The Honorable James L. Robart 1 United States District Judge 2 3 4 5 6 UNITED STATES DISTRICT COURT 7 WESTERN DISTRICT OF WASHINGTON AT SEATTLE 8 9 Case No. 2:15-cv-00813-JLR NORTHWEST IMMIGRANT RIGHTS PROJECT and THE ADVOCATES FOR 10 **HUMAN RIGHTS**; 11 Wilman GONZALEZ ROSARIO, L.S., K.T., 12 A.A., Karla DIAZ MARIN, Antonio MACHIC YAC, Faridy SALMON, Jaimin 13 SHAH, Marvella ARCOS-PEREZ, Carmen OSORIO-BALLESTEROS, and W.H., 14 Individually and on Behalf of All Others 15 Similarly Situated, 16 Plaintiffs, 17 v. 18 UNITED STATES CITIZENSHIP AND 19 IMMIGRATION SERVICES, et al., 20 Defendants. 21 22 **Defendants' Motion to Dismiss** 23 24 25 26 27 28

The Honorable James L. Robart 1 United States District Judge 2 3 4 5 6 UNITED STATES DISTRICT COURT 7 WESTERN DISTRICT OF WASHINGTON AT SEATTLE 8 9 Case No. 2:15-cv-00813-JLR NORTHWEST IMMIGRANT RIGHTS PROJECT and THE ADVOCATES FOR 10 **DEFENDANTS' MOTION TO DISMISS HUMAN RIGHTS**; 11 Wilman GONZALEZ ROSARIO, L.S., K.T., ORAL ARGUMENT REQUESTED 12 A.A., Karla DIAZ MARIN, Antonio NOTE ON CALENDAR: May 13, 2016 MACHIC YAC, Faridy SALMON, Jaimin 13 SHAH, Marvella ARCOS-PEREZ, Carmen OSORIO-BALLESTEROS, and W.H., 14 Individually and on Behalf of All Others 15 Similarly Situated, 16 Plaintiffs, 17 v. 18 UNITED STATES CITIZENSHIP AND 19 IMMIGRATION SERVICES; UNITED STATES DEPARTMENT OF HOMELAND 20 SECURITY; Leon RODRIGUEZ, DIRECTOR, U.S. Citizenship and 21 Immigration Services; Jeh JOHNSON, 22 Secretary, U.S. Department of Homeland Security, 23 Defendants. 24 25 26 27 28

Defendants' Motion to Dismiss Case No. 2:15-cv-00813-JLR

TABLE OF CONTENTS

N/	ATURE OF THE PROCEEDING	
I.	Plaintiffs and Their Claims	
	A. Putative "90-Day Subclass" Representatives	
	1. Ms. Arcos-Perez	
	2. Renewal EADs Based on Pending Asylum Applications	
	3. EADs Based on Deferred Action Status	
	4. EAD Based on Nonimmigrant Student Status	
	B. Putative "30-Day Subclass" Representatives	
	C. Putative "DACA Renewal Subclass" Representative	
	D. Organizational Plaintiffs	
II.	Statutory and Regulatory Background	
	A. General Background	
	B. Deferred Action for Childhood Arrivals ("DACA")	
	C. Asylum	
ST	CANDARD OF REVIEW10	
Al	RGUMENT1	
I.	Ms. Arcos's and Ms. Osorio's Claims Should be Dismissed for Lack of Subject-Matter Jurisdiction because They do not Allege Action the Agency Was Required to Take.	
	A. The Doctrine of Law of the Case Should be Applied to Ms. Arcos and Ms. Osorio's Claims.	
	B. Even if the Doctrine of Law of the Case Does not Apply, Ms. Arcos's and Ms Osorio's Claims Should be Dismissed for Lack of Subject Matter Jurisdiction	

U.S. Department of Justice, Civil Division

(202) 598-2446

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 4 of 33

1	II. Plaintiffs' Claims Regarding Interim EADs for Initial Applications Based on Pending Asylum Claims Should be Dimissed
2	
3	III. Even Assuming the Individual Plaintiffs' Have Standing, Their Claims Should be Dimissed Because They Are Moot
4	IV. The Organizational Plaintiffs' Claims Should Be Dismissed17
5	A. The Organizatoinal Plaintiffs' Have Failed to Allege Sufficient Facts to Establish Standing
7	Standing.
8	B. Even if the Organization Plaintiffs have Standing, They Have Failed to State a Claim upon Which Relief can be Granted
9	CERTIFICATE OF SERVICE
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27 28	
۷٥	

Defendants' Motion to Dismiss Case No. 2:15-cv-00813-JLR

TABLE OF AUTHORITIES 1 **Cases** 2 Alvarado v. Table Mountain Rancheria, 3 4 Arizona v. California, 5 6 Ashcroft v. Iqbal, 7 8 Bell Atl. Corp. v. Twombly, 9 10 Bennett v. Spear, 11 12 County of Riverside v. McLaughlin, 13 14 GATX/Airlog Corp. v. U.S. Dist. Ct. for the N. Dist. of Cal., 15 192 F.3d 1304 (9th Cir. 1999)11. 15 16 Gonzalez v. Arizona, 17 18 Gros Ventre Tribe v. United States, 19 20 Havens Realty Corp. v. Coleman, 21 22 Indep. Mining Co. v. Babbit, 23 24 Jaa v. U.S. I.N.S., 25 26 Japan Whaling Ass'n v. American Cetacean Soc'y, 27 28 Office of Immigration Litigation

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 6 of 33

1	La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest,
2	624 F.3d 1083 (9th Cir. 2010)
3	Lexmark Int'l, Inc. v. Static Control Components, Inc.,
4	134 S. Ct. 1377 (2014)
5	Lowry v. Barnhart,
6	329 F.3d 1019 (9th Cir. 2003)19
7	Lujan v. Defenders of Wildlife,
8	504 U.S. 555 (1992)
9	Lujan v. Nat'l Wildlife Fed.,
10	497 U.S. 871 (1990)19
11	Milgard Tempering, Inc. v. Selas Corp. of Am.,
12	902 F.2d 703 (9th Cir.1990)11
13	Murphy v. Hunt,
14	455 U.S. 478 (1984)
15	Norton v. S. Utah Wilderness All.,
16	542 U.S. 55 (2004)
17	Pepper v. United States,
18	562 U.S. 476 (2011)11
19	Perez v. Nidek Co., Ltd.,
20	711 F.3d 1109 (9th Cir. 2013)17
21	Pitts v. Terrible Herbst, Inc.,
22	653 F.3d 1081 (9th Cir. 2011)14
23	Savage v. Glendale Union High Sch.,
24	343 F.3d 1036 (9th Cir. 2003)10
25	Southern Pacific Terminal Co. v. ICC,
26	219 U.S. 498 (1911)
27	
28	

