

The Honorable James L. Roberts

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS
PROJECT, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

RESPONSE TO PLAINTIFFS' THIRD
MOTION FOR CIVIL CONTEMPT AND TO
ENFORCE PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR:
February 10, 2023

INTRODUCTION

1
2 In their Third Motion for Civil Contempt and to Enforce Permanent Injunction
3 (“Motion”), Plaintiffs seek to hold U.S. Citizenship and Immigration Services (hereinafter,
4 “USCIS” or “the Government”) in contempt for violating this Court’s July 26, 2018
5 injunction requiring that USCIS adjudicate initial applications for asylum-related employment
6 authorization documents (“EADs”) within 30-days, as set out by 8 C.F.R. § 208.7(a)(1). But
7 Plaintiffs fail to identify what reasonable steps they contend USCIS must take beyond the
8 steps that USCIS has already taken and has committed to take moving forward. *See* ECF No.
9 216 (Declaration of Connie Nolan, dated February 6, 2023) at ¶ 15 (indicating that USCIS has
10 already added 14 additional adjudicators and will immediately reassign 60 additional
11 adjudicators to work on these applications); *see id.* at ¶¶ 13-14, 17-19. Under these
12 circumstances, it would not be appropriate to hold USCIS in contempt of court. *See* ECF No.
13 207 at 2-3 (declining to hold the agency in contempt because the Court “is satisfied that
14 Defendants have taken ‘all reasonable steps’ within their power to increase the resources
15 available to adjudicate initial EAD applications, to reduce the backlog of pending
16 applications, and to return to substantial compliance with the court’s injunction”).

17 Moreover, there is no basis for granting Plaintiffs the specific relief sought in their
18 Motion. *First*, Plaintiffs seek an order requiring USCIS to establish and maintain a 95%
19 compliance rate. ECF No. 212 at 12. But this Court has already considered and rejected this
20 request on three separate occasions, ECF Nos. 145, 184, and 207 and it does not make sense to
21 come to a different conclusion now. *Second*, Plaintiffs request an order requiring USCIS to clear
22 any backlog by February 28, 2023. ECF No. 212 at 12. But they fail to identify any basis for this
23 request or any path for USCIS to accomplish this objective. *Third*, Plaintiffs request that this
24 Court order USCIS to provide it with monthly compliance reports. ECF No. 212 at 12. This
25 relief is unnecessary because USCIS had already been providing Plaintiffs and this Court with

1 such reports and, furthermore, earlier last month provided a sworn declaration addressing efforts
2 to come into compliance and the challenges involved with such efforts. *See* ECF No. 221.
3 *Fourth*, Plaintiffs request that this Court order USCIS to post processing times on its website
4 detailing how long it takes to process EAD applications. Because this request is well outside the
5 scope of this Court’s July 26, 2018 order, this litigation generally, this Court should deny that
6 request. For these additional reasons, this Court should decline to award the relief requested by
7 Plaintiffs.

8 **BACKGROUND**

9 On July 26, 2018, this Court entered summary judgment against the Government and
10 enjoined the Defendants “from further failing to adhere to the 30-day deadline for adjudicating
11 employment authorization document applications, as set out by 8 C.F.R. § 208.7(a)(1).” ECF No.
12 128 at 1-2. The parties negotiated the Implementation Plan, which this Court subsequently
13 adopted. *See* ECF Nos. 137; 134-1. This Court ordered additional briefing on whether it “should
14 specify specific rates of compliance for employment authorization document (EAD) adjudication
15 as part of an implementation order” ECF No. 137 at 1. On March 20, 2019, this Court
16 declined to dictate a specific rate of compliance, explaining that doing so would constitute a
17 “modification to the court’s injunction.” ECF No. 145 at 5 (citing *Rufo v. Inmates of Suffolk*
18 *Cnty. Jail*, 502 U.S. 367, 383 (1992)).

19 As Plaintiffs recognize, through August 2020, USCIS substantially complied with this
20 Court’s order. ECF No. 196 at 10. On June 22, 2020, USCIS published a new rule, amending 8
21 C.F.R. § 208.7(a)(1) by eliminating the 30-day processing deadlines, effective August 21, 2020.
22 *See* ECF No. 164 at 1 (citing “Removal of 30-Day Processing Provision for Asylum Applicant-
23 Related Form I-765 Employment Authorization Applications,” 85 Fed. Reg. 37,502-37,546
24 (June 22, 2020) (“Timeline Repeal Rule”). After discussions between counsel, the parties
25 reached an agreement regarding the impact of the Timeline Repeal Rule. ECF No. 164.

