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' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT Noted for Consideration: April 28, 2023 ORAL ARGUMENT REQUESTED

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants, through counsel, respectfully move to dismiss the single claim asserted in the operative complaint. *See* ECF No. 27, Am. Compl., ¶¶ 77–88. Plaintiffs, 299 noncitizens who allegedly have pending Form I-601A waiver applications, *see* Am. Compl., ¶¶ 1, 8, n.1, are purportedly members of a putative class of "at least 70,000 non-citizens." ECF No. 17 at 3. Plaintiffs allege that their Form I-601A waiver applications have been pending with USCIS for at least 12 months. *See* Am. Compl., ¶ 8. Plaintiffs' Amended Complaint asserts one cause of action pursuant to the Administrative Procedure Act ("APA"): unreasonable delay in deciding Form I-601A waiver applications. Am. Compl., ¶¶ 77–88.

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The Court should dismiss Plaintiffs' amended complaint under Rule 12(b)(1) because it lacks jurisdiction over Plaintiffs' unreasonable delay claim regarding the processing of their Form I-601A waiver applications because the waiver's enabling statute expressly divests the Court of jurisdiction to review any "decision or action by the [Secretary] regarding a waiver." 8 U.S.C. § 1182(a)(9)(B)(v).

Moreover, the Court should dismiss the amended complaint under Rule 12(b)(6) because Plaintiffs' complaint has not alleged facts sufficient to state a plausible claim for unreasonable delay under the *TRAC* factors.

BACKGROUND

A. Form I-601A, The Provisional Unlawful Presence Waiver

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. Declaration of Sharon Orise, ECF No. 31-1 ("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 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 by virtue of not being 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 one year during a single stay, and who then

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departs voluntarily from the United States before the commencement of removal proceedings, is inadmissible if they again seek admission within three years of the date of departure. Under 8 U.S.C. § 1182(a)(9)(B)(i)(II), a noncitizen who was unlawfully present for one 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 (the "Secretary")[1] 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. Section 1182(a)(9)(B)(v), provides:

> The [Secretary] has sole discretion to waive clause (i)[2] in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the [Secretary] regarding a waiver under this clause.

The noncitizen has the burden to establish, by a preponderance of the evidence, eligibility for a provisional unlawful presence waiver. *See* 8 C.F.R. § 212.7(e)(7). Moreover, because the grant of a waiver is discretionary, the noncitizen must also establish that he or she merits a favorable exercise of the Secretary's discretion. *See id.* (provisional waiver applicant must merit "a favorable exercise of discretion").

Noncitizens who are ineligible 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. As noted, 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

[1] Although the statute refers to the Attorney General, in 2002, Congress transferred enforcement of immigration laws to the Secretary of Homeland Security under the Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002).

[2] "Clause (i)" refers to 8 U.S.C. § 1182(a)(9)(B)(i).

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DOS for an immigrant visa within three 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 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)-(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), which 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 visas. 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 allows 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). Waiver applicants must also satisfy other eligibility criteria set forth under 8 C.F.R. § 212.7(e)(3) and (4). Notably, filing a

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Form I-601A application 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 DOS determines that the noncitizen is otherwise eligible for an immigrant visa. *See* 8 C.F.R. § 212.7(e)(12).

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 applications. *See* Orise Decl., ¶¶ 1–2. Once applicants file their Form I-601A applications along with supporting evidence and applicable fees at the USCIS Lockbox location, USCIS routes the applications to the Service Center responsible for adjudicating the applications. *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 applications are placed into the work queue. *Id*.

An Immigration Services Officer ("ISO") reviews the Form I-601A application, 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

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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*.

The COVID-19 pandemic has affected processing times of 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 applications. *Id*., ¶ 26. USCIS publishes processing times on its website for the Form I-601A application to provide the public with realistic expectations as to the processing length of their case. *Id*., ¶ 22. Since Fiscal Year ("FY") 2018, USCIS has adjudicated 147,539 Form I-601A applications. *Id*., ¶ 24. As of February of 2023, USCIS has adjudicated 2,298 Form I-601A applications in FY 2023 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. As noted, the

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operative complaint asserts one cause of action pursuant to the APA: unreasonable delay in deciding Form I-601A Provisional Waiver Applications. Am. Compl., ¶¶ 77–88.