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 7 of 33

1	Spencer v. Kemna,
2	523 U.S. 1 (1998)15
3	Stock W., Inc. v. Confederated Tribes,
4	873 F.2d 1221 (9th Cir. 1989)10
5	Toyo Tire Holdings of Am. v. Cont'l Tire of N. Am., Inc.,
6	609 F.3d 975 (9th Cir. 2010)15
7	Tor v. YouTube, Inc.,
8	562 F.3d 1212 (9th Cir. 2009)15
9	U.S. ex rel. Knauff Shaughnessy,
10	338 U.S. 537 (1950)6
11	United States v. Lummi Indian Tribe,
12	235 F.3d 443 (9th Cir. 2000)11
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

Defendants' Motion to Dismiss Case No. 2:15-cv-00813-JLR

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 8 of 33

1	<u>Statutes</u>	
2	5 U.S.C. § 701	1, 6
3	5 U.S.C. § 706	10, 13, 16
4	5 U.S.C. § 706(1)	13
5	8 U.S.C. § 1003(a)(1)	6
6	8 U.S.C. § 1003(a)(3)	6
7	8 U.S.C. § 1182(a)(9)(B)(ii)	8
8	8 U.S.C. § 1184(p)(2)	3
9	8 U.S.C. § 1324a(h)(3)	8
10	28 U.S.C. § 1331	6
11	28 U.S.C. § 1361	2, 6, 13, 16
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 9 of 33

1	<u>Regulations</u>
2	8 C.F.R. § 103.2(a)(7)
3	8 C.F.R. § 103.2(b)
4	8 C.F.R. § 103.2(b)(10)(i)
5	8 C.F.R. § 103.2(b)(10)(ii)
6	8 C.F.R. § 208.7(a)
7	8 C.F.R. § 208.7(a)(1)6, 10, 12, 19
8	8 C.F.R. § 208.7(b), (c)
9	8 C.F.R. § 214.14(d)
10	8 C.F.R. § 214.14(d)(3)
11	8 C.F.R. § 274a.12
12	8 C.F.R. § 274a.12(a)
13	8 C.F.R. § 274a.12(c)
14	8 C.F.R. § 274a.12(c)(8)
15	8 C.F.R. § 274a.12(c)(9)
16	8 C.F.R. § 274a.12(c)(14)
17	8 C.F.R. § 274a.12(c)(19)
18	8 C.F.R. § 274a.13(a)
19	8 C.F.R. § 274a.13(a)(2)
20	8 C.F.R. § 274a.13(d)
21	
22	
23	
24	
25	
26	
27	
28	
	U.S. Department of Legica, Civil Division

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 10 of 33

1		
2	<u>Federal Register</u>	
3	52 Fed. Reg. 16,216, 16,220 (May 1, 1987)	20
4	62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997)	20
5	Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program	
6	Improvements Affecting High-Skilled Nonimmigrant Workers, 80 Fed. Reg. 81,900 (proposed Dec. 31, 2015)	
7	(to be codified at 8 C.F.R pts. 204, 205, 214, 245, 274a)	16
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

Defendants' Motion to Dismiss Case No. 2:15-cv-00813-JLR

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 11 of 33

Federal Rule of Civil Procedure	
12(b)(1)	passim
23(a)(4)	14
	Federal Rule of Civil Procedure 12(b)(1)

20

21

22

23

24

25

26

27

28

Defendants, U.S. Citizenship and Immigration Services ("USCIS"), U.S. Department of Homeland Security ("DHS"), Leon Rodriguez, and Jeh Johnson, in their official capacities, respectfully move this Court to dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction and as moot. Plaintiffs seek to compel Defendants (1) to adjudicate their and their clients' initial Form I-765 applications for employment authorization documents ("EADs") based on asylum applications within thirty days of USCIS' receipt of the Form I-765 or issue interim EADs after thirty days has elapsed, and (2) to adjudicate their and their clients' remaining Form I-765 applications for EADs within ninety days of USCIS' receipt of the Form I-765 or issue interim EADs after ninety days has elapsed. Am. Compl. ¶ 108, 109, 115, 116, 122, 123, 125, 127, 129, 131, 133, 135, ECF No. 58. This Court, however, lacks jurisdiction over two Plaintiffs' claims in the Amended Complaint because Plaintiffs have not demonstrated that this Court has the subject-matter jurisdiction necessary to proceed. The Court also lacks subjectmatter jurisdiction over the claims regarding interim EADs for initial applications based on pending asylum applications. In addition, even where subject-matter jurisdiction exists, the claims of the individual Plaintiffs, in their individual capacities (i.e., should the motion for class certification be denied), are moot because USCIS has already adjudicated their Form I-765 applications. Finally, the organizational Plaintiffs have failed to demonstrate the requisite standing because they have not alleged sufficient facts to show a diversion of organizational resources. They also fail to state a claim under the Mandamus Act and the Administrative Procedures Act because no duty is owed to them by the Defendants and they have failed to demonstrate they are within the zone of interest contemplated by the statute and regulations. The Court therefore should dismiss this case in its entirety to the extent that it also denies the Plaintiffs Renewed Motion for Class Certification.

NATURE OF THE PROCEEDING

I. PLAINTIFFS AND THEIR CLAIMS

On May 22, 2015, Plaintiffs filed this lawsuit, alleging violations of the immigration regulations and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* On August 10, 2015, Defendants moved to dismiss Plaintiffs' claims for lack of standing and lack of

subject-matter jurisdiction. On February 10, 2016, the Court held that it lacked subject-matter jurisdiction to consider the claims of individual Plaintiffs Marvella Arcos-Perez and Carmen Osorio-Ballesteros and dismissed their claims. Order at 20, 29, ECF No. 55. The Court also held that Northwest Immigrant Rights Project ("NWIRP") and The Advocates for Human Rights ("The Advocates") did not allege sufficient injury to their organizations to establish standing and dismissed their claims. *Id.* at 34. However, the Court found that it had jurisdiction over W.H.'s claims under the APA and Mandamus and Venue Act of 1962 ("Mandamus Act"), 28 U.S.C. § 1361 and that, although his application for an EAD had been granted, his claim was not moot as it related to the putative class W.H. represents. *Id.* at 26, 31.

On March 10, 2016, Plaintiffs filed an Amended Complaint. ECF No. 58. The Amended Complaint retains the three individual plaintiffs previously named, Marvella Arcos-Perez, Carmen Osorio-Ballesteros, and W.H., and adds eight new individual plaintiffs, Wilman Gonzalez Rosario, L.S., K.T., A.A., Karla Diaz Marin, Antonio Machic Yac, Faridy Salmon, and Jaimin Shah, who have sued on behalf of themselves and others similarly situated. *See* Amended Complaint ¶¶ 18-28, 46, 50, 53, 57, 59, 62, 64, 68, 73, 76, 79. On March 11, 2016, Plaintiffs filed their Renewed Motion for Class Certification. ECF No. 59.

