

1 District Judge James L. Robart  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 SEATTLE, WASHINGTON

11 NORTHWEST IMMIGRANT RIGHTS  
12 PROJECT, ET AL.,

13 Plaintiffs,

14 v.

15 UNITED STATES CITIZENSHIP AND  
16 IMMIGRATION SERVICES, ET AL.,

17 Defendants.

Case No. 2:15-cv-00813

PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

NOTE ON CALENDAR: July 24, 2015

18 **INTRODUCTION**

19 This Court should grant summary judgment to the Plaintiffs because there are no  
20 material facts in dispute and the legal issues presented are straightforward. Plaintiffs challenge  
21 Defendants' policies and practices of unlawfully delaying adjudication of applications for  
22 employment authorization documents (EADs) and failing to issue interim employment  
23 authorization, as required by Defendants' own regulations. The legal question for summary  
judgment is basic: Does USCIS have to follow its own *mandatory* regulations?

1 As discussed in greater detail below, the material facts in this matter are not disputed.  
2 First, it is undisputed that Defendants do not adjudicate all EAD applications within the  
3 regulatory timetable. Plaintiffs have documented numerous cases where Defendant USCIS has  
4 failed to timely adjudicate EAD applications, causing significant hardship to noncitizens. *See,*  
5 *e.g.*, Dkt. 5-8 at 2-4 (Oskouian Decl. for Organizational Plaintiff NWIRP ¶¶ 4-9); Dkt. 5-5 at 2-  
6 4 (McKenzie Decl. for Organizational Plaintiff The Advocates ¶¶ 5-6, 8-10, 14-15). The  
7 evidence submitted to date — including declarations of non-profit legal service providers,  
8 attorneys practicing across the United States, and noncitizens whose EAD applications have  
9 been pending beyond the regulatory time limits — demonstrates further that USCIS’s delays in  
10 adjudicating EADs are nationwide and extensive. *Id.*; *see also* Dkt. 5-1 to 5-4, 5-6, 5-7, 5-9, 5-  
11 10.

12 The USCIS Ombudsman also has documented the nationwide scope and breadth of the  
13 delays in adjudicating EADs. According to the Ombudsman’s most recent Annual Report  
14 “every year thousands of eligible individuals encounter processing delays”.<sup>1</sup> USCIS  
15 Ombudsman 2015 Annual Report, Exh. A at 48. “Customers regularly turn to the Ombudsman  
16 for case assistance when their Forms I-765 remain pending outside of the 90-day regulatory  
17 processing period.” *Id.* at 49. In fact, in the latest yearly reporting period, EAD issues  
18 constituted the second-most common request for assistance, with the 878 requests for help  
19 comprising 11.6% of all requests to the USCIS Ombudsman. Exh. A at 4, 17, 49. While USCIS  
20 may adjudicate most EAD applications on time, the USCIS Ombudsman has documented  
21 seasonal delays in adjudications of EAD applications subject to the 90-day deadline. *Id.* at 48.

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23 <sup>1</sup> The USCIS Ombudsman, a position within USCIS created by statute, provides individual case assistance and makes recommendations to improve the administration of immigration benefits by USCIS. *See* <http://www.dhs.gov/topic/cis-ombudsman> (accessed July 1, 2015).

1 In addition, the Ombudsman recognizes the hardship to the thousands of people every year  
2 who experience delays:

3 When processing of employment authorization applications is delayed, both individuals  
4 and their current or would-be employers suffer adverse consequences. Applicants  
5 experience financial hardship due to job interruption and employment termination; they  
6 may lose or have difficulty renewing driver's licenses; business operations stall due to  
7 loss of employee services; and families face suspension of essential income and health  
8 benefits.

9 *Id.* (footnote omitted).

10 Second, it is undisputed that Defendants do not grant interim employment authorization  
11 when the regulatory timetable has expired. Defendant USCIS candidly admits that it “no  
12 longer produces interim EADs” despite the regulatory requirement to do so. Dkt. 5-1 at 2  
13 (Lawrence Decl. ¶ 8), Exh. B at 9 (USCIS/AILA April 16, 2015 Meeting Q&A); *see also* 8  
14 C.F.R. § 274a.13(d); Exh. C at 1 (I-765 Instr.). In addition, Plaintiffs have documented cases  
15 where USCIS employers have confirmed this fact. *See* Dkt. 5-6 at 2 (Collopy Decl. ¶ 6)  
16 (“When our client appeared at the InfoPass appointment on July 14, 2014, she was told that  
17 USCIS no longer provides interim EADs.”); Dkt. 5-2 at 2-3 (Parsons Decl. ¶ 8) (“The officer  
18 [my client] spoke to at the appointment told him that the San Antonio Field Office could not  
19 issue interim EADs.”).

20 Because Plaintiffs have established that Defendants are in violation of their own  
21 regulations, summary judgment is appropriate.

## 22 **BACKGROUND**

23 Individual Plaintiffs and putative class members must apply for and receive an  
employment authorization document in order to verify to employers that they are lawfully

1 permitted to work in the United States.<sup>2</sup> *See* 8 U.S.C. § 1324a; 8 C.F.R. §§ 274a.12(a), (c);  
2 274a.13(a); Exh. C at 1 (I-765 Instr.). An EAD has a fixed validity period, but the length of the  
3 validity period varies depending on the classification under which the EAD is issued. When  
4 the validity period expires, the individual must renew his or her EAD in order to continue  
5 working. Even if a noncitizen is in a status that permits him or her to obtain work authorization  
6 by filing an EAD application, he or she is generally not permitted to work unless in possession  
7 of an unexpired EAD. *See* 8 C.F.R. § 274a.12(c).

