JUDGE TANA LIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIA SILVIA GUEVARA ENRIQUEZ, SOFIO CALLEJAS VENEGAS, KEVIN ALBERTO JIMENEZ RIVAS, AND ISMAEL MONTES CISNEROS,

Plaintiffs,

v.

U.S. CITIZENSHIP & IMMIGRATION SERVICES; UR JADDOU, Director of USCIS,

Defendants.

Case No. 2:23-cv-00097-TL

REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:
MARCH 10, 2023

ORAL ARGUMENT REQUESTED

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiffs Maria Silvia Guevara Enriquez, Sofio Callejas Venegas, Kevin Alberto Jimenez Rivas, and Ismael Montes Cisneros ("Individual Plaintiffs") submit this reply in support of their Motion for Class Certification, ECF No. 17. Defendants incorrectly contend that Individual Plaintiffs' proposed class is impermissibly broad, and their arguments are foreclosed by Ninth Circuit precedent. In fact, the proposed class meets Rule 23's commonality and typicality requirements because their central allegations are that agency-wide policies and practices result in class-wide delays for I-601A waiver applicants, and the common answer regarding the existence and legality of each challenged policy and practice will drive the resolution of the litigation. *See* Fed. R. Civ. P. 23(a). Contrary to Defendants' purported concerns, the proposed class definition and request for relief would result in significant improvement for the processing times of all putative class members and do not create an impermissible conflict of interests. As Defendants' opposition to class certification cannot withstand scrutiny, the Court should certify the class without delay.

Defendants ask the Court to "defer the resolution" of this motion until after the Court has decided their forthcoming motion to dismiss. *See* Defs.' Opp. to Pls.' Mot. for Class Cert. (Defs.' Opp.), ECF No. 31, at 1, n.1. Because Defendants have neither filed a motion to stay nor a motion to dismiss, the Court should decline Defendants' request. Even if they had filed such motions, there is no reason to delay deciding whether a class should be certified at this stage of the litigation, particularly given the federal government defendants' proclivity to "moot" named plaintiffs in immigration delay cases. *See, e.g.*, *Edakunni v. Mayorkas*, No. 2:21-CV-00393-TL, 2022 WL 2439864, at *4-5 (W.D. Wash. July 5, 2022).

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I. ARGUMENT

The Individual Plaintiffs satisfy Rule 23(a) criteria—numerosity, commonality, typicality, and adequacy of representation. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). The proposed class also falls within each of the three categories found in Rule 23(b): given the number of impacted individuals, there is a the risk that individual suits will result in inconsistent outcomes; the appropriate relief in this case is declaratory and injunctive relief; and, as discussed below, the common questions of law or fact predominate over individual questions affecting individual I-601A applicants. *Id*.

A. Plaintiffs meet the Rule 23 standards for class certification

1. The Proposed Class Is Ascertainable and Clearly Defined

Individual Plaintiffs have clearly defined an ascertainable class of current and future I-601A applicants whose applications have been pending for twelve months or more. Defendants posit that the inclusion of *future* I-601A applicants renders the class impermissibly overbroad and not ascertainable. Defs.' Opp. at 10. Defendants misstate and misunderstand the Ninth Circuit Court of Appeals' case law on ascertainability. "'The inclusion of future class members in a class is not itself unusual or objectionable' and is not a barrier to ascertainability." *MadKudu Inc. v. U.S. Citizenship & Immigr. Servs.*, No. 20-CV-02653-SVK, 2020 WL 7389419, at *4 (N.D. Cal. Nov. 17, 2020) (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010), *abrogated on other grounds*, *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)). Indeed, courts in the Ninth Circuit regularly certify classes that include future class members. *See, e.g.*, *Nightingale v. U.S. Citizenship &*

Immigr. Servs., 333 F.R.D. 449, 456 (N.D. Cal. 2019) (certifying class of "[a]ll individuals who filed, *or will file*, A-File FOIA requests with USCIS") (emphasis added); *Garcia v. Johnson*, No. 14-CV-01775-YGR, 2014 WL 6657591, at *16 (N.D. Cal. Nov. 21, 2014) (certifying a class of "all individuals who . . . are *or will be* subject to removal") (emphasis added).

