District Judge James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

WILMAN GONZALEZ ROSARIO, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 2:15-cv-00813

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case challenges the failure of Defendant U.S. Citizenship and Immigration Services (USCIS) to timely adjudicate applications for employment authorization (EAD) filed by Plaintiffs and class members, all of whom are applying for initial EADs in conjunction with their application for asylum. By regulation, USCIS must adjudicate these applications within 30 days of receipt. *See* 8 C.F.R. § 208.7(a)(1). In their cross motion for summary judgment, Dkt. 119, Defendants concede, as they must, that they consistently violate this regulatory mandate.

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Because Defendants cannot defend their actions on the merits, Defendants instead only ask this Court not to issue the injunctive relief that Plaintiffs seek; namely, to compel compliance with the regulation. Defendants do not dispute that Plaintiffs and class members warrant declaratory relief. Rather, they claim this Court is not required to issue mandamus relief because Plaintiffs have not demonstrated compelling circumstances. This argument ignores the harms Plaintiffs and class members suffer. Every day they are without an EAD, Plaintiffs and class members are prevented from providing for themselves and their families, many of whom rely on that support for basic necessities such as food and shelter. Moreover, injunctive relief is required to effectuate compliance with the regulation's mandatory language and the purpose behind it.

Defendants further allege that, even if injunctive relief is required, which it is, Defendants' actions to comply with the deadline are reasonable. This assertion asks the Court to rely on the most minimal changes made by USCIS in the face of a steady increase of applications notwithstanding the proven ability of other, similarly-situated agencies to respond in the face of similar application increases by allocating appropriate human and technological resources to reduce processing backlogs.

II. LEGAL STANDARD FOR REVIEW

Summary judgment is warranted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED R. CIV. P. 56(a). The moving party bears the burden of demonstrating that he or she is entitled to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the moving party has met its burden, the nonmoving party must make a "sufficient showing on an essential element

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of her case with respect to which she has the burden of proof" to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Under the Administrative Procedure Act (APA), courts can "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in the original). Failure to comply with an agency regulation (rule) is a type of discrete agency action covered by § 706(1) claims. *Id.* at 62 (citing 5 U.S.C. § 551(13)). Properly promulgated agency regulations, such as those at issue in this case, have the force and effect of law. *Chrysler Corp.*, 441 U.S. at 295-96.

Alternatively, where the relief sought through the APA is identical to the relief sought through a mandamus action under 28 U.S.C. § 1361, courts can order mandamus relief. "[T]he Supreme Court has construed a claim seeking mandamus …, 'in essence,' as one for relief under § 706 of the APA." *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986)). Where "the relief sought is essentially the same," a court can elect to analyze the claim under either. *Id.*; *see also Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *5 (N.D. Cal. Nov. 21, 2014) ("Where, as here, the relief sought is identical under the APA and the mandamus statute, proceeding under one as opposed to the other is not significant.").

III. FACTUAL BACKGROUND

Defendants concede, as they must, that they consistently violate the mandatory 30-day regulatory timeframe for processing initial asylum EADs. Dkt. 119 at 7. The chart below demonstrates that Defendant USCIS has failed to adjudicate initial asylum EADs within the

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mandatory 30-day period on a consistent basis and has failed to adjudicate them even when the time period is doubled.

Fiscal Year (FY)	Total Initial received in each FY[1]	Total completed within 30 days (including RFEs)[2]	Total # completed within 30 days (excluding RFEs)[3]	Total # completed within 60 days (including RFEs)[4]	Total # completed within 60 days (excluding RFEs)[5]	Total # completed in each FY[6]
2010	Unknown	5,040	5,035	17,602	17,307	24,718
2011	Unknown	7,290	7,285	19,739	19,328	26,813
2012	Unknown	10,160	10,147	26,892	25,893	34,113
2013	41,024	10,373	10,350	27,069	25,959	36,521
2014	62,170	10,892	10,858	37,830	35,930	57,753
2015	106,002	6,987	6,972	56,050	54,284	98,002
2016	169,969	31,543	31,448	87,164	84,329	160,765
2017	261,447	72,344	72,249	191,620	188,813	259,411

When viewed in this historical context, notwithstanding any of Defendants' attempts to comply with the regulatory deadline, the data evidences the agency's large-scale noncompliance with the regulatory deadline since at least FY 2014.