8 By separate motion, Dkt. No. 5-1, Plaintiffs seek to have this Court certify a nationwide  
9 class of:

10 Noncitizens who have filed or will file an application for employment authorization that  
11 was not or will not be adjudicated within the required regulatory timeframe, comprising  
those who:

12 1. Have filed or will file an application for employment authorization under 8  
13 C.F.R. § 274a.13, and who are entitled or will be entitled to interim employment  
14 authorization under 8 C.F.R. § 274a.13(d) but who have not received or will not receive  
employment authorization or interim employment authorization (the “90-Day  
Subclass”); or

15 2. Have filed or will file an application for employment authorization under 8  
16 C.F.R. § 208.7, and who are entitled or will be entitled to employment authorization  
17 under 8 C.F.R. § 208.7(a)(1), but who have not received or will not receive  
employment authorization or interim employment authorization (the “30-Day  
Subclass”).

18 With respect to the first subclass, USCIS is required to adjudicate most applications for  
19 employment authorization within 90 days. 8 C.F.R. § 274.13(d). With respect to the second  
20 subclass, initial EAD applications based on asylum applications are to be adjudicated within 30  
21 days. 8 C.F.R. § 208.7. In either case, when USCIS fails to adjudicate EAD applications within  
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23 \_\_\_\_\_  
<sup>2</sup> Some noncitizens with valid, unexpired nonimmigrant status may have employment  
authorization incident to their status. *See* 8 C.F.R. 274a.12(b).

1 the regulatory timetable, it is **required** to provide interim employment authorization. *Id.*, see  
2 also Exh. C at 1 (I-765 Instr.). Plaintiffs seek summary judgment on the discrete legal issue of  
3 whether Defendants’ failures to timely adjudicate EAD applications and issue interim  
4 employment authorization violate the agency regulations.

5 Three Individual Plaintiffs and two Organizational Plaintiffs brought this putative class  
6 action. As discussed below, USCIS failed to timely adjudicate the EAD applications of the  
7 three Individual Plaintiffs and failed to grant them interim employment authorization, to their  
8 detriment.<sup>3</sup> On December 29, 2014, Individual Plaintiff Carmen Osorio-Ballesteros filed an  
9 application for renewal of her EAD in conjunction with a request for renewal of Deferred  
10 Action for Childhood Arrivals (DACA). Dkt. 5-12 at 1-2 (Hoffmann Decl. ¶¶ 4-6). USCIS  
11 failed to adjudicate the EAD application by March 29, 2015, the ninetieth day after filing, and  
12 did not issue her an interim employment authorization. *See id.* at 2-3 (¶¶ 6, 9, 14).

13 On April 10, 2015, after Ms. Osorio-Ballesteros’ application for an EAD had been  
14 pending over 100 days, her lawyer requested case assistance from the USCIS Ombudsman’s  
15 Office. *Id.* at 2 (¶ 9). On May 15, 2015, her lawyer received a response indicating that Ms.  
16 Osorio-Ballesteros’ pending applications were “actively being reviewed.” *Id.* at 3 (¶ 13).  
17 When Ms. Osorio-Ballesteros’ EAD expired on April 21, 2015, she lost her full-time job,  
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20 <sup>3</sup> Although the Individual Plaintiffs’ EAD applications have been adjudicated since this lawsuit  
21 was filed, their cases exemplify the transitory nature of such claims. The Supreme Court has  
22 repeatedly held that class relief is appropriate in cases regarding individual claims that are  
23 “capable of repetition, yet evading review.” *See Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11  
(1975); *Sosna v. Iowa*, 419 U.S. 393, 401 n. 9 (1975). Under this doctrine, the named plaintiffs  
may proceed even though their interest in the suit has expired, as long as the duration of the  
challenged conduct is too short to be resolved through litigation and the case challenges an  
ongoing agency policy or practice. *See, e.g., Los Angeles Unified School District v. Garcia*, 669  
F.3d 956, 958 n.1 (9th Cir. 2012); *United States v Howard*, 480 F.3d 1005, 1009-1010 (9th Cir.  
2007); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1117-18 (9th Cir. 2003).

1 which she needed to support herself and her three minor U.S. citizen children. *Id.* at 3-4 (¶ 15).

2 The lack of a valid EAD also made her ineligible to apply for unemployment benefits. *Id.*

3 After this lawsuit was filed, Ms. Osorio-Ballesteros' EAD application was granted — more  
4 than two months after the regulatory deadline had passed. Exh. G (USCIS Approval Notice  
5 for Ms. Osorio-Ballesteros).

6 On January 9, 2015, Individual Plaintiff W.H., who at that time had employment  
7 authorization based on an approved application for Temporary Protected Status, filed an initial  
8 application for employment authorization in conjunction with an asylum application that had  
9 been pending since March 12, 2014. Dkt. 5-13 at 1-2 (Brown Decl. ¶¶ 3-4). USCIS  
10 acknowledged receipt of W.H.'s initial asylum EAD application on January 9, 2015. *Id.* at 2 (¶  
11 4). USCIS failed to adjudicate the EAD application by February 9, 2015, the thirtieth day after  
12 filing, and did not provide an interim employment authorization. *Id.* at 2-3 (¶ 7).

13 W.H.'s lawyer called USCIS's National Customer Service Center (NCSC) hotline twice  
14 to inquire about the status of W.H.'s EAD. *Id.* at 2-3 (¶¶ 5-7). On February 25, 2015, W.H.'s  
15 lawyer was told to expect a response by mail within 15 days. *Id.* at 2 (¶ 5). On March 3, 2015,  
16 W.H.'s lawyer was told that the "application [wa]s currently pending adjudication [but they]  
17 regret [they] are unable to provide [W.H.'s lawyer] with a completion date at this time." *Id.*  
18 (¶ 6). W.H.'s prior EAD expired on March 31, 2015. Due to USCIS's failure to grant him  
19 interim employment authorization, W.H. lost his Missouri driver's license. *Id.* at 3 (¶ 8). After  
20 this lawsuit was filed, W-H-'s EAD application was granted — more than four months after the  
21 regulatory deadline had passed. Exh. H (USCIS Approval Notice for W.H.).

