UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Amado de Jesus MORENO; Nelda Yolanda REYES; Jose CANTARERO ARGUETA; Haydee AVILEZ ROJAS,

Plaintiffs,

v.

Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; L. Francis CISSNA, Director, U.S. Citizenship and Immigration Services, in his official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

Case No._____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

This case involves noncitizens who have maintained lawful Temporary Protected Status (TPS) for years—in many cases, close to two decades—and who, during this time, established close relationships with U.S. citizens and businesses. Relying upon these relationships, they now seek to become lawful permanent residents (LPRs) pursuant to the adjustment of status statute, 8 U.S.C. § 1255. However, Defendants, the Department of Homeland Security (DHS), its component agency U.S. Citizenship and Immigration Services (USCIS), and the heads of both agencies, have or will deny their applications based on a policy that Plaintiffs allege violates the TPS statute, 8 U.S.C. § 1254a(f)(4), and the adjustment statute, § 1255.

Plaintiffs seek to certify a class on behalf of similarly situated TPS holders who entered the United States without inspection, subsequently were granted TPS by USCIS, and

who have applied or will apply with USCIS to adjust to LPR status. To adjust their status, Plaintiffs and class members must demonstrate that they were "inspected and admitted or paroled" into the United States. *See* 8 U.S.C. § 1255(a); see also § 1255(k) (requiring a lawful admission to be exempted from the bar to adjustment for unlawful presence). Plaintiffs contend, in accord with the plain language of the TPS statute, 8 U.S.C. § 1254a(f)(4), that the grant of TPS constitutes an inspection and admission for purposes of adjusting status; because all have been granted TPS—and thus have been inspected and admitted for purposes of adjustment—their initial entries without inspection do not prevent them from demonstrating eligibility under § 1255. The Courts of Appeals for the Sixth and Ninth Circuits ruled that the plain language of the statute compels this interpretation. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013).

Defendants' policy, found in the USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5) (Aug. 23, 2017), *available at* https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html, rejects this interpretation, stating that the grant of TPS does not constitute an inspection and admission for purposes of adjustment. Defendants find support for their position in the per curiam decision *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011), issued prior to the *Ramirez* and *Flores* decisions and rejected by both of those courts. Defendants apply this policy throughout the United States, except within the jurisdictions of the Courts of Appeals for the Sixth and Ninth Circuits. Pursuant to this policy, Defendant USCIS has denied or will deny the adjustment applications of all Plaintiffs and class members based upon an alleged lack of an inspection and admission.

Plaintiffs seek injunctive, declaratory, and mandamus relief to remedy Defendants' unlawful interpretation of the TPS statute. The scope of the proposed class consists of TPS

holders within the jurisdictions of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth,[1] who initially entered without inspection, have applied or will apply to adjust to LPR status, and whose adjustment applications have been or will be denied based upon Defendants' policy.

This case presents a question of law common to all Plaintiffs and class members: whether USCIS' policy of finding TPS holders ineligible for adjustment of status under 8 U.S.C. § 1255 violates the TPS statute and the Administrative Procedure Act. This question can be resolved on a class-wide basis, making certification appropriate. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move this Court to certify the following class with named Plaintiffs as class representatives:

> All individuals with TPS who reside within the geographic boundaries of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits; whose initial entries into the United States were without inspection; who have applied or will apply for adjustment of status to lawful permanent residence with USCIS; and whose adjustment applications have been or will be denied on the basis of USCIS' policy that TPS does not constitute an admission for purposes of adjusting status under 8 U.S.C. § 1255.

Plaintiffs seek to ensure that Defendants timely adjudicate their and class members' adjustment applications in accord with the plain language of the TPS statute.