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[1] *See* Dkt. 103-2, U.S. Citizenship and Immigration Services I-765 Application for Employment with a Classification of Asylum Applicant with Pending Asylum Application (C8) Receipts (listing receipts by month, FY 2013 to FY 2017). No data is available for FY 2010 to FY 2012.

[2] Dkt 103-4,1–2 ("[N]umber of completions by Quarter for Initial I-765 with a class preference of C8 grouped by processing days (Received Date to Decision Date)).

[3] *Id.* at 3-4 ("[N]umber of completions by Quarter for Initial I-765 with a class preference of C8 grouped by processing days (Received Date to Decision Date), excluding any case with an Initial or Additional RFE).

[4] *Id.* at 1-2. Total number completed within 60 days is generated by adding together the number of applications completed in the "000-030 Days" and "031-060 Days" columns.

[5] *Id.* at 3-4.

[6] *See* Dkt. 103-4 at 1-2 ("[N]umber of completions by Quarter for Initial I-765 with a class preference of C8 grouped by processing days (Received Date to Decision Date).

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Notably, Defendants' admit that USCIS adjudicated only 28% of initial asylum EAD applications within 30 days in FY 2017, while simultaneously claiming that "after a concerted effort" only 38% of all current applications, taking a snapshot on October 3, 2017, have been pending for more than 30 days. Dkt. 119 at 14. But the latter statistic is misleading. The 38% number is based on a fraction where Defendants are using, as a denominator, all cases that were pending on October 3, 2017. The figure thus necessarily includes applications that were filed days before or hours before the time that snapshot of data was captured on October 3, 2017. As such, Defendants' snapshot bears little probative value; it is impossible to tell whether any of the applications then-pending for less than 30 days were in fact adjudicated within 30 days. Based on Defendants' past conduct, many of these cases pending for less than 30 days as of October 3, 2017, would ultimately have been adjudicated after the 30-day deadline. The key point from Defendants' data is that in 72% of the initial asylum EAD cases, they are *not* timely adjudicating the applications and are therefore violating the regulation, for the last fiscal year for which they have provided data.

IV. ARGUMENT

A. Plaintiffs and Class Members Warrant Declaratory Relief.

In this action, Plaintiffs request that the Court declare that USCIS has violated the mandatory deadline. *See* Dkt. 58 at 38 ¶ (7). Significantly, Defendants do not dispute that such relief is warranted. Indeed, it should be granted, as the agency is expected to comply with the law and the Court's order. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.").

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In some cases, declaratory relief can effectively be an injunction. *See* Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1775, *Class Actions for Injunctive or Declaratory Relief Under Rule 23(b)(2)—In General* (3d ed., April 2018); *see, e.g., Khoury v. Asher*, 3 F. Supp. 3d 877, 892 (W.D. Wash. 2014), *aff'd*, 667 F. App'x 966 (9th Cir. 2016) *cert granted sub. nom. Nielsen v. Preap*, 138 S. Ct. 1279 (2018) (issuing only declaratory relief, rather than injunction, under the assumption that "[t]he court has no reason to expect that the government will not take appropriate action to end its violation of the law.").

In *Friends of the Clearwater v. Dombeck*, for example, the Ninth Circuit held that the U.S. Forest Service's failure to follow governing regulations, which required the agency to evaluate in a timely manner the need for a supplemental environmental impact statement (SEIS) regarding timber sales, violated the National Environmental Policy Act. 222 F.3d 552, 554 (9th Cir. 2000). After suit was filed, and during the pendency of the litigation, the agency completed the SEIS process and concluded that timber sales did not affect the quality of the environment in a way not previously considered. *Id*. at 559-60. As such, the court reasoned that it "would serve no useful purpose to remand this case to the district court for it to order the Forest Service to prepare studies that the Forest Service already has completed and that cannot be successfully challenged." *Id*. at 561. In contrast to the agency's response to the suit in *Friends of Clearwater* and as explained further below, *see* Section IV.B.2, *infra*, USCIS has not come close to timely completing initial EAD adjudications after suit was filed.