A. Putative "90-Day Subclass" Representatives

1. Ms. Arcos-Perez

Marvella Arcos-Perez is a native and citizen of Mexico who, on March 27, 2013, lodged, but did not file, a defensive application for asylum. Arcos Certified Administrative Record ("A.R.") at 1, 3, 10. On August 2, 2013, the immigration judge held a Master Calendar hearing, during which Ms. Arcos's asylum application was filed. *Id.* at 1. That same day, the immigration judge administratively closed Ms. Arcos's removal proceedings, including her asylum case, pursuant to Ms. Arcos's request for, and DHS's agreement to grant, prosecutorial discretion. *Id.* at 1, 24. In May 2014, USCIS mistakenly granted Ms. Arcos an EAD based on her asylum application, even though the administrative closure of her case stopped her EAD asylum clock on the day it was filed, thereby tolling the 180 days necessary for her to possibly be eligible for an EAD. *Id.* at 1. Ms. Arcos filed a Form I-765 Application for Employment

Authorization ("Form I-765") to renew her EAD on January 12, 2015. *Id.* After recognizing both Ms. Arcos's ineligibility to receive an EAD and that the previous EAD had been granted in error, USCIS denied her EAD application on June 10, 2015. *Id.* Ms. Arcos had filed her premature EAD application 149 days earlier. *Id.* On October 15, 2015, Ms. Arcos filed another EAD application based on the same grounds. Arcos Second A.R. at 1. On February 10, 2016, the Court dismissed Ms. Arcos's claim for lack of subject-matter jurisdiction. Order at 20. On March 4, 2016, USCIS denied Ms. Arcos's application again because her initial EAD had been granted in error and she was not otherwise eligible for an EAD. *Id.* at 1-2.

2. Renewal EADs Based on Pending Asylum Applications

L.S. is a native and citizen of the Gambia with a pending asylum application. L.S. A.R. at 1. He was granted an initial EAD on February 19, 2015, valid until February 18, 2016. *Id.* at 7. On November 16, 2015, he filed a Form I-765 to renew his EAD. *Id.* at 1. On March 18, 2016, USCIS granted L.S.'s application for a renewal EAD based on his pending asylum application, 123 days after he filed his application. *Id.*

K.T. is a native and citizen of Albania and has a pending asylum application. K.T. A.R. at 5. He was granted an initial EAD on October 27, 2014, valid until October 26, 2015. *Id.* at 8. On July 30, 2015, he filed a Form I-765 to renew his EAD. *Id.* at 5. On March 28, 2016, USCIS granted K.T.'s application for a renewal EAD based on his pending asylum application, 242 days after he filed his application. *Id.*

3. EADs Based on Deferred Action Status

Wilman Gonzalez Rosario is a native and citizen of the Dominican Republic. Gonzalez Rosario A.R. at 7. On March 20, 2015, USCIS granted Mr. Gonzalez Rosario deferred action while he awaits a U nonimmigrant visa. ¹ *Id.* at 8. On May 7, 2015, he filed a Form I-765 based on his deferred action. *Id.* at 7. On March 16, 2016, USCIS granted Mr. Gonzalez Rosarios's application for an EAD, 314 days after he filed his application. *Id.*

U.S. Department of Justice, Civil Division Office of Immigration Litigation P.O. Box 868, Ben Franklin Station Washington, D.C. 20044 (202) 598-2446

¹ Each fiscal year, USCIS may grant only 10,000 U visa applications. 8 U.S.C. § 1184(p)(2). After the cap has been reached each year, eligible applicants are placed on a waiting list and given deferred action status until they can be issued a U visa. 8 C.F.R. § 214.14(d). Aliens with deferred action status may apply for employment authorization. 8 C.F.R. § 274a.12(c)(14).

Karla Diaz Marin, a native and citizen of Mexico, was granted deferred action on February 24, 2015, while she awaits a U nonimmigrant visa. Diaz Marin A.R. at 8, 9. On August 11, 2015, she filed an I-765, incorrectly indicating that she was the recipient of a U nonimmigrant visa, rather than the recipient of deferred action. *Id.* at 8 (question 16, originally completed as "(a)(19)"). On March 18, 2016, USCIS approved her application, but on the basis of her deferred action status, 220 days after she filed the application. *Id.*

Faridy Salmon is a native and citizen of Ecuador. Salmon A.R. at 23. On September 22, 2015, she was granted deferred action on humanitarian grounds. *Id.* at 20. On October 5, 2015, she filed a Form I-765 seeking an EAD on the basis of that status. *Id.* at 7. However, she incorrectly filed her application with the Vermont Service Center, rather than with the Chicago Lockbox. *See id.* at 7 (stamped "VSC"); *see also* Direct Filing Addresses for Form I-765, Application for Employment Authorization, *available at* https://www.uscis.gov/i-765-addresses (stating that those filing for an EAD on the basis of deferred action must file their application at the USCIS Chicago Lockbox). After the application was rerouted, USCIS approved the application on the basis of her deferred action status on April 6, 2016, 184 days after she filed the application. Salmon A.R. at 7.

4. EAD Based on Nonimmigrant Student Status

Jaimin Shah is a native and citizen of India. Shah A.R. at 26. He is present in the United States pursuant to an F-1 student visa. *Id.* at 24. On November 9, 2015, he filed a Form I-765 seeking an EAD in order to obtain Post-Completion Optional Practical Training ("OPT"). *Id.* at 1. On March 15, 2016, USCIS granted Mr. Shah's application for an EAD, 127 days after he filed the application. *Id.*

B. Putative "30-Day Subclass" Representatives

W.H. is a native and citizen of Syria. W.H. A.R. at 3. USCIS granted him Temporary Protected Status ("TPS") in October 2013, with an EAD valid from October 21, 2013, until March 31, 2015. *Id.* at 6. On March 10, 2014, W.H. filed a completed asylum application. *Id.* at 5. On December 15, 2014, W.H. filed a Form I-765 application for an EAD, indicating that he was seeking an initial EAD based on his asylum application. *Id.* at 8-9. On January 2, 2015,

1 USCIS notified W.H. that his EAD application had been rejected for insufficient fees and 2 supporting documentation. Id. at 9. On January 9, 2015, W.H. submitted another Form I-765, 3 indicating that he was applying for an initial EAD based on an asylum application, not a renewal 4 EAD based on TPS, and therefore a filing fee was not required. *Id.* at 3. On June 16, 2015, USCIS granted W.H.'s application for an initial EAD based on his asylum application, 158 days 5 after he filed his application. *Id.* On February 10, 2016, this Court held that it had subject-6 7 matter jurisdiction over W.H.'s claims. Order at 26. 8 A.A. is a native and citizen of Ethiopia, who applied for asylum on August 19, 2015. 9

A.A. is a native and citizen of Ethiopia, who applied for asylum on August 19, 2015.

