The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.A., Antonio MACHIC YAC, and W.H., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; *et al.*,

Defendants.

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
July 2, 2018

Oral Argument Requested

Defendants, U.S. Citizenship and Immigration Services ("USCIS"), U.S. Department of Homeland Security ("DHS"), L. Francis Cissna, and Kirstjen Nielsen, in their official capacities, hereby move for summary judgment in favor of Defendants pursuant Federal Rule of Civil Procedure 56. Although this Court has held that the 30-day timeline to adjudicate an initial employment authorization document ("EAD") application for an applicant with a pending asylum application ("initial asylum EADs") found at 8 C.F.R. § 208.7(a) is mandatory for jurisdictional purposes, it is not mandatory that Plaintiffs are entitled to injunctive and mandamus relief when Defendants cannot meet that deadline. Instead, Defendants current and ongoing efforts to process initial asylum EADs is reasonable. This Court should decline to afford relief to Plaintiffs and grant summary judgment for Defendants.

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(202) 598-2446

NATURE OF THE PROCEEDING

I. PROCEDURAL HISTORY OF CASE

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.* ECF No. 1. On August 10, 2015, Defendants moved to dismiss Plaintiffs' claims for lack of standing and lack of subject-matter jurisdiction. ECF No. 34. 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 the 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. Because the Court dismissed a significant portion of Plaintiffs' claims, it also denied the Motion for Class Certification without prejudice. *Id.* at 36.

On March 10, 2016, Plaintiffs filed an Amended Complaint challenging alleged delay by USCIS in adjudicating applications for employment authorization documents ("EADs") and failure to issue interim employment authorization documents. ECF No. 58. Plaintiffs also renewed their Motion for Class Certification. ECF No. 59. On April 18, 2016, Defendants again moved to dismiss Plaintiffs' claims for lack of subject-matter jurisdiction and for failure to state a claim. ECF No. 69. On October 5, 2016, the Court once again dismissed the claims of Ms. Arcos-Perez and Ms. Osorio-Ballesteros for lack of subject-matter jurisdiction. Order at 18, ECF No. 80. The Court also held that NWIRP and The Advocates failed to state a claim upon which relief could be granted because they were not within the zone of interests of the APA or owed a duty under the Mandamus Act. *Id.* at 30-31, 35-36. The Court found, however, that it has jurisdiction to consider the claims of the other individual Plaintiffs and the putative classes they sought to represent. *See generally id.* Also on October 5, 2016, the Court denied Plaintiffs'

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Renewed Motion for Class Certification, holding that Plaintiffs had not established the requisite commonality under Federal Rule of Civil Procedure 23(a). However, the Court granted Plaintiffs leave to file a third motion for class certification.

On November 4, 2016, Plaintiffs filed their third motion for class certification. ECF No. 82. On March 3, 2017, Defendants moved to dismissed the claims of the putative 90-day class and the individuals who sought to represent them due to a change in the regulations that eliminated the 90-day time period and the authority to grant interim EADs. ECF No. 88. On July 18, 2017, the Court granted the motion to dismiss the claims of the putative 90-day class as moot and granted class certification for the 30-day class. ECF No. 95. The class consists of:

> Noncitizens who have filed or will file applications for employment authorization that were not or will not be adjudicated within . . . 30 days . . . and who have not or will not be granted interim employment authorization. [This class] consists of only those applicants for whom 30 days has accrued or will accrue under the applicable regulations, 8 C.F.R. §§ 103.2(b)(10)(i), 208.7(a)(2), (a)(4).

Id. at 26-27.

On April 17, 2018, the Court permitted the supplementation of the administrative record with statistics and procedures regarding initial asylum EADs. ECF No 113. Defendants filed that supplemental administrative record ("SAR") on May 9, 2018. ECF No. 116.