22 On January 12, 2015, Individual Plaintiff Marvella Arcos-Perez filed an application for  
23 renewal of her EAD, which had been previously granted in conjunction with an application for

1 asylum. Dkt. 5-11 at 1 (Arcos-Perez Decl.). Ms. Arcos is a widow who resides with and  
2 provides support for her twenty-four year old daughter with an intellectual disability. *Id.*  
3 USCIS failed to adjudicate the EAD application by April 12, 2015, the ninetieth day after  
4 filing, and did not issue interim employment authorization. *Id.* After this lawsuit was filed,  
5 Ms. Arcos-Perez’s EAD application was denied — almost two months after the regulatory  
6 deadline had passed. Exh. I.

7           Organizational Plaintiff The Advocates for Human Rights (“The Advocates”) is a  
8 Minnesota-based non-profit human rights organization that provides free legal services to low-  
9 income immigrants seeking political asylum. Dkt. 5-5 at 1 (McKenzie Decl. (¶ 1). Primarily  
10 serving asylum seekers in Minnesota, North Dakota, and South Dakota, The Advocates is the  
11 largest provider of asylum-related legal services in the region. *Id.* at 1-2 (¶ 3). The Advocates’  
12 three staff attorneys regularly file applications for employment authorization on behalf of their  
13 own asylum clients and, in some cases, on behalf of asylum clients represented by volunteer  
14 attorneys. *Id.* at 1-2 (¶¶ 3-4). None of the 10 initial asylum EAD applications filed by The  
15 Advocates between January 1, 2013 and May 13, 2015 were adjudicated within the 30-day  
16 regulatory time period; processing times ranged from 45 to 100 days. *Id.* at 2-3 (¶¶ 5-6). Of the  
17 26 renewal EAD applications adjudicated as of the declaration date, 46% (12) were adjudicated  
18 after the 90-day regulatory time period. *Id.* No applicant received interim work authorization.  
19 *Id.* at 3 (¶ 6). The Advocates has been “forced to divert scarce resources to resolving and  
20 addressing” EAD delays that The Advocates would have used to provide assistance to asylum  
21 seekers. *Id.* at 6-8.

22           Organizational Plaintiff Northwest Immigrant Rights Project is a statewide non-profit  
23 immigration legal services organization founded in Seattle, Washington in 1984. Dkt. 5-8 at 1

1 (Oskouian Decl.). Each year, NWIRP provides direct legal assistance in immigration matters to  
2 over 10,000 low-income people from over 150 countries, who speak over 60 different  
3 languages and dialects. *Id.* NWIRP regularly submits EAD applications on behalf of its clients  
4 in Seattle, Granger, Tacoma, and Wenatchee. *Id.* In a one-year period from April 9, 2014 to  
5 April 9, 2015, NWIRP estimates that it filed over 900 EAD applications. *Id.* To evaluate the  
6 extent of delays in adjudicating EADs, NWIRP looked at a snapshot of EAD applications filed  
7 between November 2014 and early 2015. Of 101 applications filed, 21 were adjudicated after  
8 the regulatory deadline, including 7 initial asylum EAD applications and 14 applications  
9 subject to the 90-day deadline. *Id.* at 2-3. No NWIRP clients received interim employment  
10 authorization. *Id.* at 3. NWIRP continues to expend significant resources addressing delays in  
11 EAD adjudications for its clients.

12       Since this lawsuit was filed, USCIS has failed to timely adjudicate many other pending  
13 EAD applications. For example, NWIRP client Sadan Escobar Perez applied for employment  
14 authorization on July 3, 2014, based on his concurrently-filed application to adjust status to  
15 lawful permanent residence. Exh. J at 1 (Shepherd Decl. ¶ 3). Although USCIS issued a  
16 timely Request for Evidence (RFE) for photographs, more than 90 days have elapsed since  
17 USCIS received the requested photographs. *Id.* at 1-2 (¶¶ 4, 7). On June 10, 2015, NWIRP  
18 contacted USCIS after updates on USCIS's case status system indicated a decision would be  
19 reached by May 11. *Id.* at 2 (¶ 5). On June 22, 2015, USCIS responded that Mr. Escobar  
20 Perez's application was under officer review, and that the agency could not provide a  
21 timeframe for a decision. *Id.* (¶ 6). On that date, NWIRP also requested that USCIS issue an  
22 interim EAD. *Id.* However, USCIS has not issued interim employment authorization to Mr.

23



1 Escobar Perez, whose application has been pending for almost a year and thus is unable to  
2 work. *Id.* (¶¶ 7-8).

3 Another NWIRP client, M.S., is a 14-year-old asylum seeker who lives with his mother  
4 and two U.S. citizen siblings in Edmonds, Washington. Exh. K at 1 (Montenegro Decl. ¶ 1).  
5 His mother was granted withholding of removal, due to the danger she would face if deported.  
6 *Id.* M.S. filed an asylum application on September 19, 2014, and an application for an initial  
7 asylum EAD on May 18, 2015. *Id.* (¶ 3). His application was not adjudicated within 30 days,  
8 and he did not receive an interim EAD. *Id.* at 1-2 (¶¶ 3-5). On June 26, 2015, his attorney  
9 called the USCIS customer service line to request adjudication and an interim EAD. *Id.* at 2 (¶  
10 6). USCIS stated that it was having technical difficulties and directed M.S.'s attorney to call  
11 back in a week. *Id.* M.S. is currently on summer vacation from school, and would like to work  
12 during his break to help support his family. *Id.* (¶ 7). This would be very helpful for the family,  
13 as his single mother works full time to support him and her two other U.S. citizen children. *Id.*

14 The Defendants' failure to follow their own regulations regarding EAD adjudication  
15 and interim employment authorization has a widespread impact, as demonstrated by the  
16 following examples. Romel Oliveros Moncayo Fernandez, who resides in Minnesota, filed an  
17 EAD application on June 16, 2014. Exh. L at 1 (Moncayo Fernandez Decl. ¶¶ 1-2). His EAD  
18 application is based on a grant of deferred action as a "derivative" (spouse) because his wife  
19 meets the requirements for a U visa, but no visas are currently available. *Id.* Although his  
20 EAD application has now been pending for almost one year, USCIS has not issued him interim  
21 employment authorization. *Id.* (¶ 3). When Mr. Moncayo Fernandez's attorney contacted the  
22 USCIS Vermont Service Center (VSC) on October 13, 2014, and again on January 26, 2015,  
23 about his EAD application, VSC indicated only that the application was still pending. *Id.* (¶ 4).

