The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILMAN GONZALEZ ROSARIO, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CIVIL CONTEMPT AND TO ENFORCE PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR:
FEBRUARY 10, 2023

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REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CIVIL CONTEMPT AND TO ENFORCE PERMANENT INJUNCTION

I. Introduction

Defendants do not dispute that now, more than a year after the court order in *AsylumWorks v. Mayorkas, et al.*, 1:20-cv-03185 (BAH), 2022 WL 355213 (D.D.C 2022), they continue to fail to comply with this Court's injunction enforcing the regulatory time period for adjudicating initial employment authorization applications for asylum seekers filed pursuant to 8 C.F.R. 274a(12)(c)(8) (hereinafter referred to as "C8 initial EAD applications"). Despite Defendants' repeated assurances over the last year that they would soon return to compliance, including recently informing this Court that "USCIS anticipates being able to finish processing the C8 initial adjudications backlog on or about November 15, 2022," ECF No. 206 at 3, Defendants now advise they will not clear the backlog and resume "90% or better compliance" until the end of August—and even then, *only if* the current number of incoming receipts "is the new plateau." ECF No. 216 at ¶20.[1] Ultimately, it remains undisputed that Defendants continue to violate the court order.

In light of their woeful noncompliance, it is Defendants' burden to show they are taking "*all* reasonable steps to comply with the order." *Kelly v. Wengler*, 822 F.3d 1085, 1096 (9th Cir. 2016) (emphasis in original). They have failed to do so, and instead simply advise that they might reach compliance in another half year. Moreover, Defendants' arguments against the specific sanctions requested fail to acknowledge that in denying previous motions for contempt this Court has explicitly provided that Plaintiffs' may renew their motions if Defendants do not reach substantial compliance by a specified date. That date has come and gone, with no end in sight to Defendants' failure adhere to this Court's order. Absent this Court's intervention, the permanent injunction ceases to have any meaning. Given that Defendants failed yet again to reach compliance by the end of the year, pursuant to this Court's instruction in its last order,

[1] Defendants provide no explanation as to why they might expect the current number to be the plateau. To the contrary, they acknowledge the number of applications continually increases over time. *See* ECF No. 215 at 6 n.1. By so qualifying their goal, Defendants effectively wipe their hands of any responsibility to return to compliance by *any* timeline.

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Plaintiffs now respectfully request the Court take the steps necessary to enforce its order. *See Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 450 (1911) ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.").

II. Argument

There is no dispute that Defendants continue to violate the permanent injunction by failing to comply with the 30-day time period for adjudicating initial C8 EAD applications. It is not enough for the noncompliant party to offer that they have taken a series of steps to improve. Instead, they must demonstrate they took "*all* reasonable steps to comply with the order." *Kelly*, 822 F.3d at 1096. Accordingly, it is insufficient for USCIS to assert that they have assigned a certain number of additional officers to adjudicate the applications when it is evident from the record that even with this new number, the agency is unable to comply with the injunction. "Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense." *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992). While Defendants might complain about the increasing number of applications, it is an undisputed fact that the number of applicants rises from year to year. *See* ECF No. 215 at 6 n.1.They are thus responsible for their own failure to take the steps necessary to prepare for and address the increasing numbers.

Defendants attempt to shift the burden to Plaintiffs to provide details as to how they should run their bureaucracy. Not only does this impermissibly shift the burden to Plaintiffs, it also ignores that Plaintiffs have repeatedly asserted that Defendants must dramatically expand the resources dedicated to adjudicating class members' applications. Plaintiffs are not required to point out precisely what steps Defendants must take, nor do they have the information to do so. Only Defendants possess the information as to how many adjudications officers are necessary to comply with the regulatory 30-day period. Only Defendants know how many officers need to be hired, transferred, reassigned, or authorized for overtime to comply with the

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injunction. Hence, it is only appropriate that Defendants bear the burden to demonstrate that they have taken *all* reasonable steps necessary to comply. *Kelly*, 822 F.3d at 1096.