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 application prior to December 31, 2021. *See id*., ¶ 8.[3] Plaintiffs further allege that their Form I-601A applications have been pending for at least 12 months. *Id*.

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. Plaintiffs further request that "if USCIS issues a [RFE]," the Court should "order the USCIS to adjudicate the provisional waiver application within 30 days of the agency's receipt of the response to the [RFE]." *Id*. For 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.

On January 26, 2023, Plaintiff filed a motion for class certification. ECF No. 17. On March 6, 2023, Defendants filed its response in opposition. ECF No. 31. On March 9, 2023, Plaintiffs filed its reply in support of their motion for class certification. ECF No. 33. Plaintiffs' motion for class certification is pending.

LEGAL STANDARD

A. Fed. R. Civ. Pro. 12(b)(1)

Motions filed under Rule 12(b)(1) allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction, only possessing the power authorized by the Constitution and statutes.

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

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Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). As a starting point for this analysis, a district court should assume that it lacks subject matter jurisdiction, and the party asserting the claim bears the burden of establishing that subject matter jurisdiction exists. *See In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008) (citing *Kokkonen*, 511 U.S. at 377).

A motion to dismiss for lack of subject matter jurisdiction may be either facial or factual. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial challenge to subject matter jurisdiction presumes that the complaint contains insufficient allegations to invoke federal jurisdiction. *Id*. A factual challenge is where "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id*. Under the latter theory, the district court must not accept the facts in the complaint as true and may consider extrinsic evidence. *See Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012); *Safe Air for Everyone*, 373 F.3d at 1039.

B. Fed. R. Civ. Pro. 12(b)(6)

Rule 12(b)(6) governs dismissal of a case for failure to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, a district court is not required to accept conclusory allegations or unwarranted factual deductions as true. *See Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). "In determining whether a complaint fails to state a claim," a court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [courts] may take judicial notice." *Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006) (quoting *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624–25 (D.C. Cir. 1997)). Finally, "[d]ismissal can be based on the lack of a cognizable legal

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theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

ARGUMENT

A. THIS COURT LACKS JURISDICTION TO REVIEW PLAINTIFFS' UNREASONABLE DELAY CLAIM UNDER 8 U.S.C. § 1182(a)(9)(B)(v).

The APA provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[T]he only agency action that can be compelled under the APA is action legally *required*. . . . Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 63–64 (2004) (emphases in original).

The APA, however, does not apply where the relevant statute "precludes judicial review." 5 U.S.C. § 701(a)(1). In 1996, Congress passed legislation to reduce, and in some cases eliminate, judicial review of certain immigration-related decisions. *See* Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA") at § 306, 110 Stat. 3009 (September 30, 1996). The Supreme Court has observed, "*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (emphasis in original).

This Court lacks jurisdiction over Plaintiffs' unreasonable delay claim regarding the processing of their Form I-601A waiver applications because the waiver's enabling statute expressly divests the Court of jurisdiction to review a "decision or action by the [Secretary] regarding a waiver." 8 U.S.C. § 1182(a)(9)(B)(v).

The 2013 final rule promulgating the waiver, provides, in relevant part: "The Secretary [of Homeland Security] is implementing this provisional unlawful presence waiver process under the broad authority to administer DHS and the authorities provided under the Homeland Security

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Act of 2002, the immigration and nationality laws, and other delegated authority." *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*; Final Rule, 78 Fed. Reg. 536, 537 (Jan. 3, 2013). The final rule further identifies the enabling statute: "The Secretary's discretionary authority to waive the ground of inadmissibility for unlawful presence can be found in INA section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v)." *Id*. at 537. Critically, the enabling statute, Section 1182(a)(9)(B)(v), provides:

> The [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. *No court shall have jurisdiction to review a decision or action by the* [*Secretary*] *regarding a waiver under this clause*.

Id. (emphasis added). This provision was added to the statute by section 301(b) of the IIRIRA. Public Law 104-208, Div. C, 110 Stat. 3009 (Sept. 30, 1996).

