

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' SECOND
MOTION FOR CIVIL CONTEMPT AND TO
ENFORCE PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR:
September 16, 2022

1 **INTRODUCTION**

2 This case is a class action lawsuit. But unlike most class action lawsuits, here, the size
3 class and, thus, the scope of the relief ordered by this Court, turns on judicial decisions in two
4 separate and unrelated cases: *AsylumWorks, et al. v. Mayorkas, et al.*, No. 20-cv-3815 (D.D.C.)
5 (the *AsylumWorks Litigation*) and *Casa de Maryland, et al. v. Wolf, et al.*, Case No. 8:20-cv-
6 02118-PX (D. Md.) (the “*CASA Litigation*”).

7 In their second Motion for Civil Contempt and to Enforce Permanent Injunction
8 (“Motion”), Plaintiffs seek to hold U.S. Citizenship and Immigration Services (“USCIS”) in
9 contempt for violating this Court’s July 26, 2018 injunction requiring that USCIS adjudicate
10 initial applications for asylum-related employment authorization documents (“EADs”) within
11 30-days, as set out by 8 C.F.R. § 208.7(a)(1). But the question of which applicants benefit from 8
12 C.F.R. § 208.7(a)(1), and thus this Court’s injunction, changed dramatically on February 7, 2022
13 when the U.S. District Court for the District of Columbia issued an order (the “*AsylumWorks*
14 *Order*”) vacating an agency rule amending this regulatory provision. *See* ECF No. 190 (advising
15 the Court of this development).

16 Up to February 7, 2022, USCIS was in compliance with this Court’s 2018 injunction.
17 *See* ECF No. 203-1 (showing a compliance rate of 92.1% for January 2022); ECF No. 203-2
18 (showing a compliance rate of 97.4% for the portion of February prior to February 7, 2022).
19 However, between the close of business on February 7 and the morning of February 8, USCIS
20 fell out of compliance with this Court’s injunction as an immediate consequence of the
21 *AsylumWorks Order*, which effectively expanded the size of the class to include all applicants
22 for initial asylum-related EADs irrespective of whether they were members of plaintiff
23 organizations in the *CASA Litigation*. ECF No. 190-1. Under these circumstances, and given
24 USCIS’s efforts to subsequently achieve compliance, it would not be appropriate or equitable to
25 hold USCIS in contempt.

1 seeking to modify an injunction bears the burden of establishing that a significant change in
2 circumstances warrants a revision of the injunction).

3 As Plaintiffs recognize, through August 2020, USCIS substantially complied with this
4 Court's order, adjudicating no less than 96% of all initial asylum EAD applications
5 within 30 days. ECF No. 196 at 10. On June 22, 2020, USCIS published a new rule, amending 8
6 C.F.R. § 208.7(a)(1) by eliminating the 30-day processing deadlines, effective August 21, 2020.
7 *See* ECF No. 164 at 1 (citing "Removal of 30-Day Processing Provision for Asylum Applicant-
8 Related Form I-765 Employment Authorization Applications," 85 Fed. Reg. 37,502-37,546
9 (June 22, 2020) ("Timeline Repeal Rule")). After discussions between counsel, the parties
10 reached an agreement regarding the impact of the Timeline Repeal Rule. ECF No. 164.
11 Specifically, the parties agreed that this Court's injunction (under the then existing version of 8
12 C.F.R. § 208.7(a)(1)) continued to apply to those applicants who filed prior to the August 21,
13 2020 effective date, but that there would "not be any new class members after that date" if the
14 Timeline Repeal Rule took effect on August 21, 2020. ECF No. 164 (citing ECF No. 162 at 5);
15 ECF No. 170-2 ¶ 11.

