-starts when USCIS "receives the requested evidence or response." *Id.* Furthermore, USCIS will not grant an interim benefit while the underlying benefit request remains in suspense pending the submission of requested initial evidence. 8 C.F.R. § 103.2(b)(10)(ii).

ARGUMENT

I. Certain Individual Plaintiffs lack standing to assert the claims in the Amended Complaint, and therefore are not proper class representatives.

Certain of the Individual Plaintiffs lack standing to maintain this lawsuit. As a result, they are not proper class representatives, and this Court should deny the motion for class certification to the extent that these Individual Plaintiffs seek to be a class representative.

A named plaintiff must have a "personal stake in the outcome" and be a member of the class that he or she seeks to represent for the class to be certified. *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974). "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they have been personally injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Thus, the Ninth Circuit explained, "A named plaintiff cannot represent a class alleging [ ] claims that the named plaintiff does not have standing to raise. It is not enough that the class members share other claims in common." *Hawkins v. Comparet–Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001) (citation omitted); *see also Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("if Lierboe has no [] claim, she cannot represent others who may have such a claim, and her bid to serve as a class representative must fail").

A. Plaintiff Arcos lacks standing because her asylum application was never pending for the requisite 180 days, and therefore she was never eligible for an EAD.

On February 10, 2016, the Court held that it lacked subject-matter jurisdiction to consider the claims of Ms. Arcos and dismissed her claims. *See* ECF No. 55. In its recent motion to dismiss Plaintiffs' Amended Complaint, Defendants argue that Ms. Arcos continues to lack standing because she has never been eligible for an EAD based on her pending asylum application. *See* ECF No. 69.

Ms. Arcos applied for asylum with the immigration court on August 2, 2013, and her case was administratively closed on that same day. Arcos Certified Administrative Record ("A.R.")

at 1, 24. When an asylum case is administratively closed in the immigration courts, the relevant time period is tolled. *See* Memorandum from the Principal Legal Advisor, U.S. Immigration & Customs Enforcement Office of the Principal Legal Advisor, Case-by-Case Review of Incoming and Certain Pending Cases, 3, n. 5, (Nov. 17, 2011);[2] U.S. Immigration & Customs Enforcement, Guidance to ICE Attorneys Reviewing the CBP, USCIS, & ICE Cases Before the Executive Office for Immigration Review (undated).[3] As such, she accrued no time towards the 180 days required before USCIS may issue an EAD to an initial asylum applicant. Ms. Arcos was ineligible to submit her EAD application when she initially applied because the time period tolled on day one. 8 C.F.R. § 208.7(a)(1). USCIS approved the initial EAD in error, but that error did not make her eligible to apply for a renewal EAD. Because 150 days must pass before an asylum applicant is eligible to file an EAD application, and this did not occur here, Ms. Arcos was never eligible to apply for an EAD, much less entitled to receive one. Thus, she cannot show any invasion of a legally protected interest, she lacks standing, and she cannot represent a class regarding this claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Lewis*, 518 U.S. at 357.[4]

B. Plaintiff Osorio lacks standing because she was not eligible for any employment authorization until *after* USCIS granted her deferred action.

On February 10, 2016, the Court further held that it lacked subject-matter jurisdiction to consider the claims of Ms. Osorio. *See* ECF No. 55. In their recent motion to dismiss Plaintiffs'

[2] *Available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf. This memorandum has been superseded by Memorandum from the Secretary, U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) with regard to the enforcement priorities addressed in the 2011 memorandum, but the policies concerning treatment of administrative closure for EAD purposes were not affected.

[3] *See* https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf

[4] Defendants acknowledge that there are other named plaintiffs with standing to preserve this claim as a class representative.

Amended Complaint, Defendants argue that Ms. Osorio continues to lack standing because she did not merit any interim EAD because she had not yet proven her DACA renewal eligibility. *See* ECF No. 69.

Ms. Osorio claims that she was entitled to interim employment authorization under 8 C.F.R. § 274a.13(d) because she made a request for renewal of Deferred Action for Childhood Arrivals ("DACA") and included an EAD application. ECF No. 58 ¶ 76. In fact, Ms. Osorio was not eligible for an EAD (and the 90-day interim-EAD clock did not start running) until USCIS actually *granted* her DACA renewal. Thus, she cannot establish any injury-in-fact because USCIS was required to adjudicate her DACA request before deciding her EAD application.