Here, the Court lacks jurisdiction under the plain terms of Section 1182(a)(9)(B)(v). Indeed, where Section 1182(a)(9)(B)(v) insulates "a decision or *action*" from judicial review, USCIS's alleged unreasonable delay or failure to act, as Plaintiffs claim here, constitutes agency action as defined by the APA. *See SUWA*, 542 U.S. at 62 ("'[A]gency action' is defined in § 551(13) to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.'") (alterations and emphasis in original). Plaintiffs appear to concede as much. *See Am*. Compl., ¶ 78 ("Agency action includes an agency's failure to act."); *id*., ¶ 86 ("USCIS' failure to adjudicate provisional unlawful presence waivers within 180 days after filing constitutes an unreasonable delay."); *see also id*., ¶¶ 4–7 (alleging USCIS' "failure to decide"). In other words, USCIS's alleged unreasonable delay in processing Plaintiffs' waiver applications is an "action" within the meaning of Section 1182(a)(9)(B)(v) that Congress has shielded from this Court's jurisdiction in the IIRIRA. Accordingly, the plain text of Section 1182(a)(9)(B)(v) squarely applies to Plaintiffs' unreasonable delay claim regarding USCIS's processing of Form I-601A waivers, divesting the Court of jurisdiction.

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To be sure, some courts have interpreted Section 1182(a)(9)(B)(v) as applying only "to review [of] *discretionary* decisions such as the denial of a waiver of removal . . ." *E.g.*, *Das Silva v. Holder*, 330 Fed. Appx. 255, 256 (2d Cir. 2009) (emphasis added). But that interpretation runs headlong into the Supreme Court's recent decision in *Patel v. Garland*, 142 S. Ct. 1614 (2022). *Patel* concerned another jurisdiction-stripping provision introduced to the INA under the IIRIRA, 8 U.S.C. § 1252(a)(2)(B)(i). Section 1252(a)(2)(B)(i) provides that "[n]otwithstanding any other provision of law," no court shall have jurisdiction to review "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title." 8 U.S.C. § 1252(a)(2)(B)(i). *Patel* largely concerned the scope of the word "judgment" as used in Section 1252(a)(2)(B)(i) in the context of a denial of a noncitizen's adjustment of status application. *See* 142 S. Ct. at 1622. After analyzing Section 1252(a)(2)(B)(i), the Supreme Court held that federal courts lack jurisdiction over *all* decisions related to the denial of adjustment of status and accepted the interpretation that 8 U.S.C. § 1252(a)(2)(B)(i)'s jurisdictional bar "does not restrict itself to certain kinds of decisions." *Id*. at 1622. Notably, the Supreme Court rejected the interpretation that Section 1252(a)(2)(B)(i) was limited to only "discretionary judgments or the last-in-time judgment[,]" *id*., because "[h]ad Congress intended instead to limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language—as it did elsewhere in the immigration code." *Id*. at 1624. Additionally, the Supreme Court underscored that the use of the word "regarding" "has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Id*. at 1622 (internal quotation marks and citation omitted). Here, the jurisdiction-stripping provision within the Secretary's waiver authority under Section 1182(a)(9)(B)(v) states, "[n]o court shall have jurisdiction to review a decision or *action* by the [Secretary] *regarding* a waiver under this clause." 8 U.S.C. § 1182(a)(9)(B)(v) (emphasis added). Under a plain reading, Section 1182(a)(9)(B)(v) renders *any* "decision or action" regarding a waiver unreviewable as there is no textual limitation providing that the "decision or action" must be discretionary in nature. *See*

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Patel, 142 S. Ct. at 1624 ("the point is simply that the absence of any reference to discretion in § 1252(a)(2)(B)(i) undercuts the . . . efforts to read it in."). Accordingly, with *Patel* in mind, taking together "decision or action" and "regarding"—with its "broadening effect"—as applied to "a waiver under this clause," this Court should give effect to the entirety of Section 1182(a)(9)(B)(v) as encompassing any claim having to do with the Secretary's waiver authority, including any claim of unreasonable delay.

Thus, the Court lacks jurisdiction because the APA does not apply where Section 1182(a)(9)(B)(v) "precludes judicial review." *See* 5 U.S.C. § 701(a)(1). The Court should, therefore, dismiss Plaintiffs' operative complaint for lack of jurisdiction.

B. Plaintiffs Fail to State a Claim of Unreasonable Delay.

To succeed on an APA unreasonable-delay claim, a plaintiff must show that: (1) the agency has a nondiscretionary duty to act; and (2) the agency has unreasonably delayed in acting on that duty. *See SUWA*, 542 U.S. at 63–65. The Ninth Circuit evaluates unreasonable agency delay using the "*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[;] (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."