1 After inquiring again by email on June 26, 2015, the attorney received the following VSC reply  
2 on July 1: “the EAD application will be requested for purpose of putting it in the work flow to  
3 be worked.” *Id.* Mr. Moncayo Fernandez has three young U.S. citizen children who reside  
4 with him and his wife and depend on him for financial support. He also pays child support for  
5 a teenage daughter who lives with her mother. *Id.* at 2 (¶ 5). Since USCIS has failed to  
6 adjudicate his EAD application or provide him with interim employment authorization, he  
7 cannot apply for well-paying jobs such as state construction work. *Id.*

8 In addition, USCIS has failed to adjudicate a pending EAD application from Attorney  
9 Cynthia Mazariegos, who practices in Chicago, Illinois. Her client, Gerardo Fernandez  
10 Guzman, had previously obtained employment authorization based on his receipt of Deferred  
11 Action for Childhood Arrivals (DACA). *See* Exh. M at 1 (Mazariegos Decl. ¶ 3). On  
12 December 1, 2014, Mr. Fernandez Guzman, through counsel, filed his DACA renewal and his  
13 EAD renewal applications. *Id.* On December 30, 2014, he completed his biometrics at the  
14 appointment originally scheduled by USCIS. *Id.* At a May 18, 2015 appointment at the  
15 USCIS Chicago Field Office, an InfoPass officer informed him that USCIS would not issue an  
16 interim EAD. *Id.* (¶ 4). Mr. Fernandez Guzman has not received a Request for Evidence from  
17 USCIS regarding either his DACA renewal or his EAD renewal applications. *Id.* (¶ 5). Nor  
18 has he received interim employment authorization, although his EAD renewal application has  
19 been pending for more than 90 days. *Id.* at 2 (¶ 6). Mr. Fernandez Guzman’s EAD expired on  
20 March 17, 2015. Without a valid EAD, he cannot take the courses required to obtain a type of  
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1 machinist certification that would qualify him to apply for a union job with a starting salary of  
2 at least \$17 per hour. *Id.* at 1-2 (¶¶ 3, 7).

3 USCIS has also failed to adjudicate a pending EAD application from Leticia A. Corona,  
4 who practices in McLean, Virginia, and represents Selvin Omar Alvarado-Morales. Mr.  
5 Alvarado-Morales' lawyer filed his initial EAD application with USCIS on January 20, 2015,  
6 based on a pending asylum application. Exh. N at 1 (Corona Decl., ¶¶ 1-3). When USCIS did  
7 not adjudicate the EAD application within the required 30-day period, his lawyer opened a  
8 service request with the agency. USCIS proceeded to issue a Request for Evidence, to which  
9 counsel timely responded. *Id.* at 1-2 (¶¶ 4-5). Although Mr. Alvarado-Morales' EAD  
10 application remains pending, USCIS has not issued him interim employment authorization.  
11 His lack of an EAD has prevented him from obtaining a Social Security number, a Virginia  
12 driver's license, or sufficiently stable employment to support his partner and U.S. citizen child.  
13 *Id.* at 2 (¶¶ 6-7).

14 Finally, USCIS failed to timely adjudicate Mohammad Al Sal's application to renew  
15 his employment authorization, which was filed on March 3, 2015 by Attorney Matthew  
16 Hoppock, who practices in Overland Park, Kansas. Exh. O at 1-2 (Hoppock Decl. ¶¶ 1-2, 4).  
17 Like his initial EAD application, Mr. Al Sal's renewal application was based on his wife's  
18 pending asylum application, in which he is included. *Id.* (¶¶ 3-4). On May 14, 2015, Mr. Al  
19 Sal's attorney contacted USCIS because his client was at risk of losing his job if he did not  
20 receive employment authorization before his then-current EAD expired on June 24, 2015. *Id.*  
21 at 2 (¶ 5). While the USCIS officer agreed that adjudication of Mr. Al Sal's renewal EAD  
22 application had exceeded standard processing times, the agency refused to expedite until the  
23 application had been pending for 75 days—two days later, on a Sunday. *Id.* On June 22, 2015,

1 Mr. Al Sal's lawyer contacted USCIS because his client's EAD application was still pending,  
2 and USCIS had not issued interim employment authorization. *Id.* at 2 (¶ 6). On June 23,  
3 USCIS notified Mr. Al Sal that his client would receive a response within 60 days. *Id.* On June  
4 25, the USCIS case status system was updated to state that a Request for Evidence (RFE) had  
5 been mailed to Mr. Al Sal, but neither he nor his lawyer has received it. *Id.* at 3 (¶ 7). Due to  
6 his lack of employment authorization, Mr. Al Sal has lost his job, and he is having difficulty  
7 supporting his family. *Id.* (¶¶ 8-9)

8         These extremely problematic delays are echoed by attorneys and organizations across  
9 the country whose declarations were submitted in support of Plaintiffs' Motion for Class  
10 Certification.