Thus, the Court's ruling that the 30-day deadline is mandatory should end the question as to whether and when Defendants must adjudicate initial asylum EAD applications. Accordingly, declaratory relief is warranted.

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B. Plaintiffs and Class Members Also Warrant Injunctive Relief.

1. An injunction is required because Plaintiffs and class members have presented compelling circumstances and have shown that the 30-day deadline was intended to benefit them.

Defendant USCIS concedes that it does not adjudicate all – or even half – of initial asylum EAD applications within 30 days of receipt as required by 8 C.F.R. § 208.7(a)(1). Dkt. 119 at 9. This Court has already concluded that those regulatory deadlines are mandatory. Dkt. 95 at 21, n.10. Instead, Defendants attempt to argue that Plaintiffs and class members have not demonstrated compelling circumstances warranting relief on their mandamus claim and that an injunction is unnecessary to effectuate Congressional intent on their APA claim. Dkt. 119 at 9-12. Defendants' first argument is not supported by the record and Defendants' second argument misapprehends the relevant facts and law.

First, to the extent that Defendants' rely on mandamus case law to suggest that mandamus relief requires "compelling circumstances to issue," Plaintiffs and class members have made such a showing here. *See* Dkt. 119 at 9 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982) and *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam)).[7] The agency's admitted delay in issuing initial asylum EADs has harmed Plaintiffs and class members financially and emotionally. Unable to obtain a job, Plaintiffs A.A. and Machic Yac were each forced to rely on family and friends for financial support. *See* Dkt. 59-13 at ¶ 6; Dkt. 59-3 at ¶ 6. Without evidence of lawful status, Plaintiff Machic Yac was unable

[7] In *Allied Chem. Corp.*, the Supreme Court, in a per curiam opinion, reversed the Tenth Circuit's issuance of a writ of mandamus directing the trial court to restore the verdict as to liability but permitting a new trial on damages under the All Writs Act, 28 U.S.C. § 2106. 449 U.S. at 33-34. Thus, to the extent that the Court referred to mandamus as an extraordinary remedy, it only did so in the context of issuance of the writ to confine an inferior federal court. *Id*. at 35. Contrary to Defendants' suggestion otherwise, mandamus relief in the context of claims against government agencies are common, not extraordinary.

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to obtain a driver's license, *see* Dkt. 59-3 at ¶ 6, and Plaintiff W.H. was unable to renew his Missouri driver's license. *See.* Dkt. 5-13 at ¶ 8. The harms suffered by the named Plaintiffs from the failure to timely receive initial asylum EAD are indicative of the harms suffered by members of the class.

Second, to the extent that intent bears on injunctive relief, it favors Plaintiffs' and class members' position. In *Biodiversity Legal Found. v. Badgley*, the Ninth Circuit held that courts considering violations of mandatory statutory deadlines should look to whether "an injunction is necessary to effectuate the congressional purpose behind the statute." 309 F.3d 1166, 1177 (9th Cir. 2002). In that case, the court found that the Department of Interior and the United States Fish and Wildlife Service's failure to make certain determinations on a petition to classify a species as threatened or endangered within twelve months of receipt of the petition violated the plain language of a provision of the Endangered Species Act. *Id.* at 1177-78. This failure to act timely, the court held, compelled the district court to grant injunctive relief. *Id.* at 1178. In so holding, the court rejected the district court's consideration of the Service's other stated priorities. *Id*. Similarly, there can be no dispute about the purpose of the initial asylum EAD regulation, as the language is clear: the agency must adjudicate the application within 30 days.[8]

[8] The fact that the 30-day deadline is required by regulation, not statute, does not excuse Defendants from compliance. When individual rights are affected, "it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Therefore, agencies are bound to follow regulations they promulgate. *See Sameena Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir.1998) (citing *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954)). When agency regulations are "intended to protect the interests of a party before the agency ... [they] 'must be scrupulously observed.'" *Sameena*, 147 F.3d at 1153. *See also Galvez v. Howerton*, 503 F. Supp. 35, 39 (C.D. Cal. 1980) (finding that INS is obligated to follow its own regulatory time frames when adjudicating applications). A judicial decree may issue compelling the agency to take discrete actions including actions dictated by "agency regulations that have the force of law . . . ." *Norton*, 542 U.S. at 65.