II. BACKGROUND

In assessing whether Rule 23 requirements have been met, the court should consider the merits "only to the extent they overlap with Rule 23's inquiry." *Brooks v. Roberts*, 251 F. Supp. 3d 401, 415 n.4 (E.D.N.Y. 2017) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,

[1] The class does not include TPS holders within the jurisdictions of the Sixth and Ninth Circuits because Defendants do not apply the challenged policy within those Circuits pursuant to *Ramirez, supra* and *Flores, supra*; it also does not include TPS holders within the jurisdiction of the Eleventh Circuit because that court has upheld the policy. *Serrano, supra*.

351 (2011)). To facilitate any review that may be necessary, Plaintiffs provide a summary of their merits claims here. *See also* Dkt. 1.

A. Overview of the Facts and Law

Plaintiffs and members of the proposed class reside within the jurisdictions of the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits. All entered the United States without inspection but subsequently applied for and were granted TPS by USCIS, after demonstrating that they did not have a disqualifying criminal record and were otherwise admissible. After years of living in the country in this lawful—although nonpermanent—status, they seek to become LPRs based on visa petitions filed by U.S. citizen family members or employers on their behalf. However, USCIS has denied or will deny their applications solely due to Defendants' policy, which fails to acknowledge a grant of TPS as an inspection and admission for purposes of adjustment of status. Plaintiffs contend that this policy violates 8 U.S.C. §§ 1254a(f) and 1255.

TPS provides a temporary haven for noncitizens living in the United States when natural disasters or civil strife render their home countries unsafe for return. Noncitizens granted TPS by USCIS have non-permanent lawful status. While in TPS, beneficiaries are protected from removal and eligible for work authorization. During their many years as TPS holders, Plaintiffs and proposed class members have integrated fully into their communities in the United States. Some were brought to the United States as children and have never left. *See, e.g.*, Exh. E, Shafiqullah Dec. ¶¶ 4-5 (describing Haitian client trafficked into United States at age 14; Salvadoran client brought in at age 2 or 3); Exh. J, Volpe Dec. ¶ 4b (client arrived at age 8); Exh. T, Hall Dec. ¶ 9 (client arrived at age 9); Exh. G, Nowak Dec. ¶ 3a (client entered at about age 10). Others, like Plaintiff Cantarero Argueta, Dkt.1 ¶ 34, have

been here for most or all of their adult lives. *See also*, Exh. P, Sharma-Crawford Dec. ¶ 7 (describing 12 or more clients in their forties and fifties who have lived in the United States for close to 20 years); Exh. C, Liberles Dec. ¶¶ 4-5 (describing clients living here since 1992 and 1995 respectively). Others are near retirement age, such as Plaintiffs Reyes and Avilez Rojas. Dkt. 1 ¶¶ 29 and 41; *see also* Exh. M, Garcia Dec. ¶ 4 (describing 61-year-old client who worked in United States in healthcare industry for many years).

During their time in the United States, Plaintiffs and class members marry, raise U.S. citizen children, purchase homes, work, pursue training and education, and join churches and community groups.[2] Many work in construction, landscaping, health care, food services, and retail jobs. *See, e.g.*, Exh. D, Pilsbury Dec. ¶ 4 (describing generally jobs held by a large number of her Salvadoran clients); Exh. L, Taylor Dec. ¶ 4 (client works in school cafeteria); Exh. O, Takhsh Dec. ¶ 4 (client worked as nursing assistant and in housekeeping services); Exh. S, Peterson Dec. ¶ 5 (client worked in bakery). Some have held their jobs for many years. For example, Plaintiff Moreno has worked as a telemarketer for the same employer for over 17 years, Dkt. 1 ¶ 22, while Plaintiff Cantarero Argueta has worked in the kitchens of two employers for approximately 12 years. Dkt. 1 ¶ 37; *see also*, Exh. R, Blackford Dec. ¶ 4 (clients worked as manual laborers for approximately 10 and 25 years, respectively); Exh. Q, Loesch Dec. ¶ 4 (client worked for 8 years at meat-processing plant and last 3 years at cabinet-making company); Exh. J, Volpe Dec. ¶ 4a (client worked many years in

