District Judge Tana Lin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIA SILVIA GUEVARA ENRIQUEZ, *et al.*,

Plaintiffs,

v.

U.S. CITIZENSHIP & IMMIGRATION SERVICES, *et al.*,

Defendants.

No. 2:23-cv-00097-TL

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Noted for Consideration on:
March 10, 2023

INTRODUCTION

Defendants respectfully submit this opposition to Plaintiffs' Motion for Class Certification ("Motion").[1] ECF No. 17. Pursuant to the Amended Complaint, ECF No. 27, Plaintiffs are allegedly 299 noncitizens who have pending Form I-601A, Application for Provisional Unlawful Presence Waiver. *See id.* ¶¶ 1, 8, n.1. Plaintiffs seek to certify a class defined as follows, ECF No. 17 at 17:

[1] By March 31, 2023, Defendants will file a motion to dismiss Plaintiffs' first amended complaint. *See* Fed. R. Civ. P. 12(a)(2). Pursuant to Section II.I. of the Court's Standing Order for All Civil Cases, Defendants have initiated a meet and confer process as to Defendants' forthcoming motion to dismiss. Defendants respectfully submit that it would be appropriate for the Court to defer the resolution of Plaintiffs' class certification motion until it has had an opportunity to consider Defendants' motion to dismiss.

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All individuals:

(a) who filed, or will file in the future, an application with [the U.S. Citizenship and Immigration Service ("USCIS")] for a provisional unlawful presence waiver (Form I-601A or any successor form), and

(b) whose applications have been pending for at least twelve months from the date of filing.

This Court should deny class certification because: (1) the proposed class definition is impermissibly broad because it has no reasonable temporal limits and includes members who lack standing; (2) the proposed class lacks commonality and typicality, as evidenced by the substantial variance among named Plaintiffs as to when they filed their Form I-601A, how long in excess of 12 months those applications have been pending with USCIS, and the circumstances surrounding the pendency of those applications; and (3) the proposed class cannot adequately represent all members because Plaintiffs have proposed a multi-tiered system of relief that would grant greater relief to certain putative class members.

Defendants' opposition is supported by the Declaration of Sharon Orise ("Orise Decl."), attached as Exhibit 1.

BACKGROUND

A. The Provisional Unlawful Presence Waiver (Form I-601A)

Under the Immigration and Nationality Act ("INA"), certain noncitizens are eligible to apply for lawful permanent resident ("LPR") status based on their relationship to a U.S. citizen or LPR, their employment, their special immigrant classification, or some other immigrant category. *See generally* 8 U.S.C. §§ 1151, 1153. As an initial step in this process, the noncitizen must be the beneficiary of an approved immigrant petition, such as a Form I-130, Petition for Alien Relative, Form I-140, Immigrant Petition for Alien Worker, Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, filed on their behalf, or be selected to participate in the Diversity Visa program. Orise Decl., ¶ 8; *see generally* 8 U.S.C. §§ 1153, 1154 (granting immigrant status); 8 C.F.R. § 204 (immigrant petition process); 22 C.F.R. § 42.33 (diversity visa process). If USCIS approves the underlying immigrant visa petition (or the noncitizen is selected to participate in the Diversity Visa program), the noncitizen must either apply for adjustment of

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status, if present in the United States and eligible to adjust, 8 U.S.C. § 1255(a), or apply for an immigrant visa with the U.S. Department of State ("DOS"), 8 U.S.C. § 1202(a); 22 C.F.R. § 42.61(a). In either case, the noncitizen must, among other requirements, be admissible and not inadmissible under any ground set forth in 8 U.S.C. § 1182(a). *See*, *e.g.*, 8 U.S.C. § 1255(a).

Under 8 U.S.C. § 1182(a)(9)(B)(i)(I), a noncitizen who was unlawfully present in the United States for more than 180 days but less than 1 year during a single stay, and who then departs voluntarily from the United States before the commencement of removal proceedings, is inadmissible if they again seek admission within 3 years of the date of departure. Under 8 U.S.C. § 1182 (a)(9)(B)(i)(II), a noncitizen who was unlawfully present for 1 year or more during a single stay and then departs before, during, or after removal proceedings, is inadmissible if they again seek admission within 10 years of the date of departure or removal.