A.A. A.R. at 1, 7. On January 19, 2016, he filed a Form I-765, seeking an initial EAD. *Id.* at 1. On March 16, 2016, USCIS approved A.A.'s application for an initial EAD based his asylum application, 57 days after he filed the application. *Id.*

Antonio Machic Yac is a native and citizen of Guatemala, who applied for asylum on July 17, 2015. Machic Yac A.R. at 1, 6. He filed a Form I-765 on December 31, 2015, seeking an initial EAD. *Id.* at 1. On March 31, 2016, USCIS approved Mr. Machic Yac's application for an initial EAD based on his asylum application, 91 days after he filed the application. *Id.*

C. Putative "DACA Renewal Subclass" Representative

Carmen Osorio-Ballesteros, a native and citizen of Mexico, is a Deferred Action for Childhood Arrivals ("DACA") recipient. Osorio A.R. at 3. On December 29, 2014, she filed a request to renew her DACA and a Form I-765 to renew her EAD based on DACA. *Id.* at 3, 10, 13. USCIS approved both her DACA renewal request and her EAD application on June 3, 2015. *Id.* at 3. On February 10, 2016, this Court ruled that it did not have subject-matter jurisdiction over Ms. Osorio's claims. Order at 29.

D. Organizational Plaintiffs

The Amended Complaint also names two organizational Plaintiffs, Northwest Immigrant Rights Project ("NWIRP"), an immigration legal services organization that has filed applications for EADs on behalf of its noncitizen clients, and The Advocates for Human Rights ("The Advocates"), a human rights legal services organization that has filed EADs on behalf of its own, and other legal service providers' asylum clients. *Id.* ¶¶ 15-16. The Court previously held that

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

these Plaintiffs had not established standing to bring their own claims before the Court because they did not show diversion of resources or frustration of their mission. Order at 34.

Plaintiffs assert jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (mandamus statute). Amended Complaint ¶ 13. Plaintiffs' Amended Complaint alleges that where USCIS does not adjudicate initial Form I-765 applications for EADs based on asylum applications within thirty days of USCIS' receipt of the Form I-765 or issue interim EADs after thirty days has elapsed, Defendants violate (1) 8 C.F.R. §§ 208.7(a)(1), 274a.13(a)(2), 274a.13(d), and the Form I-765 Instructions, and (2) the APA, 5 U.S.C. § 701 *et seq. Id.* ¶¶ 115, 116, 129, 131. Plaintiffs' Amended Complaint also alleges that where USCIS does not adjudicate the remaining Form I-765 applications for EADs within ninety days of USCIS' receipt of the Form I-765 or issue an interim EAD when ninety days has elapsed, Defendants violate (1) 8 C.F.R. § 274a.13(d), and (2) the APA, 5 U.S.C. § 701 *et seq. Id.* ¶¶ 108, 109, 122, 123, 125, 127 133, 135.

II. STATUTORY AND REGULATORY BACKGROUND

A. General Background

The Immigration and Nationality Act ("INA") charges the Secretary of DHS with the administration and enforcement of the immigration laws. 8 U.S.C. § 1003(a)(1). The INA vests the Secretary with discretion over immigration matters, authorizing him to "establish such regulations; . . . issue such instructions; and perform such other acts *as he deems necessary* for carrying out his authority" under the statute. 8 U.S.C. § 1003(a)(3) (emphasis added). Such authority reflects the longstanding recognition that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

Recognizing that the immigration statutes vest the agency with broad discretion, USCIS (formerly the Immigration and Naturalization Service ("INS")) promulgated regulations conferring on certain benefits recipients and/or applicants the discretionary privilege to obtain work authorization. *See* 8 C.F.R. § 274a.12. Certain classes of benefits recipients are authorized to be employed in the United States "incident to status." *Id.* § 274a.12(a). These persons are

authorized to work as a condition of their admission as soon as the qualifying immigration benefit or status is granted, and they file Forms I-765 only to obtain documentary evidence (e.g., for I-9 purposes) of the employment authorization they already have. *Id.* § 274a.12(a). Other classes of aliens may be eligible for employment authorization but must file a Form I-765 application to receive discretionary work authorization. *Id.* § 274a.12(c). For all eligibility classes in this subsection, USCIS may, in its discretion, grant work authorization and establish a specific validity period for such work authorization. *Id.* Certain aliens may be eligible for work authorization while their underlying immigration benefits or status applications remain pending. See, e.g., Id. § 274a.12(c)(8) (asylum applicants), (c)(9) (adjustment of status applicants), and (c)(19) (TPS applicants). Other classes of aliens in this subsection may be eligible for work authorization based upon a status or circumstance that is unrelated to having a pending request for a separate immigration benefit. See, e.g., id. § 274a.12(c)(14) (alien granted deferred action). USCIS is authorized to grant interim EADs in certain circumstances while a Form I-765 remains pending. Where 8 C.F.R. § 274a.13(d) applies, "USCIS will adjudicate the [EAD] application within 90 days from the date of the application " 8 C.F.R. § 274a.13(d). As discussed further below, section 274a.13(d) explicitly carves out, *inter alia*, initial Form I-765 EAD applications based on asylum applications. *Id.* However, where 8 C.F.R. § 274a.13(d) applies, "[f]ailure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days." *Id.* The regulation states that the ninety-day interim EAD provision applies when the qualifying Form I-765 is properly filed. See 8 C.F.R. §§ 274a.12(d)(13); 103.2(a)(7) (receipt date determined by proper

signature, fee, location); 103.2(b) (initial evidence requirement). When USCIS requests additional evidence either in support of the Form I-765 or the underlying benefits application, the ninety-day period is suspended, and once USCIS receives the requested evidence, the ninety-day period restarts. 8 C.F.R. § 103.2(b)(10)(i). When the applicant, petitioner, sponsor, beneficiary, or other material person requires fingerprinting and requests fingerprint or interview rescheduling, the ninety-day period is suspended, and then restarts on the day of the rescheduled request. *Id.* Generally, USCIS will not grant an interim benefit when the underlying benefit

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

18

19

20

21

22

23

24

25

26

27

28

application remains in suspense for the submission of requested initial evidence. 8 C.F.R. § 103.2(b)(10)(ii). In addition, USCIS will not grant an interim EAD where parallel statutory or regulatory provisions preclude such issuance.

B. Deferred Action for Childhood Arrivals ("DACA")

Beginning in 2012, the Executive Branch implemented guidance known as the Deferred Action for Childhood Arrivals ("DACA") guidelines to authorize undocumented individuals who meet certain criteria to remain in the United States for a limited time. See "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" ("Napolitano Directive"), available at http://www.dhs.gov/xlibrary/assets/s1exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; see also Frequently Asked Questions ("FAQ"), available at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivalsprocess/frequently-asked-questions#what is DACA. DACA recipients enjoy no formal immigration status, but DHS permits them to remain in the United States for a renewable period of two years. See id. DHS considers DACA recipients not to be unlawfully present in the United States because their deferred action is a period of stay authorized by the Attorney General. See 8 U.S.C. § 1182(a)(9)(B)(ii); 8 C.F.R. § 214.14(d)(3); INS Adjudicator's Field Manual Ch. 40.9.2(b)(3)(J). DACA recipients may request renewal of their period of deferred action for up to two years, which USCIS may grant based on an individualized discretionary review of an alien's case. See Renewal of DACA, available at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivalsprocess/frequently-asked-questions#renewal of DACA.