16 Although the Timeline Repeal Rule initially took effect on August 21, 2020, ECF No.
17 171 at 3, it was almost immediately challenged in a separate lawsuit in U.S. district court in
18 Maryland (the *CASA Litigation*). *See* ECF No. 124 3-4. In the *CASA Litigation*, two public
19 interest organizations, Casa de Maryland, Inc. ("CASA") and Asylum Seekers Advocacy Project
20 ("ASAP") challenged both the Timeline Repeal Rule and an additional rule unrelated to the
21 current litigation entitled "Asylum Application, Interview, and Employment Authorization for
22 Applicants," 85 Fed. Reg. 38,532-38,628 (June 26, 2020) ("Broader EAD Rules"). On
23 September 11, 2020, a district court in Maryland entered a preliminary injunction enjoining both
24 rules but limited the scope of the preliminary injunction to members of CASA and ASAP. *See*
25 *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020) (motion granted in part and

1 denied in part). The parties to the *CASA Litigation* disagreed about how the Maryland September
2 2020 PI Order should be implemented, including specifically, what steps USCIS was required to
3 take to identify members of CASA and ASAP given that these two organizations could not
4 provide a list of their members. This disagreement as to how this order should be implemented
5 resulted in a backlog of initial asylum EAD applications. ECF No. 170-2 ¶ 6.

6 On March 25, 2021, Plaintiffs filed their initial first motion for contempt seeking, *inter*
7 *alia*, an order requiring USCIS to clear its backlog by May 24, 2021 and to establish and
8 maintain a 95% compliance rate. ECF No. 171 at 11-12. After oral argument, on May 28, 2021,
9 this Court denied Plaintiffs' motion and directed the parties to file a joint status report within ten
10 days of the issuance of an order in the *Maryland Litigation* on the pending motion for permanent
11 injunction. In the following month, June 2021, USCIS returned to substantial compliance with
12 this Court's July 2018 injunction. *See* ECF No. 197-1.

13 Earlier, on December 23, 2020, the *AsylumWorks* plaintiffs also filed a lawsuit
14 challenging, *inter alia*, the Timeline Repeal Rule. *See* ECF No. 190. Thus, the *AsylumWorks*
15 *Litigation* and the *CASA Litigation* proceeded on parallel tracks with both groups of plaintiffs
16 seeking permanent relief with respect to the Timeline Rule. In the *CASA Litigation*, cross-
17 motions for summary judgment were fully briefed by July 13, 2021. In the *AsylumWorks*
18 *Litigation*, cross-motions for summary judgment were fully briefed by October 5, 2021. The
19 district court in the *AsylumWorks Litigation* ruled first, vacating the Timeline Rule on February
20 7, 2022. *See* ECF No. 190-1 (also available at *AsylumWorks v. Mayorkas*, No. 1:20-cv-03815-
21 BAH, 2022 WL 355213 (D.D.C. Feb. 7, 2022).

22 On February 17, 2022, per this Court's May 28, 2021 order, the parties filed a Joint
23 Status Report providing this Court with a copy of the *AsylumWorks* Order and Memorandum
24 Opinion. *See* ECF No.190. The parties further advised this Court that they had agreed, in light of
25 this development, that USCIS would provide Plaintiffs with additional status reports through

1 September 2022. *Id.* This agreement was in addition to the parties’ prior agreements to provide
2 monthly reports beyond those ordered by this Court.

3 The *AsylumWorks* Order greatly expanded the size of the class in this litigation. *See* ECF
4 No. 203 (Declaration of Connie Nolan, Deputy Associate Director of Service Center Operations
5 (“Nolan Decl.”) ¶ 28; *see also*, ECF No. 190 (recognizing that the *AsylumWorks* Order
6 “consequently expands the class of individuals entitled to protection under this Court’s July 26,
7 2018, injunction to again include all initial asylum EAD applicants”). In January 2022 (prior to
8 the issuance of the order), there were only 8,138 class-member pending applications, 97.8% of
9 which had been pending for 30 days or less. ECF No. 203-1 (January 2022 Status Report). In
10 contrast, the February 2022 Status Report indicates that at the end of the month (after the
11 issuance of the order) there were 93,639 class-member applications pending (a more than
12 elevenfold increase), including, 66,935 applications that had been pending for over 120 days.
13 *See* ECF No. 203-2; *see also*, ECF No. 196 at 5-6.¹

14 Given this backlog, and the fact that USCIS had only been adjudicating approximately
15 10,000 applications per month prior to the issuance of this order, USCIS needed a new approach
16 to address this significant backlog that the *AsylumWorks* Order created overnight. *See* ECF No.
17 190-1. Counsel for the parties conferred on how to proceed and, on March 21, 2022, USCIS
18 proposed making sweeping changes to the parties’ Implementation Plan. ECF Nos. 197-5; 197-6.
19 Although this proposal was rejected by Plaintiffs’ counsel, ECF Nos. 197-7, the parties reached
20 an agreement on a more limited change to the Implementation Plan that was adopted by this
21 Court on April 29, 2022. *See* ECF No. 193; *see also*, ECF No. 197-10.