At least one district court has distilled the *TRAC* factors as follows:

> These considerations cohere into three basic inquiries in this case. First, is there any rhyme or reason—congressionally prescribed or otherwise—for [the agency]'s delay (factors one and two)? Second, what are the consequences of delay if the Court does not compel the [agency] to act (factors three and five)? Finally, how

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> might forcing the agency to act thwart its ability to address other priorities (factor four)?

Ctr. for Sci. in the Pub. Int. v. United States Food & Drug Admin., 74 F. Supp. 3d 295, 300 (D.D.C. 2014).

Some courts have held that evaluating the *TRAC* factors is premature at the motion-to-dismiss stage. *See*, *e.g.*, *Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *12 (N.D. Cal. Nov. 21, 2014) (denying motion to dismiss that required a *TRAC* analysis); *Hui Dong v. Cuccinelli*, No. 20-cv-10030-CBM-(PLAx), 2021 WL 1214512, at *4 (C.D. Cal. Mar. 2, 2021) ("[T]he Court finds it is premature to rule on the issue of whether Plaintiff has satisfied the *TRAC* test at the pleading stage as to Plaintiff's APA claim."); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (observing that the "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court."). "Nevertheless, in cases . . . involving claims of unreasonably delayed waiver determinations, the *TRAC* factors have been generally employed at the motion to dismiss stage to determine whether a plaintiff's complaint has alleged facts sufficient to state a plausible claim for unreasonable administrative delay." *Sarlak v. Pompeo*, No. 20-cv-35-BAH, 2020 WL 3082018, at *5 (D.D.C. June 10, 2020) (internal citations and quotation marks omitted). In other words, the court would not be "determining whether there has been an unreasonable delay; rather, it is determining whether plaintiffs' complaint has alleged facts sufficient to state a plausible claim for unreasonable administrative delay." *Ghadami v. DHS*, No. 19-cv-00397-ABJ, 2020 WL 1308376, at *7 n.6 (D.D.C. Mar. 19, 2020).

As this Court held in another case concerning processing delays in a different immigration application context (and involving some of the same plaintiffs' counsel):

> District court review of complained-of agency inaction is extremely narrow in scope. Under Section 706(1) of the APA, the Court can merely compel USCIS to take a *discrete* agency action that it is *required* to take. When asked to review an agency's failure to act . . . courts must approach the substantive task of reviewing

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> such failures with appropriate deference to an agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources.

Edakunni v. Mayorkas, No. 2:21-CV-00393-TL, 2022 WL 2439864, at *3 (W.D. Wash. July 5, 2022) (emphases in original) (cleaned up). Thus, at the outset, Plaintiffs fail adequately to allege that USCIS has a nondiscretionary duty to adjudicate the I-601A applications. None of their cited authorities show that adjudicating Plaintiffs' applications "within 180 days after filing," Am. Compl., ¶ 86, is an agency action that USCIS is legally required to take. For the proposition that "USCIS [must] adjudicate an application for a provisional unlawful presence waiver within 180 days," Am. Compl., ¶ 49, Plaintiffs rely on 8 U.S.C. § 1571(b). But this Court has already rejected that proposition, finding that statute to be nonbinding. *See Edakunni*, 2022 WL 2439864, at *6 ("Plaintiff has failed to establish that USCIS was required to rule on their H-4 benefits requests within 180 days. This Court joins courts across the country in determining that there is no mandatory timeframe within which USCIS must process H-4 applicants' I-539 and I-765 forms."). Moreover, Plaintiffs cite to the statutory provision for the Secretary's waiver authority under Section 1182(a)(9)(B)(v), Am. Compl., ¶ 24, which states that rather than being required, as Plaintiffs allege in their complaint, the waiver is completely discretionary. *See* 8 U.S.C. § 1182(a)(9)(B)(v) ("The [Secretary] has *sole discretion* to waive clause (i). . . if it is established *to the satisfaction of the* [*Secretary*]") (emphases added).

Even if Plaintiffs could plausibly allege that USCIS has a nondiscretionary duty to act, Plaintiffs fail to make out sufficient allegations under the *TRAC* factors to demonstrate unreasonable delay to warrant relief under the APA.