Pursuant to 8 U.S.C. § 1182(a)(9)(B)(v) the Secretary of Homeland Security ("Secretary") has authority to waive unlawful presence ground of inadmissibility if the noncitizen is seeking admission as an immigrant and if the noncitizen demonstrates that the denial of his or her admission to the United States would cause "extreme hardship" to the noncitizen's U.S. citizen or lawful permanent resident spouse or parent. Because the granting of a waiver is discretionary, the noncitizen must also establish that he or she merits a favorable exercise of the Secretary's discretion. *See* 8 C.F.R. § 212.7(e)(7) (provisional waiver applicant must merit "a favorable exercise of discretion").

Noncitizens who are not eligible to adjust their status in the United States must travel abroad and obtain an immigrant visa. *See* 8 U.S.C. § 1202(a), 22 C.F.R. § 42.61(a); *see also* 9 FAM 504.1-3. Such noncitizens who accrued more than 180 days of unlawful presence during a single stay in the United States and departed or were removed, who then apply with DOS for an immigrant visa within 3 or 10 years depending on their period of unlawful presence, are inadmissible under 8 U.S.C. § 1182(a)(9)(B) and must obtain a waiver of inadmissibility to overcome inadmissibility before their immigrant visa applications can be approved. *See* 8 U.S.C. § 1182(a)(9)(B)(i) and (v). Typically, noncitizens cannot apply for a waiver of inadmissibility until after they have appeared for their immigrant visa interview abroad, 22 C.F.R. § 42.62(a)-

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(b), and a DOS consular officer has determined that they are inadmissible to the United States. *See* 22 C.F.R. § 40.92(c); *see also Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*; Final Rule 78 Fed. Reg. 536, 536 (Jan 3, 2013) ("[c]urrently, these immediate relatives cannot apply for the waiver until after their immigrant visa interviews abroad.").

In 2013, the U.S. Department of Homeland Security ("DHS") promulgated regulations at 8 C.F.R. § 212.7(e) that allowed certain immediate relatives of U.S. citizens who were physically present in the United States to request provisional unlawful presence waivers prior to departing from the United States for consular processing of their immigrant visa. Orise Decl., ¶ 3; *see Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*; Final Rule 78 Fed. Reg. 536 (Jan. 3, 2013). USCIS's approval of an applicant's provisional unlawful presence waiver prior to departure allowed the DOS consular officer to issue the immigrant visa without further delay, if there are no other grounds of inadmissibility and if the immediate relative is otherwise eligible, to be issued an immigrant visa. Orise Decl., ¶¶ 5–6. In 2016, DHS expanded the provisional unlawful presence program to make it available to noncitizens with pending immigrant visa cases with DOS based on being the principal or derivative beneficiary of an approved Form I-130, Form I-140, Form I-360, or Diversity Visa selection. Orise Decl., ¶¶ 4, 8; *see Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*; Final Rule, 81 Fed. Reg. 50244, 50245 (July 29, 2016).

Waiver applicants must demonstrate that the refusal of admission to the United States will cause extreme hardship to their U.S. citizen or LPR spouse or parent and that they warrant a favorable exercise of discretion under 8 U.S.C. § 1182(a)(9)(B)(v) and must also satisfy other eligibility criteria set forth under 8 C.F.R. § 212.7(e)(3) and (4). Filing Form I-601A with USCIS does not confer any benefits on the noncitizen. *See* 8 C.F.R. § 212.7(e)(2)(ii). If the provisional unlawful presence waiver is approved, it becomes effective only after the noncitizen departs the United States, appears for an immigrant visa interview at a U.S. embassy or consulate, and if the U.S. Department of State determines that the noncitizen is otherwise eligible for an immigrant visa. *See* 8 C.F.R. § 212.7(e)(12).