Defendants acknowledge that the identity of each class member need not be known at the time of certification where the class definition provides for an administratively feasible way for the court to ascertain whether an individual is a member. Defs.' Opp. at 10 (citing *Booth v. Appstack, Inc.*, No 13-cv-1533-JLR, 2015 WL 1466247, at *3 (W.D. Wash. Mar. 30, 2015)). The proposed class must be defined by criteria that is "precise, objective, and presently ascertainable," which Individual Plaintiffs' proposed definition is. *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). The class is defined as individuals who have filed and who will file an application for a provisional waiver *and* whose applications have been pending for at least twelve months, which provides a bright line rule for the court and Defendants to easily ascertain who is presently a class member and when others meet the class definition. *See* Pls.' Mot. Class Cert., ECF No. 17, at 6.

Notably, Defendants do not contend that they fail to track the date on which an application has been submitted or are otherwise unable to calculate how long an I-601A has been pending. Nor can they. USCIS provides each applicant with a notice of receipt with the date the application has been received. *See* USCIS, Form I-797C, Notice of Action, https://www.uscis.gov/forms/all-forms/form-i-797c-notice-of-action (Jan. 25, 2021).

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Furthermore, USCIS aggregates pending wait times to determine average wait times, as discussed in Defendants' supporting declaration. *See* ECF No. 31-1, Decl. of Sharon Orise, ¶ 21 ("Orise Decl."). Thus, determining whether any current or future I-601A application has been pending for 12 months is easily ascertainable and administratively feasible.

Defendants also erroneously contend the class cannot be certified because future provisional waiver applicants do not currently have Article III standing, Defs.' Opp. at 10-11, their arguments are foreclosed by Ninth Circuit precedent. That a proposed class contains members who lack Article III standing at the time certification is sought does not preclude certification where the relief sought is injunctive or equitable. *See Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022) (en banc), *overruling Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012);*See also Election Integrity Project California, Inc. v. Weber,* No. 21-56061, 2022 WL 16647768, at *2 (9th Cir. Nov. 3, 2022)("[I]n cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III.")

Accordingly, Defendants' arguments around standing and ascertainability necessarily fail.[1]

[1] Defendants question the decision of counsel for Individual Plaintiffs not to meet and confer before filing this motion. Defs.' Opp. at 7 n.3. As the pleadings reflect, Defendants have not identified factual or legal issues that would have narrowed if the parties had conferred, and so Defendants were not prejudiced, particularly where Plaintiffs agreed to an extension of time for Defendants to file an opposition. Also, at the time when the Individual Plaintiffs filed the motion, no counsel for Defendants had entered an appearance. Furthermore, Section II(D) of this Court's standing order excepts dispositive motions from the conferral requirement, but for a motion to dismiss. Counsel for Individual Plaintiffs followed the reasoning expressed in *Boucher v. First. Am. Title Ins. Co.*, No. C40-199RAJ,

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2. The Proposed Class Satisfies Commonality and Typicality Requirements

Defendants ignore Individual Plaintiffs' arguments that USCIS has systematically delayed adjudication of all Form I-601As, instead arguing that the circumstances surrounding each applicant's delay are too disparate to satisfy the commonality and typicality requirements of Rule 23(a). Defs.' Opp. at 11-15. But Individual Plaintiffs allege a pattern and practice of delayed adjudication of I-601A applications, and the proposed class shares common questions of law and fact regarding that pattern and practice, as required by Rule 23(a). Pls.' Mot. at . Defendants argue that the individualized *TRAC* factor analysis might reveal that a period of delay might constitute unreasonable delay for one class member but would not necessarily establish unreasonable delay for another. *Id*. at 12 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 3 (2011)). Yet, USCIS publicly publishes processing times that provide a guidepost on processing times for at least 80% of applicants. And Defendants do not dispute that the processing times have risen substantially since Fiscal Year 2018 for *all* applicants. *See* Orise Decl. ¶ 25. USCIS also states that it purportedly processes applicants using a first in, first out methodology. *Id.* ¶ 23 ("USCIS generally adjudicates application types in the order we receive them"). Thus, the substantial increase in processing times coupled with the first in, first out methodology affects all I-601A applicants, regardless of their individual circumstances.

