

HONORABLE JAMES L. ROBERT

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

A.A., *et al.*,

Plaintiffs,

v.

United States Citizenship and Immigration  
Services, *et al.*,

Defendants.

No. C15-0813-JLR

Plaintiffs' Reply in Support of Cross-  
Motion to Supplement the Record

Noted for consideration: 12/22/2017

**I. Introduction.**

The Defendants do not object to most of the materials that the Plaintiffs seek to include in the Administrative Record. The only major point of contention is regarding Plaintiffs' request to depose Mr. Neufeld.<sup>1</sup> Plaintiffs maintain that the information contained in Mr. Neufeld's declaration is irrelevant to this case. However, if the Court permits the Defendants to

<sup>1</sup> Defendants also object to producing datasets divided out by EAD applications based on affirmative or defensive asylum claims and data regarding applications that are filed at or near the 150-day eligibility deadline. Dkt. 106, at 4-5. Plaintiffs have no objection to withdrawing this request so long as the Court does not consider Defendants' assertions about those particular issues since Defendants themselves admit they cannot actually produce any data substantiating the assertions.



1 supplement the record with Mr. Neufeld's declaration, Plaintiffs must be permitted to depose  
2 him.

3 **II. Reply Argument.**

4 While "inquiry into the mental processes of administrative decisionmakers is usually to  
5 be avoided[,]" *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971),  
6 *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), the agency should not  
7 be permitted to introduce exactly such "mental processes" via a declaration from an agency  
8 decisionmaker while precluding plaintiffs from questioning the declarant. *See Goldberg v.*  
9 *Kelly*, 397 U.S. 254, 269 (1970) ("due process requires an opportunity to confront and cross-  
10 examine adverse witnesses"). If memorialization of Mr. Neufeld's "mental process" is  
11 necessary, then Plaintiffs should have the opportunity to depose him and obtain this evidence,  
12 particularly since his declaration is incomplete and inaccurate. *See, e.g., Ecology Ctr., Inc. v.*  
13 *Gorman*, 902 F. Supp. 203, 204-05 (D. Mont. 1995) (permitting plaintiff depositions to  
14 supplement administrative record).

15 The Defendants incorrectly contend that Plaintiffs identified only one contention for  
16 which Mr. Neufeld did not provide sufficient support in his declaration. Dkt. 106, at 6. In fact,  
17 Plaintiffs identified this contention as one example of why a deposition is required here. *See*  
18 Dkt. 104, at 7 ("the data underlying his assertions is inadequate and plaintiffs have a right to  
19 depose him to examine and confront his assertions"). There are numerous other assertions in  
20 Mr. Neufeld's declaration that warrant further exploration through a deposition. For example,  
21 Mr. Neufeld admits that there are "limited circumstance" in which an interim work  
22 authorization document may be produced (Dkt. 103-6, at ¶ 10), but does not specify the nature

1 of these circumstances. Given that the production of interim EADs could resolve numerous  
2 problems arising from the agency delays at issue in this case, this information could be highly  
3 relevant to the remedies available to address the agency's ongoing noncompliance.

4 Mr. Neufeld's declaration also asserts that applications that are routed to the  
5 Background Check Unit ("BCU") or the Center Fraud Detection Operations ("CFDO") may  
6 take longer to adjudicate. Dkt. 103-6, at ¶¶ 20-24. In particular, he states that "resolv[ing] any  
7 issues regarding background checks" may require "more than 30 days to adjudicate." Dkt. 103-  
8 6, at ¶ 24. However, he indicates further that USCIS has recently switched from a  
9 "complicated" system which "often times [took] more than 30 days to resolve" to a new system  
10 which "automates that background check portion so that it can be resolved more quickly." Dkt.  
11 103-6, at ¶ 25. Mr. Neufeld fails to explain why cases routed to the BCU still take longer than  
12 30 days to adjudicate when it appears that the primary obstacle to timely adjudication has been  
13 automated. Additionally, the declaration does not explain how much longer it takes for cases  
14 routed to the BCU/CFDO to be adjudicated. A deposition is necessary to permit Plaintiffs to  
15 explore this issue in greater detail.

16 Other assertions in Mr. Neufeld's declaration are contradicted by the Defendants' own  
17 statements. For example, Mr. Neufeld contends that some cases may take longer than 30 days  
18 to adjudicate because the cases are filed "at exactly or around the day that the underlying  
19 asylum application has been pending for 150 days." Dkt. 103-6, at ¶ 30. Yet, when Plaintiffs'  
20 requested data on the number of times that this actually happens, Defendants admitted that they  
21 do not keep this data "in the ordinary course of business." Dkt. 106, at 5. If this is the case, the  
22

1 basis for Mr. Neufeld’s speculation that this could be an “additional complication” (Dkt. 103-6,  
2 at ¶ 30) impacting the agency’s ability to comply with the regulatory deadline is unclear.