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In addition to the clear language of the regulation, the legislative history and agency statements in the Federal Register also establish that the purpose of the 30-day deadline is to ensure that the agency promptly adjudicates work permit applications in cases where it has failed to adjudicate the asylum application within the congressionally-mandated period of 180 days. 8 U.S.C. § 1158(d)(5)(A)(iii) ("final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed"). The 1995 regulatory changes implemented, for the first time, a waiting period before initial asylum applicants could receive a work authorization document. However, Defendants' characterization of the 1995 changes as somehow limiting the benefit of work authorization to those with meritorious asylum claims, regardless of how long it takes the agency to make such a determination, does not withstand scrutiny. Dkt. 119 at 6, n.2. The purpose of this change was to "reduce the incidence of asylum applications filed primarily to obtain employment authorization." Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14779, 14780 (Mar. 30, 1994). But contrary to Defendants' characterization of these changes, in the 1995 changes, the agency made it clear that it selected the 150-day time frame for filing a work authorization request because "it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated" within that period. *Id.* Indeed, the agency confirmed that "[t]he INS will adjudicate these applications for work authorization within 30 days of receipt, *regardless of the merits of the underlying asylum claim*." *Id.* (emphasis added).

It was the 1997 regulatory change which created, for the first time, a new work authorization category for those whose asylum applications had been recommended for approval. *See* 8 C.F.R. § 274a.12(c)(8)(ii). *See also* Inspection and Expedited Removal of

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Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10340 (Mar. 6, 1997) (adding this category). As noted by Defendants, this was added to account for cases where the asylum case was approvable but the agency could not issue final approval until background checks had cleared. *Id.* at 10317-18.

Thus, the 1995 regulatory change was intended to reduce the filing of wholly frivolous asylum applications by removing the ability of asylum applicants to receive immediate work authorization. But Defendants' reading of the regulatory change as intended to "ensure[] work authorization to those granted asylum as soon as possible, not those who had applied for asylum" (Dkt. 119 at 6, n.2) is not supported by the cited Federal Register notices. To the contrary, the agency indicated that its aim was to complete the entire asylum adjudication process in less time, in the hopes that "few applicants would ever reach the 150-day point." 59 Fed. Reg. 14779, 14780 (Mar. 30, 1994). This is consistent with the statutory directive from Congress that the "initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed" and that the entire adjudication should take place "within 180 days . . . ." 8 U.S.C. § 1158(d)(5)(A)(ii)-(iii).

The Court must therefore consider the regulatory deadline for adjudicating work permit requests in conjunction with the underlying statutory mandate that the agency adjudicate asylum applications within 180 days. The purpose behind the regulation at issue in this case is to ensure that the agency promptly adjudicates work permit applications in cases where it has failed to adjudicate the asylum application within this Congressionally-mandated period.

For these reasons, declaratory and injunctive relief is required. Defendants' arguments must fail, and Plaintiffs request the Court issue a declaratory judgment and an injunction ordering that Defendants must comply with the mandatory deadline.

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2. Injunctive relief is warranted because Defendants have failed to take reasonable actions to comply with the deadline.

Not only is injunctive relief required here, as explained in Section IV.A, it is further warranted under the Ninth Circuit's test governing unreasonable delay claims in *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). Notwithstanding the binding nature of the standard set forth in *Badgley*, Defendants urge the Court to analyze Plaintiffs' claims for injunctive relief under the test set forth in *Telecomm. Res. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). *See* Dkt. 119 at 12-13. Significantly, however, this Court already has rejected the applicability of the *TRAC* analysis to this case. *See* Dkt. 95 at 20-22, 20 n.9; *see also Badgley*, 309 F.3d at 1177 n.11 (court does not apply TRAC factors when Congress has specifically provided a deadline for performance).