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B. USCIS's Processing of Unlawful Presence Waiver Applications

USCIS's Service Center Operations Directorate ("SCOPS") is responsible for receiving and adjudicating Form I-601A. *See* Orise Decl., ¶¶ 1–2. Once an applicant files their Form I-601A along with supporting evidence and applicable fees at the USCIS Lockbox location, USCIS routes the application to the Service Center responsible for adjudicating the application. *Id*., ¶ 10. For each Form I-601A, USCIS requests, creates, or consolidates the applicant's administrative file ("A-file") or temporary file ("T-file"). *Id*., ¶¶ 11–12. USCIS requires the A-file or T-file to identify potential eligibility issues and to review the applicant's relevant immigration history prior to making a final decision on the application. *Id*., ¶ 12. The Service Center must also initiate and complete security checks on each applicant. *Id*., ¶ 13. All applicants must attend a biometric services appointment at a USCIS Application Support Center ("ASC"). *Id*. ASC appointments are generally scheduled shortly after filing. *See id*., ¶ 14. Once biometrics and security checks are completed, adjudication-ready Form I-601A are placed into the work queue. *Id*.

An Immigration Services Officer ("ISO") reviews the Form I-601A, along with the supporting evidence, all relevant electronic systems, including background and security check information, and the applicant's A-file to assess whether the applicant has satisfied his or her burden to demonstrate eligibility for the provisional unlawful presence waiver. *Id*., ¶ 15. In particular, the ISO analyzes whether the refusal of admission would result in extreme hardship to the qualifying U.S. citizen or LPR spouse or parent or, in other words, whether the qualifying relative will suffer extreme hardship based on the applicant's separation or relocation. *Id*., ¶ 16. The extreme hardship analysis is highly individualized and case-specific and is based on the totality of the evidence and circumstances present in the individual case. *Id*. Even if an applicant has demonstrated threshold eligibility for the unlawful presence waiver, the grant of the waiver remains discretionary. *Id*., ¶¶ 17–18. In cases where the record contains insufficient evidence to establish eligibility, USCIS issues a Request for Evidence ("RFE") for the applicant to provide additional evidence for the record. *Id*., ¶ 19. Applicants typically must respond to an RFE within 30 days. *Id*.

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The COVID-19 pandemic has affected processing times of the Form I-601A applications in several ways. *Id.*, ¶ 27. For example, beginning in March 2020, USCIS experienced delays receiving A-files requested from the National Archives and Records Administration Federal Records Center. *Id.,* ¶ 29. This caused significant delays in A-file requests and transfers to the requesting Service Centers. *Id*. Moreover, ASC capacity for biometric services appointments was very limited due to the pandemic-related closures and capacity restrictions, which caused unprecedented appointment backlogs for all form types requiring biometrics. *Id*., ¶ 27. Furthermore, USCIS has provided for more flexible deadlines to respond to RFEs: for RFEs issued between March 1, 2020, and March 23, 2023, USCIS accepts responses received within 60 calendar days after the initial due date set forth in the RFE before taking any further action on the application. *Id*., ¶ 19. Finally, USCIS experienced a hiring freeze due to the COVID-19 pandemic's effect on its funding, which lasted from May 1, 2020, through March 31, 2021, and has negatively impacted staffing and contributed to the adjudication backlog. *Id*., ¶¶ 30–31.

As of February 15, 2023, SCOPS has a total of approximately 131,704 pending Form I-601A. *Id*., ¶ 26. USCIS publishes processing times on its website for the Form I-601A to provide the public with realistic expectations as to the processing length of their case. *Id*., ¶ 22. Currently, at the Nebraska Service Center and Potomac Service Center, 80 percent of Form I-601A are completed (whether approved or denied) within 34.5 months and 39.5 months, respectively. *Id*., ¶ 21. From FY 2018 to date, USCIS has adjudicated 147,539 Form I601A applications. *Id*., ¶ 24. So far in FY 2023, USCIS has adjudicated 2,298 Form I-601A applications and continues to do so. *Id*.