DACA recipients may obtain work authorization pursuant to 8 C.F.R. § 274a.12(c)(14). Under this provision, USCIS may approve an EAD only for an alien who has been "granted deferred action" provided "the alien establishes an economic necessity for employment." *Id.* Because an alien is not even *eligible* for employment authorization until actually *granted* deferred action, the 90-day period for USCIS to adjudicate the EAD application does not, and cannot, start running until USCIS renders a decision on the underlying DACA request. *See* 8 C.F.R. §§ 103.2(b), 274a.12(c)(14), 274a.13(d); 8 U.S.C. § 1324a(h)(3); Application for Employment Authorization, Form I-765 Instructions, at 1 (Nov. 4, 2015).

USCIS addresses when it may consider an EAD application in the Application for Employment Authorization, Form I-765 ("Form I-765") instructions. The instructions state: "The Interim EAD provisions apply to individuals filing Form I-765 based on Consideration of Deferred Action for Childhood Arrivals *only after a determination on deferred action is reached*." Form I-765 Instructions at 1 (Nov. 4, 2015) (emphasis added). It further explains, "The 90-day period for adjudicating Form I-765 filed together with Form I-821D does not begin until DHS has decided whether to defer action in your case." *Id.* The instructions do not

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differentiate between Form I-765s submitted with initial DACA requests (or other deferred action requests) and those submitted with renewal requests.[5]

Ms. Osorio was previously granted DACA, but her period of deferred action expired on April 21, 2015. Osorio A.R. at 3. On December 29, 2014, she filed a request to renew her DACA and her EAD, both of which were still pending at the time the complaint was filed. Osorio A.R. at 3, 10. On June 3, 2015, both the renewal DACA request and EAD application were approved by the Texas Service Center. *Id*. at 3. Under USCIS' interpretation of the DACA process, the 90-day period in which USCIS was required to adjudicate Ms. Osorio's Form I-765 began when USCIS approved her DACA renewal request. Indeed, USCIS issued her an EAD on the same day that she qualified for DACA renewal.[6] As an alien who was ineligible for an EAD while her DACA renewal request remained pending,[7] Ms. Osorio cannot show any invasion of a legally protected interest, as is required for a redressable injury to exist. *Lujan*, 504 U.S. at 560. As a result, she lacks standing, and there is no Individual Plaintiff with standing to represent the class as defined in Plaintiffs' third subclass. *Lewis*, 518 U.S. at 357.

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[5] It appears that Plaintiffs may not be challenging EAD adjudications associated with initial DACA requestors, as the Plaintiffs do not include any initial DACA requestors in their declarations. In fact, the declaration from the director of the Seattle office of NWIRP implicitly acknowledges that initial DACA requestors are not eligible for an EAD within 90 days of the time the EAD application is filed. *See* Declaration of Mozhdeh Oskouian at ¶ 4 (describing searches for EAD applications pending over 90 days and specifically stating that, "The EAD applications not subject to the 90-day timeframe included . . . initial DACA applications.").

[6] *See* Instructions for Form I-765, Application for Employment Authorization at 6 ("The 90-day period for adjudicating Form I-765 filed together with Form I-821D [the DACA application from] does not begin until DHS has decided whether to defer action in your case."), *available at* http://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf.

[7] Although Ms. Osorio was eligible for employment authorization between December 29, 2014, and April 21, 2015, based on her initial grant of deferred action, that benefit had already been granted to her. Her renewal request was for a new period of work authorization beginning when her first grant of deferred action, with its related work authorization, ended. That renewal request required a new grant of deferred action beginning on April 21, 2015, before it could be adjudicated.

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C. The Individual Plaintiffs lack standing to challenge USCIS's request for interim EADs for asylum applications.