II. STATUTORY AND REGULATORY BACKGROUND

A. Current Procedures

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); *see generally* SAR at 1-83. Individuals who are aggravated felons are not eligible for an EAD. 8 C.F.R. § 208.7(a)(1). The 150 and 180-day periods are calculated according to the asylum EAD clock. 8 C.F.R. § 208.7(a)(1), (2); SAR at 7. The asylum EAD clock starts when a complete asylum application is first filed with USCIS or filed or lodged with the immigration court. 8 C.F.R. § 208.7(a); Executive Office for Immigration Review, Office of the

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Chief Immigration Judge, EOIR OPPM 13-03: Guidelines for Implementation of the ABT Settlement Agreement (Dec. 3, 2013), https://www.justice.gov/sites/default/files/eoir/legacy/2013/12/03/13-03.pdf (regarding the process for lodging an application); Executive Office for Immigration Review, Office of the Chief Immigration Judge, EOIR OPPM 16-01: Filing Applications for Asylum (Sept. 14, 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf (providing for filing asylum applications by mail). 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); 208.3(c)(3). Once started, the EAD asylum clock is suspended for periods of applicant-caused or requested delay and during periods in which a Request for Evidence is pending. 8 C.F.R. § 208.7(a)(2). 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),[1] available at http://www.ice.gov/doclib/foia/prosecutorial-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), 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 before USCIS or at a hearing before an immigration judge, the asylum EAD clock will resume. 8 C.F.R. § 208.7(a)(2). If the asylum application is denied prior to the

[1] 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.

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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. Once an EAD based on a pending 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 appeals the asylum application denial through administrative or judicial review. 8 C.F.R. § 208.7(b), (c). If an individual is granted asylum, they are able to work incident to that status. 8 C.F.R. § 274a.12(a)(5).

B. History of the 30-day Timeline

The 30-day timeline present in today's regulations can be traced to reforms in the asylum adjudication system instituted in 1994 as an effort to move asylum applications through the adjudication process more quickly and prevent fraud in the asylum process. In 1994, the then-Immigration and Naturalization Service ("INS") promulgated a regulation to "streamline the adjudication of asylum applications" and also "restrict employment authorization to applicants for asylum . . . whose claims have been pending more than 150 days." Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization (Proposed Rule), 59 Fed. Reg. 14,779, 14,779 (Mar. 30, 1994); *see also* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization (Final Rule), 59 Fed. Reg. 62,284 (Dec. 5, 1994). This rule provided that asylum applicants could apply for work authorization after their applications were pending for 150 days and that the INS would adjudicate those applications within 30 days. 59 Fed. Reg. at 14,785. Prior to this change, asylum applicants had been able to apply for an EAD when they applied for asylum. *Id.* at 14,780; *see also* 8 C.F.R. § 208.7(a) (1994). In making this change,

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the agency was aware that "[a]pplicants with pending asylum claims will wait longer than required at present to receive employment authorization" and envisioned that "few applicants would ever reach the 150-day point." 59 Fed. Reg. at 14,780. This change was intended to "reduce the incidence of asylum applications filed primarily to obtain employment authorization." *Id.* In this version of the rule, provision was made for an interim EAD if an adjudication was not made within 30 days. *Id.* at 14,785.

In 1997, in the wake of significant changes in the immigration statutes, including the addition of a statutory prohibition on granting employment authorization to asylum applicants prior to 180 days after filing for asylum, *see* 8 U.S.C. § 1158(d)(2) (effective April 1, 1997), the agency again addressed EADs for asylum applicants. In this change, the agency removed the provision that permitted interim EADs if an application was not adjudicated within 30 days.[2] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures (Proposed Rule), 62 Fed. Reg. 444, 464 (Jan. 3, 1997); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures (Interim Rule), 62 Fed. Reg. 10,312, 10,340 (Mar. 6, 1997);

III. FACTS

In Fiscal Year 2013, USCIS received 41,024 applications for initial asylum EADs. SAR at 84. By Fiscal Year 2017, that number increased more than six times, to 261,447. SAR at 85. In order to deal with this immense increase in workload, USCIS has instituted a number of changes. On October 5, 2016, USCIS increased the validity period of an initial asylum EAD document from one to two years. *USCIS Increases Validity of Work Permits to Two Years for*

[2] The Court previously noted that a goal of the 1995 regulatory changes were to "ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible." ECF No. 55 at 25 (quoting 62 Fed. Reg. at 10,318). However, that statement was made in the context of describing the solution to a potential delay in providing EADs that could arise when an individual was recommended for a grant of asylum but waiting for background checks to be complete. 62 Fed. Reg. at 10,317-318. The phrase "bona fide asylees" in the passage is of significance. The agency was referencing the goal of ensuring work authorization to those granted asylum as soon as possible, not those who had applied for asylum.