C. The Complaint, Named Plaintiffs, and Proposed Class Representatives

On January 23, 2023, Plaintiffs filed this putative class action lawsuit. ECF No. 1. On February 17, 2023, Plaintiffs filed an amended class complaint. ECF No. 27. The operative complaint asserts one cause of action pursuant to the Administrative Procedure Act: unreasonable delay in deciding Form I-601A Provisional Waiver Applications. Am. Compl., ¶¶ 77–88.

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All but one of the 299 named Plaintiffs is allegedly the beneficiary of an approved immigrant visa petition filed by a U.S. citizen or LPR; one petition is allegedly employment based. *See id*., ¶¶ 1, 8. Plaintiffs represent that they all filed a Form I-601A prior to December 31, 2021. *See id*., ¶ 8.[2] Plaintiffs further allege that their Form I-601A have been pending for at least 12 months. *Id*.

On January 26, 2023, without first seeking to meet and confer with government counsel, as required by this Court,[3] Plaintiffs filed their motion for class certification. ECF No. 17. Plaintiffs propose the following named Plaintiffs as class representatives: Maria Silvia Guevara Enriquez; Sofio Callejas Venegas; Kevin Alberto Jimenez Rivas; and Ismael Montes Cisneros. Motion at 1.

LEGAL STANDARD

A. Class Certification.

"Federal Rule of Civil Procedure 23 governs the maintenance of class actions in federal court." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 (9th Cir. 2017). "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

Rule 23(a) sets out four prerequisites—numerosity, commonality, typicality, and adequate representation—that must be satisfied before a certified class can proceed in federal

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[2] This representation appears to be inaccurate. According to the operative complaint, there are three individual plaintiffs who filed their Form I-601A in 2022, including Plaintiffs Mario Alberto Avelar Rodriguez, Potchanee Boonwangrae, and Martha D. Matos De Soto. Am. Compl. at 19.

[3] Section II.D. of the Court's Standing Order for All Civil Cases provides, in pertinent part: "[M]otions shall contain a certification that the Parties have met and conferred. . . . Motions that do not comply may be summarily denied." Plaintiffs provide a "Certificate of Service" with the Motion stating that they sent a courtesy copy to an Assistant U.S. Attorney. Motion at 20. Plaintiffs, however, sought to meet and confer with neither the Assistant U.S. Attorney nor undersigned counsel (counsel was assigned on February 10, 2023, when the motion had already been filed) and, accordingly, fail to certify that they complied with the Court's requirement under its Standing Orders.

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court. *See* Fed. R. Civ. P. 23; *Dukes*, 564 U.S. at 349; *Briseno*, 844 F.3d at 1124. These prerequisites "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Dukes*, 564 U.S. at 349 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). A court should grant certification only "after a rigorous analysis . . . [determining] that the prerequisites of Rule 23(a) have been satisfied." *Id.*, at 350–51 (quotation marks and citations omitted).

In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under one of the three subsections of Rule 23(b). *Id.* at 345. Plaintiffs assert that they meet the requirements of Rule 23(b)(2). Motion at 17. Rule 23(b)(2) requires that plaintiffs pursuing injunctive or declaratory relief must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." Fed. R. Civ. P. 23(b)(2); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986–89 (9th Cir. 2011)).

"The party seeking class certification bears the burden of establishing that the proposed class meets the requirements of Rule 23." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1177 (9th Cir. 2015). The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

B. The "*TRAC*" Factors

The Ninth Circuit evaluates unreasonable agency delay using the seven "*TRAC*" factors. *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). The "*TRAC* factors" are, *id.* n.7 (alterations in original) (citing *Telecommunications Research & Action Center v. F.C.C.* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984)):

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;]

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> (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

"The most important is the first factor, the 'rule of reason,' though it, like the others, is not itself determinative." *In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017) (citation omitted). Moreover, as relevant here, the weight of Ninth Circuit precedent regarding delays in the context of immigration processing sides strongly with the Defendants under the "rule of reason." *See Siwen Zhang v. Cissna*, 2019 WL 3241187, at *5 (C.D. Cal. April 25, 2019) (collecting cases). "District courts have generally found that immigration delays in excess of five, six, seven years are unreasonable, while those between three to five years are often not unreasonable." *Yavari v. Pompeo*, No. 19-cv-02524, 2019 WL 6720995, at *8 (C.D. Cal. Oct. 10, 2019) (citing S*iwen Zhang*, 2019 WL 3241187, at *5).

