UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

NORTHWEST IMMIGRANT RIGHTS PROJECT, ET AL., Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., Defendants.	Case No. 2:15-cv-00813 PLAINTIFFS' MOTION FOR CLASS CERTIFICATION ORAL ARGUMENT REQUESTED NOTE ON CALENDAR: June 19, 2015

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

Individual Plaintiffs bring this action to compel Defendants to comply with mandatory agency regulations requiring adjudication of employment authorization applications within a specific time period or, where the regulatory deadline has passed, issuance of interim employment authorization. Defendants' unlawful actions temporarily prevent Individual Plaintiffs and other similarly situated individuals from working legally in the United States, deprive many of work-related medical and other benefits, preclude those in certain states from securing or maintaining their driver's licenses, and force employers to lay off qualified

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employees. Accordingly, Individual Plaintiffs seek declaratory and injunctive relief requiring Defendants to conform their policies and practices to the applicable regulations.

Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Individual Plaintiffs respectfully move this Court to certify the following nationwide class and to appoint all Individual Plaintiffs as class representatives:

> Noncitizens who have filed or will file an application for employment authorization that was not or will not be adjudicated within the required regulatory timeframe, comprising those who:
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> 1. Have filed or will file an application for employment authorization under 8 C.F.R. § 274a.13, 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 employment authorization or interim employment authorization (the "90-Day Subclass"); or
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> 2. Have filed or will file an application for employment authorization under 8 C.F.R. § 208.7, and who are entitled or will be entitled to employment authorization under 8 C.F.R. § 208.7(a)(1), but who have not received or will not receive employment authorization or interim employment authorization (the "30-Day Subclass").

II. BACKGROUND

This action concerns two subclasses of individuals who are entitled to employment authorization under the Defendants' regulations, but have been or will be temporarily prevented from working lawfully due to Defendants' failure to comply with the applicable regulations. First, the 90-Day Subclass consists of individuals who are entitled to interim employment authorization due to Defendants' "failure to complete the adjudication [of an EAD application] within 90 days" from the date of receipt as required by the regulation. 8 C.F.R. § 274.13(d). In such circumstances, the Defendants are required to issue "an employment authorization document for a period not to exceed 240 days." *Id*. Yet, Defendants routinely fail to timely adjudicate applications subject to the 90-day regulatory

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deadline.[1] Defendant USCIS also has candidly admitted that it "no longer produces interim EADs." Exh. A at 2 (Lawrence Decl. ¶ 8).[2] As a result, class members are suffering and will continue to suffer harm in the form of lost wages and benefits, lost employment opportunities, and in some states, the inability to secure or maintain valid driver's licenses.[3]

Initial applicants for employment authorization on the basis of pending asylum applications have a different regulatory timeline, 8 C.F.R. § 208.7, which the Defendants also routinely violate.[4] Asylum applicants are not entitled to work authorization "prior to 180 days after the date of filing of the application for asylum." 8 U.S.C. § 1158(d)(2). The Defendants'

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[1] *See* Exh. B at 1 (Parsons Decl. ¶ 4) (asserting that 31 of 59 DACA renewal applications submitted in the past eight months were pending for more than 90 days); Exh. J at 1 (Cortes Decl. ¶ 4) (indicating that USCIS took longer than 90 days to process 20 EAD renewal and new applications filed between late October and December 2014); Exh. D at 1 (Heming Segal Decl. ¶ 4) (asserting that 7 of 14 EAD applications filed in connection with DACA renewal requests since July 2014 were not adjudicated within 90 days); Exh. E at 2 (McKenzie Decl. ¶ 6) (asserting that, of 31 EAD renewal applications filed between January 1, 2013 and May 13, 2015, 12 (46%) were adjudicated outside the 90-day period and 5 remain pending beyond the regulatory adjudication deadline).

[2] *See also* Exh. F at 2 (Collopy Decl. ¶ 6) ("When our client appeared at the InfoPass appointment on July 14, 2014, she was told that USCIS no longer provides interim EADs."); Exh. B at 2-3 (Parsons Decl. ¶ 8) ("The officer [my client] spoke to at the appointment told him that the San Antonio Field Office could not issue interim EADs.").