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24 ¹ The January 2022 Status Report indicates a compliance rate of 92.1% and the
25 February 2022 Status Report indicates a compliance rate of 97.4% for the portion of February
prior to the issuance of the *AsylumWorks* Order. *See* ECF Nos. 203-1 and 203-2.

1 In subsequent months, the parties have continued to confer about this matter, *see, e.g.*,
2 ECF No. 197-11 (responding to Plaintiffs' questions), and USCIS has continued to provide
3 monthly updates to Plaintiffs. *See* ECF No. 203 (exhibits). As the parties have discussed, USCIS
4 decided to focus its resources on eliminating the backlog of older applications. *See* ECF No. 197-
5 14. This focus resulted in a decline in the monthly compliance rates. *See* ECF No. 203 (Nolan
6 Decl.) ¶¶ 34-35. Although Plaintiffs disagree with this approach, *see* ECF No. 196 at 7, they
7 have not suggested an alternative and USCIS continues to believe that this approach is necessary.
8 *See id.* at ¶ 35.

9 In June 2022, the district court in Maryland court ordered the parties to brief their
10 competing positions with respect to whether the *CASA Litigation* is moot in light of the
11 *AsylumWorks* Order. Although the Government believes that the litigation is moot, the *CASA*
12 Plaintiffs disagree contending that they are entitled to additional relief.²

13 On July 22, 2022, the *AsylumWorks* Plaintiffs filed a Motion to Enforce Judgment or for
14 Additional Injunctive Relief, seeking to compel USCIS to adjudicate applications within 30 days.
15 *See AsylumWorks Litigation*, ECF No. 47. USCIS responded to this motion and the district court
16 ordered the *AsylumWorks* Plaintiffs to file a reply brief by September 20, 2022. *See*
17 *AsylumWorks Litigation* (unnumbered docket entry).

18 On August 25, 2022, the Plaintiffs in this action filed the present Motion seeking an order
19 requiring USCIS to establish and maintain a 95% compliance rate, requiring USCIS to clear any
20 backlog by September 30, 2022, and ordering USCIS to provide monthly compliance reports.
21 ECF No. 196 at 11-12. The Plaintiffs' Motion, thus, overlaps in part with the *AsylumWorks*
22 Plaintiffs' pending motion to enforce.

23 ² Although the Court entered a briefing schedule (with the Government's brief due
24 August 26, 2002), this briefing has not yet occurred because the Government requested that the
25 *CASA Litigation* be stayed given the pending motions in the *AsylumWorks Litigation* and in
this action.

1 On September 6, 2022, USCIS filed with this Court the August 2022 Status Report
2 showing a compliance rate of 5%. ECF No. 201. This report also indicated that the rate of
3 monthly adjudications increased to 34,889 and that USCIS had largely eliminated the backlog
4 for applications that have been pending for more than 90 days. *Id.*

5 LEGAL STANDARD

6 “Civil contempt . . . consists of a party’s disobedience to a specific and definite court
7 order by failure to take all reasonable steps within the party’s power to comply.” *Inst. of*
8 *Cetacean Rsch. v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935, 945 (9th Cir. 2014). The
9 party alleging civil contempt must demonstrate that the party violated the court’s order by clear
10 and convincing evidence. *Id.*; see *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10
11 F.3d 693, 695 (9th Cir. 1993) (“[t]he party alleging civil contempt must demonstrate that the
12 alleged contemnor violated the court’s order by clear and convincing evidence, not merely a
13 preponderance of the evidence”). Substantial compliance with a court order is a defense to civil
14 contempt. *In re Dual-Deck Video*, 10 F.3d at 695; see *Gen. Signal Corp. v. Donallco, Inc.*, 787
15 F.2d 1376, 1379 (9th Cir. 1986) (explaining that substantial compliance with a court order is a
16 defense to an action for civil contempt).