ARGUMENT

THE MOTION FOR CLASS CERTIFICATION SHOULD BE DENIED.

The Court should not certify the proposed class. The proposed class definition lacks the required clear parameters for class certification and is overinclusive to the point that some of its members would lack Article III standing. Moreover, Plaintiffs' proposed class fails to survive Rule 23 analysis for lack of commonality, typicality, and adequacy of representation.

A. The Proposed Class Definition is Impermissibly Broad.

As noted, Plaintiffs propose the following class definition: "All individuals: (a) who filed, or will file in the future, an application with USCIS for a provisional unlawful presence waiver (Form I-601A or any successor form), and (b) whose applications have been pending for at least twelve months from the date of filing." Motion at 3. At the threshold, the class definition fails because it is overbroad.

In addition to the express requirements of Rule 23, courts also require putative class-action plaintiffs to show that the class definition is ascertainable. *See Booth v. Appstack, Inc.*, No. 13-cv-1533-JLR, 2015 WL 1466247, at *3 (W.D. Wash. Mar. 30, 2015) (citing *O'Connor v.*

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Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)). "Specifically, a class definition must be 'precise, objective and presently ascertainable.'" *Id*. (citation omitted). "'While the identity of each class member need not be known at the time of certification, the class definition must be definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.'" *Id*. (citation omitted).

Here, Plaintiffs' proposed class is substantially overbroad because it includes not only current applicants whose Form I-601A applications have been pending with USCIS for at least one year, but also any current or future applicant who might experience a delay of twelve months or more, even if those delays are beyond USCIS's control. Notably, the definition is so broad as to sweep in even future Form I-601A applicants who have not yet filed an application. In other words, by defining the class as including "[a]ll individuals" who "will file in the future" a Form I-601A, the proposed class would necessarily include individuals who presently lack standing to bring an unlawful delay claim against USCIS. *See* Motion at 3. Plaintiffs' proposed class definition, therefore, fails to satisfy ascertainability because it lacks clear temporal limits, consists of an unknowable number of individuals who would be class members, and some of those individuals' inclusion into the proposed class would violate Article III's standing requirements. As a court in this district has held, "a class definition that encompasses a substantial number of members who have no cause of action is not sufficiently 'precise, objective and presently ascertainable' to be certified." *Booth*, 2015 WL 1466247, at *15 (collecting cases). What is more, the Court *must* deny class certification because Plaintiffs fail to establish Article III standing, particularly for the putative class members who "*will file in the future*" their Form I-601A applications, *see* Motion at 3 (emphasis added), and therefore presently lack injury-in-fact. *See Ellis*, 657 F.3d at 978–79 ("In a class action, the plaintiff class bears the burden of showing that Article III standing exists "); *see also Nat'l Fed'n of the Blind v. Target Corp*., No. 06-cv-01802 MHP, 2007 WL 1223755, at *3 (N.D. Cal. Apr. 25, 2007) (holding that, because "inclusion of individuals [who are] not entitled to relief would defeat class

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certification and present obvious standing challenges," a court "cannot avoid addressing the issue of overbreadth at [the class certification] stage").

Thus, because "courts consistently decline to certify class definitions that encompass members who are not entitled to bring suit under the applicable substantive law," *Booth*, 2015 WL 1466247, at *15 (collecting cases), Plaintiffs' motion must be denied.

B. The Proposed Class Fails to Satisfy Commonality and Typicality.

Plaintiffs have failed to demonstrate that "a single significant question of law or fact," *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quotation marks and citation omitted) (clarifying commonality inquiry), common to the class to satisfy Rule 23(a)(2). "What matters to class certification . . . is not the raising of common 'questions' – even in droves – but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (alteration in original) (quotation marks and citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (quotation marks and citation omitted).

