The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.A., *et al.*,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,[1]

Defendants.

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

Defendants' Reply in Support of Motion to Supplement the Administrative Record and Response to Plaintiffs' Cross-Motion

Note on Motion Calendar: December 22, 2017

The documents that Defendants propose to include in the administrative record are proper additions to the record because they explain the inaction and delay of the agency in adjudicating employment authorization document ("EAD") applications alleged by Plaintiffs and because this information does not exist elsewhere in the record. To the extent that Defendants can reasonably provide the data and information requested by Plaintiffs, Defendants do not oppose including those documents in the administrative record. Further, Defendants do not oppose including Plaintiffs' prior submissions to this Court, so long as they relate to the claims of the 30-day class.

[1] On December 6, 2017, Kirstjen M. Nielsen was sworn in as Secretary of the U.S. Department of Homeland Security, automatically substituting for Elaine C. Duke, former Acting Secretary, as a party in accordance with Federal Rule of Civil Procedure 25(d). On October 8, 2017, L. Francis Cissna was sworn in as Director of U.S. Citizenship and Immigration Services, automatically substituting for James McCament, former Acting Director, as a party in accordance with Federal Rule of Civil Procedure 25(d).

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I. Plaintiffs' Relevancy Objection is Misplaced.

Plaintiffs contend that Defendants should not be permitted to supplement the administrative record with most of Defendants' proposed information because any explanation of the delay in adjudicating EAD applications is not relevant to the legal arguments advanced by Plaintiffs. ECF No. 104 at 2-6. Upon closer inspection of this argument, Plaintiffs actually appear to be objecting to consideration of *any* administrative record, rather than asserting that the supplemental information proposed does not fall within one of the permitted circumstances outlined by the Ninth Circuit in *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Whether an administrative record is required at all is not the question before the Court in a motion to supplement.[2] Plaintiffs are free to make those arguments in a motion for summary judgment. Instead, the question before the Court in a motion to supplement is whether the requested supplemental information may be added to the administrative record in order to explain the challenged agency action, inaction, or delay. As Defendants explained in their motion, ECF No. 103 at 2, such supplementation is particularly permitted in cases involving agency inaction or delay because "when a court is asked to review agency inaction before the agency has made a final decision, there is often no official statement of the agency's justification for its actions or inactions." *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002).

II. The Supplemental Materials are Appropriate to Explain the Agency's Actions.

Contrary to Plaintiffs' assertions, the supplemental information proposed by Defendants is permissible under this circuits' case law regarding cases under 5 U.S.C. § 706(1). Unlike cases involving final agency action, when a case involves agency inaction or delay, there is no final decision point to mark the limits of the record. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). Therefore, supplemental information is permitted to allow the agency to provide justification for its actions in place of a final agency action that would encompass that information. *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997).

[2] Additionally, the Administrative Procedure Act specifically calls for review of an administrative record even in cases involving agency inaction or delay. 5 U.S.C. § 706.

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Such justifications and the information that supports them fall within the exceptions recognized in *Lands Council*, 395 F.3d at 1030. Here, Defendants seek to supplement the record with a declaration that explains the agency's actions, both historically and in the present, together with data and policy documents that support that declaration. ECF Nos. 103-1 to 103-6, Exs. A-F.

Plaintiffs attempt to distinguish *Independence Mining Co.*, 105 F.3d at 511, *Friends of the Clearwater*, 222 F.3d at 560, and *San Francisco Baykeeper*, 297 F.3d at 886, because these cases pertain to instances of agency inaction, rather than agency delay, the issue here. ECF No. 104 at 4-5 & n.2. This is a distinction without a difference in the circumstance. Whether the APA challenge is to inaction or to delay, the fact remains that the agency has made no final decision at the time of the challenge and, therefore, the administrative record is not yet static. *See Friends of the Clearwater*, 222 F.3d at 560 ("[R]eview is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record."). It is this lack of a static record of final agency action that permits supplementation with materials similar to those that might be found in an administrative record supporting a final agency action. This is precisely what Defendants seek to add to the record here.

Plaintiffs also assert that Mr. Neufeld's declaration, ECF No. 103-6, Ex. F, is an impermissible post hoc rationalization of USCIS's actions. ECF No. 104 at 3-4. The bar on post hoc rationalization applies when an agency states a reason for a decision when it makes that decision but later provides a different reason when a court reviews the decision.[3] *Indep. Mining Co.*, 105 F.3d at 511. But as the Court in *Independence Mining Co.* explicitly found, where

[3] Plaintiffs point to *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), and *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284–85 (D.C Cir. 1981), to support their argument that Mr. Neufeld's declaration is a post hoc rationalization. However, both of these cases involved final agency action with a final administrative record, unlike the circumstances here. Similarly, *Nat'l Ass'n Of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1248 (11th Cir. 2006), is inapposite because that case involved final agency action and an attempt to supplement an administrative record despite the party's failure to comply with the specific rules of the agency regarding how to insert items for consideration at the administrative level.

"there is no date certain by which to evaluate an agency's justification for its actions," the explanation of those actions via a declaration during litigation is not an impermissible post hoc rationalization. 105 F.3d at 511. Here, Defendants have not provided any prior reason for the delays in adjudicating EAD applications that they would be seeking to alter through Mr. Neufeld's declaration. Instead, Defendants provide an explanation at this time because the record contains no other explanation for the challenged actions. Moreover, because Plaintiffs challenge the ongoing delays in adjudicating EAD applications, Mr. Neufeld's discussion of the current circumstances, with the data supporting that discussion, is wholly appropriate.

The supplemental materials proposed by Defendants are appropriate to explain the decisions made and actions taken by USCIS, and the Court should permit their addition to the administrative record.