Courts in this circuit have certified classes where plaintiffs allege USCIS's pattern and practice predominate over any individual claims. In *Nightingale v. USCIS*, the court certified a class and found commonality where the "shared injury between plaintiffs and

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2011 WL 13359325 (W.D. Wash. May 5, 2011). A class action motion may not be traditionally thought of as a dispositive motion, but it is in material respects similar. *Id*. at *1. Individual Plaintiffs respectfully request that if the Court disagrees with counsel's decision to forego conferral, the Court exercise its discretion to nevertheless hear the motion.

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proposed class members [was] the delayed receipt of determinations on their A-File FOIA requests filed with USCIS," despite differences in delay amongst individual class members. 333 F.R.D. at 459. Similarly, in *MadKudu, Inc. v. USCIS*, the court found that "the underlying facts of each petition [are] not relevant to a determination of class membership and 'individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality.'" 2020 WL 7389419, at *7 (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds, Johnson v. California*, 543 U.S. 499 (2005)).

Defendants point to *Monk v. Wilkie*, 978 F.3d 1273 (Fed. Cir. 2020), noting that the Federal Circuit affirmed the denial of class certification for a proposed class where the alleged common injury was delay of at least 12 months. Defs.' Opp. at 13. But *Monk* presented an unreasonable delay claim on behalf of veterans appealing decisions on disability claims where Congress intervened during the pendency of the case, enacting legislation to simplify and expedite the appeals of disability determinations and funding additional adjudicators. *Monk*, 978 F.3d at 1275. At the time of appeal, the government reported that the streamlining legislation had "vastly improved appeal processing times." *Id*. at 1276. Those who had appealed before the enactment of the streamlining legislation could take advantage of the new streamlined processes if they opted into the new system. *Id*. The court in Monk stated that "when Congress has 'carefully crafted a 'comprehensive remedial structure,' that structure warrants evaluation in practice, before judicial intervention should be contemplated." *Id*. at 1277. On these distinguishable facts, the court thus affirmed the lower court's ruling that the commonality requirement had not been met.

While Plaintiffs would welcome a similar legislative fix, there is no comparable congressional intervention here. In this case, class members have no opportunity to opt into a new alternative, streamlined processing system. With the unique circumstances that drove the

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court's analysis in *Monk* absent here, *Monk* provides little support to Defendants' position and in fact supports Individual Plaintiffs' motion for class certification.

Here, common questions of law and fact predominate over any questions affecting the individual class members. The Individual Plaintiffs and proposed class members have been or will be forced to suffer the consequences of USCIS' failure to timely adjudicate their I-601A waiver applications. When considering unreasonable delay, the *TRAC* analysis sets forth a set of factors that will determine this case, and each factor presents common questions. *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("TRAC"). Common questions of fact include whether: 1) USCIS's six-fold increase in median processing times since Fiscal Year 2018 is unreasonable; 2) a 34-39 month processing time for the adjudication of I-601A waiver applications is reasonable; 3) USCIS is using a first-in, first-out adjudication method, as they claim; and 4) USCIS adopted a pattern or practice to adjudicate I-601A waiver applications at a different pace than years prior when processing times were consistently less than six months.