The commonality requirement is especially rigorous where, as here, Plaintiffs seek class certification under Rule 23(b)(2), Motion at 17, which requires that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). For certification under Rule 23(b)(2), plaintiffs must show that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quotation marks and citation omitted).

The commonality and typicality requirements of Rule 23(a) are interrelated and, in some instances, merge. *Id*. at 349 n.5. "Both [requirements] serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id*.

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Even when putting aside Plaintiffs' impermissibly broad—and Article III-defeating—class definition, the breadth of some of the characteristics of the individually-named plaintiffs belie commonality and typicality, especially in the context of an unreasonable delay case, rendering the case "[in]capable of a class-wide resolution." *See Nw. Immigrant Rts. Project v. USCIS*, 325 F.R.D. 671, 693 (W.D. Wash. 2016) ("*NWIRP*") (alteration in original) (quotation marks and citation omitted). Although the timeliness inquiry on its face "appears ripe for a straightforward answer" of true or false, Plaintiffs' unreasonable delay claim actually "necessitate[s] a substantial individualized inquiry into the timeliness of USCIS's adjudications." *NWIRP*, 325 F.R.D. at 693. Specifically, Plaintiffs fail to show that the proposed class is entitled to common relief because application of the individualized, multi-factored *TRAC* analysis Plaintiffs rely on, *see* Motion at 13, to demonstrate unreasonable delay will necessarily differ from one class member to the next. In other words, what might be unreasonable delay by USCIS for one class member will not necessarily establish unreasonable delay as to each member when viewed through the *TRAC* analysis. *See Dukes*, 564 U.S. at 350 ("That common contention, moreover, must be of such a nature that it is capable of classwide 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.").

Initially, in the context of seeking class certification in an unreasonable delay case, Plaintiffs ask the Court to work backwards by assuming that any delay lasting at least one year is *per se* unreasonable for any class member, thereby requiring adjudication under the APA. Plaintiffs' 12-month floor is arbitrary under *TRAC*, especially where there is no statute or regulation that requires Plaintiffs' applications to be adjudicated within one year. *See* Orise Decl., ¶ 20; *CRVQ v. U.S. Citizenship & Immigration Servs.*, 2020 WL 8994098, at *6 (C.D. Cal. Sep. 24, 2020) (finding that the "*TRAC* test is fact-intensive, and courts have declined to resolve whether the *TRAC* test has been satisfied at the pleadings stage, including with respect to immigration applications."). The U.S. Court of Appeals for the Federal Circuit observed, "we see

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no reason to articulate a hard and fast rule with respect to the point in time at which a delay becomes unreasonable" under the *TRAC* factors. *Martin v. O'Rourke*, 891 F.3d 1338, 1346 (Fed. Cir. 2018). That is because, according to the Federal Circuit's reasoning, "a two-year delay may be unreasonable in one case, and it may not be in another" depending on the facts and circumstances of any given case. *See id*.

Plaintiffs assert that they satisfy commonality because "[t]he common questions of law include whether USCIS's delay in adjudicating [Form] I-601A waiver applications for more than 12 months is unreasonable . . ." Motion at 13. But the Supreme Court in *Dukes* underscored that common questions are insufficient to establish commonality. *See* 564 U.S. at 350. And here, "[w]hat constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." *Tewolde v. Wiles*, No. 11-cv-1077-JLR, 2012 WL 750542, at *4 (W.D. Wash. Mar. 7, 2012) (quotation marks and citation omitted). Illustratively, the Federal Circuit affirmed a lower court's denial of class certification for lack of commonality for a proposed class where the alleged common injury was delay for at least 12 months, just as Plaintiffs propose here. *See Monk v. Wilkie*, 978 F.3d 1273, 1274, 1278 (Fed. Cir. 2020). Notably, among the 299 individually named Plaintiffs who allegedly filed Form I-601A applications, Am. Compl., ¶¶ 1, 8, there is significant variation in length of delay that underscores a lack of commonality. According to the operative complaint, named Plaintiffs filed their Form I-601A in Fiscal Years 2018, 2019, 2020, 2021, and 2022; the earliest application was filed on June 29, 2018, and the most recent application was filed on May 17, 2022. Am. Compl. at 12, 19.[4] The lack of commonality among the disparate individual Plaintiffs is apparent. Some named Plaintiffs' applications have been pending for about a year. *See generally* Am. Compl., ¶ 8. Other named Plaintiffs' applications have been pending for longer. *See generally id*. To illustrate the significant variance among the proposed class, compare the circumstances of Plaintiff Nabor Benitez Ocampo, who allegedly filed his Form I-601A on June 29, 2018, with