Defendants focus on arbitrary numbers that simply fail to address what is needed for compliance. For example, USCIS notes that it adjudicated over 55,000 EAD applications in the last month. Nolan Decl. ECF No. 216 ¶11. Yet the agency received over 62,000 applications in the same month, evidencing not progress, but a further increase in the backlog. *Id.* ¶10. Accordingly, "USCIS has not been able to reduce the backlog and achieve 30-day processing." *Id.* ¶ 7.[2] The regulation prioritizes asylum seeker's initial EAD application, so that they may support themselves and their families, but the agency continues to treat this time-line as aspirational, notwithstanding this Court's order. Defendants seek to distract by noting that the applications have dramatically increased—failing to acknowledge that a dramatic increase was guaranteed as a result of the decision in *AsylumWorks* in February of 2022. Prior to that point, the asylum rules had severely limited the number of asylum seekers eligible to apply for employment authorization. *Asylumworks v. Mayorkas*, No. 20-CV-3815 (BAH), 2021 WL 2227335, at *6 (D.D.C. June 1, 2021) (noting that the rules made it "harder, and in some cases impossible" for asylum applicants to get EADs). Thus, the *AsylumWorks* decision not only restored the 30-day adjudicatory timeline, but also restored the prior rules defining employment eligibility, returning to the status quo prior to the Trump administration's war on asylum. Rather than preparing for the inevitable increase in applications, the agency continues to gape at the unremarkable fact that month after month there is an increase in the number of class members' applications.

Plaintiffs have repeatedly stated that Defendants must allocate significantly more resources to reach substantial compliance. *See, e.g.*, ECF No. 204 at 3. Remarkably, over the last fiscal year, the agency failed to employ the funds Congress allocated specifically to address the backlogs. ECF No. 212 at 11. Defendants do not even address this point in their response,

[2] Similarly, Defendants contend that "USCIS's inability to meet the projected compliance goal is not indicative of USCIS processing fewer C8 initial EAD applications." ECF NO. 216 at 4. But it is not a question of absolute numbers. Rather, the question is whether USCIS timely adjudicates the applications submitted.

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underscoring that they have failed to even take advantage of the resources allocated to fix this very problem. And in any event, as this Court has held, "resource constraints . . . 'do not justify departing from the [law's] clear text.'" *Rosario*, 365 F. Supp. 3d at 1163 n.6 (quoting *Pereira v. Sessions*, 138 S.Ct. 2105, 2118 (2018)).

Sanctions are thus appropriate because the agency has failed to take all reasonable steps to comply with the injunction.

III. The Sanctions Sought Are Necessary to Facilitate Compliance.

Defendants also err in faulting Plaintiffs' request to establish a clear benchmark for substantial compliance. While this Court has previously refused to grant such relief, Defendants ignore that the Court expressly advised that it may be appropriate to make this request in the future. When the Court first issued the injunction it denied Plaintiffs request to modify the injunction so as to set specific compliance in part, "[g]iven that the adjudication rate reflects significant improvement since the court entered its injunction." March 20, 2019 Order, ECF No. 145 at 5. The Court further advised, however, that if Defendants' compliance rates dropped, the "remedy is a motion for civil contempt." *Id.* Hence, Plaintiffs' request is consistent with this Court's original instruction.

Similarly, with each of the two prior orders denying Plaintiffs' motion for civil contempt the Court instructed that if Defendants failed to reach substantial compliance by a specified date, Plaintiffs were authorized to renew their motions for civil contempt. When this Court denied Plaintiffs' first motion for civil contempt it specified that "Plaintiffs may renew their motion if Defendants do not reach substantial compliance with this court's permanent injunction within 120 days of the filing date of this order." ECF No. 184 at 2. In addition, the Court further ordered Defendants to submit compliance reports for the months of May, June, July, and August 2021. *Id.* Only after the Court issued its May 2021 order did Defendants again return to a 95% compliance rate. *See* February 2022 Compliance Report, ECF No. 191-1. Similarly, in denying Plaintiffs' second motion for civil contempt this Court once again instructed that Plaintiffs may "renew their motion for contempt if Defendants do not reach substantial compliance with the court's permanent injunction by December 31, 2022." ECF No. 207 at 3. Defendants failed to

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do so. Accordingly, Plaintiffs seek sanctions pursuant to the Court's prior order. The purpose is clearly to "coerce obedience to a court order . . . ." *Gen. Signal Corp.*, 787 F.2d at 1380; *Turner v. Rogers*, 564 U.S. 431, 441 (2011).