- 11         • Attorney Paul Parsons, who practices in Texas, asserts that 31 of 59 DACA renewal  
12 applications submitted in the past eight months have been pending for more than 90  
13 days. Dkt. 5-2 at 1 (Parsons Decl. ¶ 4).
- 14         • New York attorney Julia Heming Segal states that 7 of 14 EAD applications filed in  
15 connection with DACA renewal requests since July 2014 were not adjudicated within  
16 90 days. Dkt. 5-4 at 1 (Heming Segal Decl. ¶¶ 3-4).
- 17         • Attorney Dree Collopy, who practices in Washington, DC, indicates that she and her  
18 three partners file approximately 80-90 EAD applications each year and have seen an  
19 increase in EAD adjudication delays since the spring of 2014. Dkt. 5-6 at 1 (Collopy  
20 Decl. ¶¶ 3-4).
- 21         • Clairissa Scheiderer, a staff attorney at Freedom House, a Michigan-based non-profit  
22 organization, states that of 34 EAD applications that her organization filed with USCIS  
23 from January 2014 to March 2015 on behalf of clients seeking initial asylum EADs,

1 none were issued within the required 30-day period, 8 were issued within 30 to 60 days,  
2 9 were issued within 61 to 90 days, 13 were issued after more than 91 days, and 4, also  
3 beyond the 30-day regulatory time frame, remained pending at the time she signed her  
4 declaration. Dkt. 5-7 at 1 (Scheiderer Decl. ¶¶ 4-5).

- 5 • The National Immigrant Justice Center (NIJC), headquartered in Chicago, asserts that,  
6 of 340 EAD applications filed during calendar year 2014, approximately 70 clients did  
7 not receive an EAD within 90 days of filing or, where applicable, within the 30-day  
8 period for initial asylum-based EAD applications. Dkt 5-9 at 1 (McCarthy Decl. ¶¶ 3-  
9 4).
- 10 • The Migrant and Immigrant Community Action Project (MICA), in St. Louis, Missouri,  
11 reports that out of approximately 50 EAD applications filed within the past year , on  
12 behalf of clients with a variety of underlying applications, including asylum (initial and  
13 renewal), DACA renewal and adjustment of status to lawful permanent residence,  
14 USCIS took longer than the regulatory time frame to process approximately 20 of those  
15 applications. Dkt. 5-10 at 1 (Cortes Decl. ¶¶ 3-4).

16 The above-referenced experiences of Individual Plaintiffs, putative class members,  
17 Organizational Plaintiffs, and attorneys throughout the country demonstrate that Defendant  
18 USCIS regularly fails to adjudicate individual EAD applications within the required regulatory  
19 time frame and never issues interim employment authorization. Indeed, USCIS has not issued  
20 interim employment authorization since it removed card production machines from its local  
21 offices. Exh. B at 9 (USCIS/AILA April 16, 2015 Meeting Q&A); Exh. D at 3 (Aytes Memo).

1 **ARGUMENT**

2 **I. Legal Standards**

3 Summary judgment is appropriate when no genuine dispute of material fact exists and the  
 4 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty*  
 5 *Lobby, Inc.*, 477 U.S. 247-48 (1986). “[O]nly disputes over facts that might affect the outcome of  
 6 the suit under the governing law properly preclude the entry of summary judgment.” *Nat’l Ass’n*  
 7 *of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012), *cert. denied*, 133 S.  
 8 Ct. 1241 (2013), *citing Anderson*, 477 U.S. at 248. Where, as here, the only issue is a legal  
 9 question, summary judgment is proper. *See, e.g., Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir.  
 10 1998) (agency’s statutory interpretation is a question of law). Plaintiffs’ request for mandamus  
 11 relief also may be resolved by summary judgment. *Huang v. Mukasey*, 545 F. Supp. 2d 1170,  
 12 1172 (W.D. Wash. 2008).

13 Under the Administrative Procedure Act (“APA”), this Court can “compel agency action  
 14 unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), and set aside agency action  
 15 that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”  
 16 5 U.S.C. § 706(2)(A). *See, e.g., Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230  
 17 n.4 (1986); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979). “Agency action” is  
 18 expressly defined by the statute to include a “failure to act.” 5 U.S.C. § 551(13). *See Norton v.*  
 19 *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (a “failure to act” includes “the  
 20 failure to . . . take some decision by a statutory deadline”). Properly promulgated agency  
 21 regulations, such as those at issue in this case, have the force and effect of law. *Chrysler Corp.*,  
 22 441 U.S. at 295-96.

23 This Court can review Defendants’ failure to comply with its regulations because this  
 failure constitutes final agency action under the APA. Two conditions are required for finality:

1 the action must be the “consummation” of the decision-making process and the action must be  
2 one by which rights or obligations are determined or legal consequences flow. *Bennett v. Spear*,  
3 520 U.S. 154, 177-78 (1997) (citations omitted). These two conditions are satisfied because  
4 there are final regulations USCIS is not following and USCIS’s failure has the legal consequence  
5 of preventing applicants from engaging in lawful employment (“[w]hen administrative inaction  
6 has precisely the same impact on the rights of the parties as denial of relief, an agency cannot  
7 preclude judicial review by casting its decision in the form of inaction rather than in the form of  
8 an order denying relief”). *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099  
9 (D.C. Cir. 1970) (footnote omitted). Thus, where the Defendants are failing to comply with the  
10 mandate of a regulation, as they are doing here, such action constitutes a failure to act under the  
11 APA.

12 Alternatively, this Court can compel the DHS Secretary and USCIS Director to act under  
13 the Mandamus and Venue Act of 1962 (“MVA”), 28 U.S.C. § 1361. Plaintiffs’ claim for interim  
14 employment authorization because USCIS failed to adjudicate their I-765 applications within the  
15 regulatory timetable is “clear and certain.” *See Johnson v. Reilly*, 349 F. 3d 1149, 1154 (9th Cir.  
16 2003) (internal quotations and citations omitted). Defendants’ duty to adjudicate applications for  
17 employment authorization within the regulatory timetable or to grant interim employment  
18 authorization is “ministerial and so plainly prescribed as to be free from doubt.” Moreover,  
19 plaintiffs have “no other adequate remedy.” *Id.*

20 There is “little practical difference” as to whether jurisdiction lies under federal question  
21 jurisdiction or the MVA, when, as here, the relief sought through the APA and mandamus is  
22 identical: to compel agency action that has been unreasonably denied. *See Dong v. Chertoff*, 513  
23

1 F. Supp. 2d 1158, 1161–62 (N.D.Cal.2007) (citing *Independence Mining Co. v. Babbitt*,  
2 105 F.3d 502, 507 (9th Cir. 1997)).