[3] *See* Exh. E at 3-6 (McKenzie Decl. ¶¶ 8, 10-13). In many states, an EAD is one of the primary documents accepted to prove identity or lawful presence in order to obtain a driver's license. *See e.g.*, Tenn. Department of Safety and Homeland Security, Proof of Temporary Legal Presence, http://1.usa.gov/1FAYjAL (last visited May 21, 2015); Tex. Department of Public Safety, Identification Requirements, http://bit.ly/1gs8khA (last visited May 21, 2015); Wis. Department of Transportation, Acceptable Documents for Proof of Citizenship or Legal Status in the United States, http://1.usa.gov/1wUdkTV (last visited May 21, 2015).

[4] Exh. G at 1 (Scheiderer Decl. ¶¶ 4-5) (asserting that, of 34 EAD applications that Freedom House filed with USCIS from January 2014 to March 2015 on behalf of clients seeking initial asylum EADs, none were issued within the required 30-day period, 8 were issued within 30 to 60 days, 9 were issued within 61 to 90 days, 13 were issued after more than 91 days, and 4 remain pending); Ex. E at 3 (McKenzie Decl. ¶ 6) (asserting that none of the ten initial asylum EAD applications filed between January 1, 2013 and May 13, 2015 were adjudicated within the 30-day regulatory time period; processing times ranged from 45 to 100 days).

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regulations implementing this provision permit asylum applicants to file their applications for initial Employment Authorization Documents (EAD) only after 150 days have elapsed since the filing of their underlying asylum applications. 8 C.F.R. § 208.7(a)(1). Upon receipt of a properly-filed application for an initial asylum EAD, Defendants are required to grant or deny the application within 30 days:

> If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied. If the asylum application is not so denied, the Service *shall have 30 days from the date of filing the employment authorization request to grant or deny that application*, except that no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application . . . .

8 C.F.R. § 208.7(a)(1) (emphasis added).

Notwithstanding this mandatory directive, Defendants regularly fail to issue initial asylum EADs to eligible asylum seekers until long after the 30 day period has expired.[5] Individuals who file initial applications for asylum-based EADs are also eligible for interim employment authorization, per the Defendants' instructions to Form I-765:

> **Interim EAD:** An EAD issued to an eligible applicant when USCIS has failed to adjudicate an application within 90 days of a properly filed EAD application, *or within 30 days of a properly filed initial EAD application based on an asylum application* filed after January 4, 1995. The interim EAD will be granted for a period not to exceed 240 days . . . .

U.S. Citizenship and Immigration Services, Instructions for I-765, Application for Employment Authorization at 1 (emphasis added), *available at* http://www.uscis.gov/i-765.[6] Yet, as the attached evidence demonstrates, Defendants also consistently ignore this interim EAD requirement.[7]

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[5] *See supra* n. 4.

[6] Regulations provide that "such instructions are incorporated into the regulations." 8 C.F.R. § 103.2(a)(1).

[7] *See* Ex. A at 2 (Lawrence Decl. ¶ 8); *supra* n. 2.

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III. CLASS CERTIFICATION

Upon a showing that the requirements of Rule 23(a) and (b)(2) have been met, numerous district courts within the Ninth Circuit have certified classes of noncitizens who challenge immigration policies and practices. *See, e.g., Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014) (certifying district-wide class of certain noncitizens subject to mandatory detention); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) (reversing district court order denying class certification for class of immigration detainees subject to prolonged detention); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying district-wide class of certain individuals with delayed naturalization cases); *Santillan v. Ashcroft*, No. 04-2686 MHP, 2004 U.S. Dist. LEXIS 20824 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *A.B.T. v. United States Citizenship & Immigration Servs.*, No. 11-2108, 2013 U.S. Dist. LEXIS 160453 *at* *11(W.D. Wash. Nov. 4, 2013) (W.D. Wash. Nov. 4, 2013) (approving settlement and certifying nationwide class of persons in removal proceedings challenging procedures governing the ability of asylum applicants to work while their asylum applications are pending). Like these cases, the instant action satisfies the requirements for class certification under Rule 23(a) and (b)(2). Each of these requirements is discussed below.