1 Specifically, the parties agreed that this Court’s injunction (under the then-existing version of 8
2 C.F.R. § 208.7(a)(1)) continued to apply to those applicants who filed prior to the August 21,
3 2020 effective date, but that there would “not be any new class members after that date” if the
4 Timeline Repeal Rule took effect on August 21, 2020. ECF No. 164 (citing ECF No. 162 at 5);
5 ECF No. 170-2 ¶ 11.

6 Although the Timeline Repeal Rule initially took effect on August 21, 2020, ECF No.
7 171 at 3, it was almost immediately challenged in a separate lawsuit in U.S. district court in
8 Maryland styled as *Casa de Maryland, et al. v. Wolf, et al.*, Case No. 8:20-cv-02118-PX (D. Md.
9 (the “*CASA Litigation*”). See ECF No. 124 3-4. In the *CASA Litigation*, two public interest
10 organizations, Casa de Maryland, Inc. (“CASA”) and Asylum Seekers Advocacy Project
11 (“ASAP”) challenged both the Timeline Repeal Rule and an additional rule unrelated to the
12 current litigation entitled “Asylum Application, Interview, and Employment Authorization for
13 Applicants,” 85 Fed. Reg. 38,532-628 (June 26, 2020) (“Broader EAD Rules”). On September
14 11, 2020, the district court in Maryland entered a preliminary injunction enjoining both rules but
15 limited the scope of the preliminary injunction to members of CASA and ASAP. See *Casa de*
16 *Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020). The parties to the *CASA Litigation*
17 disagreed about how the Maryland September 2020 PI Order should be implemented, including
18 specifically, what steps USCIS was required to take to identify members of CASA and ASAP
19 given that these two organizations could not provide a list of their members. This disagreement
20 as to how that order should be implemented resulted in a backlog of initial asylum EAD
21 applications. ECF No. 170-2 ¶ 6.

22 On March 25, 2021, Plaintiffs filed their first motion for contempt seeking, *inter alia*, an
23 order requiring USCIS to clear its backlog by May 24, 2021 and to establish and maintain a 95%
24 compliance rate. ECF No. 171 at 11-12. After oral argument, on May 28, 2021, this Court denied
25

1 Plaintiffs' motion. In the following month, June 2021, USCIS returned to substantial compliance
2 with this Court's July 2018 injunction. *See* ECF No. 197-1.

3 Earlier, on December 23, 2020, a second group of plaintiffs filed a lawsuit challenging,
4 *inter alia*, the Timeline Repeal Rule. *AsylumWorks, et al. v. Mayorkas, et al.*, No. 20-cv-3815
5 (D.D.C.) (the "*AsylumWorks Litigation*"). That lawsuit was successful and, on February 7, 2022
6 the district court vacated the Timeline Rule on February 7, 2022. *See* ECF No. 190-1 (also
7 available at *AsylumWorks v. Mayorkas*, No. 1:20-cv-03815-BAH, 2022 WL 355213 (D.D.C. Feb. 7,
8 2022).

9 On February 17, 2022, per this Court's May 28, 2021 order, the parties filed a Joint
10 Status Report providing this Court with a copy of the *AsylumWorks* Order and Memorandum
11 Opinion. *See* ECF No.190. The *AsylumWorks* Order greatly expanded the size of the class in this
12 litigation. *See* ECF No. 203 at ¶ 28; *see also*, ECF No. 190. Counsel for the parties conferred on
13 how to proceed and, on March 21, 2022, USCIS proposed making sweeping changes to the
14 parties' Implementation Plan. ECF Nos. 197-5; 197-6. Although this proposal was rejected by
15 Plaintiffs' counsel, ECF Nos. 197-7, the parties reached an agreement on a more limited change
16 to the Implementation Plan that was adopted by this Court on April 29, 2022. *See* ECF No. 193;
17 *see also*, ECF No. 197-10. In subsequent months, the parties continued to confer about this
18 matter and USCIS has continued to provide monthly updates. USCIS decided to focus its
19 resources on eliminating the backlog of older applications, *see* ECF No. 197-14, even though this
20 focus resulted in a decline in the monthly compliance rates. *See* ECF No. 203 at ¶¶ 35-36.
21 However, USCIS has successfully adjudicated its oldest cases and eliminated the backlog of
22 applicants who filed prior to February 7, 2022. ECF No. 211-2 at ¶ 11.