1. Factors One and Two

While the Ninth Circuit has held that the first factor—the rule of reason—is the most important factor, neither it nor any other factor is determinative. *See In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017). This factor requires the Court to identify whether there is "any rhyme or reason" for the agency's delay. *See Ctr. for Sci. in the Pub. Interest*, 74 F. Supp. 3d at

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300. The second *TRAC* factor considers whether a statutory timetable has been established by Congress. *See TRAC*, 750 F.2d at 80.

Plaintiffs allege "Defendant USCIS does not follow a rule of reason in adjudicating Form I-601A provisional waiver applications." Am. Compl., ¶ 46. Plaintiffs, however, fail to allege sufficient facts to plausibly claim that Factors One and Two weigh in their favor. First, Plaintiffs rely on a statement by Defendant Jaddou reported in an article, which states: "Let me be very clear. Our processing times are too long. There are no ifs, ands or buts about it." *Id*., ¶ 47 (citing Suzanne Monyak, *USCIS director: Federal immigration funds 'critical' to agency*, Roll Call (Feb. 2, 2022, 7:17 pm), https://rollcall.com/2022/02/02/uscis-director-federal-immigration-funds-critical-to-agency/). But the article that Plaintiffs cite in their own complaint reveals that there is a "rhyme or reason," *Ctr. for Sci. in the Pub. Int.*, 74 F. Supp. 3d at 300, for the Defendants' alleged delay. The article reports that USCIS has endured significant financial strain and needs additional resources "to decrease processing times and to tackle the unprecedented backlog and [USCIS's] ever growing humanitarian mission":

> USCIS has also suffered financially in recent years, in part due to a dip in applications and to travel restrictions during the COVID-19 pandemic. The agency narrowly averted furloughs of more than half of its employees in 2020 and implemented a hiring freeze. In a July 2021 annual report to Congress, the Homeland Security ombudsman said the immigration agency "is still running at a revenue loss," which will lead to "continuing backlogs and lengthening processing times."

Monyak, *supra*.

As for Factor Two, Plaintiffs, as noted, rely on 8 U.S.C. § 1571(b) to allege a statutory timetable to adjudicate Form I-601A applications. Am. Compl., ¶ 49. Plaintiffs' reliance is misplaced for three reasons. First, again, this Court has already rejected this proposition in *Edakunni*, finding the statute to be nonbinding. *See* 2022 WL 2439864, at *6; *see also Tony N. v. U.S. Citizenship & Immigr. Servs.*, No. 21-CV-08742-MMC, 2021 WL 6064004, at *5 (N.D. Cal. Dec. 22, 2021) ("Although plaintiffs rely on 8 U.S.C. § 1571, which states 'the processing of an immigration benefit application should be completed not later than 180 days after the initial

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filing,' that statute is essentially 'precatory' rather than mandatory in nature.") (cleaned up). That is consistent with the Ninth Circuit's conclusion that such policy statements made by Congress do not create binding, enforceable rights. *See Yang v. California Dep't of Soc. Servs.*, 183 F.3d 953, 958 (9th Cir. 1999) ("[S]ection 5566(b) couples the phrase 'sense of the Congress' with the term 'should,' yielding the conclusion that this provision is precatory and did not bestow on Hmong veterans any right to food stamp benefits."). Second, the language from the statute does not come from the enabling statute, *see TRAC*, 750 F.2d at 80, but from a "2000 statute authorizing funds to eliminate a then-existing backlog of certain immigration petitions." *Jain v. Renaud*, No. 21-cv-3115, 2021 WL 2458356, at *5 (N.D. Ca. June 16, 2021) (discussing 8 U.S.C. § 1571). Third, the statute does not even appear to apply to Form I-601A waivers at all and is, therefore, irrelevant. The statute uses general language in connection to "an immigration benefit" rather than specifically to Form I-601A waivers. *See generally* 8 U.S.C. § 1571(b). Moreover, Form I-601A waivers do not appear to fall under the definition of "immigration benefit" where 8 U.S.C. § 1572 defines "immigration benefit application" as "any application or petition to confer, certify, change, adjust, or extend" but not *waive*, as relevant here, a ground of inadmissibility. *See* 8 U.S.C. § 1572(2).