[2] *See, e.g.*, Center for American Progress, *TPS Holders in the United States* (2017), https://cdn.americanprogress.org/content/uploads/2017/10/19125633/101717_TPSFactsheet-USA.pdf; Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. MIGR. & HUM. SEC. 577 (2017), *available at* http://cmsny.org/publications/jmhs-tps-elsalvador-honduras-haiti/.

construction); Exh. C, Liberles Dec. ¶ 4 (client worked at store for 5 years). In many cases, such as that of Plaintiff Cantarero Argueta, Dkt. 1 ¶ 37, their families depend on them for support. *See also*, Exh. B, Estrada Dec. ¶ 4 (describing two clients whose families depend on them for support); Exh. O, Takhsh Dec. ¶ 4 (client is sole support for injured husband and 4-year-old child); Exh. R, Blackford Dec. ¶ 4 (client is sole support for his disabled U.S. citizen wife and three U.S. citizen children); Exh. C, Liberles Dec. ¶ 4 (widowed client is sole support for her 3 U.S. citizen children).

Plaintiffs and proposed class members wish to adjust to LPR status to avoid being forcibly separated from their family, homes, and employment. Each is eligible for a visa based on their relationship with a U.S. citizen spouse, adult child, parent, or employer—a prerequisite for adjustment of status. 8 U.S.C. § 1255(a) (requiring that an adjustment applicant be eligible to receive an immigrant visa and that a visa be immediately available).

An applicant for adjustment of status generally must show that he or she was "inspected and admitted or paroled." 8 U.S.C. § 1255(a). The TPS statute provides that, for purposes of adjustment of status, TPS holders are "considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). Two Courts of Appeals have held that, pursuant to the plain language of this provision, a TPS holder is deemed to have been inspected and admitted because he or she is deemed to be in "lawful nonimmigrant status." *Ramirez*, 852 F.3d at 960; *Flores*, 718 F.3d at 553-554; but see *Serrano*, 655 F.3d 1266.

Defendants comply with the plain language of the statute when adjudicating the adjustment applications of TPS holders within the Sixth and Ninth Circuits. However, in the jurisdictions covered by the proposed class, Defendants have a policy of denying the adjustment of status applications of TPS holders who initially entered without inspection and

admission, refusing to give effect to 8 U.S.C. § 1254a(f)(4) and refusing to acknowledge that the grant of TPS constitutes the inspection and admission required to adjust status. Defendants have denied, or will deny, the adjustment applications of all Plaintiffs and class members pursuant to this policy. Plaintiffs seek declaratory and injunctive relief to remedy Defendants' violation of the statute.

B. Named Plaintiffs' Factual Backgrounds

Amado De Jesus Moreno

Plaintiff Amado De Jesus Moreno is a 45-year-old noncitizen from El Salvador who resides with his wife and two U.S. citizen children, ages 6 and 12, in Brooklyn, New York.[3] He also has two sons, currently ages 19 and 24, who reside in El Salvador. He first entered the United States without inspection in August 2000. The following year, USCIS granted him TPS. He has maintained that status for more than sixteen years, renewing it and the attendant employment authorization regularly as required by USCIS. In 2011, Plaintiff Moreno traveled outside of the United States—with advance approval from USCIS—and DHS inspected and paroled him into the country upon his return.

Plaintiff Moreno has worked as a telemarketer for the same employer, Jersey Lynne Farms, for approximately 18 years. His employer has filed the necessary paperwork to obtain a visa for him, which has been approved. His employer intends to promote him as a customer services manager upon his receipt of lawful permanent residence. In this managerial position, he would be responsible for supervising four telemarketers, handling complaints, taking orders, and responding to Spanish speaking customers.

[3] All facts related to Plaintiff Moreno are taken from Dkt. 1, ¶¶ 19-28.