3 **II. This Court has Subject Matter Jurisdiction**

4 The federal question statute, 28 U.S.C. § 1331, provides jurisdiction for review of agency  
5 action under the APA. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see also Bowen v.*  
6 *Massachusetts*, 487 U.S. 879, 891 n.16 (1988) (“[I]t is common ground that if review is proper  
7 under the APA, the District Court has jurisdiction under 28 U.S.C. §1331”); *ANA International*  
8 *Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) (applying this rule in the immigration context).  
9 The APA waives sovereign immunity, as plaintiffs seek only non-monetary damages. 5 U.S.C.  
10 § 702.

11 The INA does not preclude jurisdiction as the agency action at issue is outside the scope  
12 of 8 U.S.C. § 1252(a)(2)(B). Adjudication of EAD applications does not relate to the granting of  
13 relief under any of the statutory provisions barred from judicial review by § 1252(a)(2)(B)(i).  
14 Moreover, as discussed below, the agency action required by DHS regulations is not committed  
15 to the agency’s discretion and thus is not barred by § 1252(a)(2)(B)(ii). The absence of discretion  
16 also removes this case from the narrow exception to judicial review of agency action under the  
17 APA, 5 U.S.C. §701(a)(2), for actions “committed to agency discretion by law.” *Heckler v.*  
18 *Chaney*, 470 U.S. 821, 828, 830 (1985).

19 Although the examples of litigation regarding EAD adjudications are limited, courts that  
20 have considered the issue have concluded they have jurisdiction to review agency decisions on  
21 EADs. *See, e.g., Hillcrest Baptist Church v. United States*, No. C06-1042Z, 2007 WL 636826 \*  
22 7 (W.D. Wash., Feb. 23, 2007) (“The Court has jurisdiction over Plaintiffs’ claim for review of  
23 CIS’s denial of Mr. Lehman’s request for employment authorization”); *see also A.B.T. v.*

*USCIS*, 2:11-cv-02108-RAJ, 2013 WL5913323 (W.D. Wash., Nov. 4, 2013) (order approving



1 nationwide class action settlement relating to asylum EADs). Courts have also exercised  
 2 jurisdiction over the agency's failure to issue interim EADs. *See Ramos v. Thornburgh*, 732 F.  
 3 Supp. 696, 701 (E.D. Tex. 1989); *John Doe I v. Meese*, 690 F. Supp. 1572, 1577 (S.D. Tex.  
 4 1988).

5 **III. Defendants' Failure to Comply with Non-Discretionary, Ministerial Duties**  
 6 **Violates the APA as a Matter of Law.**

7 **A. The regulatory framework requires USCIS to timely adjudicate EAD**  
 8 **applications or issue interim employment authorization.**

9 Defendants have put into place a clear regulatory scheme requiring them to: 1) adjudicate  
 10 EAD applications within the time specified in the regulation; and 2) if they fail to do so, grant  
 11 interim employment authorization. The choice of regulatory language—"will" and "shall"—  
 12 makes these requirements mandatory. *See Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1258 (W.D.  
 13 Wash. 2008) ("shall" is mandatory); *Iddir v. INS*, 301 F.3d 492, 499-500 (7th Cir. 2002).

14 For EAD applications filed under 8 C.F.R. § 274a.13(d), the regulation states, in relevant  
 15 part:

16 (d) Interim employment authorization. **USCIS will adjudicate the**  
 17 **application within 90 days from the date of receipt of the application,**  
 18 except as described in 8 CFR 214.2(h)(9)(iv), and except in the case of an  
 19 initial application for employment authorization under 8 CFR 274a.12(c)(8),  
 20 which is governed by paragraph (a)(2) of this section, and 8 CFR  
 21 274a.12(c)(9) in so far as it is governed by 8 CFR 245.13(j) and 245.15(n).  
 22 **Failure to complete the adjudication within 90 days will result in the**  
 23 **grant of an employment authorization document for a period not to**  
**exceed 240 days.**

8 C.F.R. § 274a.13(d) (emphasis added).

USCIS affirmed these mandatory requirements in an August 18, 2006 Interoffice  
 Memorandum: "USCIS **is required** to adjudicate a pending Form I-765 within 90 days from the  
 date of receipt. 8 C.F.R. § 274a.13(d)." Exh. D at 3 (emphasis added). "Failure to complete the

1 adjudication within this time frame **requires** the Service to grant an employment authorization  
2 document for a period not to exceed 240 days.” *Id.* (emphasis added).

3 When USCIS implemented employment authorization for L-2 and E-2 spouses in 2002,  
4 USCIS again affirmed the mandatory requirements:

5 By regulation, the Service has up to 90 days from the date the Service receives an  
6 alien’s Form I-765 to adjudicate the application. In the event that an alien does not  
7 receive the [EAD] within this 90 day period, he or she can go to a District Office and  
8 receive an employment authorization document that is valid for up to 240 days.

9 Exh. E at 3 (Yates Memorandum).

10 More recently, the USCIS Ombudsman confirmed that the regulation imposes a 90-day  
11 processing requirement. “USCIS is **required by regulation** to adjudicate most EAD applications  
12 within 90 days of receipt,” citing 8 C.F.R. § 274a.13(d). Exh. A at 48 (emphasis added; footnote  
13 omitted).

14 For initial EAD applications based on a pending asylum application, filing with USCIS  
15 may occur at any point after 150 days have elapsed since the date USCIS received the complete  
16 asylum application. 8 C.F.R. § 208.7(a)(1). The regulation provides that USCIS “**shall have 30**  
17 **days from the date of filing of the employment authorization request** to grant or deny that  
18 application ...” *Id.* (emphasis added).