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Asylum Applicants, U.S. Citizenship and Immigration Services (Oct. 6, 2016), https://www.uscis.gov/news/alerts/uscis-increases-validity-work-permits-two-years-asylum-applicants. USCIS also provided checklists on its website to assist applicants in submitting complete applications in the first instance. *Form M-1162, Optional Checklist for Form I-765 (c)(8) Filings Asylum Applications (With a Pending Asylum Application) Who filed for Asylum on or after January 4, 1995*, U.S. Citizenship and Immigration Services (July 17, 2017), https://www.uscis.gov/system/files_force/files/form/m-1162.pdf.

USCIS also amended the process for applying for and renewing other EADs by eliminating the 90-day processing timeline and interim EADs for those non-initial asylum applications while creating auto-extensions for a number of different types of applications effective January 2017. *See generally* ECF No. 88 at 3-5 (summarizing new regulation). This change was part of an effort to modernize the regulations to deal with the current issues regarding security and technology. *See* Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers (Proposed Rule), 80 Fed. Reg. 81,900-01, 81,928 (Dec. 31, 2015). For example, increased threats to national security and public safety not known when the timeline regulations were implemented in 1987, required a shift to centralized card production of tamper-proof, secure cards. *Id.* at 81,929. Additionally, USCIS specifically noted that strict timelines do not allow the agency to "maintain necessary levels of security when application receipt volumes suddenly increase." *Id.* While not directly impacting initial asylum EADs (which are based on pending asylum applications), the new rule reflects the current realities that equally impact all types of EADs, including those for asylum applicants. *See id.*

As discussed above, USCIS has sought to address the increased backlog of initial asylum EADs while maintaining required levels of security. Despite a concerted effort to reduce the backlog of initial asylum EADs at the end of Fiscal Year 2017, *see* ECF No. 103 at 4 (describing the data displayed at SAR87-88), USCIS was not able to adjudicate 100 percent of initial asylum EADs within 30 days. *See* SAR at 87.

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In the face an immense increase in initial asylum EAD applications, the inability to comply with the regulatory timeline, and the concerns of security and fraud as discussed in the regulatory change relating to other EAD applications, Defendants are working toward amending the regulations to eliminate the 30-day processing timeline. *See* Office of Management and Budget, Office of Information and Regulatory Affairs, *View Rule*, RIN 1615-AC19 (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1615-AC19. It is anticipated that a Notice of Proposed Rulemaking will be published in June 2018. *Id.* Defendants will update the Court with further details of this Notice of Proposed Rulemaking as they are available.

IV. STANDARD OF REVIEW

A. Summary Judgement

Federal Rule of Civil Procedure 56(a) states that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." However, in a case seeking review of an administrative decision, the reviewing court "is not required to resolve any facts." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Rather, reviewing only the administrative record, the district court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* at 769. "[S]ummary judgment is an appropriate mechanism" to conduct such review. *Id.*

B. Administrative Procedure Act and Mandamus Act.

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 Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986))). Under the APA, a court may compel agency action unreasonably delayed, but such an order is an equitable remedy which is generally within the court's discretion to impose. *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). In

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determining whether to issue an injunction, the court balances the equities at stake and "mould[s] each decree to the necessities of the particular case." *Weinberger*, 456 U.S. at 312 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

ARGUMENT

While Defendants acknowledge that this Court has previously held that Defendants have a mandatory duty to adjudicate initial EAD applications within 30 days as provided in 8 C.F.R. § 208.7, ECF No. 55 at 25, ECF No. 95 at 21 n.10,[3] and Defendants acknowledge that they are unable to meet that requirement for every applicant, a question for this Court remains: what remedy is appropriate? The answer to this question is subject to a reasonableness analysis because neither the agency nor Congress have circumscribed this Court's equitable discretion to craft an appropriate remedy. Defendants contend that because any delay in adjudication suffered by class members is reasonable given the overall circumstances surrounding the adjudication of initial asylum EADs, no injunction should issue.