Moreover, Defendants claim that the court should not issue an injunction because they may, at some future time, seek to eliminate the 30-day deadline, but this is irrelevant to this Court's analysis and speculative at best. *See Flores v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986) ("Appellee's arguments fall by the wayside in light of the black-letter principle that properly enacted regulations have the force of law and are binding on the government until properly repealed.") (internal citation omitted); *Perez Santana v. Holder*, 731 F.3d 50, 58 n.6 (1st Cir. 2013) (rejecting government's argument that plans to initiate a rulemaking proceeding regarding the regulation at issue should affect its decision, stating "[t]he status of these proceedings is unclear and their outcome is uncertain."). The speculative regulatory change has not been published in the Federal Register, does not have the force of law, and may never be promulgated. Thus, the Court should disregard this possibility when deciding the pending motions.

Defendants' entire claim that this Court should not issue injunctive relief hinges on its attempt to convince this Court of only one of the inapplicable *TRAC* factors; namely, that

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Defendants "do not purposefully fail" to process initial EAD applications within the requisite period. Dkt. 119 at 13. These efforts, Defendants contend, consist of extending the validity of initial asylum EADs and posting a two-page document on its website. Defendants' efforts are grossly inadequate and, therefore, unreasonable.

First, while it is generally helpful that Defendant USCIS has elected to extend the validity of initial asylum EADs after it finally adjudicates the application, that change does nothing to address the actual issue in this case, that is, Defendant USCIS' failure to timely adjudicate the initial EAD application in the first instance. Second, Defendants so-called "guidance and checklists for applicants" intended "to have more applications properly prepared for adjudication when received" is actually a single document that puts the instructions for Form I-765 into checklist format for class members. *See* USCIS, *Form M-1162, Optional Checklist for Form I-765 (c)(8) Filings* (July 17, 2017), https://www.uscis.gov/i-765. Had the initial I-765 instructions been clear and sufficiently understandable for readers in the first place, there would be no need for this new two-page document. As such, Defendant USCIS' most minimal of efforts cannot supplant the appropriateness of injunctive relief.

Third, Defendants offer no explanation for their failure to allocate the seemingly necessary human and technological resources to comply with the regulatory mandate to timely process initial EAD applications. The Court should reject Defendants' attempt to defend the agency's failure to timely adjudicate initial EAD applications due to "resource and logistical constraints in the face of an astronomical increase in both asylum [and subsequent EAD] applications." Dkt. 119 at 13. Defendant USCIS for years has failed to comply with its obligations and has not adequately devoted resources to resolution.

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In contrast, when sued, other agencies, including other component agencies with DHS, have responded to reduce processing backlogs. For example, USCIS was able to resolve in a little over one year a nationwide backlog of delayed naturalization cases when faced with increasing litigation. About a decade ago, USCIS was a defendant in numerous lawsuits challenging lengthy delays in adjudicating naturalization applications pending completion of a "name check." *See Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1202 (W.D. Wash. 2008) (certifying class), *amended in part*, No. C07-1739MJP, 2008 WL 2275558 (W.D. Wash. June 3, 2008) ("In the last year, approximately 31 claims against USCIS for delayed naturalization applications due to a pending name check heard before this Judge alone."). Nine days before oral argument in a putative class action in this District, USCIS and the FBI announced a plan to eliminate the name check backlog within a year, including over 29,000 cases pending more than two years. *See* Press Release, USCIS, USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks (Apr. 2, 2008), https://www.uscis.gov/sites/default/files/files/article/NameCheck_2Apr08.pdf; *see Roshandel v. Chertoff*, No. 07-1739-MJP, Dkt. Nos. 22-24. Fourteen months later, USCIS announced the name check backlog had been eliminated. *See* Press Release, USCIS, USCIS, FBI Eliminate National Name Check Backlog (June 22, 2009), https://www.uscis.gov/sites/default/files/files/article/NNCP_backlog_elim_22jun09.pdf.