17 ARGUMENT

18 This Court should not find USCIS in contempt of court. This is the unusual case in
19 which the size of the class (and, thus, the scope of this Court’s order) fluctuates based on
20 litigation in two separate, unrelated cases. It is undisputed that USCIS was in compliance with
21 this Court’s order until the evening of February 7, 2022, when the U.S. District Court for the
22 District of Columbia issued the *AsylumWorks* Order, *inter alia*, vacating the Timeline Rule.
23 See ECF No. 203-1 (January 2022 Status Report indicating a 92.1% compliance and that 97.8%
24 of applications had been pending for 30 days or less and that 99.2% of applications were
25 pending for 60 days or less). The *AsylumWorks* Order greatly expanded the size of the class

1 from 8,138 (at the end of January) to 93,639 (at the end of February). *See* ECF Nos. 203-1 and
 2 203-2. Significantly, this expanded class included more than 66,00 applicants who were not
 3 class members when they applied for an initial EADs and whose applications had been pending
 4 for more than 120 days when they were made members of the class by virtue of the
 5 *AsylumWorks* Order. *See* ECF No. 196 at 5.³ USCIS is working to achieving 30-day processing,
 6 as required by this Court’s order, for all initial asylum-related EAD applications. ECF No. 203
 7 (Nolan Decl.) ¶¶ 33-34, 38, 39-40, 42. Since February 7, 2022, USCIS has worked to increase
 8 resources for the initial EAD workload, including adding staff (pulling from other workloads as
 9 well as new hires). *Id.* at ¶ 33. Specifically, USCIS has added staff dedicated to the adjudication
 10 of EAD initial applications by reassigning experienced officers from other lines of work and
 11 assigning new hires to this portfolio. *Id.* at ¶ 38. In addition, USCIS is offering overtime to all
 12 officers working EAD initial applications. *Id.* And, in order, to offset the unexpectedly high
 13 volume of incoming receipts and meet previously expected goals, USCIS is also moving a
 14 portion of the backlog of EAD initial applications to an additional service center to increase
 15 overall production capacity. *Id.* However, despite these steps, USCIS needs more time to
 16 achieve 30-day processing. *See id.* at ¶ 41-42.⁴

17 To be clear, USCIS is adjudicating more applications now than it did when it was in
 18 compliance with this Court’s order. *See id.* ¶¶ 35, 38. For example, in January 2022 (when the
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20 ³ Although Plaintiffs dispute whether USCIS’s noncompliance is the result of the
 21 *AsylumWorks* Order, ECF No. 196 at 1, the number speak for themselves. In the afternoon of
 22 February 7, 2022, USCIS was in compliance with this Court’s order; by the next morning
 23 (February 8, 2022) USCIS was not in compliance and faced a backlog of over 66,000
 applications from individuals who had suddenly become class members. *See* ECF Nos. 203-1
 and 203-2.

24 ⁴ To be clear, the 93,639 total is in addition to the 7,518 applications that were
 25 adjudicated by USCIS in February 2022. *See* ECF No. 203-2 (February 2022 Status Report).

1 compliance rate was 92.1%) it only adjudicated 12,457 applications. In contrast in the past five
2 months it has adjudicated 26,473 application (April 2022), 31,474 applications (May 2022),
3 29,014 applications (June 2022), 25,694 applications (July 2022), and 34,889 applications
4 (August 2022). *See id.* (Exhibits 4-8). These five months are the highest total monthly
5 adjudications during this past year and are among the highest totals since this Court issued its
6 permanent injunction in 2018. *Id.* USCIS’s decision to focus on eliminating the backlog of
7 applications is bearing fruit. *See id.* at ¶ 39.

8 The total number of class-member cases pending for adjudication at the end of February
9 2022 was 93,639, up from 8,138 at the end of January 2022. The backlog of cases pending for
10 90 days or more alone increased from 30 cases at the end of January 2022 to 72,412 at the end
11 of February 2022. Since then, USCIS’s backlog reduction efforts have reduced the number of
12 cases pending 90 days or more to only 687 (at the end of August 2022). *See* ECF No. 203-8
13 (August Status Report). As a result, USCIS is now focusing on more recently filed applications.
14 ECF No. 203 (Nolan Decl.) ¶¶ 34-35. Given the agency’s efforts to date, and the inherent
15 obstacles in adjudicating a sudden addition of over 80,000 applications to the class while also
16 addressing an uptick in recently filed applications, this Court should not find USCIS in
17 contempt.