3 Mr. Neufeld contends that there would be “public safety or other risks” if the agency  
4 erroneously granted a work permit to an initial asylum applicant. Dkt. 103-6, at ¶ 58. But given  
5 that asylum applicants may not be removed from the United States until their asylum  
6 applications have been adjudicated, his assertion that timely adjudicating such individuals’  
7 EAD applications creates an increased risk to public safety appears completely baseless. Those  
8 same applicants are often permitted to remain in the country for years, during which they are  
9 free to do anything they want—except work. Defendants’ assertions here are meritless but, if  
10 the Court is going to consider them, they must first be subjected to examination via deposition.

11 Finally, Mr. Neufeld contends that one reason for the delay is the time required to route  
12 initial asylum applications from the centralized lockbox facility to the service center for  
13 adjudication. Dkt. 103-6, at ¶ 54. Mr. Neufeld does not explain why applicants could not simply  
14 be permitted to file their initial work permit applications directly with the appropriate service  
15 center, which was the case previously. *See* Dkt. 107-1, Instructions for Submitting I-765  
16 Applications (Rev. 08/11/2001), at 6 (directing applicants in the (c)(8) category to file  
17 applications directly with the service center).

18 **III. Conclusion.**

19 For the foregoing reasons, if the Court permits the Defendants to supplement the record  
20 with Mr. Neufeld’s declaration, the Plaintiffs should be permitted to depose him to ensure a full  
21 and fair presentation of the issues. And, because the Defendants have admitted that they have  
22 no empirical data to support their contentions that it takes longer to adjudicate cases (1) based

1 on defensive asylum applications and (2) ““filed at exactly or around’ day 150” (Dkt. 106, at 5),  
2 the Court should not consider these assertions. If the Court does consider these statements, it  
3 should also order the Defendants to produce the data requested by the Plaintiffs.

4 Respectfully submitted this 20th day of December, 2017.

5  
6 SUNBIRD LAW, PLLC

7 */s/ Devin T. Theriot-Orr*

8 Devin T. Theriot-Orr, WSBA 33995

9 1000 Fourth Ave., Suite 3200

10 Seattle, WA 98154

11 Ph. (206) 962-5052

12 Fax (206) 681-9663

13 Em [devin@sunbird.law](mailto:devin@sunbird.law)

14 AMERICAN IMMIGRATION COUNCIL

15 */s/ Melissa Crow*

16 Melissa Crow, *Pro hac vice*

17 Leslie K. Dellon, *Pro hac vice*

18 1331 G Street, NW, Suite 200

19 Washington, D.C. 20005

20 Ph. (202) 507-7523

21 Em [MCrow@immcouncil.org](mailto:MCrow@immcouncil.org)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP

/s/ Marc Van Der Hout  
Marc Van Der Hout, *Pro hac vice*

180 Sutter Street, Suite 500  
San Francisco, CA 94104  
Ph. (415) 981-3000  
Em [MV@vblaw.com](mailto:MV@vblaw.com)

NORTHWEST IMMIGRANT RIGHTS PROJECT

/s/ Christopher Strawn  
Christopher Strawn, WSBA 32243

615 Second Avenue, Suite 400  
Seattle, WA 98104  
Ph. (206) 957-8628  
Em [Chris@nwirp.org](mailto:Chris@nwirp.org)

SCOTT D. POLLOCK & ASSOCIATES, P.C.  
Scott D. Pollock, *Pro hac vice*  
Christina J. Murdoch, *Pro hac vice*  
Kathryn R. Weber, *Pro hac vice*  
105 W. Madison, Suite 2200  
Chicago, Ill 60602  
Ph. (312) 444-1940

GIBBS HOUSTON PAUW  
Robert H. Gibbs, WSBA 5932  
Robert Pauw, WSBA 13613  
1000 Second Avenue, Suite 1600  
Seattle, WA 98104  
Ph. (206) 682-1080  
Em [rgibbs@ghp-law.net](mailto:rgibbs@ghp-law.net)



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

**Certificate of Service**

I certify that on December 20, 2017 I electronically filed the foregoing document, together with all attachments, with the Clerk of the Court for the Western District of Washington using the CM/ECF system. All participants are registered with CM/ECF and the CM/ECF system will provide notice of this filing to all case participants.

/s/ Devin T. Theriot-Orr  
Devin T. Theriot-Orr, WSBA 33995