IV. THIS ACTION SATISFIES THE CLASS CERTIFICATION REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(a).

A. Joinder of the Proposed Class Members Is Impracticable.

1. The Class Size Makes Joinder Impracticable.

Rule 23(a)(1) requires that the class be "so numerous that joinder is impracticable." "[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-

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14 (9th Cir. 1964) (citation omitted). No fixed number of class members is required. *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995). In fact, courts have found impracticability of joinder when relatively few class members are involved. *See Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763, 765-66 (9th Cir. 1971) (finding 17 class members sufficient); *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class with 27 known members).

"Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such situation." W. Rubenstein & A. Conte, 1 Newberg on Class Actions § 3:11 (5th ed. 2014). "Thus, Rule 23(a)(1) is an impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due process, judicial economy, and the ability of claimants to institute suits." *Id.* Where it is a close question, the Court should certify the class. *Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998) ("where the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1)"). Determining whether plaintiffs meet the test "requires examination of the specific facts of each case and imposes no absolute limitations." *Troy v. Kehe Food Distributors*, 276 F.R.D. 642, 652 (W.D. Wash. 2011) (citing *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980)).

Moreover, in certifying classes of noncitizens, courts have taken notice of circumstances in which "INS [now DHS] is uniquely positioned to ascertain class membership." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (requiring Defendants to provide notice to class members). Where DHS has control of the information

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proving the impracticability of joinder and does not make such information available, it would be improper to allow the agency to defeat class certification on numerosity grounds. Currently, it is not possible to determine the length of time the agency will take to adjudicate EAD applications. Though the agency publishes the number of EAD applications filed each fiscal year and the processing times for various applications, it does not publish processing times that are reliable indicators of the actual time the agency will take to adjudicate these applications. *See* Citizenship and Immigration Services Ombudsman, Annual Report 2014, 50 (June 27, 2014) ("Stakeholders are unable to accurately determine how long a case might take to be completed based on the methodology USCIS uses to calculate its posted adjudication timelines. These processing times are not an average processing time for all cases in a particular queue. Nor do they represent the time it may take for most cases to be completed."), *available at* http://1.usa.gov/1R9YWTG (last visited May 22, 2015).

Despite these limitations, Plaintiffs have provided compelling evidence that the class of individuals subject to EAD adjudication delays is numerous and that joinder is impracticable. Between November 2014 and January 2015, the American Immigration Lawyers Association (AILA) collected over fifty examples of EAD adjudication delays in cases handled by AILA members throughout the country. *See* Exh. A at 2 (Lawrence Decl. ¶ 9). Various non-profit organizations and immigration lawyers also have reported a significant number of EAD adjudication delays over the past year. [8] USCIS did not provide notice of

[8] *See, e.g.*, Exh. H at 2 (Oskouian Decl. ¶¶ 4-5) (asserting that, of 101 applications filed by the Northwest Immigrant Rights Project between November 2014 and early 2015, 21 were adjudicated after the regulatory deadline, including 7 initial asylum EAD applications and 14 applications subject to the 90-day deadline); Exh. I at 1 (McCarthy Decl. ¶¶ 3-4) (asserting that, of 340 EAD applications filed by the National Immigrant Justice Center (NIJC) during calendar year 2014, approximately 70 clients did not receive an EAD within 90 days of filing or within the 30-day period for initial asylum-based EAD applications); Exh. J at 1 (Cortes

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adjudication delays or issue interim EADs in any of these cases.[9] In light of the declarants' statements regarding the pervasiveness of EAD delays, this Court can reasonably assume that the class is numerous. *See Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003) ("the Court does not need to know the exact size of the putative class, 'so long as general knowledge and common sense indicate that it is large'") (citing *Perez-Funez*, 611 F. Supp. at 995), *aff'd,* 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005); Newberg on Class Actions § 3:13 ("it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members").