[4] USCIS cannot confirm the accuracy of these specific filing dates at this time, but, for the purposes of class certification, will assume the accuracy of Plaintiffs' representations.

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Plaintiff Potchanee Boonwangrae, who alleged filed his application on May 17, 2022. *See generally* Am. Compl., at 12, 19. Benitez Ocampo and Boonwangrae allegedly experienced very different lengths of processing delays to date and are thus very differently situated. Accordingly, the dissimilar situations of Benitez Ocampo and Boonwangrae could lead to different results under the *TRAC* analysis. *See Martin*, 891 F.3d at 1346 (rejecting "hard and fast rule" in evaluating reasonableness of delay and finding "'[t]his 'rule of reason' inquiry is best left to the discretion of the [lower court]"). This example illustrates that Plaintiffs' proposed class definition simply does not account for the potential factual variations among the proposed class, such as each individual applicant's length of delay.

Compounding the varied lengths of delay experienced by the named Plaintiffs is the fact that USCIS may issue a Request for Evidence ("RFE") in an individual case, which, in turn, may prolong the adjudication process. *See* Orise Decl., ¶ 19. Despite their burden to demonstrate that class certification is appropriate, Plaintiffs fail to address the effect of an RFE on processing times and do not indicate whether any of the named Plaintiffs ever received RFEs and how long they took to respond to the RFEs, if at all. *See generally* ECF No. 17. The potential existence for this factual distinction further undermines commonality. Although Plaintiffs acknowledge RFEs in their operative complaint, they apparently dismiss the effect RFEs have on processing times by highlighting, "[i]n keeping with the agency's streamlining of the provisional waiver application process, Defendant USCIS sets a deadline of 30 days for responses to RFEs issued in connection with Form I-601A applications." Am. Compl., ¶ 26. During the COVID-19 pandemic, however, for RFEs issued between March 1, 2020, and March 23, 2023, USCIS extended the deadline to respond by an additional 60 days. Orise Decl., ¶ 19. Thus, contrary to Plaintiffs' suggestion in their operative complaint, up to 90 days could be attributable to the RFE process, which could be outcome determinative of the *TRAC* analysis, particularly for the putative class members whose applications have been pending for approximately 12 months. Ultimately, Plaintiffs fail to establish commonality because some processing delay could be

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attributable to the RFE process, which Plaintiffs' completely fail to address in seeking class certification on their unreasonable delay claim. Furthermore, neither Plaintiffs' motion nor their complaint mentions the COVID-19 pandemic, where the pandemic has affected processing times at various points—including the RFE process, delays related to closures at ASCs, and delays caused by backlogs in A-file requests—and did not necessarily affect all putative class members uniformly, which further calls commonality into question. *See* Orise Decl., ¶¶ 19, 27, 29.