Defendants argue in their motion to dismiss Plaintiffs' Amended Complaint that W.H.'s, A.A.'s, and Machic Yac's claims requesting interim EADs should be dismissed for lack of subject-matter jurisdiction because they have not identified actions that USCIS was required to take. *See* ECF No. 69 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). The interim EAD regulation at 8 C.F.R. § 274a.13(d) expressly does not apply to initial EAD applications based on asylum applications. The Instructions to Form I-765 state that asylum applicants whose EAD has been pending for over thirty days *may* request an interim EAD, not that USCIS *must* issue one. The Court has already recognized this weakness in Plaintiffs' claim: "because the regulations applicable to asylum applicants make no reference to interim EADs, the court reserves judgment as to whether [the interim EAD] remedy is available." *See* ECF No. 55 at 26 n.19. Thus, USCIS is not required to issue interim EADs when an initial EAD application based on an asylum application is not adjudicated within thirty days of the date of filing. Because USCIS has not "failed to take a *discrete* agency action it [wa]s *required to take*," *Norton*, 542 U.S. at 64, none of the Individual Plaintiffs has standing, nor could they even hypothetically have standing, to bring this claim, and the portion of Plaintiffs' second subclass seeking certification of these initial asylum applicants claiming a right to interim EADs must be excluded.

II. The Individual Plaintiffs cannot satisfy the commonality and typicality requirements for class certification.

Setting aside the standing deficiencies described above, the Individual Plaintiffs also cannot meet the requirements for class certification found in Federal Rule of Civil Procedure 23. USCIS's adjudication of an EAD application is wholly dependent on the category under which the alien claims eligibility, the factual circumstances specific to that case, and any processing and/or resource issues related to each particular type of EAD application. Because of the case-specific nature of each EAD adjudication, the Individual Plaintiffs cannot satisfy the commonality and typicality requirements for class certification.

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To obtain class certification, Plaintiffs must demonstrate that the proposed class members are entitled to common relief. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). Regarding Rule 23(a)(2), the Supreme Court has repeatedly held that it "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." *Wal-Mart Stores,* 564 U.S. at 350 (citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (citation omitted).

This typicality requirement is likewise present in Rule 23(b)(2), the Rule under which Plaintiffs seek certification. For certification under Rule 23(b)(2), Plaintiffs must show that "declaratory relief is appropriate respecting the class as a whole" and 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." *Id.* at 360. Therefore, Plaintiffs have the burden of demonstrating that the factual differences in the class are unlikely to bear on the individual's entitlement to relief. If the factual differences have the likelihood of changing the outcome of the legal issue, then class certification may not be appropriate. *Cf. Yamasaki*, 442 U.S. at 701.

The typicality requirement ensures that the interests of the named representative(s) align with the interests of the class. *Hanon v. Dataproducts*, 976 F.2d 497, 508 (9th Cir. 1992). The test to be applied "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Id.*

A. The Individual Plaintiffs cannot establish commonality because it is impossible to determine whether an individual is entitled to employment authorization without evaluating the specific facts pertinent to that individual.

The Individual Plaintiffs fail to establish the commonality requirement because the review of an EAD application is a fact-intensive endeavor requiring the evaluation of facts and

law specific to each individual applicant. In *Coughlin v. Rogers*, 130 F.3d 1348 (9th Cir. 1997), 49 aliens sought to compel the Government to adjudicate their pending immigrant petitions or applications. *Id*. at 1349. The Court of Appeals for the Ninth Circuit found that there was no common question of law or fact because even though the plaintiffs' claims arose under the same general law, each plaintiff's claim was "discrete" and involved "different legal issues, standards, and procedures" requiring "individualized" attention. *Id.* at 1351. As a result, it affirmed the decision of the district court to sever plaintiffs' claims. *Id.* Although *Coughlin* involved a motion to sever claims that were improperly joined (rather than a class action lawsuit under Rule 23(a)), its rationale applies with equal force to the present case.

Here, the proposed class includes EAD applicants who seek employment authorization based on numerous underlying eligibility categories, and whose claims could arise from countless different factual circumstances. First, the Individual Plaintiffs purport to sweep into their proposed class nearly every type of alien who might be seeking an EAD, regardless of the underlying eligibility category at issue. In fact, the regulations define at least 40 different categories of aliens who are eligible to seek an EAD, depending on their status or circumstances, including whether they have a pending request for another immigration benefit. *See* 8 C.F.R. § 274a.12(a) (listing eligibility categories of aliens entitled to an EAD incident to status), (c) (listing eligibility categories for aliens who must apply for employment authorization). In any case where USCIS's adjudication of an EAD application has exceeded 30 days for initial asylum applicants or 90 days for all other applicants, the reasons for the delay could differ depending on the underlying eligibility category at issue. By way of example, consider an EAD applicant who has a final order of removal/deportation and has been released on an order of supervision: he must satisfy a factual predicate (impossibility or impracticality of removal) before being eligible for employment authorization. *See* 8 C.F.R. § 274a.12(c)(18). Until such time as that factual predicate is established, he would remain ineligible for any employment authorization, interim or otherwise. In contrast, those eligible for an EAD incident to status, like a nonimmigrant fiancé, must only prove their immigration status. *See* 8 C.F.R. § 274a.12(a)(6).