Defendants are incorrect when they suggest that Plaintiffs are seeking to "broaden the scope of the permanent injunction." Defs' Response, ECF No. 179 at 11. Rather, Plaintiffs want precisely what the Court has already ordered—for Defendants to adjudicate class member applications within 30 days. Sanctions are necessary to coerce Defendants to return to substantial compliance—at the same rates they achieved prior to promulgation of the now vacated asylum rule. Instead, Defendants have regressed to rates *worse than before* the Court issued the permanent injunction. *Compare* February 2023 Compliance Report, ECF No. 214 at 2, *with Rosario v. U. S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1158 (W.D. Wash. 2018) (USCIS timely adjudicated only 22% of initial C8 EAD applications).

Defendants next state in conclusory terms that is it "not possible" to clear any backlog by the end of February, ECF No. 215 at 8, despite recently advising the Court that the agency anticipated clearing the backlog by November 15, 2022, ECF No. 206 at 3. Effectively, Defendants are stating that it is "not possible" to clear the backlog by the end of the month with the amount of resources that the agency has currently allocated to adjudicating class members' applications. And again, Defendants err in asserting that Plaintiffs have the burden of identifying additional steps that must be taken to achieve this. But the answer is clear: the agency must assign more officer time to adjudicating initial C8 EAD applications.

Defendants also state it is unnecessary to order that they provide monthly compliance reports because they are already doing so. ECF No. 215 at 1. This ignores that they only resumed doing so after being so ordered by the Court, and that they currently are ordered to provide monthly reports only through the end of the current month. ECF No. 207 at 3 (Ordering Defendants to file monthly status reports for "for September 2022, October 2022, November 2022, December 2022, January 2023, and February 2023"). It is thus disingenuous to assert that this relief is unnecessary. The monthly reports are not merely a tool to ensure that Defendants *reach* compliance—they also allow Plaintiffs to monitor whether Defendants are

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maintaining substantial compliance. As noted, Defendants immediately regressed from substantial compliance at the point they were no longer required to submit monthly status reports. *See* ECF No. 175 ¶ 3.

Finally, Defendants protest that the agency should not be required to post processing times on its website, asserting "this request is well outside the scope of this Court's July 26, 2018 order [and] this litigation generally." ECF No. 215 at 3. Defendants do not explain how posting the same information publicly that they provide in the monthly status reports may be considered outside the scope of this litigation. To the contrary, it is precisely because Defendants have failed to comply with the Court's July 26, 2018 order that this information is required. Each month tens of thousands of class members seek information as to when they may expect their employment authorization given the agency's failure to comply with the injunction. And inexplicably, unlike almost all other application forms, USCIS has refused to provide this information on their public website providing case processing times. *See* https://egov.uscis.gov/processing-times/ (providing the estimated processing times for applications submitted to USCIS).

IV. Conclusion

Defendants have failed for over twelve months to comply with this Court's order, and now purport only to aspire to clear the backlog by the end of August of this year, and then, only if there are not further increases in the number of applications. Accordingly, Plaintiffs ask the Court to find that Defendants have not substantially complied with the Court's permanent injunction, hold Defendants in contempt, and impose the sanctions requested.

Respectfully submitted this 10th day of February, 2023.

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CERTIFICATE OF WORD COUNT

I hereby certify that this reply brief contains 2093 words, in compliance with the Local Civil Rule 7(e) (2100 word limit for reply brief).

DATED this 10th day of February, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 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.

DATED this 10th day of February, 2023.

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