18 In the alternative, if this Court finds USCIS in contempt, it should, in the exercise of its
19 discretion, decline to award sanctions. *Distributors Ass’n Warehousemen’s Pension Tr. v.*
20 *Foreign Trade Zone 3, Inc.*, No. C 05-1161 SBA, 2009 WL 975786, at *1 (N.D. Cal. Apr. 9,
21 2009) (“Should a court find a party in contempt, it has discretion in deciding whether to impose
22 sanctions”). Specifically, this Court should not award the three forms of relief requested in
23 Plaintiffs’ Motion.

24 *First*, Plaintiffs seek an order requiring USCIS to establish and maintain a 95%
25 compliance rate. ECF No. 196 at 11. This issue has already been briefed by the parties on two

1 separate occasions and, as the Court previously recognized, “adding such a provision to the
2 injunction when the court has already specified that Defendants are to submit status reports at
3 regular intervals would be an improper modification to the court’s injunction.” ECF No. 145 at
4 5; *see also* ECF No. 184 (denying this request). As this Court explained, the “adoption of
5 specific rates of compliance would not be appropriate because such rates would invite the
6 possibility of arbitrary enforcement actions that would fail to take into account the reasonable
7 steps that Defendants take to comply with the court’s order.” *Id.* at 6.

8 The purpose of civil contempt is to “coerce obedience to a court order” *Gen.*
9 *Signal Corp.*, 787 F.2d at 1380; *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (“Civil contempt
10 . . . seeks only to coerce the defendant to do what a court had previously ordered him to do”)
11 (citations and quotations omitted). Thus, it is not proper to use this Motion to attempt to
12 broaden the scope of this Court’s injunction and impose additional requirements on USCIS
13 beyond what this Court ordered and the parties agreed to in their Implementation Plan .

14 Plaintiffs’ request is particularly inappropriate given the fact that this Court has, on two
15 separate occasions, considered and rejected this request and given that USCIS was achieving a
16 compliance rate of over 95% immediately prior to the issuance of the *AsylumWorks* Order. *See*
17 ECF Nos. 145, 184, *see also*, ECF No. 203-2 (February 2022 Status Report indicating a 97.4%
18 compliance rate for early February 2022).

19 *Second*, Plaintiffs request an order requiring USCIS to clear any backlog by September
20 30, 2022. ECF No. 196 at 11-12. This relief is unnecessary because USCIS has already reduced
21 the backlog of applications pending for more than 120 days to 243 (from 66,935 at the end of
22 February 2022). *See* ECF No. 203-8 (August 2022 Status Report). And while USCIS
23 previously estimated that it would achieve substantial compliance by the end of September, it
24 will likely not be able to achieve this goal given the recent uptick in the number of applications
25 being filed. ECF No. 203 (Nolan Decl.) ¶¶ 41-42. That said, by the end of September, USCIS

1 “anticipates resolving the backlog in the near future, and resuming focus on working incoming
2 monthly receipts, *with a goal of processing up to 90% of applications within 30 days of filing*
3 soon thereafter.” ECF No. 203 (Nolan Decl.) ¶ 41 (emphasis original).

4 *Third*, Plaintiffs request that this Court provide it with monthly compliance reports by
5 the 5th day of each month. ECF No. 196 at 12. But USCIS previously agreed on February 17,
6 2022 to provide such reports, ECF No. 190 (Joint Status Report) and has, per its agreement,
7 provided such reports on a monthly basis. USCIS further advises that it will continue to provide
8 such reports until such time as it is in substantial compliance with this Court’s injunction. In
9 this regard, USCIS will advise Plaintiffs and the Court one month prior to the last planned
10 monthly report, to ensure Plaintiffs may raise any concerns, and if appropriate seek relief from
11 the Court. There is no reason to hold USCIS in contempt of court so that USCIS can be ordered
12 to do something that it has already agreed to do. Moreover, to the extent this Court would like
13 to review these reports to monitor USCIS’s progress, USCIS is more than willing to file such
14 reports with this Court.

15 **CONCLUSION**

16 WHEREFORE, this Court should deny Plaintiffs’ Second Motion for Civil Contempt.
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1 DATED September 12, 2022

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22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on September 12, 2022, I electronically filed the foregoing with the
24 Clerk of the Court using the CM/ECF system, which will send notification of such filing to those
25 attorneys of record registered on the CM/ECF system.

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