2. Factors Three and Five

"The third and fifth [*TRAC*] factors overlap—the impact on human health and welfare and economic harm, and the nature and extent of the interests prejudiced by the delay," *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 118 (D.D.C. 2005). Plaintiffs allege:

> USCIS's delay in deciding Plaintiffs' provisional waiver applications impacts human health and welfare, not merely economic interests, as Plaintiffs are denied the opportunity to obtain lawful status in the United States; to seek authorized employment; and to plan their future with their families. The delay leaves Plaintiffs and their families in a state of uncertainty about whether they will be able to continue living together in the United States and leaves them without work authorization.

Am. Comp., ¶ 84 (internal citation omitted). The problem with those allegations is that Plaintiffs' injuries do not appear to be attributable to any delay on the part of USCIS; instead, these injuries

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Washington, DC 20044
(202) 532-4142

seem to be the result of their unlawful presence, which is undisputed. *See* Am. Comp., ¶ 19 ("Noncitizen beneficiaries of an approved immigrant visa petition who are (a) unlawfully present in the United States, and (b) not lawfully admitted or paroled into the United States, like Plaintiffs and class members . . .").

3. Factor Four

The fourth *TRAC* factor—the effect of granting relief on the agency's competing priorities—carries significant weight and may be dispositive "even though all the other factors considered in *TRAC* favored" the plaintiff. *Mashpee Wampanoag*, 336 F.3d at 1100. For this factor, Plaintiffs emphasize USCIS's "history of prioritizing family unity," Am. Compl. ¶ 58, and that its "delay in adjudicating provisional unlawful presence waiver applications harm family unity . . . ." *Id*, ¶ 65. But Plaintiffs' allegations seem to assume that family unity is essentially USCIS's sole priority and that Form I-601A waiver applications exclusively serve that interest, which is implausible. Moreover, the Roll Call article that Plaintiffs cite in their complaint suggests that USCIS has many competing priorities that serve a range of different interests, including family unity. *See* Monyak, *supra* ("USCIS must continue to receive appropriations to meet the increasing demand for *many* of our humanitarian benefits.") (emphasis added).

4. Factor Six

While the final factor states only that "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," *TRAC*, 750 F.2d at 80 (citation and quotation marks omitted), courts have looked to good faith efforts to reduce delays as a factor weighing against injunctive relief. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192–93 (D.C. Cir. 2016) ("[T]he Secretary's good faith efforts to reduce the delays within the constraints she faces . . . push in the same direction [against enjoining unreasonable delay.]"). Plaintiffs' cited article on Roll Call plainly demonstrates that USCIS is making good faith efforts to address backlogs and alleviate delays. *See* Monyak, *supra.* The article reports that

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(202) 532-4142

Defendant Jaddou is attempting to address those issues by seeking more funding through both appropriations and fee increases, along with further plans to increase staffing. *See id*.

* * *

In sum, Plaintiffs fail to allege sufficient facts in support of their claim of unreasonable delay.

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P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4142

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss.

Dated: March 31, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

WILLIAM C. PEACHY
Director

WILLIAM C. SILVIS
Assistant Director

CARA E. ALSTERBERG
Senior Litigation Counsel

s/ James J. Wen
JAMES J. WEN, NY #5422126
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868
Ben Franklin Station
Washington, DC 20044
Phone: 202-532-4142
Email: james.j.wen@usdoj.gov

I certify that this memorandum contains [6,107] words, in compliance with the Local Civil Rules.

ERIC C. STEINHART
Trial Attorney

District Judge Tana Lin

UNITED STATES DISTRICT COURT FOR THE
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 CERTIFICATION OF CONFERRAL

I, James J. Wen, hereby certify as follows:

1. I am a Trial Attorney in the Office of Immigration Litigation – District Court Section in the Civil Division of the U.S. Department of Justice and represent Defendants in the above-captioned case.

2. On March 7, 2023, the parties met and conferred telephonically regarding Defendants' motion to dismiss.

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Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4142

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DATED this 31st day of March, 2023.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy
Assistant Attorney General

WILLIAM C. PEACHY
Director

WILLIAM C. SILVIS
Assistant Director

CARA E. ALSTERBERG
Senior Litigation Counsel

s/ James J. Wen
JAMES J. WEN, NY #5422126
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868
Ben Franklin Station
Washington, DC 20044
Phone: 202-532-4142
Email: james.j.wen@usdoj.gov

ERIC C. STEINHART
Trial Attorney