Joinder is also inherently impracticable because of the unnamed, unknown future class members who will be subjected to Defendants' unlawful refusal to comply with mandatory regulations governing the timetable for adjudication of employment authorization applications. *Ali*, 213 F.R.D. at 408-09 ("'where the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met,' regardless of class size.") (citations omitted); *see also Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable."); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D.Cal.1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable,

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Decl. ¶¶ 3-4) (asserting that, of approximately 50 EAD applications filed by the Migrant and Immigrant Community Action Project (MICA) within the past year, approximately 20 clients did not receive their EADs within the regulatory time period); Exh. F at 1 (Collopy Decl. ¶¶ 3-4) (asserting that she and her three partners file "approximately 80-90 EAD applications each year" and since the spring of 2014, have "seen an increase in EADs not being issued to our clients within the required time frame"). *See also supra* n. 1, 4.

[9] *See, e.g.*, Exh. H at 3 (Oskouian Decl. ¶ 5); Exh. I at 1 (McCarthy Decl. ¶ 4); Exh. J at 1 (Cortes Decl. ¶ 4); Exh. F at 1 (Collopy Decl. ¶ 4).

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without regard to the number of persons already injured"). Future unnamed, unknown class members will be unable to obtain EADs in a timely manner and will suffer a loss of income and possibly their jobs, and employers will be forced to lay off qualified workers.

2. Other Relevant Factors Also Indicate That Joinder Would Be Impracticable.

In addition to class size and future class members, factors that inform the impracticability of joinder include: "[1] the geographical diversity of class members, [2] the ability of individual claimants to institute separate suits, and [3] whether injunctive or declaratory relief is sought." *McCluskey v. Tr. of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010) (quoting *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)). Application of these factors also establishes the impracticability of joinder in the present case.

The attached declarations from lawyers and nonprofit organizations from across the United States leave no doubt about the geographical diversity of the proposed class members. Immigration practitioners in Washington, California, the District of Columbia, Illinois, Michigan, Minnesota, Missouri, New York, and Texas affirm that USCIS regularly takes longer than the regulatory time period to adjudicate EAD applications. *See* Exh. B, C, D, E, F, G, H, I, and J. The far-reaching nature of this problem would make joinder impracticable and militates in favor of class certification.

Moreover, the proposed class members would have great difficulty pursuing their claims individually due to a variety of factors, including lack of representation, lack of awareness that a cause of action exists, and/or fear of government retaliation. Numerous courts have found that joinder would be impracticable under comparable circumstances. *See*,

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e.g., United States ex rel. Morgan v. Sielaff, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals . . . who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf."); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that "poor, and elderly or disabled" plaintiffs dispersed over a wide geographic area "could not without great hardship bring multiple lawsuits"). In this case, the likelihood that any significant number of eligible individual class members would sue USCIS for failure to timely adjudicate an EAD application is minimal. During the twenty-eight years since 8 C.F.R. § 274a.13(d) was promulgated, plaintiffs are aware of only a handful of cases that have challenged Defendants' failure to timely adjudicate EAD claims or issue interim employment authorization.[10] In contrast to such piecemeal efforts, a unified proceeding would permit resolution of the disputed issues in a systemic manner and result in a uniform practice, should Plaintiffs prevail.

Equity favors class certification where class members lack the financial means to afford legal assistance. *Lynch v. Rank*, 604 F. Supp. 30, 38-39 (N.D. Cal. 1984) (certifying class of "poor and disabled" plaintiffs represented by public interest law groups), *aff'd* 747

[10] For example, in *Ramos v. Thornburgh*, 732 F. Supp. 696 (E.D. Tex. 1989), five plaintiffs alleged that "their requests for temporary employment authorization ha[d] been pending for more than sixty days without adjudication, and that they ha[d] not received interim employment authorization." 732 F. Supp. at 698. *See also Najera-Borja v. McElroy*, No. 89-2320, 1995 WL 151775 *1 (E.D.N.Y. Mar. 29, 1995) (court previously certified class of asylum applicants, including those whose employment authorization applications were not adjudicated within 90 days due to failure to appear at an interview for which they did not have notice, and ordered agency to provide interim employment authorization); *Doe v. Meese*, 690 F. Supp. 1572 (S.D. Tex. 1988) (granting preliminary injunction to named plaintiffs regarding agency's failure to issue interim employment authorization); *Elmalky v. Upchurch*, No. 06-2359, 2007 U.S. Dist. LEXIS 22353 (N.D. Tex. Mar. 28, 2007) (denying agency's motion to dismiss delayed EAD adjudication claim).