The class action lawsuit of *Alfaro Garcia v. Johnson* is yet another an example of how USCIS can allocate resources to comply with a regulatory deadline. No. 3:14-cv-01775 (N.D. Cal., filed Apr. 17, 2014). In that case, plaintiffs filed a nationwide class action lawsuit on behalf of noncitizens with certain final administrative orders who claimed a fear of return and USCIS had not made determinations on their claims within 10 days, as mandated by 8 C.F.R. §

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208.31(b). After the district court certified the class, the parties entered into a Settlement Agreement that ensured that USCIS will process "reasonable fear" determinations more quickly, provide greater transparency into the processing of cases, and alter its policies and procedures to accomplish these goals. *Alfaro Garcia. v. Johnson.*, No 4:14-CV-01775-YGR (N.D. Cal., Aug. 20, 2015), No. 104-2 at A (notice of proposed settlement agreement), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2014/04/Notice-of-Proposed-Settlement.pdf ("*Garcia* Settlement"); *Garcia v. Johnson*, No. 4:14-CV-01775-YGR, 2015 WL 13387594 (N.D. Cal. Oct. 27, 2015) (order approving settlement agreement). The agreement further provided that the district court would retain jurisdiction for enforcement purposes for five years, although the period can be shortened to three years if certain benchmarks were achieved. *Garcia* Settlement at A (4).

Similarly, U.S. Customs and Border Patrol was a defendant in a lawsuit alleging that the agency engaged in a pattern and practice of failing to timely respond to requests under the Freedom of Information Act (FOIA). *See Brown v. CBP*, No. 3:15-cv-01181 (N.D. Cal., filed Mar. 12, 2015). In response to that lawsuit, CBP responded by successfully reducing its FOIA backlog from 34,307 in Fiscal Year (FY) 2015 to 3,186 as of June 24, 2016. *See Brown v. CBP*, No. 3:15-cv-01181-JD (N.D. Cal. 2016) (settlement agreement), at 2-3, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/brown_v_cbp_settlement_0.pdf ("*Brown* Settlement"). In the settlement agreement resolving that case, CBP cited its receipt of increased numbers of FOIA requests in FY 2014, FY 2015, and FY 2016, *id.* at 5, just as they now cite to the increased numbers of initial EAD applications. Dkt. 119 at 13. But, more importantly, the agency both reduced its backlog after suit and

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"implemented processes and devoted staff to ensure timely compliance with this [high] level of FOIA requests." *Brown* Settlement at 6.

The Supreme Court just last week rejected the invocation of "practical concerns" by an agency to avoid compliance with clear statutory language. *See Pereira v. Sessions*, No. 17-459, slip op. at 12 (U.S. June 21, 2018). There, the government argued that the "administrative realities of removal proceedings" made it difficult for the Department of Homeland Security and the immigration courts to coordinate so that non-citizens were served charging documents which stated the date, time, and place of removal proceedings, as required by statute. *Id.* The Court rejected the agency's plea of administrative difficulty, finding it "hard to imagine" that the government could not devise a system to set hearing dates in advance. *Id.* Moreover, the statutory requirement was clear. *Id.* at *8, 11. "At the end of the day," *Pereira* decided, "given the clarity of the plain language, we apply the statute as it is written." *Id*. at *13 (citations and quotations omitted).

In sum, other component DHS agencies have implemented new processes for handling increased processing demands after being sued for delayed processing. Accordingly, this Court should not credit USCIS' protestation that it is ill-equipped to handle its workload. Dkt. 119 at 15. Defendant USCIS is fully capable of allocating staff resources – as it did in response to the aforementioned cases – to initial asylum EAD processing. Asylum seekers who need EADs to financially provide for themselves and their families should not suffer because the USCIS has not acted to devote additional resources to meet demand.

IV. CONCLUSION

This Court should deny Defendants' motion for summary judgment, and, instead, should enter summary judgment for Plaintiffs, under FED. R. CIV. P. 56. Section 208.7(a) of

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8 C.F.R. requires adjudication of initial EAD applications within 30 days of receipt. Defendant USCIS' systemic and flagrant violation of this mandatory deadline warrants that the Court declare Defendants actions unlawful and order them to comply with the law.

Respectfully submitted this 2nd day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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