With an approved visa petition, Plaintiff Moreno filed an application to adjust his status to that of a lawful permanent resident with USCIS on or about January 15, 2015. At the same time, he filed an application on behalf of his sons in El Salvador—both of whom were children as defined in 8 U.S.C. § 1101(b)(a) at the time—to allow them to obtain visas as his derivatives. USCIS denied his adjustment application, contending that he was ineligible to adjust his status because he had entered without inspection and failed to maintain a lawful status from the date of his entry until his receipt of TPS. Plaintiff Moreno requested that USCIS reopen its decision, arguing that he was eligible to adjust because he had been inspected and paroled and, additionally, that he was eligible for an exemption from the unlawful presence bar to adjustment pursuant to 8 U.S.C. § 1255(k). On July 14, 2017, USCIS denied Plaintiff Moreno's reopening request, finding him ineligible for the § 1255(k) exemption because that section applies only if the individual was "admitted" to the United States, and a parole is not an admission. Exh. X (USCIS denial). As a result, USCIS indicated that his period of unlawful presence prior to his grant of TPS disqualified him for adjustment of status.

But for Defendants' unlawful policy, Plaintiff Moreno's adjustment application would not have been denied on this basis. Instead, had USCIS treated his grant of TPS as an inspection and admission for purposes of his adjustment of status application, the agency would have found that he was eligible for the § 1255(k) exemption and adjustment of status.

Plaintiff Moreno was and continues to be harmed by this denial. Without permanent resident status, he has not received the promotion and accompanying pay raise promised by his employer. His sons, as derivatives on his application, have not been able to get in the visa queue and move forward with their own efforts to join their father and family in the United

States. Finally, Plaintiff Moreno will lose TPS and the attendant employment authorization in 18 months when the TPS designation for El Salvador is terminated. At that point, without a status adjustment, he will be at risk of deportation to a country in which he has not resided for over 16 years. Deportation would split his family apart, depriving his minor U.S. citizen children of their father. For all of these reasons, he wishes to have his adjustment application fairly adjudicated in accordance with the law.

Nelda Yolanda Reyes

Plaintiff Nelda Yolanda Reyes is a 64-year-old noncitizen from Honduras who resides in Green Bay, Wisconsin.[4] She has five adult children. She was granted TPS valid as of July 1999, after her initial entry without inspection. She has maintained her TPS status for eighteen years.

Plaintiff Reyes' adult U.S. citizen son filed a visa petition on her behalf with USCIS on or about October 14, 2015. USCIS has not adjudicated this visa petition yet. Concurrently with her son filing the visa petition, Plaintiff Reyes filed her adjustment of status application with USCIS. On or about November 12, 2015, USCIS sent Plaintiff Reyes a request for evidence establishing that she had been admitted or paroled into the United States. Her attorney responded on February 1, 2016, explaining that her grant of TPS constituted an inspection and admission for purposes of adjustment, in accord with the plain language of 8 U.S.C. § 1254a(f)(4).

On September 5, 2015, USCIS denied the adjustment application, stating that Plaintiff Reyes had failed to demonstrate eligibility when she failed to produce evidence that she had been inspected and admitted or paroled into the United States. Exh. Y (USCIS denial). But

[4] All facts related to Plaintiff Reyes are taken from Dkt. 1, ¶¶ 29-33.

for Defendants' unlawful policy, Plaintiff Reyes' adjustment application would not have been denied on this basis. Instead, had USCIS treated her grant of TPS as an inspection and admission for purposes of her adjustment application, it would not have found her ineligible.

Plaintiff Reyes was and continues to be harmed by this denial. Because Defendant DHS renewed the TPS designation for Honduras only until July 2018, she faces uncertainty regarding her future protected status. It is uncertain whether DHS will renew the TPS designation for Honduras in July 2018 or—as has been true with respect to several other TPS designated countries—terminate. Should DHS terminate the TPS designation for Honduras, Plaintiff Reyes will lose her status and face deportation to a country in which she has not resided for close to two decades. For all of these reasons, she wishes to have her adjustment application fairly adjudicated in accordance with the law.