Second, the factual circumstances specific to any given EAD adjudication compound the potential differences between any two purported class members. In certain circumstances, the time for USCIS to adjudicate an EAD application is tolled or re-set. For example, for initial asylum applicants, tolling occurs when an alien causes delay in the underlying asylum adjudication. *See* 8 C.F.R. § 208.7(a)(2). For all EAD applicants, the time period re-starts if the alien fails to provide necessary initial evidence for the underlying benefit application or requests rescheduling of fingerprinting or an interview, and the time period is tolled during any pending request for evidence. *See* 8 C.F.R. § 103.2(b)(10). The Individual Plaintiffs implicitly acknowledge these potential differences between class members because they each are careful to allege that they did not receive any requests for evidence or miss any biometrics appointment. ECF No. 58 ¶¶ 18-28. The EAD application of a class member who missed his or her biometric appointment would be tolled or re-set; therefore, the Individual Plaintiffs would not be in position to represent the interests of those who failed to appear for their biometric appointment.

Third, there is no relation amongst the alleged wait times experienced by the Individual Plaintiffs. Whereas Plaintiffs allege that USCIS delayed 224 days in adjudicating Mr. Rosario's EAD (*see* Rosario A.R. at 7), they claim that Mr. Shah needed to wait just 37 days beyond his expected wait to be granted an EAD. *See* Shah A.R. at 26. Neither of these times is a statistical outlier. A.A. received his EAD after just a 27-day delay (s*ee* A.A. A.R. at 1, 7), whereas, conversely, K.T. had a delay of 212 days (*see* K.T. A.R. at 5), and Ms. Marin had a 130-day delay. *See* Marin A.R. at 8, 9. With wait times ranging from a few weeks up to 224 days, the Individual Plaintiffs fail to establish any semblance of commonality even amongst the 11 named Individual Plaintiffs.

Finally, the means by which certain classes of applicants receive EADs and renewed EADs varies dramatically. For example, certain groups of TPS recipients may receive auto-extensions of their TPS status: "Sometimes DHS must issue a blanket automatic extension of the expiring EADs for TPS beneficiaries of a specific country in order to allow time for EADs with new validity dates to be issued." *See* Temporary Protected Status, https://www.uscis.gov/

humanitarian/temporary-protected-status#Automatic%20Employment%20Authorization %20Document %20(EAD)%20Extension. An applicant class that must reapply for an EAD lacks commonality with a class that is eligible for a "blanket automatic extension."

At the heart of this case is alleged delay by USCIS in adjudicating EAD applications. But as the specific facts surrounding the Individual Plaintiffs' claims indicate, an individualized inquiry is required for each case of alleged delay in order to determine eligibility for relief. It would be impractical, if not impossible, for the Court to order class relief that would take into account all of the different eligibility categories and factual scenarios that putative class members might present. Thus, the Individual Plaintiffs cannot demonstrate commonality, as required for class certification. *See generally Wal-Mart Stores*, 564 U.S. at 350 ("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.").

B. The Individual Plaintiffs cannot establish typicality because they are subject to unique defenses to their claims of entitlement to employment authorization.

The Individual Plaintiffs' claims are subject to unique defenses that preclude their efforts to establish typicality. As discussed above, Ms. Arcos seeks an EAD based on an underlying asylum application. Ms. Arcos is *ineligible* for an EAD because her removal proceedings are administratively closed, and with applicable tolling, her asylum application has not been pending for the necessary 180-day period. *See* Arcos A.R. at 1; 8 C.F.R. § 208.7(a)(1), (2). Similarly, Ms. Osorio (like all DACA-based applicants) is subject to the unique defense that she was ineligible for an EAD for as long as her DACA application remained pending because she had not yet been "granted deferred action." *See* 8 C.F.R. § 274a.12(c)(14).