DACA recipients may obtain EADs, as set forth in 8 C.F.R. § 274a.12(c)(14). Under this provision, USCIS may only approve an EAD for an alien who has been "granted deferred action." *Id.* In making an employment authorization determination, USCIS must first verify that an applicant is lawfully admitted or otherwise has authority to be employed in the United States. *See* 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12. Thus, "[t]he Interim EAD provisions apply to individuals filing Form I-765 based on Consideration of Deferred Action for Childhood Arrivals

only after a determination on deferred action is reached." Form I-765 Instructions at 1 (Feb. 13, 2015) (emphasis added) available at http://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf. The instructions further explain, "The 90-day period for adjudicating Form I-765 filed together with Form I-821D does not begin until DHS has decided whether to defer action in your case." *Id.* at 6. The instructions do not differentiate between I-765s based on initial DACA requests and those based on renewal requests, both of which require a Form I-821D. *Id.*

C. Asylum

An asylum applicant may apply for work authorization by filing a Form I-765 application for an EAD after a complete asylum application has been pending for 150 days, and the asylum applicant may be eligible to receive an EAD thirty days thereafter. See 8 C.F.R. §§ 208.7(a), 274a.12(c)(8). The 150 and 180-day periods are calculated according to the asylum EAD clock. 8 C.F.R. § 208.7(a)(1), (2). The asylum EAD clock starts when a complete asylum application is first filed with USCIS, is submitted in immigration court, or, in more recent times, is lodged at the immigration court window. 8 C.F.R. § 208.7(a). If the asylum application is missing required initial evidence, it is not complete. USCIS may request the missing evidence and any time period for USCIS processing will start over from the date of receipt of the required initial evidence. 8 C.F.R. § 103.2(b)(10)(i). Once started, the EAD asylum clock is suspended for periods of applicant-caused delay and during periods in which a Request for Evidence is pending. 8 C.F.R. § 208.7(a). When an asylum case is administratively closed pursuant to prosecutorial discretion in the immigration courts, the asylum EAD clock is stopped. See Memorandum from the Principal Legal Advisor, U.S. Immigration & Customs Enforcement Office of the Principal Legal Advisor, Case-by-Case Review of Incoming and Certain Pending Cases, 3, n.5, (Nov. 17, 2011), available at http://www.ice.gov/doclib/foia/prosecutorial-

2425

26

27

28

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

² This memorandum has been superseded by Memorandum from the Secretary, U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), available at

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf, with regard to the enforcement priorities addressed in the 2011 memorandum, but the policies concerning treatment of administrative closure for EAD purposes were not affected.

discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf; U.S.

Immigration & Customs Enforcement, Guidance to ICE Attorneys Reviewing the CBP, USCIS, & ICE Cases Before the Executive Office for Immigration Review (undated), available at http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf. Once the delay has been resolved, the asylum EAD clock will resume. *Id.* If the asylum application is denied prior to the conclusion of the 180-day period, the application for an EAD will be denied. 8 C.F.R. § 208.7(a)(1).

If the asylum application has not been adjudicated within the 150-day period, USCIS "shall have 30 days from the date of filing of the request [for] employment authorization to grant or deny that application, except that no employment authorization shall be issued to an asylum applicant prior to the 180-day period" 8 C.F.R. § 208.7(a)(1). The regulations do not provide for an interim EAD if this timeline is not met. *Compare* 8 C.F.R. § 208.7(a)(1), *with* 8 C.F.R. § 274a.13(d). Once an EAD based on an asylum application is granted, it is renewable, and the asylum applicant must file a Form I-765 application to renew the EAD. *See* 8 C.F.R. § 208.7(b), (c). Generally, an EAD will not be renewed if the asylum application is denied but may be renewed if the alien continues to pursue the asylum application through administrative or judicial review. 8 C.F.R. § 208.7(b), (c).

STANDARD OF REVIEW

Plaintiffs have the burden of establishing jurisdiction. *See Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). A motion to dismiss under Rule 12(b)(1) tests the subject-matter jurisdiction of the Court. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). The elements necessary to establish standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Claims seeking relief under section 706 of the APA and under the Mandamus Act are coextensive. *See Indep. Mining Co. v. Babbit*, 105 F.3d 502, 507 (9th Cir. 1997) ("[T]he Supreme Court has construed a claim seeking mandamus relief under the [Mandamus Act], 'in essence,' as one for relief under § 706 of the APA." (citing *Japan Whaling Ass'n v. American*

1	Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986))). A plaintiff must show "that an agency failed to
2	take a discrete agency action that it is required to take," Norton v. S. Utah Wilderness All., 542
3	U.S. 55, 64 (2004). If not, the claim "may be dismissed for lack of jurisdiction." Alvarado v.
4	Table Mountain Rancheria, 509 F.3d 1008, 1019-20 (9th Cir. 2007) (citing Gros Ventre Tribe v.
5	United States, 469 F.3d 801, 814 (9th Cir.2006)). Further, a court should dismiss a case for lack
6	of jurisdiction if the case becomes moot and if the court can no longer provide the petitioner with
7	"effective relief." GATX/Airlog Corp. v. U.S. Dist. Ct. for the N. Dist. of Cal., 192 F.3d 1304,
8	1306 (9th Cir. 1999).
9	A Rule 12(b)(6) motion tests the legal sufficiency of a claim. "To survive dismissal, the
10	complaint must allege sufficient facts to state a claim for relief that is plausible on its face." Bell
11	Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). Although the Court must accept as true all

A Rule 12(b)(6) motion tests the legal sufficiency of a claim. "To survive dismissal, the complaint must allege sufficient facts to state a claim for relief that is plausible on its face." Bell | Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). Although the Court must accept as true all well-pleaded factual allegations when determining the legal sufficiency of a claim, it need not credit "legal conclusion couched as a factual allegation." *Id.* at 555.

Additionally, pursuant to the doctrine of the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Pepper v. United States, 562 U.S. 476, 506 (2011) (citing Arizona v. California, 460 U.S. 605, 618 (1983)); see also United States v. Lummi Indian Tribe, 235 F.3d 443, 447, 452 (9th Cir. 2000) (upholding the application of law of the case doctrine to an amended pleading).

19

18

12

13

14

15

16

17

ARGUMENT

20 21

MS. ARCOS'S AND MS. OSORIO'S CLAIMS SHOULD BE DISMISSED FOR I. LACK OF SUBJECT-MATTER JURISDICTION BECAUSE THEY DO NOT ALLEGE ACTION THE AGENCY WAS REQUIRED TO TAKE.