Jose Cantarero Argueta

Plaintiff Jose Cantarero Argueta is a 40-year-old noncitizen from Honduras who resides in Mt. Airy, Maryland with his wife and two U.S. citizen children, ages 14 and 15.[5] He first entered the United States without inspection on or about April 7, 1997, and subsequently USCIS granted him TPS in 2000. He has remained in that status for more than 17 years. In 2014, he traveled outside of the United States, with advance permission from USCIS; upon his return, DHS inspected and paroled him back into the country.

Plaintiff Cantarero Argueta has worked as kitchen manager since 2006, with two different employers. In 2014 and 2015, his then employer, Unlimited Ventures, took the necessary steps to sponsor him for a visa. USCIS subsequently approved his visa petition. Plaintiff Cantarero Argueta also filed an application for adjustment of status based upon the

[5] All facts related to Plaintiff Cantarero Argueta are taken from Dkt. 1, ¶¶ 34-40.

then-pending visa petition in 2015. While his application was pending, Unlimited Ventures sold the company, and Plaintiff Cantarero Argueta returned to full-time employment with his prior employer, MJJ Enterprises. He subsequently filed the necessary paperwork regarding this change in employment with USCIS, thus demonstrating his continuing eligibility to adjust status based upon the approved visa petition filed by Unlimited Ventures. He remains employed as a kitchen manager by MJJ Enterprises.

On February 9, 2018, USCIS sent Plaintiff Cantarero Argueta a Notice of Intent to Deny his adjustment application because his parole in 2014 is not an admission, and without an admission he is not eligible for a waiver of the bar to adjustment for unlawful presence under § 1255(k). Exh. Z (USCIS Notice of Intent to Deny). Plaintiff Cantarero Argueta intends to respond to this Notice by explaining that he was inspected and admitted when he was granted TPS and therefore is eligible for the § 1255(k) waiver. Nevertheless, Plaintiff Cantarero Argueta's adjustment application will be denied based on USCIS' policy of not treating a grant of TPS as an inspection and admission for purposes of adjustment. But for Defendants' unlawful policy, USCIS would find Plaintiff Cantarero Argueta eligible both for the exemption from the unlawful presence bar to adjustment of status found in § 1255(k).

Plaintiff Cantarero Argueta will be harmed when USCIS denies his adjustment application. Because Defendant DHS renewed TPS for Honduras only until July 2018, he faces uncertainty regarding his future status within the United States. It is uncertain whether DHS will renew the TPS designation for Honduras in July 2018 or—as has been true with respect to several other TPS designated countries—terminate. Should DHS terminate the TPS designation for Honduras, Plaintiff Cantarero Argueta will lose his status and face deportation to a country in which he has not resided for over 20 years. Deportation would split his family

apart, depriving his minor U.S. citizen children of their father, the primary wage earner for the family. For all of these reasons, he wishes to have his adjustment application fairly adjudicated in accordance with the law.

Haydee Avilez Rojas

Plaintiff Haydee Avilez Rojas is a 64-year-old noncitizen from Honduras who resides in Plainfield, New Jersey with her 70-year-old U.S. citizen husband.[6] She has lived at the same address for more than 15 years. She has three adult children. She suffers from high blood pressure and her husband has had two prostate surgeries.

Plaintiff Avilez Rojas first entered the United States without inspection on or about May 1998. In February 2000, USCIS granted her TPS. She has maintained that status for 18 years, renewing it and the attendant employment authorization as required by USCIS.

Plaintiff Avilez Rojas' husband filed a visa petition on her behalf with USCIS on or about February 15, 2017. USCIS approved this petition on September 13, 2017. On or about February 15, 2018, Plaintiff Avilez Rojas filed her adjustment of status application by mailing it to USCIS. Although USCIS has not yet adjudicated the application, Plaintiff Avilez Rojas application will be denied based on USCIS' policy of not treating a grant of TPS as an inspection and admission for purposes of adjustment. But for Defendants' unlawful policy, USCIS would find Plaintiff Avilez Rojas eligible for adjustment of status.