Indeed, USCIS' declaration raises further questions of law and fact common to the class. *See* Orise Decl., ECF No. 31-1. Ms. Orise notes that in Fiscal Year 2018, USCIS transitioned from field offices adjudicating I-601A applications to service centers adjudicating I-601A applications, raising factual questions about whether this adjudicatory change resulted in the rising processing times. *Id.* ¶ 2. Ms. Orise also discusses COVID-19's impact on delays and USCIS' funding, raising common questions of fact regarding USCIS' operations, where the agency has long-returned to normal processing. *Id.* ¶¶ 27-31. These common questions establish commonality regarding the reasonableness of USCIS' delays affecting the class as a whole. *See Wal-Mart*, 564 U.S. at 350.

A common answer to these factual and legal questions regarding the legality of each challenged policy and practice will "'drive the resolution of the litigation.'" *Ellis v. Costco*

Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Wal-Mart*, 131 S. Ct. at 2551). Although factual variations may change the outcomes of individual cases, the pace of adjudication is common and any factual differences are insufficient to defeat commonality where the central allegations are that USCIS's policies and practices result in class-wide delays for I-601A waiver applicants. *See Califano v. Yamasaki* , 442 U.S. 682, 701 (1979) ("It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification"). Courts have affirmed that such factual questions are well-suited to resolution on a class-wide basis where the claims turn on a unified policy or practice. *See, e.g., Stockwell v. City of S.F.*, 749 F.3d 1107, 1114 (9th Cir. 2014) (reversing denial of class certification motion because movants had "identified a single, well-enunciated, uniform policy" that was allegedly responsible for the harms suffered by the class); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1203–04 (W.D. Wash. 2008), *amended in part,* No. C07-1739MJP, 2008 WL 2275558 (W.D. Wash. June 3, 2008) (finding commonality where plaintiffs challenged delays in naturalization adjudications due to Federal Bureau of Investigation "name checks"). Moreover, "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy v. Kehe Food Distrib., Inc.*, 276 F.R.D. 642, 654 (W.D. Wash. 2011); *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985), *amended by* 796 F.2d 309 (9th Cir. 1986) (Mem.) (holding that the constitutionality of an INS procedure "[p]lainly" created common questions of law and fact). As such, resolution of the common issues presented will resolve class members' claims "in one stroke." *Wal-Mart*, 564 U.S. at 350.

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3. The Proposed Class Representatives Will Adequately Protect Class Interests

Defendants assert the proposed class representatives cannot adequately represent the class because Plaintiffs' proposed class definition and prayer for relief "work together to create an impermissible conflict of interest among putative class members." Defs.' Opp. at 16. Defendants' concern is unfounded.

According to Defendants, the class definition and prayer for relief create three tiers of relief: (1) for class members who have waited at least 12 months for adjudication, the requested relief would require adjudication within 30 days; (2) for future provisional waiver applicants, the requested relief would require adjudication within 180 days of filing; and (3) for those who have already filed their provisional waiver applications and have been waiting approximately 180 days at the time relief is ordered, the requested relief would require adjudication upon within 30 days after the application has been pending for 12 months. *See* Defs.' Opp. at 16. Defendants argue this is problematic because those in the second category, who would not have filed their application at the time relief is ordered, would receive superior relief to the third category, who would have already had an application pending for about 180 days at the time the court orders relief. *Id*. at 16-17.

In Defendants' scenario, however, applicants in the third category would receive substantial benefit in knowing that their applications would be adjudicated within 30 days of reaching the 12-month mark. And it is unlikely that many new applicants from the second tier would receive adjudication ahead of the already pending applicants as posited by Defendants, because newly filed applications would still likely take nearly six months to adjudicate. So any slight difference would be immaterial. Moreover, the interests of putative class members in different tiers are not adverse as the requested relief would dramatically

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improve the time in which everyone could expect to receive a decision on their applications.[2] The goal is to return the agency to the reasonable processing times for adjudicating applications that it previously accomplished, and 180 days is the benchmark, as it was before 2018. The suggestion that the requested relief creates an impermissible conflict of interest among putative class members or that proposed class representatives or proposed class counsel are not prosecuting this action equally on behalf of the entire class is without merit.