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F.2d 528 (9th Cir. 1984). Here, class members' limited means stems directly from their lack of employment authorization, which limits their ability to support themselves and their families.[11] This predicament makes it virtually impossible for class members to individually retain counsel to challenge the Defendants' illegal actions.

Judicial economy also favors certification in this case. The requirements of the Defendants' regulations are clear, as is Defendants' pattern and practice of violating the regulations. Requiring applicants for employment authorization to file separate lawsuits every time the agency fails to timely adjudicate EAD applications would be a waste of judicial resources.

In addition, where, as here, injunctive or declaratory relief is sought, the requirements of Rule 23 are more flexible. *See Goodnight v. Shalala*, 837 F. Supp. 1564, 1582 (D. Utah 1993). In such cases, smaller classes are less objectionable and the plaintiffs' burden to identify class members is substantially reduced. *See Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984) (citing *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975)); *Doe v. Charleston Area Medical Ctr*., 529 F.2d 638, 645 (4th Cir. 1975) ("Where 'the only relief sought for the class is injunctive and declaratory in nature . . .,' even 'speculative and conclusory representations' as to the size of the class suffice as to the requirement of many.") (citation omitted). Plaintiffs seek only declaratory and injunctive relief. Because Plaintiffs satisfy the stricter numerosity requirement of Rule 23(a)(1), *a fortiori*, they meet the requirements of the rule when liberally construed.

[11] *See, e.g.*, Exh. H at 3 (Oskouian Decl. ¶ 7); Exh. E at 3-4 (McKenzie Decl. ¶ 8.

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Moreover, where the class is inherently transitory and "includes unnamed, unknown future members," joinder also is impracticable. *Ali v. Ashcroft*, 213 F.R.D. 390, 408-09 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (citations omitted); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) ("the fact that the class includes unknown, unnamed future members also weighs in favor of certification"); *Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) ("[T]he fluid nature of a plaintiff class—as in the prison-litigation context—counsels in favor of certification of all present and future members.").

Plaintiffs' individual EAD delay claims likely will be resolved during the pendency of this matter, when Defendants eventually adjudicate their underlying employment authorization applications, though weeks or months after the regulations require them to have done so. In addition, every day, new members will be added to the proposed class because Defendants are not adjudicating their EAD applications in accordance with the regulatory timetable, and Defendants refuse to issue interim employment authorization.[12] Due to the fluid nature of the class and the numerous unnamed future class members, joinder is impracticable.

B. The Class Presents Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, "[a]ll questions of fact and law need not be common." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Hanlon v.*

[12] *See* Exh. A at 2 (Lawrence Dec. ¶ 7) (noting that "spikes in reports of EAD delays eventually subside," but that AILA's "experience has been that an increase in reports of EAD adjudication delays ultimately recurs"); Exh. H at 3 (Oskouian Decl. ¶ 6) ("Those subject to delayed EAD adjudications are a frequently changing group. Just as some clients with delayed EADs receive a decision, other clients' pending applications pass the regulatory deadline.").

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Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)). To the contrary, one shared legal issue can be sufficient. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Rodriguez*, 591 F.3d at 1122 ("[T]he commonality requirement [] asks us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). In determining that a common question of law exists, the putative class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Thus, "[w]hat matters to class certification is not the raising of common 'questions' . . . but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

All the Individual Plaintiffs and proposed class members have been or will be forced to suffer the consequences of USCIS's failure to timely adjudicate their EAD applications and the agency's failure to grant interim employment authorization. Their cases raise a common question of fact, namely, whether USCIS has a policy and practice of failing to issue interim employment authorization to individuals who are entitled to it based on the agency's failure to comply with the regulatory timetable for EAD adjudications. They also raise a common question of law — namely, whether the Defendants' policy and practice of failing to issue

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interim employment authorization to those who are entitled to it violates the relevant regulations. Should Plaintiffs prevail, all who fall within the class and subclasses will benefit. Thus, a common answer regarding the legality of each challenged policy and practice "will drive the resolution of the litigation." *Ellis*, 657 F.3d at 981 (citing *Dukes*, 131 S. Ct. at 2551); *see also Unthaksinkun v. Porter*, 2011 U.S. Dist. LEXIS 111099, *at* *38 (W.D. Wash. Sept. 28, 2011) (finding that, because all class members alleged the same agency conduct violated their constitutional rights, the court's ruling as to the legality of the conduct would apply to all).