Plaintiff Avilez Rojas will be harmed when USCIS denies her adjustment application. Because Defendant DHS renewed TPS for Honduras only until July 2018, she faces uncertainty regarding her future status within the United States. It is uncertain whether DHS will renew the TPS designation for Honduras in July 2018 or—as has been true with respect

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[6] All facts related to Plaintiff Avilez Rojas are taken from Dkt. 1, ¶¶ 41-45.

to several other TPS designated countries—terminate. Should DHS terminate the TPS designation for Honduras, Plaintiff Avilez Rojas will lose her status and face deportation to a country in which she has not resided for close to two decades. Deportation would separate her from her husband. Given her age and medical problems, she will be unable to support herself in Honduras. Furthermore, Plaintiff Avilez Rojas' U.S. citizen husband will suffer hardship if she is deported. For all of these reasons, she wishes to have her adjustment application fairly adjudicated in accordance with the law.

III. THE COURT SHOULD CERTIFY THE CLASS

Plaintiffs and proposed class members seek certification under FED. R. CIV. P. 23(a) and (b)(2) to challenge Defendants' policy of refusing to treat the grant of TPS as an inspection and admission for purposes of adjustment of status.

While a plaintiff must satisfy all Rule 23 requirements for class certification, the Second Circuit employs a "liberal rather than restrictive construction of Rule 23, adopt[ing] a standard of flexibility in deciding whether to grant certification." *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 350 (E.D.N.Y. 2006) (citation omitted). In fact, "the Second Circuit's general preference is for granting rather than denying class certification." *Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 361 (E.D.N.Y. 2009) (citation omitted).

Under Rule 23(a), the party seeking class certification must establish that: (1) "the class is so numerous that joinder of all members is impracticable;" (2) "there are questions of law or fact common to the class;" (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class;" and (4) "the representative parties will fairly and adequately protect the interests of the class." In this case, Plaintiffs also must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the

class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

Certification here is consistent with FED. R. CIV. PROC. 23(a) and 23(b)(2). "Rule 23(b)(2) is designed to assist and is most commonly relied upon by litigants seeking institutional reform in the form of injunctive relief." *Hill v. City of New York*, 136 F. Supp. 3d 304, 357 (E.D.N.Y. 2015) (quoting *Marisol A. v. Giuliani*, 929 F. Supp. 662, 692 (S.D.N.Y.1996), *aff'd*, 126 F.3d 372 (2d Cir.1997)). Moreover, "[c]lass certification under Rule 23(b)(2) is particularly appropriate in civil rights litigation." *Id*. (citations omitted). Here, Plaintiffs seek only such relief and, absent class certification, most class members never will be eligible to adjust to lawful permanent residence.

A. This Action Satisfies the Class Certification Requirements of Rule 23(a)

1. The Proposed Class Members Are So Numerous That Joinder Is Impracticable

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Impracticable does not mean impossible, but "only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 244-45 (2d Cir. 2007). "[N]umerosity is presumed at a level of 40 members[.]" *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (citing 1 NEWBERG ON CLASS ACTIONS §3.05 (2d ed. 1985); *see also Betrand v. Sava*, 684 F.2d 204, 219 (2d Cir. 1981) (leaving "undisturbed" a district court's certification of a class of 53); *Shahriar v. Smith & Wolinsky Rest. Group, Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (finding 275 sufficient); *V.W.*

v. Conway, 236 F. Supp. 3d 554, 574 (N.D.N.Y. 2017) (finding class of 86 sufficient).[7]

While a plaintiff must "show some evidence of or reasonably estimate the number of class members," a precise quantification is not required. *Kalkstein v. Collecto, Inc.*, 304 F.R.D. 114, 119 (E.D.N.Y. 2015) (citations omitted). Moreover, district courts "may make 'common sense assumptions' to support a finding of numerosity." *Id.* (citations omitted).