I. No Injunction is Required.

Plaintiffs seek an order compelling "Defendants to comply with 8 C.F.R. 208.7(a) by adjudicating initial asylum EAD applications within 30 days of receipt." ECF No. 58 at 38. This type of relief is an injunction, an equitable remedy which is not issued as a matter of course, even in the face of a violation of law, or here, regulation. *Weinberger*, 456 U.S. at 311–13. Similarly, the remedy of mandamus is extraordinary and requires compelling circumstances to issue. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). As noted throughout this case, a claim to compel agency action unreasonably delayed under the APA is coextensive to a claim seeking the relief of mandamus. *See Indep. Mining Co.*, 105 F.3d at 507 ("[T]he Supreme Court has

[3] Specifically, the Court held that "the language of Section 208.7(a)(1) is mandatory." ECF No. 55 at 25. The Court later rejected Defendants' argument that, although the regulation may constitute a discrete agency action that the agency is required to take, the 30-day timeline itself is not mandatory and the agency's delay in adjudication should analyzed for reasonableness. ECF. No. 95 at 20-22 & n.10. Defendants respectfully disagree with the Court's ruling and reserve all rights to appeal.

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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).

Because an injunction or mandamus order is an extraordinary remedy, even when confronted with actions that do not conform exactly to the regulatory requirements, "the test for determining whether equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute." *Biodiversity Legal Foundation*, 309 F.3d at 1177.

The purpose behind the 30-day processing deadline does not mandate an injunction requiring its strict compliance. The INS promulgated the 30-day deadline in 1994 as part of an effort to streamline the processing of asylum applications. 59 Fed. Reg. at 14,779. With this change, asylum applicants were no longer allowed to apply for EADs at the same time as they applied for asylum. *Id.* They were now required to wait to submit an application for employment authorization until their asylum application was pending for 150 days. *Id.* In establishing these new timelines, the agency intended to grant fewer EADs to those with pending applications as part of an effort to discourage asylum applications that were filed primarily to obtain employment authorization. *Id.* at 14,780 ("Ideally, however, few applicants would ever reach the 150-day point."). The 1994 regulations, therefore, lengthened the time an applicant waited to receive an EAD while his or her asylum application was pending.

This judgment initially enacted by the agency was codified by Congress at 8 U.S.C. § 1158(d)(2) in 1996, which prevents Defendants from granting EADs until an asylum application has been pending for at least 180 days. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 604, 110 Stat. 3009. Congress has also made clear that employment authorization provided by the regulations was not due to the absolute command of Congress: "An applicant for asylum is not entitled to employment authorization." 8 U.S.C. § 1158(d)(2); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103–322, §§ 130005(b), 130010, 108 Stat 1796 (adding the referenced language to 8 U.S.C. § 1158(d)(2)). Although the agency put in place a 30-day deadline, it was not implemented to conform to the mandates of the legislature or to ensure that

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asylum applicants received employment authorization as quickly as possible. It was to permit applicants to work after their asylum applications had been pending for a point in time chose by the agency as appropriate. 59 Fed. Reg. at 14,780 ("The *Department* selected 150 days as the period beyond which it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated." (emphasis added)).

This history stands in stark contrast the strict Congressional judgements found in the Endangered Species Act ("ESA") at issue in *Biodiversity Legal Foundation*. There, the ESA required that the Fish and Wildlife Service ("Service") make a determination as to whether a citizen petition to list a species as endangered was warranted or unwarranted within one year. *Biodiversity Legal Found.*, 309 F.3d at 1170. Plaintiffs sued under the APA because the Service had failed to make such a determination within one year regarding three citizen petitions. *Id.* The Service argued that the courts were not required to grant injunctive relief and should instead balance the factors set forth in *Telecomms. Research & Action Ctr. v. F.C.C.* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984)). *Id.* at 177 & n.11. The Ninth Circuit found that no balancing of equities could be considered because "Congress' clear intent required issuance of an injunction." *Biodiversity Legal Found.*, 309 F.3d at 1177 (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)). In *TVA*, the Supreme Court found that because Congress clearly intended to "afford[ ] endangered species the highest of priorities," the principles of separation of powers did not permit a court sitting in equity to reweigh what Congress had determined was in the public interest in the face of executive branch delay. *TVA*, 437 U.S. at 194. Therefore, the Ninth Circuit concluded that an injunction must issue when there is a violation of particular provisions of the citizen participation provisions of the ESA. *Biodiversity Legal Found.*, 309 F.3d at 1178.