19 The I-765 (EAD application) Instructions mandate interim employment authorization  
20 when this 30-day deadline and the 90-day deadline are not met:

21 **Interim EAD:** An EAD issued to an eligible applicant when USCIS has failed  
22 to adjudicate an application within 90 days of a properly filed EAD  
23 application, or within 30 days of a properly filed initial EAD application based  
on an asylum application filed on or after January 4, 1995. **The interim EAD**  
**will be granted for a period not to exceed 240 days** and is subject to the  
conditions noted on the document.

1 Exh. C at 1 (emphasis added).<sup>4</sup> Form instructions are incorporated into the regulations requiring  
 2 submission of a benefit request, such as an EAD application. 8 C.F.R. § 103.2(a)(1); *see also*  
 3 *Marriage of Khan*, 182 Wash. App. 795, 799, 332 P.3d 1016, 1018 (Wash. Ct. App. 2014)  
 4 (noting that USCIS form instructions are incorporated into the regulations).

5 This regulatory framework, which mandates the automatic provision of interim  
 6 employment authorization if the agency fails to timely adjudicate EAD applications, has been in  
 7 place for more than a quarter-century. Promulgated on May 1, 1987, 8 C.F.R. § 274a.13(d)  
 8 initially provided for interim employment authorization if an EAD application was not  
 9 adjudicated within sixty days of receipt. It read:

10 d) Interim employment authorization. The district director shall adjudicate the application  
 11 for employment authorization within 60 days from the date of receipt of the application  
 12 by the Service or the date of receipt of a returned application by the Service. **Failure to  
 complete the adjudication within 60 days will result in the grant of interim  
 employment authorization for a period not to exceed 120 days.**

13 8 C.F.R. § 274a.13(d), *added by* 52 Fed. Reg. 16216, 16228 (May 1, 1987) (emphasis added).

14 This regulation also applied to initial asylum EAD applications, which were previously subject to  
 15 a 60-day adjudication period. *See id.* at 16227-28 (8 C.F.R. §§ 274a.13(c)(8), (d) (1987)); *see*  
 16 *also Ramos v. Thornburgh*, 732 F. Supp. 696, 701 (E.D. Texas 1989).

17 In late 1994, legacy INS extended the waiting period for interim employment  
 18 authorization issuance from 60 days to 90 days, with the exception of initial asylum-based EAD  
 19 applications, which the agency is required to adjudicate within 30 days. 59 Fed. Reg. 62284,  
 20 62303 (Dec. 5, 1994) (effective Jan. 1, 1995). Accordingly, the current regulation requires  
 21 USCIS to adjudicate initial asylum EADs within 30 days and most other EADs within 90 days.  
 22

23 <sup>4</sup> USCIS did not place this latest edition of the I-765 Instructions on its website, available to the  
 public, until May 22, 2015. The language quoted above is identical to the prior I-765  
 Instructions, at 1 (edition date Aug. 6, 2014), which were quoted in the Complaint.

1 See 8 C.F.R. § 274a.13(d) (“USCIS will adjudicate the application within 90 days from the date  
2 of receipt of the application ... except in the case of an initial application for employment  
3 authorization under 8 CFR 274a.12(c)(8) [pending asylum application], which is governed by  
4 paragraph (a)(2) of this section.”); 8 C.F.R. § 274a.13(a)(2), *citing* 8 C.F.R. § 208.7[a][1] (“the  
5 Service shall have 30 days from the date of filing of the [initial asylum-based] employment  
6 authorization request to grant or deny that application”).

7 As reflected in the current I-765 Instructions, the change in the required time period for  
8 adjudicating initial asylum EADs did not change the long-established rule that asylum seekers  
9 are also entitled to interim employment authorization when the adjudication of their EAD  
10 applications is delayed. *See* Exh. C at 1 (I-765 Instr.). Rather, the interim EAD regulation at  
11 8 C.F.R. § 274a.13(d) simply recognizes that initial asylum EADs are to be adjudicated on a  
12 faster, 30-day time frame, and does not limit vulnerable asylum-seekers’ access to an interim  
13 EAD. The provision for interim employment authorization set forth in the I-765 Instructions  
14 also has the force of law. 8 C.F.R. § 103.2(a)(1); Exh. C at 1.<sup>5</sup>

15 **B. USCIS is required to follow its own regulations.**

16 When individual rights are affected, “it is incumbent upon agencies to follow their own  
17 procedures.” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Therefore, agencies are bound to follow  
18 regulations they promulgate. *See Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v.*  
19 *Shaughnessy*, 347 U.S. 260, 267 (1954); *Sameena, Inc. v. United States Air Force*, 147 F.3d  
20 1148, 1153 (9th Cir.1998), *citing Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959). Regulations  
21 properly enacted “have the force of law and are binding on the government until properly

22 \_\_\_\_\_  
23 <sup>5</sup> As the I-765 Instructions provide: “**Interim EAD:** An EAD issued to an eligible applicant  
when USCIS has failed to adjudicate an application within 90 days of a properly filed EAD  
application, or within 30 days of a properly filed initial EAD application based on an asylum  
application filed on or after January 4, 1995.” Exh. C at 1.

1 repealed.” *Flores. v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986) (citing *Accardi*, 347 U.S. at 265).

2 When agency regulations are “intended to protect the interests of a party before the agency ...  
3 [they] ‘must be scrupulously observed.’” *Sameena*, 147 F.3d at 1153 (citation omitted).

4 The regulatory provisions are straightforward, as courts interpreting the predecessor  
5 provisions have repeatedly acknowledged. On a motion for preliminary injunction, a Texas  
6 District Court concluded:

7 Any plaintiffs who have had requests for employment authorization pending without a  
8 decision for more than sixty days are almost certain to prevail on the merits. 8 C.F.R. §  
9 274.13(d) requires that the district director adjudicate a request for temporary  
10 employment authorization within sixty days from the date of receipt of the request. If the  
11 INS fails to adjudicate a request for temporary employment authorization within sixty  
12 days from the date of receipt, the agency has a duty to grant interim employment  
13 authorization for a period not to exceed 120 days. *John Doe I*, 690 F. Supp. at 1577  
14 (S.D.Tex.1988). Defendant does not dispute the mandatory nature of this regulation.