23 On August 25, 2022, the Plaintiffs in this action filed their Second Motion for Contempt
24 seeking an order requiring USCIS to establish and maintain a 95% compliance rate, requiring
25 USCIS to clear any backlog by September 30, 2022, and ordering USCIS to provide monthly

1 compliance reports. ECF No. 196 at 11-12. After oral argument, this Court denied Plaintiffs’
2 Motion recognizing that USCIS has taken all reasonable steps within its power to adjudicate
3 initial EAD applications, to reduce the backlog of pending application, and to return to
4 substantial compliance with the court’s injunction. ECF No. 207. The Court further stated that
5 Plaintiffs may renew their motion for contempt if Defendants do not reach substantial
6 compliance by December 31, 2022.

7 On January 5, 2023, USCIS filed a Status Report with the Court indicating a compliance
8 rate of 14.3%. ECF No. 211-1. Attached to this compliance report was a declaration explaining
9 that the volume of EAD applications was more than double the historic data and describing steps
10 that the agency was undertaking to address the unprecedented volume of initial EAD
11 applications. ECF No. 211-2 at ¶¶ 8-12, 14. Specifically, the declaration stated that as of mid-
12 December 2022, there were 114 officers adjudicating initial applications full-time and an
13 additional 52 adjudicating applications on a part-time basis. *Id.* at ¶ 14. In addition, the
14 declaration advised that the USCIS Nebraska Service Center was bringing on board 14 additional
15 full-time adjudicators who would begin adjudicating applications by the end of January. *Id.*

16 On January 26, 2023, Plaintiffs filed their third Motion for Contempt. On February 2,
17 2023, USCIS filed another Status Report showing a compliance rate of 20.2%, but also
18 indicating that USCIS adjudicated over 55,000 initial EAD applications – more than twice the
19 number of applications adjudicated in a typical month. *See* ECF No. 214-1. The January Status
20 Report also showed that more than half of the pending initial EAD applications have been
21 pending for 30 days or less and that 89.4% have been pending for 60 days or less. *See id.*

22 LEGAL STANDARD

23 “Civil contempt . . . consists of a party’s disobedience to a specific and definite court
24 order by failure to take all reasonable steps within the party’s power to comply.” *Inst. of*
25 *Cetacean Rsch. v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935, 945 (9th Cir. 2014)

1 (quotations and citations omitted); *see also Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*,
 2 689 F.2d 885, 892 (9th Cir. 1982) (“We hold that the district court did not abuse its discretion
 3 in concluding that defendants had made every reasonable effort to comply with the court’s
 4 order and that defendants were therefore not in contempt”); *Peppers v. Barry*, 873 F.2d 967,
 5 969 (6th Cir. 1989) (holding that contempt would not be appropriate because agency took all
 6 reasonable steps to achieve compliance) (citing, *inter alia*, *Shuffler v. Heritage Bank*, 720 F.2d
 7 1141, 1146–47 (9th Cir.1983). The party alleging civil contempt must demonstrate that the
 8 party violated the court’s order by clear and convincing evidence. *Inst. of Cetacean Rsch.*, 774
 9 F.3d at 945; *see In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695
 10 (9th Cir. 1993) (“[t]he party alleging civil contempt must demonstrate that the alleged
 11 contemnor violated the court’s order by clear and convincing evidence, not merely a
 12 preponderance of the evidence”). Substantial compliance with a court order is a defense to civil
 13 contempt. *In re Dual-Deck Video*, 10 F.3d at 695; *see Gen. Signal Corp. v. Donallco, Inc.*, 787
 14 F.2d 1376, 1379 (9th Cir. 1986) (explaining that substantial compliance with a court order is a
 15 defense to an action for civil contempt).

16 ARGUMENT

17 This Court should not find USCIS in contempt of court. USCIS has successfully
 18 eliminated the backlog stemming from the February 7, 2022 order in *AsylumWorks*. ECF No.
 19 211-2 at ¶ 11. The current backlog is comprised of relatively new cases and stems from a
 20 dramatic increase in the number of initial EAD applications that the agency failed to fully
 21 anticipate. *Id.*; *see* ECF No. 216 at ¶¶ 7-11.¹ USCIS is continuing to prioritize 30-day

22 ¹ Plaintiffs argue that “there can be no meaningful dispute that the number of applicants
 23 increases as the years go by.” ECF No. 212 at 9. But this argument downplays the increase and
 24 thus fails to recognize the scale and nature of the challenge that USCIS faces today. As USCIS
 25 previously explained, the number of applicants has not risen gradually, but instead has jumped
 dramatically to “more than double the historical data and agency expectations.” ECF No. 211-2
 at ¶ 9; *id.* at ¶¶ 6-7, 8-10. In their Third Motion for Contempt, Plaintiffs simply do not address
 this explanation.