22 23

A. The Doctrine of Law of the Case Should be Applied to Ms. Arcos and Ms. Osorio's Claims.

24 25

26

The law of the case doctrine states "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Pepper, 562 U.S. at 506. Although this rule is discretionary, it is "designed to aid in the efficient operation of court affairs." Lummi Indian Tribe, 235 F.3d at 452 (citing Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir.1990)). In the Amended Complaint, Ms. Arcos

27 28

1 and Ms. Osorio do not allege any new material facts regarding their claims as compared to the 2 initial Complaint. *Compare* Compl. ¶¶ 18, 19, 38-42, *with* Am. Compl. ¶¶ 26, 27, 73-78. 3 Although Ms. Arcos has filed a second application to renew her EAD since the initial Complaint 4 was filed, her second application suffers from the same infirmities. See Amended Complaint ¶ 26. This second application was based on the same grounds as her first denied application— 5 the erroneous initial asylum-based EAD. See Arcos Second A.R. at 1. Indeed, on March 4, 6 7 2016, USCIS denied her second application. *Id.* at 1. Therefore, these facts do not provide her 8 with a new basis for a claim. This Court has previously dismissed Ms. Arcos's and Ms. Osorio's 9 claims for lack of subject-matter jurisdiction, see Order at 20, 29, and it should once again 10 dismiss their claims. The Court's previous decision was not in error, the evidence presented in 11 the Amended Complaint is not substantially different, and there has been not intervening change in law. See Gonzalez v. Arizona, 677 F.3d 383, 398 n.4 (9th Cir. 2012), aff'd sub nom. Arizona v. 12 13 Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) (discussing exceptions to the law of 14 the case doctrine). Therefore, the holding should not be disturbed, and the Court should again

15

16

17

18

19

20

21

22

23

24

25

26

27

28

dismiss their claims.

B. Even if the Doctrine of Law of the Case Does not Apply, Ms. Arcos's and Ms Osorio's Claims Should be Dismissed for Lack of Subject Matter Jurisdiction.

The Court should once again dismiss Ms. Arcos's and Ms. Osorio's claims for lack of subject-matter jurisdiction even if it does not apply the law of the case doctrine. *See* Fed. R. Civ. P. 12(b)(1). As Defendants previously argued, Ms. Arcos's initial EAD based on a pending asylum application was erroneously granted because her application had not been pending for 180 days. *See* 8 C.F.R. § 208.7(a)(1); Arcos A.R. at 1 (Ms. Arcos's applied for asylum and was granted prosecutorial discretion on the same day). The Government should not be estopped from correcting its error by not renewing her EAD. *See Jaa v. U.S. I.N.S.*, 779 F.2d 569, 572 (9th Cir. 1986) (citations omitted). Therefore, Ms. Arcos cannot demonstrate that she has a right to an EAD or that USCIS has a duty to issue one to her, and this Court should dismiss her claims for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

This Court also lacks jurisdiction over Ms. Osorio's claims because she has not suffered injury. USCIS issued her an EAD on the same day on which she qualified for DACA renewal and obtained deferred action status. *See* 8 C.F.R. § 274a.12(c)(14). Thus, no time elapsed on her EAD application, and she did not merit any interim EAD because she had not yet proven her DACA renewal eligibility. No agency action was unreasonably delayed or unlawfully withheld. Therefore, she has failed to demonstrate standing to challenge USCIS's actions.

Further, the Court's analysis in its February 10th Order remains valid as to Ms. Arcos's and Ms. Osorio's claims. While the APA allows a court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), a claim "can only proceed where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take," Norton, 542 U.S. at 64. The Mandamus Act imparts similar requirements. 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction . . . to compel . . . [an] agency . . . to perform a duty owed to the plaintiff." (emphasis added)); see also Indep. Mining Co., 105 F.3d at 507 ("[T]he Supreme Court has construed a claim seeking mandamus relief under the [Mandamus Act], 'in essence,' as one for relief under § 706 of the APA." (citing *Japan Whaling Ass'n*, 478 U.S. at 230 n.4)). If a claim fails to allege an action the agency is required to take, it "may be dismissed for lack of jurisdiction." Alvarado, 509 F.3d at 1019-20 (citing Gros Ventre Tribe, 469 F.3d at 814). Here, USCIS did not fail to take actions it was required to take in relation to Ms. Arcos's and Ms. Osorio's claims. Ms. Arcos's initial EAD was granted in error, and therefore, she has not alleged that USCIS, in failing to adjudicate her applications to renew that EAD, "failed to take a discrete agency action it [wa]s required to take." Norton, 542 U.S. at 64. Likewise, Ms. Osorio has not alleged that USCIS "failed to take a *discrete* agency action it [wa]s required to take" because it timely adjudicated her EAD application after approving her DACA application. Id. Therefore, the Court lacks subject-matter jurisdiction over their claims and should dismiss them. See Fed. R. Civ. P. 12(b)(1).

26

23

24

25

27

3

5

7

6

8

10

1112

13

1415

16

17

18

19 20

21 22

2324

2526

27

28

II. PLAINTIFFS' CLAIMS REGARDING INTERIM EADS FOR INITIAL APPLICATIONS BASED ON PENDING ASYLUM CLAIMS SHOULD BE DISMISSED.

W.H.'s, A.A.'s, and Machic Yac's claims requesting interim EADs should be dismissed for lack of subject-matter jurisdiction because they have not identified actions that USCIS was required to take. See Norton, 542 U.S. at 64. The interim EAD regulation at 8 C.F.R. § 274a.13(d) expressly does not apply to initial EAD applications based on asylum applications. Further, the Instructions to Form I-765 state that asylum applicants whose EAD has been pending for over thirty days may request an interim EAD, not that USCIS must issue one. See Ex. 1, Form I-765 Instructions at 11 ("[Y]ou may request interim authorization by calling "), 1 ("The interim EAD will be granted for a period not to exceed 240 days") (Feb. 13, 2015). The Court recognized this weakness in Plaintiffs' claims in its February 10th Order. See Order at 26 n.19 ("However, because the regulations applicable to asylum applicants make no reference to interim EADs, the court reserves judgment as to whether [the interim EAD] remedy is available."). Thus, contrary to W.H.'s, A.A.'s, and Machic Yac's assertions, USCIS is not required to issue interim EADs when an initial EAD application based on an asylum application is not adjudicated within thirty days of the date of filing. Because USCIS has not "failed to take a discrete agency action it [wa]s required to take," Norton, 542 U.S. at 64, the Court should dismissed Plaintiffs' claims regarding interim EADs for lack of subject-matter jurisdiction.

III. EVEN ASSUMING THE INDIVIDUAL PLAINTIFFS HAVE STANDING, THEIR CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE MOOT.³

In addition to two Plaintiffs failing to demonstrate subject-matter jurisdiction over their claims, all of the individual Plaintiffs' claims, as brought in their individual capacities (rather than as putative class representatives), should be dismissed because they are moot. *See Pitts v.*

³ As reflected in the prior stipulated agreement (ECF No. 26), Defendants do not dispute, in opposing Plaintiffs' Renewed Motion for Class Certification (ECF No. 59), that the "inherently transitory" exception to mootness and the "relation back" doctrine, *see County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), apply for purposes of determining whether the individual Plaintiffs will fairly and adequately protect the interests of the putative class, as required by Federal Rule of Civil Procedure 23(a)(4). Although Defendants do not dispute mootness for class certification purposes, the individual Plaintiffs cannot assert independent claims should class certification fail because their claims have mooted out.