Ms. Salmon's delayed EAD was caused by her own mistake. On September 22, 2015, Ms. Salmon was granted deferred action on humanitarian grounds. Salmon A.R. at 20. On October 5, 2015, she filed a Form I-765 seeking an EAD on the basis of that status. *Id.* at 7. Ms. Salmon incorrectly filed her application with the Vermont Service Center, rather than with the

Chicago Lockbox. *See id.* at 7 (stamped "VSC"); *see also* Direct Filing Addresses for Form I-765, Application for Employment Authorization, *available at* https://www.uscis.gov/i-765-addresses (stating that those filing for an EAD on the basis of deferred action must file their application at the USCIS Chicago Lockbox). After the application was rerouted to correct Ms. Salmon's mistake, USCIS approved the application on the basis of her deferred action status on April 6, 2016. *Id.* at 7.

Ms. Marin's delayed EAD was also caused by her own mistake. Ms. Marin was granted deferred action on February 24, 2015, while she awaits a U nonimmigrant visa. Marin A.R. at 8, 9. On August 11, 2015, she filed a Form I-765, incorrectly indicating that she was the recipient of a U nonimmigrant visa, rather than the recipient of deferred action. *Id.* at 8 (question 16, originally completed as (a)(19)). On March 18, 2016, after USCIS corrected Ms. Marin's mistake, USCIS approved her application.

These unique factual patterns amongst just 11 named plaintiffs demonstrate the variety of factual situations experienced by applicants for EADs and the filing mistakes made by EAD applicants. These unique mistakes demonstrate that the Individual Plaintiffs, who have either caused or exacerbated their own delays, cannot show that their claims are typical of the claims of those they seek to represent.[8] *See Hanon*, 976 F.2d at 508. And, more broadly, the defense for each of these delays is not common, but each alleged delay should be reviewed for reasonableness. *See Kashkool v. Chertoff*, 553 F.3d 1131, 1143 (9th Cir. 2008) ("within a reasonable time, each agency shall proceed to conclude a matter presented to it."). Further, a change in the allocation of resources by USCIS to the various kinds of EAD applications would have a differing impact on various members of the proposed class. *See Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001) (when determining whether agency delay is unreasonable, a Court should consider the impact on allocation of agency resources); *see also Telecomms.*

[8] Additional unique defenses could apply to *other* putative class members whose EAD applications may be based on eligibility categories that differ from the categories under which the Individual Plaintiffs claim eligibility.

Research & Action Ctr. v. F.C.C. ("TRAC"), 750 F.2d 70, 80 (D.C. Cir. 1984)). With 40 different categories of differently situated aliens who are eligible to seek an EAD, any change to satisfy one of the Individual Plaintiffs might have a negative impact on a differently situated EAD applicant.

III. The Individual Plaintiffs are not adequate representatives because their interests may conflict with the interests of the proposed class.[9]

The Individual Plaintiffs are not adequate class representatives because their interests may conflict with the interests of other putative class members. 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). A determination of legal adequacy is based 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.* Indeed, "uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). This notion is compounded by the nature of a class certified pursuant to Rule 23(b)(2), the members of which do not have a right to opt out of their class. *See Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam)).

A. There are potential employment authorization applicants whose interests conflict with the Individual Plaintiffs' and who could be harmed by the class relief that the Individual Plaintiffs seek.

Individuals seeking employment authorization on the basis of a pending benefits request have interests that conflict with those of the Individual Plaintiffs. By way of illustration, H-4

[9] While Defendants do not specifically challenge the adequacy of proposed class counsel under Fed. R. Civ. P. 23(g), Plaintiffs' failure to plead with specificity concerning the type of clients the proposed organizational plaintiffs represent raises the question of Fed. R. Civ. P. 23(a)(4) adequacy conflicts if they are appointed as organizational plaintiffs. It is simply unclear, based on the Amended Complaint, whether proposed organizational plaintiffs have interests that do not conflict with the proposed class members they seek to represent as class representatives.