Although factual variations in individual cases may exist, these are insufficient to defeat commonality. *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."); *Walters*, 145 F.3d at 1046 ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification"). This case turns on the existence of a policy and practice, which applies equally to all class members regardless of any factual differences. Courts have affirmed that such factual questions are well-suited to resolution on a classwide basis. *See, e.g., Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014) (reversing denial of class certification motion because movants had "identified a single, well-enunciated, uniform policy" that was allegedly responsible for the harms suffered by the class). Moreover, "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy*, 276 F.R.D. *at* 654; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "[p]lainly" created common questions of law and fact). As such, resolution

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on a classwide basis also facilitates practical and efficient case management, which is one of the key purposes of the commonality requirement. *Rodriguez,* 591 F.3d at 1122.

C. The Claims of the Individual Plaintiffs are Typical of the Claims of the Proposed Class Members.

Rule 23(a)(3) specifies that the claims of the representatives must be "typical of the claims . . . of the class." Meeting this requirement usually follows from the presence of common questions of law. *Falcon*, 457 U.S. *at* 157 n.13. To establish typicality, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 156 (citation omitted). As with commonality, factual differences among class members do not defeat typicality provided there are legal questions common to all class members. *LaDuke,* 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Smith v. University of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims.") (citation omitted).

The claims of the Individual Plaintiffs, all of whom filed EAD applications that have remained pending beyond the strict regulatory deadlines for adjudication, are typical of the claims of the proposed class. Each Individual Plaintiff has suffered concrete harms, including loss of lawful employment opportunities, as a result of the Defendants' actions.[13] Thus Individual Plaintiffs, like all members of the proposed class, seek declaratory and injunctive

[13] Exh. K at 1-2 (Arcos-Perez Decl. ¶¶ 6-7); Exh. L at 3-4 (Hoffmann Decl. ¶¶ 11, 15-16); Exh. M at 2 (Brown Decl. ¶ 8).

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relief from this Court directing the Defendants to adjudicate EAD applications in a timely manner and, where the regulatory time period has elapsed, issue interim employment authorization.

Because the Individual Plaintiffs and proposed class members are united in their interests and injury and their cases raise common factual and legal claims, the element of typicality is met.

D. The Individual Plaintiffs Will Adequately Protect the Interests of the Proposed Class, and Counsel are Qualified to Litigate this Action.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citation omitted).

1. The Individual Plaintiffs Will Protect the Interests of the Class.

The Individual Plaintiffs will fairly and adequately protect the interests of the proposed class because their interests are consistent with those of proposed class members and they seek relief on behalf of the class as a whole. Their mutual goal is to declare Defendants' challenged policies and practices unlawful and to enjoin further violations of the regulations governing the timetable for adjudication of EAD applications.

All the Individual Plaintiffs have filed EAD applications that have remained pending longer than the regulations permit. In the case of the 30-Day Subclass, the EAD applications have remained pending longer than 30 days without being granted or denied by Defendants, as required by the governing regulation. 8 C.F.R. § 208.7(a)(1). Despite this regulatory violation, Individual Plaintiffs have not received interim employment authorization. As to the

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90-Day Subclass, the EAD applications have remained pending longer than 90 days, and the Defendants have failed to comply with the mandate that they provide interim employment authorization with a validity period not to exceed 240 days. 8 C.F.R. § 274a.13(d). The Individual Plaintiffs share a common interest with all class members in the timely adjudication of their pending EAD applications or receipt of interim employment authorization.