15 *Ramos v. Thornburgh*, 732 F. Supp. 696, 701 (E.D. Tex. 1989). Judge Justice was not writing on  
16 a blank slate, as the case he cited came to the same conclusion: “The regulations are clear. INS  
17 has a mandatory duty to grant interim employment authorization if INS fails to complete the  
18 adjudication within 60 days from the date of receipt of the application.” *John Doe I v. Meese*,  
19 690 F. Supp. 1572, 1577 (S.D. Tex. 1988).

20 For similar reasons, a New York district court certified a class and granted a preliminary  
21 injunction ordering legacy-INS to issue interim work authorization to EAD applicants based on  
22 pending asylum applications that had been denied because of INS administrative errors (not  
23 finding records or providing adequate notice).”If INS fails timely to adjudicate such [an EAD]  
request then it shall issue interim work authorization pursuant to 8 C.F.R. § 274a.13(d).” *Najera-  
Borja v. McElroy*, 1995 WL 151775 \* 1 (E.D.N.Y., March 29, 1995), citing its prior decision in  
*Najera-Borja v. Slattery*, No. 89 CV 2320 (E.D.N.Y. Aug 23, 1993) at 7.

1 More recently, a federal district court in California awarded attorney's fees when USCIS  
2 failed to issue an interim EAD on a long-delayed application. *Chowdhury v. Siciliano*, No. C06-  
3 07132JW (N.D. Cal., May 13, 2008), Exh. F at 6-7. After finding that more than 90 days had  
4 passed without the adjudication of an EAD application or issuance of interim employment  
5 authorization, the court concluded that "there was no basis in law for Defendants to delay the  
6 issuance of interim work authorization after the 90-day period had expired." *Id.*

7 **C. The Court need not engage in fact-finding to determine whether delay is**  
8 **unreasonable.**

9 The plain language of the regulations establishes that USCIS must adjudicate EAD  
10 applications filed under 8 C.F.R. § 274a.13(d) within 90 days and initial EAD asylum  
11 applications filed under 8 C.F.R. § 208.7(a)(1) within 30 days. If USCIS exceeds either of these  
12 time limits, the agency must grant interim employment authorization. The agency's inclusion in  
13 the regulations of specific time limits and a consequence for failure to comply distinguishes this  
14 case from those where the Court must decide, by applying certain factors, whether a delay is  
15 unreasonable. Compare *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th  
16 Cir. 2002) (statutory deadline provided "so no balancing of factors is required or permitted")  
17 with *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001) (affirming district court application  
18 of factors from *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80  
19 (D.C. Cir. 1984), where agency was not subject to a statutory or regulatory time limit).

20 Here, there is no need for fact-finding regarding the reasonableness of the delays because  
21 USCIS has issued substantive rules that impose specific time limits for EAD adjudications and  
22 mandate the issuance of interim employment authorization where the agency fails to comply  
23 with these deadlines. The agency has no discretion to ignore its own rules. By failing to comply  
with the regulatory timetable for EAD adjudications and to grant interim employment

1 authorization, USCIS violates two discrete, nondiscretionary duties. *See Norton v. Southern Utah*  
2 *Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). Because there are no genuine disputes  
3 regarding material facts, the Court should grant summary judgment.

4 **IV. The Court Should Issue a Writ of Mandamus to Compel the Defendants to Comply**  
5 **with their own Regulations.**

6 The same agency failures that constitute APA violations also satisfy the criteria for  
7 mandamus. The U.S. Court of Appeals for the Ninth Circuit decided to construe as essentially  
8 equivalent compelling action under the MVA and requesting relief under the APA. *See*  
9 *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *Japan Whaling*  
10 *Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n. 4 (1986)); *Garcia v. Johnson*, 2014 WL  
11 6657591 at \*5 (N.D. Cal. Nov. 21, 2014) (“The jurisdictional dimensions of the APA and the  
12 Mandamus Act are considered to be coextensive for purposes of compelling agency action that  
13 has been unreasonably delayed. Where, as here, the relief sought is identical under the APA and  
14 the mandamus statute, proceeding under one as opposed to the other is not significant.”). The  
15 regulatory requirements establish the certainty of Plaintiffs’ claims as well as the clarity of  
16 Defendants’ ministerial duties. USCIS must either adjudicate EAD applications within the  
17 regulatory time period or grant interim employment authorization.

18 Plaintiffs lack any adequate remedy short of judicial intervention. *See Johnson*, 349 F.3d  
19 at 1154. There is no other means for Individual Plaintiffs and putative class members to compel  
20 USCIS to grant interim employment authorization when it fails to meet the regulatory deadlines  
21 for EAD adjudications. *See, e.g.*, Exh. J at 2 (Shepherd Decl. ¶¶ 5-7); Exh. L at 1 (Moncayo  
22 Fernandez Decl. ¶ 4).

1 **CONCLUSION**

2 There is no genuine issue of material fact as to Defendant USCIS's practices and  
3 policies of failing to timely adjudicate EAD applications and failing to issue interim  
4 employment authorization, in violation of a clear, long-established regulatory mandate. For  
5 these reasons, Plaintiffs ask this Court to: (1) declare Defendants' failure to timely adjudicate  
6 Plaintiffs' and proposed class members' EAD applications or, where the regulatory time period  
7 has elapsed, to provide them with interim employment authorization, to be arbitrary and  
8 capricious, an abuse of discretion, and in violation of the applicable regulations; (2) order  
9 Defendants to comply with 8 C.F.R. § 208.7(a) by adjudicating initial asylum EAD  
10 applications within 30 days of receipt and with 8 C.F.R. § 274a.13(d) by adjudicating all  
11 applicable EAD applications, other than initial asylum EAD applications, within 90 days of  
12 receipt; or by issuing interim employment authorization to Individual Plaintiffs and all  
13 proposed class members in cases where the regulatory time period has elapsed.

14 Respectfully submitted this 2<sup>nd</sup> day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2nd, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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