Plaintiffs will fairly and adequately represent the interests of the class because (a) they are willing and able to represent the proposed class and have every incentive to pursue this action to a successful conclusion; (b) their interests do not in any way conflict with those of absent members of the class; and (c) they have retained counsel who are competent and experienced in litigating class actions civil and immigrants' rights.[3] Further, Plaintiffs seek the exact same relief for themselves and for members of the class: declaratory and injunctive relief.

3. Alternatively, The Court Has the Discretion to Modify the Class Definition If the Court Disagrees with Individual Plaintiffs' Position as to the Relief Requested

If the court concludes that differing relief would render the Individual Plaintiffs inadequate representatives, then the Individual Plaintiffs alternatively request the court exercise its discretionary authority to modify the class definition. "The Court has discretion to modify class definitions where appropriate." *Rosas v. Sarbanand Farms, LLC*, 329 F.R.D.

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[2] Defendants note that Requests for Evidence (RFEs) have been issued with respect to some plaintiffs and may add up to 90 days to the adjudication times for those plaintiffs. Yet, ninety days is nominal in the context of the delays currently being experienced, and the existence of some RFEs does not begin to shift the overwhelming commonality of questions of law and fact among the putative class members.

[3] Plaintiffs are attaching to this reply an executed class counsel declaration for Katherine Melloy Goettel as Exhibit A. It identical to the declaration submitted with Plaintiffs' Motion for Class Certification, *see* ECF No. 17-5, but corrects an inadvertent omission of signature.

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671, 693-94 (D. Wash. 2018) (citing *Booth*, 2015 WL 1466247, at *5).[4] In *Rosas*, plaintiffs who were noncitizen temporary agricultural workers sued blueberry growers for violating labor and immigration laws. *Id.* at 681-82. Plaintiffs moved to certify a class and a subclass of blueberry harvesters and proposed adding a second "wrongful termination" subclass. *Id*. at 683. Exercising discretion, the court added the second subclass, defining and certifying a Rule 23(b)(3) class and two subclasses. *Id*. at 694*; see also Powers v. Hamilton Cnty. Public Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (district courts have "broad discretion to modify class definitions"); *Schorsch v. Hewlett–Packard Co*., 417 F.3d 748, 750 (7th Cir. 2005) (noting that "[l]itigants and judges regularly modify class definitions"); *In re Monumental Life Ins. Co*., 365 F.3d 408, 414 (5th Cir. 2004) ("Disgtrict courts are permitted to limit or modify class definitions to provide the necessary precision."); 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1759 (4th ed.) ("[T]he court may construe the complaint or redefine the class to bring it within the scope of Rule 23 . . . .").

In the alternative, rather than denying certification, Individual Plaintiffs respectfully ask the court to modify the class definition as follows, and to permit a second amendment of the complaint to conform the class definition and relief requested accordingly:

> All individuals:
>
> (a) who filed, or will file in the future, an application with USCIS for a provisional unlawful presence waiver (Form I-601A or any successor form), and
>
> (b) whose applications have been pending for at least 180 days from the date of filing.

[4] In *Booth*, the court rejected an ascertainability challenge by exercising its discretion to modify the class definition. *Id*.

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II. CONCLUSION

For the foregoing reasons and those provided with Plaintiffs Maria Silvia Guevara Enriquez, Sofio Callejas Venegas, Kevin Alberto Jimenez Rivas, and Ismael Montes Cisneros' Motion for Class Certification, Individual Plaintiffs ask the Court to certify a class as follows:

> All individuals:
>
> (a) who filed, or will file in the future, an application with USCIS for a provisional unlawful presence waiver (Form I-601A or any successor form), and
>
> (b) whose applications have been pending for at least twelve months from the date of filing.

DATE: March 9, 2023

Respectfully submitted,

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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 7(e)(6)

I hereby certify that this memorandum contains 3,482 words, in compliance with the Local Civil Rules.

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