dependents have interests that diverge from those of the Individual Plaintiffs. *See* 8 C.F.R. § 214.2(h)(9)(iv). H-4 dependents, including spouses and children, are eligible for work authorization if, *inter alia*, the H-1B spouse/parent is the beneficiary of an approved Immigrant Petition for Alien Worker. As of May 26, 2015, the regulations provide that an H-4 dependent may file an Application for Employment Authorization concurrently with another related benefit request. 8 C.F.R. § 214.2(h)(9)(iv). USCIS's 90 day period to adjudicate the EAD application "will commence on the latest date that a concurrently filed related benefit request is approved." *Id*. The Individual Plaintiffs notably do not include an H-4 applicant who would be capable of representing the interests of this group of applicants that would likely be harmed by Plaintiffs litigation position in this case.

Like the DACA renewal candidate considered in the government's prior opposition to class certification, there is no statutory or regulatory authority that would allow USCIS to approve an EAD for an H-4 dependent before the underlying benefit application is approved. Concurrent filing enables the H-4 dependents to have their EAD application adjudicated more quickly than if they had to wait for the petition to be approved prior to submitting an EAD application. If USCIS were required to adjudicate these concurrently filed EADs within 90 days of receipt, it may have to deny the concurrently filed EAD application based on ineligibility if the underlying benefit has not yet been approved. This potential consequence, if the Individual Plaintiffs prevail in their pursuit of class relief, may be harmful to the interests of these H-4 applicants. Thus, the Individual Plaintiffs cannot adequately represent the interests of H-4 applicants and, therefore, cannot serve as adequate representatives of the class that they seek to represent.

Although Plaintiffs have attempted to carve out groups previously identified by Defendants as having interests that conflict with those of the Individual Plaintiffs (*see* ECF No. 35), there are numerous groups that are not adequately represented by the Individual Plaintiffs. Another example of a group with interests that diverge from the Individual Plaintiffs would be TPS applicants. Applicants requesting TPS for the first time must file a Form I-765 concurrently

with the TPS application. The TPS applicants are eligible to work as a "temporary treatment benefit" once USCIS makes a prima facie determination of eligibility for TPS. *See* 8 C.F.R. § 244.5(b), 8 C.F.R. § 244.10(a). Once this prima facie determination is made, USCIS adjudicates the Form I-765; however, there is no requirement that the prima facie determination would be made within 90 days. Certain issues, such as background checks for some applicants, can affect the time period needed to make the prima facie eligibility determination. As the time period to make this determination can vary and there is no separate notice to instruct an applicant that he or she has been found prima facie eligible, requiring a TPS applicant who wants to work to wait until the prima facie determination is made to file a Form I-765 could be confusing and inefficient. Conversely, many TPS re-registrants can work after their EAD expires through extensions announced in notices published in the Federal Register even if they do not get a 90-day adjudication or an interim EAD. These TPS re-registrants are not facing the same harm as other members of the proposed class.

Also problematic for Plaintiffs' class definition is their inclusion of spouses and certain sons and daughters ("derivatives") of diplomats and foreign dignitaries because they apply for work authorization via the State Department. Specifically, certain derivatives of A-1, A-2, G-1, G-3, G-4, and NATO-1 to NATO-6 applicants are eligible to work under 8 C.F.R. § 274a.12(c)(1), (4) and (7). These applicants must submit their Form I-765 applications with a request for consular approval on a Form I-566 to the State Department. The State Department adjudicates these Form I-566 applications and then forwards the approvals, with the Form I-765, to USCIS. Plaintiffs' class definition includes this group even though they may not know when the State Department forwards the Form I-765 to USCIS. These applicants have an interest that could conflict with the Plaintiffs' request that a decision be issued within 90 days of filing with USCIS, if for instance, these applicants wanted a decision within 90 days of filing with the State Department.

Similarly, students with an F-1 visa who apply for pre-completion Optional Practical Training ("OPT") would not benefit from inclusion in Plaintiffs' class. F-1 students are eligible

for OPT work during certain times, such as periods when school is not in session, pursuant to 8 C.F.R. § 274a.12(c)(3)(i)(A). For instance, an F-1 student seeking summer OPT employment can file a Form I-765 seeking work for a 2-month period during a summer vacation, up to 90 days before they want to begin to work. However, if the applicant files less than 90 days before the job begins, then the 2 month employment period may have already begun, or even expired, by the time USCIS completes adjudication of the Form I-765. In this case, issuing an interim EAD for a time period that is different from the period that they requested to work would not make any sense and would not redress any injury.