1	Terrible Herbst, Inc., 653 F.3d 1081, 1092 (9th Cir. 2011) (citations omitted) (holding that once
2	class certification is denied, the merits of a case may become moot because "the plaintiff has
3	been offered all that he can possible recover through litigation."). Article III of the Constitution
4	limits the jurisdiction of the federal courts to the consideration of actual cases or controversies.
5	Spencer v. Kemna, 523 U.S. 1, 7 (1998). Under this requirement, "throughout the litigation, the
6	plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant
7	and likely to be redressed by a favorable judicial decision." Spencer, 523 U.S. at 7. A case is
8	moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable
9	interest in the outcome." Toyo Tire Holdings of Am. v. Cont'l Tire of N. Am., Inc., 609 F.3d 975,
10	982-83 (9th Cir. 2010) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1984)). A court must
11	dismiss a case as moot if the court can no longer provide the petitioner with "effective relief."
12	GATX/Airlog Corp., 192 F.3d at 1306. An actual controversy must exist "at all stages of
13	proceedings, not merely at the time when the complaint is filed." <i>Id.</i> If a case becomes moot,
14	then the Court lacks jurisdiction because mootness is jurisdictional. Tor v. YouTube, Inc., 562
15	F.3d 1212, 1214 (9th Cir. 2009).
16	USCIS has already decided Ms. Arcos's, Ms.Osorio-Ballestero's, W.H.'s, Mr. Gonzalez
17	Rosario's, L.S.'s, K.T.'s, A.A's, Ms. Diaz Marin's, Mr. Machic Yac's, Ms. Salmon's, and Mr.
18	Shah's Form I-765 applications for EADs. See Arcos A.R. at 1; Arcos Second A.R. at 1; Osorio
19	A.R. at 3; W.H. A.R. at 3; Gonzalez Rosario A.R. at 7; L.S. A.R. at 1; K.T. A.R. at 5; A.A. A.R.
20	at 1: Diaz Marin A.R. at 8: Machic Yac A.R. at 1: Salmon A.R. at 7: Shah A.R. at 1. Any claims

Shah's Form I-765 applications for EADs. *See* Arcos A.R. at 1; Arcos Second A.R. at 1; Osorio A.R. at 3; W.H. A.R. at 3; Gonzalez Rosario A.R. at 7; L.S. A.R. at 1; K.T. A.R. at 5; A.A. A.R. at 1; Diaz Marin A.R. at 8; Machic Yac A.R. at 1; Salmon A.R. at 7; Shah A.R. at 1. Any claims that they might have had in their individual capacity are moot and no longer present a case or controversy. *See GATX/Airlog*, 192 F.3d at 1306. Because USCIS has adjudicated all of individual Plaintiffs' EAD applications, this Court is unable to provide them with any form of relief. *See id*.

Additionally, individual Plaintiffs in their individual claims do not fall into the exception to the mootness doctrine for claims that are "capable of repetition, yet evading review." *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). It is speculative to assert that their claims are likely to be repeated, and even if they were to be repeated, they would not evade

21

22

23

24

25

26

27

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 27 of 33

review. First, it is uncertain whether Plaintiffs will again apply for an EAD. For example, the
asylum claims of W.H., A.A., L.S., K.T., and Mr. Machic Yac could be denied, and they would
no longer be eligible for employment authorization. Mr. Shah might decide to return to his home
country after completing his authorized OPT. Mr. Gonzalez Rosario, Ms. Diaz Marin, and
Ms. Osorio, may fail to qualify to have their deferred action status continued and no longer be
permitted to apply for employment authorization. Second, it is uncertain if Plaintiffs' future
possible EAD applications will face allegedly unlawful delay. 4 USCIS adjudicates many
applications within the time limits prescribed by the regulations. Thus, any number of
unforeseeable events can and will affect whether any of the individual Plaintiffs will apply for an
EAD in the future and face delay. This speculation is insufficient to show that Plaintiffs claims
are capable of repetition.

Finally, even if Plaintiffs were to face delay in the adjudication of their hypothetical future EAD applications, their claims would not evade review. Each individual would be able to bring claims under the APA and Mandamus Act to ask to the court to order USCIS to adjudicate their applications. *See* 5 U.S.C. § 706; 28 U.S.C. § 1361.

Therefore, if the Plaintiffs' Renewed Motion for Class Certification is denied, the Amended Complaint should be dismissed for lack of standing due to mootness as it relates to the individual Plaintiffs' claims. *See* Fed. R. Civ. P. 12(b)(1).

⁴ Indeed, DHS is presently in the process of promulgating new regulations relating to the renewal of EADs. *See* Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 80 Fed. Reg. 81,900 (proposed Dec. 31, 2015) (to be codified at 8 C.F.R pts. 204, 205, 214, 245, 274a). The proposed regulations allow for the automatic extension of the validity of certain EADs for an interim period upon the timely filing of an application to renew such documents. *Id.* at 81,900, 81, 903, 81,926-28. They also eliminate the 90-day processing deadline and interim EAD scheme currently in place, due to national security and fraud concerns. *Id.* at 81,900, 81, 903, 81,928-29. The comment period for the regulation closed on February 29, 2016, and the rule will take effect upon the publication of a final rule in the Federal Register. *Id.* at 81,900.

IV. THE ORGANIZATIONAL PLAINTIFFS' CLAIMS SHOULD BE DISMISSED.

A. The Organizational Plaintiffs' Have Failed to Allege Sufficient Facts to Establish Standing.

The organizational Plaintiffs also lack standing, and their claims should be dismissed. *See Defenders of Wildlife*, 504 U.S. at 560-61. They have failed to sufficiently allege that the Government's delay in adjudication of EAD applications amounts to a cognizable injury suffered by them, where they have not demonstrated their operations are meaningfully impacted by Defendants' actions. In order to establish the elements required for standing, a plaintiff must support its claims "in the same way as any other matter on which the plaintiff bears the burden of proof." *See id.* at 561. At the motion to dismiss stage, this requires "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 *Twombly*, 550 U.S. at 570); *see Perez v. Nidek Co., Ltd.*, 711 F.3d 1109, 1113 (9th Cir. 2013) (applying the *Iqbal* standard to a standing analysis). "A complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement." *Id.* (quoting *Twombly*, 550 U.S. at 570 (second alteration in original).