III. Defendants do not Oppose the Inclusion of Most of Plaintiffs' Requested Information in the Administrative Record.

In their cross-motion to supplement, Plaintiffs request that Defendants (1) provide a number of further data, ECF No. 104 at 9, 10; (2) provide a memo regarding EAD clock calculations for Unaccompanied Alien Children, *id.* at 10; and (3) permit Mr. Neufeld to be deposed, *id.* at 7. Plaintiffs also seek to supplement the record with documents they have previously submitted to the Court. *Id.* at 11. Should the Court grant Defendants motion to supplement, Defendants do not oppose further supplementing the record with most of Plaintiffs' requests. Were the Court to deny Defendants' motion, the information Plaintiffs seek to add should similarly be denied.

First, Defendants are willing to supplement the record with the March 31, 2017 memo entitled "Jurisdiction and EAD Clock Procedures for Unaccompanied Alien Children (UACs)." Second, Defendants would agree to supplement the record with the data requested by Plaintiffs except where that data is not available in the ordinary course of business or would be unduly burdensome to produce and not proportional to the needs of the case. *Cf.* Fed. R. Civ. P. 26(b)(1). Defendants assert that providing the requested data sets divided out by EAD applications based on affirmative or defensive asylum claims is not proportional to the needs of

this matter. In order to generate this data, USCIS would need to first generate a list of all those individuals who filed initial EAD applications based on a pending asylum claim and then compare that list to asylum information contained in a separate electronic system. Further, certain asylum data, such as for individuals whose asylum application originated with EOIR in immigration court, and who have never filed an asylum application with USCIS, is not in USCIS systems at all. Applications for unaccompanied minors are also complicated because of special procedures for those individuals. Such asylum applications may originate in immigration court, transfer to USCIS, and then be transferred back to immigration court again. Resolving these complications and providing this data would be time and resource intensive. Moreover, the more time-intensive adjudication sometimes required for defensive-based EAD applications discussed by Mr. Neufeld, ECF No. 103-6 ¶¶ 28-29, is just one of many factors that affects USCIS's ability to process initial EAD applications based on pending asylum applications within 30 days. Thus, the need for this bifurcated data is not proportional to the resources that would be required to generate that data.

Additionally, electronically maintained "data . . . for applications that could not be adjudicated within 30 days because they were 'filed at exactly or around' day 150" is not kept in the ordinary course of business. ECF No. 104 at 10. To obtain such information, USCIS would be required to conduct a physical search of each individual initial EAD application based on a pending asylum claim filed from 2010 to 2017. As Exhibit B, ECF No. 103-2, shows, there have been over 640,000 applications filed just from FY2013 to FY2017. Therefore, the burden of generating such data outweighs its likely benefit and relevance. Apart from these two restrictions, however, Defendants are willing to provide the data as otherwise described by Plaintiffs.

Third, Defendants do not object to supplementing the administrative record with those declarations previously submitted that pertain to the 30-day class. Any other declarations have no relevance to the adjudicatory delays or injuries alleged by class members. Should the Court agree that such a limit on this form of supplementation is appropriate, Defendants will meet and confer with Plaintiffs to identify responsive declarations.

Defendants do oppose, however, Plaintiffs' request to depose Mr. Neufeld. ECF No. 104 at 7. While deposition of or live testimony from officials maybe appropriate in some instances, such instances are limited and rare. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) ("[S]uch inquiry into the mental processes of administrative decisionmakers is usually to be avoided."). Here, after taking into account the additional data Defendants agree to include in the administrative record as discussed above, Plaintiffs have identified only one contention that they allege Mr. Neufeld did not sufficiently support in his declaration: that perfect compliance with the regulatory time period may pose risks to public safety.[4] *Id.* This is not sufficient to support a request to depose Mr. Neufeld. Contrary to Plaintiffs' assertion, Mr. Neufeld's discussion of the regulation that bars aggravated felons from obtaining employment authorization, 8 C.F.R. § 208.7(a)(1), and the required steps needed to comply with that regulation provides sufficient support for this statement. Ex. F, ECF No. 103-6, ¶¶ 19-25. A deposition is not required to examine a policy determination already evidenced by the text of the regulation or to determine why perfect compliance with the regulatory deadline, which would compromise USCIS's ability to conduct background checks, "may pose public safety or other risks." *Id.* ¶ 58. Plaintiffs also assert that the data underlying Mr. Neufeld's assertions are in adequate, but this assertion addressed by the data Defendants agree to provide as set forth above. Mr. Neufeld's declaration is thorough, detailed, and supported by data and other background information cited in the declaration. Therefore, requiring that Mr. Neufeld be available for deposition is not proportional to the needs of this case.

[4] Plaintiffs also appear to state that Mr. Neufeld's assertions regarding the efforts required to calculate the asylum clock are inaccurate. *See* ECF No. 104 at 8 n.4. However, as the document cited states, the "clock" maintained by the Executive Office for Immigration Review is not accurate in every case and is not a substitute for USCIS's procedures. *See* U.S. Citizenship & Immigration Servs., The 180-Day Asylum EAD Clock Notice at 3, USCIS.GOV, *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice.pdf (last visited Dec. 8, 2017).

IV. Conclusion.

The documents that Defendants seek to add to the administrative record are appropriate additions because they explain the basis for the agency's delay in adjudicating some initial asylum-based EAD applications. *See San Francisco BayKeeper*, 297 F.3d at 886. Therefore, the Court should grant Defendants' motion to supplement the administrative record together with Plaintiffs' in the alternative motion to supplement the administrative record, subject to the limitations described above.

DATED: December 8, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2017, 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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