Here, at issue are regulations of the Executive branch, not a statute enacted by Congress. In fact, Congress' statute provides even fewer protections than that contained in the regulations.[4]

[4] Defendants do not contest that regulations that are more restrictive than the statute that enables them are still binding on the agency. *See Service v. Dulles*, 354 U.S. 363, 388 (1957). However, the difference between the statutory and regulatory requirements here is relevant to the separation of powers concerns underlying the Supreme Court and Ninth Circuit's decisions in *TVA* and *Biodiversity Legal Foundation.*

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See 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7. The regulatory history further shows that the INS enacted these regulations containing the 30-day timeline to streamline the asylum application process and prevent fraud, not exclusively to protect the rights of asylum applicants. Defendants' inability to completely meet the 30-day timeline of the regulation does not, therefore, raise the separation of powers concerns noted by the Supreme Court in *TVA*. This scenario falls outside of the ambit of *Biodiversity Legal Foundation*, and Congress has not "foreclosed the exercise of the usual discretion possessed by a court of equity." 309 F.3d. at 1178 (quotation omitted). Therefore, an injunction requiring strict compliance with the 30-day deadline is not mandated by the precedents.

II. No Injunction Should Issue.

This Court should decline to issue an injunction in this case because an injunction is not required to effectuate the purpose of USCIS or Congress. *See Biodiversity Legal Foundation*, 309 F.3d at 1177 ("[T]he test for determining whether equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute."). As discussed above, Congress has stated that there is no absolute right to employment authorization for asylum applicants. 8 U.S.C. § 1158(d)(2). It is only via USCIS's regulations that this benefit is permitted. And the purpose of the 30-day timeline in those regulations was to streamline the asylum process and actually delay the award of work authorization to applicants. Therefore, an injunction is not required to "effectuate the . . . purpose behind the [regulation]" which set forth the 30-day timeline. *Id.*

However, if this Court considers an injunction as a remedy, the Court should look to whether Defendants' actions are reasonable to determine if an injunction should issue. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016) ("By contrast, in situations where the statute imposes a deadline or other clear duty to act, the bulk of the *TRAC* factor analysis may go to the equitable question of whether mandamus *should* issue, rather than the jurisdictional question of whether it *could*."). The *TRAC* factors include: 1) the time must be governed by a rule of reason; 2) a timetable in the statute may supply the rule of reason; 3) the reasonableness of delays may change depending on the circumstances of the party seeking government action,

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including economic regulations compared to regulations about human health and welfare; 4) the court should consider the effect of expediting delayed action on other agency activities; 5) the court should consider the nature and extent of other interests prejudiced by the delay, and 6) impropriety is not required to find unreasonable delay. *TRAC,* 750 F.2d at 80. This list is illustrative and not exhaustive. *Id.* Given the current posture of this case, Defendants focus on their current efforts to meet the 30-day timeline as much as possible and the factors that do not permit 100 percent compliance to show that an injunction should not issue.[5]

First, Defendants do not purposefully fail to meet the timeline set forth in the regulations. *See* SAR at 61 (instructing adjudicators that the regulations require adjudication within 30 days). Rather, resource and logistical constraints in the face of an astronomical increase in both asylum applications and subsequent employment authorization applications make Defendants unable to comply with the regulatory timeline 100 percent of the time. *See* SAR at 84-86 (showing an increase of more than six fold in applications from 41,024 initial asylum EAD applications in FY2013 to 261,447 applications in FY2017). Despite these challenges, Defendants continue to attempt to meet the timeline as much as possible. They have instituted a number of changes to manage their resources. Initial asylum EADs are now valid for two years, rather than the previous time period of one year. *USCIS Increases Validity of Work Permits to Two Years for Asylum Applicants*, U.S. Citizenship and Immigration Services (Oct. 6, 2016), https://www.uscis.gov/news/alerts/uscis-increases-validity-work-permits-two-years-asylum-applicants. This change permits resources that would have been utilized in processing renewal asylum EAD applications each year to be utilized to process initial applications. Defendants have also issued guidance and checklists for applicants in an effort to have more applications properly prepared for adjudication when received. *Form M-1162, Optional Checklist for Form*

[5] Defendants note that this analysis illustrates Defendants' arguments against class certification. *See* ECF No. 86 at 10-12. Each individual class member may have different facts that generate a different answer as to whether the delay in adjudicating his or her specific application is reasonable. Thus, a single injunction cannot provide relief to each member of the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). However, given the certified class here, Defendants emphasize the structural issues that prevent them from adjudicating every application within 30 days.