Some Individual Plaintiffs' EAD applications will have been adjudicated by the time this motion is decided. This does not impact their ability to fairly and adequately represent the class. *Perez-Funez v. District Director, INS at* 997-8 (C.D. Cal. 1984) (finding that an immigration detainee representative who won immigration relief and thus left the class would be an adequate class representative). The short-term nature of the class members' injury makes their claims "inherently transitory" and protected under the "relation back doctrine." Under this doctrine, the certification of the class will "relate back" to the original complaint despite the fact that a named plaintiff's individual claim has become moot. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (the "relation back doctrine" is appropriate where "claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires"); *Pitts v. Terrible Herbst*, 653 F.3d 1081, 1089 (9th Cir. 2011) ("[T]he termination of a class representative's claim does not moot the class claims.").

The Supreme Court has repeatedly held that class relief is appropriate for transitory claims. For example, in *Gerstein v. Pugh*, the Court considered the viability of a class action on behalf of pretrial detainees challenging the constitutionality of their detention. By the time the case reached the Supreme Court, each of the class representatives had been convicted, and

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thus were no longer members of the class they purported to represent. This was no obstacle to class relief in the case because

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975).

Under the "capable of repetition but evading review" doctrine, the named plaintiffs may proceed even though their interest in the suit has expired, as long as the duration of the challenged conduct is too short to be resolved through litigation and the case challenges an ongoing agency policy or practice. *See, e.g.*, *Los Angeles Unified School District v. Garcia*, 669 F.3d 956, 958 n.1 (9th Cir. 2012) (challenge to school district's ongoing failure to provide special education services to children held in county jail was not moot even though the named plaintiff had aged out and been transferred to state prison); *United States v. Howard*, 480 F.3d 1005, 1009-1010 (9th Cir. 2007) (case was not moot where policy still required all pretrial detainees to be held in leg shackles at their first court appearance, even though it was purely speculative whether plaintiffs would ever be subjected to it again); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1118 (9th Cir. 2003) (plaintiffs' claims not moot when hospital policy resulted in continually recurring delays in the transfer of mentally incapacitated criminal defendants to the hospital). Here, the Individual Plaintiffs' EAD applications may be adjudicated before the Court rules on the class certification motion, but the problem — which reflects a longstanding agency policy – will inevitably recur. Defendants' policy and practice violates the regulations dictating that EAD applications must be adjudicated within a specific time period. "[Y]et, because of the passage of time, no single challenger will remain subject

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to its restrictions for the period necessary to see such a lawsuit to its conclusion." *Sosna v. Iowa*, 419 U.S. 393, 558 (1975). As a result, Defendants' unlawful conduct in this case will never be redressed absent classwide relief.

2. Class Counsel Are Qualified To Represent the Class.

The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984), *amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979), *aff'd sub nom. Adams v. Harris*, 643 F.2d 995 (4th Cir. 1981).

Plaintiffs are represented by the American Immigration Council, Northwest Immigrant Rights Project, and three private law firms that do extensive immigration litigation — Gibbs Houston Pauw, Scott D. Pollock & Associates, P.C., and Van Der Hout, Brigagliano & Nightingale, LLP. Counsel are experienced in protecting the interests of noncitizens and, collectively, have extensive experience in handling complex immigration litigation and class action claims. *See* Exh. N, O, P, Q, and R (Declarations of Counsel). Counsel have served as counsel of record in numerous immigration-related cases in which class certification and class relief were granted, including several in this district. *See id.* In sum, Plaintiffs' counsel will vigorously represent both the named and absent class members.

V. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet at least one of the requirements of Rule 23(b) for a class action to be certified. This action meets the requirements of Rule 23(b)(2), namely "the party opposing the class has acted or

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refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Individual Plaintiffs challenge—and seek declaratory and injunctive relief from—systemic policies and practices that consistently prevent the timely adjudication of EAD applications that they and other proposed class members have submitted. Accordingly, classwide relief is appropriate under Rule 23(b)(2). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (finding certification under Rule 23(b)(2) appropriate "only where the primary relief sought is declaratory or injunctive"), *amended by* 273 F.3d 1180 (9th Cir. 2001).

VI. CONCLUSION

Plaintiffs respectfully request that the Court grant this motion and enter the attached order certifying the proposed class.

Respectfully submitted this 22nd day of May, 2015.

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