Finally, any parolee is eligible to apply for work authorization for the period of his or her parole pursuant to 8 C.F.R. § 274a.12(c)(11); however, some people are only paroled into the United States for a matter of weeks for a medical procedure or to testify as a witness. These parolees are technically eligible to file a Form I-765 once they are in the country and have parole status, but if they are only here for a short time, USCIS may not be able to adjudicate the application before the parolee would have to return to his or her home country. Further, if adjudication of the Form I-765 took longer than 90 days, the parolee would not have suffered any redressable injury, since he or she would have lost eligibility for the EAD upon return to the home country. An interim EAD would not remedy this situation.

At bottom, it is Plaintiffs' burden to articulate a cognizable class, and, because they still have not been able to articulate a cognizable class, the Court should deny their motion for class certification with prejudice. *See Facciola*, 2012 WL 1021071, at *9; *Mazur*, 2009 WL 1203937, at *4; *Simon*, 2001 WL 34135273, at *3.

B. The Individual Plaintiffs cannot adequately represent a diverse set of more than 40 categories of groups eligible to apply for EADs.

Because EAD adjudications are so dependent on the eligibility category under which they are submitted, it is impossible for the 11 Individual Plaintiffs to represent 40 different categories of aliens who may be eligible to apply for EADs. Individual Plaintiffs notably do not include any adjustment of status applicants or TPS applicants – many of whom could have interests that

are distinct from, and in conflict with, the Individual Plaintiffs. Further, Plaintiffs seek to represent other groups that could be subject to conflicting agency funding priorities. By way of example, the proposed class includes both adjustment applicants and asylum applicants, but these are different groups which could have divergent interests. USICS is a self-funded agency with finite resources. To the extent, by way of example, there would be a spike in asylum applications filed by juveniles along the Mexican border, USCIS might need to increase its allocation of resources dedicated to adjudicating asylum applications. Therefore, there could conceivably be fewer resources available for USCIS to review adjustment of status applications, creating a conflict of interest between asylum applicants and adjustment applicants.

In general, with just a few carve outs for DACA, U and T Visa applicants, and VAWA applicants, the Individual Plaintiffs seek to represent a vast range of differently situated aliens. The more than 40 different categories of EAD applicants/potential class members include, but are not limited to, the following disparate groups: (i) non-immigrant fiancé(e)s (8 C.F.R. § 274a.12(a)(6)); (ii) aliens granted withholding of removal (8 C.F.R. § 274a.12(a)(10)); (iii) nonimmigrant students seeking employment for practical training (8 C.F.R. § 274a.12(c)(6)); (iv) applicants for adjustment of status (8 C.F.R. § 274a.12(c)(9)); (v) alien spouses of long-term investors in the Commonwealth of the Northern Mariana Islands (8 C.F.R. § 274a.12(c)(12)); and/or (vi) aliens subject to final orders of removal who have been released on orders of supervision (8 C.F.R. § 274a.12(c)(18)). These are just six of the multitude of classes eligible either to receive an EAD or to apply for an EAD: it would be incorrect to presume that applicants from the various EAD categories necessarily have common interests in this litigation.

Even among the numerous declarations submitted by Plaintiffs, *see* ECF Nos. 59-1 to 59-17, they fail to acknowledge the statutory, regulatory, and factual differences posed by the many groups of individuals eligible to apply for employment authorization that they seek to represent, including various reasons for delays in some individual cases. Plaintiffs fail to demonstrate how these disparate groups can be represented by a common set of plaintiffs, and, more specifically, how the specific Individual Plaintiffs in this action would be able to represent their interests.

The Individual Plaintiffs emanate from just a few of the vast array of categories, several of them caused their own delays, and all of them have now been granted EADs. Because the Individual Plaintiffs cannot adequately represent the interests of this group, they are not adequate representatives of this disparate class. The Court should therefore deny the motion for class certification.

CONCLUSION

For all of the foregoing reasons, Defendants ask this Court to deny the Individual Plaintiffs' renewed motion for class certification.

DATED: April 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 25, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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