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I-765 (c)(8) Filings Asylum Applications (With a Pending Asylum Application) Who filed for Asylum on or after January 4, 1995, U.S. Citizenship and Immigration Services (July 17, 2017), https://www.uscis.gov/system/files_force/files/form/m-1162.pdf.

The positive impact of these changes and others are shown by the data. USCIS adjudicated 28 percent of initial asylum EAD applications within 30 days in Fiscal Year ("FY") 2017, a significant increase from 20 percent in FY2016 and 7 percent in FY2015. SAP at 89-90. Excluding cases which involved a request for additional evidence, these numbers are higher: 30 percent in FY2017, 22 percent in FY16, and 8 percent in FY2016. SAP at 91-92. During this same time, receipts for initial asylum EAD applications increased nearly two and a half times in only two years—from 106,002 in FY2015 to 261,447 in FY2017. By the 60-day mark, 74 percent of applications in FY2017 had been adjudicated. This was again a marked increase from 54 percent in FY2016 and 57 percent in FY2015. These statistics show that despite intense challenges, Defendants are making significant efforts to adjudicate initial asylum EAD applications as quickly as possible.

Nevertheless, after a concerted effort at the end of FY2017, 38 percent of all pending applications as of October 3, 2017, remained over the 30-day timeline. Thus, despite all of these efforts, Defendants have been unable to comply with the 30-day timeline of 8 C.F.R. § 208.7(a). Because security and fraud concerns (like those explained when making changes to the other EAD application regulations) together with the incredible increase in applications make it impossible for Defendants to comply with the regulatory timeline, Defendants have begun the process to amend the regulation. *See* Office of Management and Budget, Office of Information and Regulatory Affairs, *View Rule*, RIN 1615-AC19 (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1615-AC19.

In light of Defendants past efforts to improve their compliance with the regulatory timeline and considering the forthcoming notice of proposed rulemaking to eliminate the 30-day timeline, this Court should not issue an injunction because Defendants conduct has been reasonable in the circumstances. Moreover, the Court should not order Defendants to do the impossible. *See Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017) ("And just as

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

a court may not require an agency to break the law, a court may not require an agency to render performance that is impossible."); *see also Ctr. for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 972 (N.D. Cal. 2013); *Nat. Res. Def. Council v. Evans*, 243 F. Supp. 2d 1046, 1058-59 (N.D. Cal. 2003). Simply mandating that Defendants comply with the regulation without any additional resources or other changes in the actual circumstances on the ground only sets Defendants up for failure. *Am. Hosp. Ass'n*, 867 F.3d at 167-68 ("The sound discretion of an equity court . . . does not embrace enforcement through contempt of a party's duty to comply with an order that calls him 'to do an impossibility.'" (quoting *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974))). Additionally, because issuance of EADs to asylum applicants is not discretionary, mandating strict adherence to the 30-day deadline also may result in issuance of EADs to those who have disqualifying criminal histories when the necessary background checks cannot be completed in time. *See* 8 C.F.R. § 208.7(a)(1); SAR at 55-60. An injunction requiring absolute compliance with the 30-day timeline set forth in 8 C.F.R. § 208.7(a) is not an appropriate remedy in reaction to Defendants reasonable course of conduct.

If the Court determines that some injunction is necessary, which Defendants do not concede, Defendants propose that they provide status reports regarding the rate of compliance with the 30-day timeline every six months until the effective date of a final regulation the eliminates the 30-day timeline.

CONCLUSION

Therefore, although the Court has found that the 30-day deadline in 8 C.F.R. § 208.7 is mandatory, the Court should not grant Plaintiffs and the certified class the requested injunctive relief. The Court should find that although Defendants are unable to meet the 30-day deadline for every initial asylum EAD application filed, their present efforts to adjudicate applications as quickly as possible given the current security, resource, and operational constraints are reasonable and that no injunction is appropriate in these circumstances.

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

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Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

JEFFREY S. ROBINS
Assistant Director

s/ Adrienne Zack
ADRIENNE ZACK
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 598-2443
Fax: (202) 305-7000
Email: adrienne.m.zack@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2018, I electronically filed the foregoing Motion for Summary Judgment with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

*s/ Adrienne Zack*_____
ADRIENNE ZACK
Trial Attorney
U.S. Department of Justice

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