Ultimately, because application of the *TRAC* factors will necessarily vary depending on each class member's distinct circumstances, neither Plaintiffs nor the Court can conclude with certainty the outcome of *TRAC* factor analysis across the entire class. Plaintiffs are seeking to certify a class with no commonality. The proposed class includes potential members whose applications have been pending for approximately a year. *See generally* Am. Compl., ¶ 8. Those class members' delay claims are mixed with delay claims by class members whose applications have been pending for two or three years and potentially affected by delays related to the COVID-19 pandemic. *See generally id*. And still other class members are lumped into the class whose applications have been pending for four years or more, since before the COVID-19 pandemic. *See generally id*. Consequently, each applicant's claim must be decided on a case-by-case basis subject to unique considerations based on the individual facts and circumstances of each applicant. *See Tewolde v. Wiles*, 2012 WL 750542, at *4. Thus, Plaintiffs' unreasonable delay claim is not appropriate for class-wide resolution as it lacks the ability to generate "common answers" that "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350 (quotation marks and citation omitted).

C. The Proposed Class Representatives Will Not Adequately Protect Class Interests.

The adequacy requirement serves to protect the due process rights of absent class members who will be bound by the judgment. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds* by *Dukes*, 564 U.S. 338. Assessing the adequacy of class representation turns on two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their

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counsel prosecute the action vigorously on behalf of the class?" *Id*. "[U]ncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

Here, Plaintiffs' proposed class definition and prayer for relief work together to create an impermissible conflict of interest among putative class members. Again, as previously noted, Plaintiffs propose the following class definition: "All individuals: (a) who filed, or will file in the future, an application with USCIS for a provisional unlawful presence waiver (Form I-601A or any successor form), and (b) whose applications have been pending for at least twelve months from the date of filing." Motion at 3. In Plaintiffs' Prayer for Relief, they request that the Court "compel[] Defendant USCIS to decide the provisional waiver applications of the individually named Plaintiffs, and others who are class members as of the date the order is issued, within *30 days*…" Am. Compl., ¶ F (emphasis added).[5] For the indeterminate future Form I-601A applicants, Plaintiffs ask the Court to order "USCIS to decide an application for a provisional unlawful waiver filed in the *future* . . . within *180 days* from the date the application is filed with USCIS." Am. Compl., ¶ G (emphasis added). The combination of Plaintiffs' class definition and requests for relief thus creates essentially three tiers of relief. The first tier is for the class members who have waited at least 12 months for USCIS to process their Form I-601A applications, and Plaintiffs demand USCIS to process these class members' applications within 30 days. *See* Am. Compl., ¶ F. The second tier is for the class members who are future Form I-601A applicants, and Plaintiffs demand that USCIS process these class members' applications within 180 days upon filing. *See* Am. Compl., ¶ G. There is, however, a third tier, which is for the theoretical class members who have already applied for Form I-601A applications and have waited approximately 180 days. These class members receive no expedited relief until their Form I-601A applications have been pending for at least 12 months, upon which they receive the relief of the first tier. That is problematic for the third-tier class members because, ironically, the

[5] Plaintiffs further request that "if USCIS issues a [RFE], order the USCIS to adjudicate the provisional waiver application within 30 days of the agency's receipt of the response to the [RFE]." Am. Compl., ¶ F.

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future Form I-601A applicants of the second tier—*those who have not yet even filed their applications*—would receive superior relief to many Form I-601A applicants who have already filed and been waiting for months but, under Plaintiffs' proposal, would not be entitled to speedier processing until their Form I-601A applications have been pending for at least 12 months. In other words, members who have already applied and have been waiting months for adjudication—those in the third tier—are caught in a "no man's land" of Plaintiffs' creation.

Thus, beyond the problems of ascertainability and Article III standing discussed above, Plaintiffs' proposed class would create a multi-tiered and unequal system of relief—one in which relief for Form I-601A applicants whose applications have been pending for less than a year would, in many instances, receive inferior relief relative to other class members who have not yet submitted Form I-601A applications. That suggests that the named Plaintiffs and the proposed class counsel[6] are not prosecuting and will not and cannot prosecute the action equally on behalf of the entire class.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Class Certification.

[6] In requesting appointment as Class Counsel, Katherine Melloy Goettel submitted an unexecuted declaration. ECF No. 17-5 at 5.

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Dated: March 6, 2023

Respectfully submitted,

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I certify that this memorandum contains [5,980] words, in compliance with the Local Civil Rules.

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