1 processing for initial EAD applications and is considering additional operational and
2 technological improvements that could be implemented. ECF No. 221-2 at ¶¶ 14-15. In
3 January 2023, USCIS's Nebraska Service Center brought on board 14 additional adjudicators
4 to work full-time on adjudicating initial EAD applications (an increase of more than 10% of the
5 number of full-time adjudicators working on these applications). *See* ECF No. 216 at ¶ 15. In
6 addition, USCIS will immediately reassign 60 additional adjudicators to work on these
7 applications (a total of 74 additional adjudicators). *See id.*

8 USCIS has already increased its rate of adjudication to over 55,000 EAD applications a
9 month, which is more than twice the number of adjudications in a typical month in a prior year.
10 *See* ECF No. 241-1; *see* ECF No. 211-2 at ¶¶ 6-10, 12. In addition, more than half of the
11 pending EAD applications have been pending for 30 days or less and almost 90% of the
12 pending EAD applications have been pending for 60 days or less. *See id.* at 2; *see* ECF No.
13 211-2 at ¶¶ 11. Admittedly, this Court ordered USCIS to adjudicate initial EAD applications
14 within 30 days, not within 60 days. ECF No. 128 at 1-2. But the fact remains that the
15 overwhelming majority of pending initial EAD applications have been pending for 60 days or
16 less, ECF No. 241-1 at 2, and given that the agency is taking concrete steps to address the
17 historically high volume of incoming applications, USCIS is doing everything that can
18 reasonably be done. *See* ECF No. 216 at ¶¶ 13-19. Under these circumstances, it is not
19 appropriate to hold USCIS in contempt. *See* ECF No. 207 at 2-3 (citing *Inst. of Cetacean*
20 *Research*, 774 F.3d at 945); *see also* *Vertex Distrib.*, 689 F.2d at 892 (affirming denial of
21 motion for contempt).

22 In the alternative, if this Court finds USCIS in contempt, it should, in the exercise of its
23 discretion, decline to award sanctions. *Distributors Ass'n Warehousemen's Pension Tr. v.*
24 *Foreign Trade Zone 3, Inc.*, No. C 05-1161 SBA, 2009 WL 975786, at *1 (N.D. Cal. Apr. 9,
25 2009) (“Should a court find a party in contempt, it has discretion in deciding whether to impose

1 sanctions”). Specifically, this Court should not award the three forms of relief requested in
2 Plaintiffs’ Motion. This is so for four reasons.

3 *First*, Plaintiffs seek an order requiring USCIS to establish and maintain a 95%
4 compliance rate. ECF No. 212 at 12. This issue has already been briefed by the parties on three
5 separate occasions and, as the Court has previously recognized, “adding such a provision to the
6 injunction when the court has already specified that Defendants are to submit status reports at
7 regular intervals would be an improper modification to the court’s injunction.” ECF No. 145 at
8 5; *see also* ECF No. 184 (denying this request). As this Court correctly determined, the
9 “adoption of specific rates of compliance would not be appropriate because such rates would
10 invite the possibility of arbitrary enforcement actions that would fail to take into account the
11 reasonable steps that Defendants take to comply with the court’s order.” *Id.* at 6. The purpose
12 of civil contempt is to “coerce obedience to a court order” *Gen. Signal Corp.*, 787 F.2d at
13 1380; *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (“Civil contempt . . . seeks only to coerce the
14 defendant to do what a court had previously ordered him to do”) (citations and quotations
15 omitted). Thus, it is not proper for Plaintiffs to use their Motion to broaden the scope of this
16 Court’s injunction and impose additional requirements on USCIS beyond what this Court
17 ordered and the parties agreed to in their Implementation Plan. And Plaintiffs’ request is
18 particularly inappropriate given the fact that this Court has, on three separate occasions,
19 considered and rejected this request and given that USCIS was achieving a compliance rate of
20 over 95% immediately prior to the issuance of the *AsylumWorks* Order. *See* ECF Nos. 145,
21 184, *see also*, ECF No. 203-2.

22 *Second*, Plaintiffs request an order requiring USCIS to clear any backlog by February
23 28, 2023. ECF No. 212 at 12. But this is not possible. *See* ECF No. 215 at ¶¶ 12-13. Moreover,
24 Plaintiffs have failed to identify any additional steps that they believe USCIS should undertake
25 to improve processing times beyond the steps already outlined by USCIS.

1 DATED February 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

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