An organization suing on its own behalf can establish injury in fact only if it has suffered harm that is both concrete and particularized and actual or imminent, not conjectural or hypothetical. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). In addition, an organizational plaintiff must show that the claimed harm is "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Thus, "an organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id.* at 1088 n.4

In its February 10th Order, the Court found that the organizational Plaintiffs had not alleged sufficient facts to establish standing because not all of the individual Plaintiffs were found to have valid claims. Order at 33. Without any indication of how much of their resources were diverted to assisting the types of claims that survived or what parts of their mission were

3

45

6

7 8

9

10

11 12

13

14

1516

17

18

19

2021

22

23

24

2526

27

28

frustrated, the Court was unable to find that their "conclusory description[s]" conferred standing. *Id.*

The Amended Complaint suffers from the same infirmities. The organizational Plaintiffs have added to their pleadings the categories under which their clients apply for EADs. Am. Compl. ¶¶ 15, 16, 83, 85. They have also added statements summarily asserting that assisting and advising their clients who face EAD delays diverts resources and frustrates their missions. *Id.* ¶¶ 15, 16, 84. These additions to the Amended Complaint are not sufficient to establish NWIRP's and The Advocate's organizational standing on their own behalf. NWIRP summarily alleges that its clients are eligible for employment authorization under various categories and that the organization has diverted resources to deal with delays in EAD applications. Am. Compl. ¶¶ 15, 83. However, NWIRP fails to show even an approximation of how many of its over 10,000 yearly clients are eligible to apply for employment authorization or how many of its clients that do apply for EADs face delays. Similarly, The Advocates allege that their clients are asylum seekers, and that their staff regularly files EAD and EAD renewal applications. *Id.* ¶ 16, 85. But they do not show any evidence of how many of their clients are affected by delays in adjudication of their applications. It is therefore impossible to determine if the organizations' resources are actually diverted to address the delayed applications, or if Defendants merely address the issue of delay on an occasional basis as part and parcel of their representation of the clients. Cf. Iqbal, 556 U.S. at 678 ("The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully."). Additionally, and most importantly, both organizations fail to allege, beyond mere conclusions, that either organization has done anything more than their regular missions, which include assisting with requests for EADs. Because the organizational Plaintiffs have failed to sufficiently allege facts establishing standing, their claims should be dismissed under Fed. R. Civ. P. 12(b)(1).

B. Even if the Organization Plaintiffs have Standing, They Have Failed to State a Claim upon Which Relief can be Granted.

This Court should deny the organizational Plaintiffs' claims, made on their own behalf, under the Mandamus Act and the APA for failure to state a claim because they have not

1	established
2	INA. See I
3	(clarifying
4	Act provide
5	plaintiff."
6	favor of [th
7	1019, 1023
8	must show
9	provision w
10	497 U.S. 87
11	relevant zo
12	particular p
13	zone. See I
14	Act and the
15	Her
16	The Advoc
17	asylum" an
18	representati
19	applicant's
20	See Form C
21	files/files/fo
22	those indiv

24

25

26

27

28

established that Defendants owe a duty to them or that they are within the zone of interest of the INA. See Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014) (clarifying that the zone of interest test is substantive rather than jurisdictional). The Mandamus Act provides a cause of action "to compel . . . [an] agency . . . to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (emphasis added). When statutes or regulations "create no duty in favor of [the plaintiff], they cannot support his mandamus claim." Lowry v. Barnhart, 329 F.3d 1019, 1023 (9th Cir. 2003). To establish a claim under the APA, the organizational Plaintiffs must show that they fall within the "zone of interest" sought to be protected by "the statutory provision whose violation forms the legal basis for [its] complaint." Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 883 (1990). The overall purpose of the statute at issue does not determine the relevant zone of interest or the required legislatively conferred cause of action, but rather the particular provision of the statute at the basis of the plaintiff's complaint provides the relevant zone. See Bennett v. Spear, 520 U.S. 154, 175-76 (1997). These claims under the Mandamus Act and the APA are "in essence" one in the same. See Indep. Mining Co., 105 F.3d at 507.

Here, the organizational Plaintiffs have not shown that USCIS owes a duty to NWRIP or The Advocates. The regulations regarding EADs speak of the ability of "an applicant for asylum" and "aliens" to seek employment authorization, not in terms of an applicant's or alien's representative. 8 C.F.R. § 208.7(a)(1), 274a.13(a). In fact, for USCIS to speak with an applicant's representative, the applicant must submit a Form G-28, authorizing USCIS to do so. *See* Form G-28 Instructions at 1 (Mar. 4, 2015), available at https://www.uscis.gov/sites/default/files/files/form/g-28instr.pdf. USCIS, to the extent it owes a duty to any party, owes a duty to those individuals seeking benefits under the INA") and its regulations. The organizational Plaintiffs themselves do not request benefits from USCIS, but rather file applications on behalf of their clients.

The organizational Plaintiffs also have not shown that they fall into the zone of interest of the EAD provisions of the INA and implementing regulations. The regulations regarding EADs based on a pending asylum application which the organizational Plaintiffs seek to enforce were enacted to allow asylum applicants to be employed during a process that can take a long period

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 31 of 33

1	of time to complete. See 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997). Additionally, as Plaintiff		
2	assert, the regulations regarding the EAD adjudication timeline and interim EADs were		
3	promulgated because of "the importance of expeditious processing of employment authorization		
4	applications." Am. Compl. ¶ 10 (quoting 52 Fed. Reg. 16,216, 16,220 (May 1, 1987)). These		
5	regulations do not indicate that they were enacted to prevent organizations that represent		
6	individuals applying for employment authorization from expending resources to handle any		
7	delay in the adjudication of applications.		
8	Therefore, because the organizational Plaintiffs have not shown that Defendants owe		
9	them a duty or that they fall within the zone of interest contemplated by the APA, INA, and		
10	regulations, their claims should be dismissed for failure to state a claim.		
11			
12			
13			
۱4			
15			
16			
۱7			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

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

Case 2:15-cv-00813-JLR Document 69 Filed 04/18/16 Page 32 of 33

1	DATED: April 18, 2016	Respectfully submitted,
2 3		BENJAMIN C. MIZER Principal Deputy Assistant Attorney General
4		WILLIAM C. PEACHEY
5		Director
6 7		JEFFREY S. ROBINS Assistant Director
8 9		JOHN INKELES Trial Attorney
10		<u>s/ Adrienne Zack</u> ADRIENNE ZACK
11		Trial Attorney
12		U.S. Department of Justice Civil Division
13		Office of Immigration Litigation District Court Section
14		P.O. Box 868, Ben Franklin Station Washington, D.C. 20044
15 16		Phone: (202) 598-2446
17		Fax: (202) 305-7000 Email:adrienne.m.zack@usdoj.gov
18		Attorneys for Defendants
19		Automeys for Defendants
20		
21		
22		
23		
24		
25		
26		
27		
28		

Defendants' Motion to Dismiss Case No. 2:15-cv-00813-JLR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2016, I electronically filed the foregoing Defendants' Motion to Dismiss along with a motion to file it under seal with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF if the Court grants the Motion to File Under Seal. I also certify that the foregoing document was served by Federal Express overnight delivery to Plaintiffs' lead counsel:

Melissa Crow American Immigration Council 1331 G St. NW, Suite 200 Washington, DC 20005 Tel: 202-507-7523

Christopher Strawn Northwest Immigrant Rights Project 615 2nd Ave., Suite 400 Seattle, WA 98104 Tel: 206-957-8628

s/ Adrienne Zack
 ADRIENNE ZACK
 Trial Attorney
 U.S. Department of Justice
 Civil Division
 Office of Immigration Litigation
 District Court Section