Plaintiffs do not know the precise size of the proposed class but allege that there are hundreds of potential class members. Dkt. 1 ¶ 66. As of October 2017, there were more than 275,000 TPS holders living within the geographic boundaries of the proposed class.[8] The majority of all TPS holders entered without inspection and have held that status for more than 15 years.[9] *See, e.g.*, Exh. J, Volpe Dec. ¶ 3 (estimating that "significantly more" than 50 percent of her organization's 1,800 plus TPS clients entered without inspection); Exh. I, Miller Dec. ¶ 3 (indicating that the majority of her organization's 500 TPS clients entered without inspection). Numerous studies demonstrate that TPS holders are well-integrated into the United States.[10] As a result of their longstanding presence in U.S. communities, many

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[7] This is consistent with cases in other jurisdictions. *See, e.g.*, *Arkansas Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (finding 20 class members sufficient); *Jones v. Diamond*, 519 F.2d 1090, 1100 & n.18 (5th Cir. 1975) (class membership of 48); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (41-46 class members); *McCluskey v. Trs. Of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673-76 (W.D. Wash. 2010) (certifying class with 27 known members).

[8] Relying on a report from the Congressional Research Service, Plaintiffs arrived at this figure by subtracting from the total number of TPS holders those who reside within the Sixth, Ninth and Eleventh Circuits. *See* Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, CONGRESSIONAL RESEARCH SERV. 4-5, 12, Table 1 (Jan. 17, 2018), https://fas.org/sgp/crs/homesec/RS20844.pdf.

[9] *Id.* at 5, Table 1.

[10] *See, e.g.*, Center for American Progress, *TPS Holders in the United States* (2017), https://cdn.americanprogress.org/content/uploads/2017/10/19125633/101717_TPSFactsheet-USA.pdf; Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. MIGR. & HUM. SEC. 577 (2017), *available at* http://cmsny.org/publications/jmhs-tps-

have U.S. citizen spouses, adult U.S. citizen children, or employers who have petitioned or will petition for a visa on their behalf, a prerequisite to the TPS holder filing an adjustment of status application. 8 U.S.C. § 1255(a). Defendants easily can ascertain the exact number visa petitions filed on behalf of TPS holders, as well as adjustment applications filed by TPS holders. *Accord Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) ("[Immigration officials are] uniquely positioned to ascertain class membership.").

Plaintiffs' estimate is further confirmed by the declarations of 20 immigration attorneys who, collectively, attest to knowledge of more than 700 current or potential clients who fall within the class. *See, e.g.*, Exh. K., Yang Dec. ¶¶ 3, 7 [sic] (approximately 188 current and 250 former clients); Exh. D, Pilsbury Dec. ¶ 5 (at least 200 clients who are class members); Exh. A, Cortes del Olmo Dec. ¶ 4 (30-40 potential clients); Exh. P, Sharma-Crawford Dec. ¶ 5 (10-15 clients); Exh. B, Estrada Dec. ¶ 3 (12 clients); Exh. C, Liberles Dec. ¶ 3 (12 clients). These numbers support a presumption that the class is so numerous that joinder would be impractical. *Consol. Rail Corp.*, 47 F.3d at 483.

Moreover, as the Second Circuit has explained, "the numerosity inquiry is not strictly mathematical but must take into account the context of the particular case, in particular whether a class is superior to joinder based on other relevant factors including: (i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members." *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., Inc.*, 772 F.3d 111, 120 (2d Cir. 2014) (citing *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). Here,

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elsalvador-honduras-haiti/; Cecilia Menjivar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants*, U. KAN. CENTER FOR MIGR. RESEARCH (2017), http://ipsr.ku.edu/migration/pdf/TPS_Report.pdf.

these factors—both alone and in combination—demonstrate that joinder is impractical.

First, the geographic spread is large, covering the geographic boundaries of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits. *See Robidoux*, 987 F.2d at 936 (finding that the fact that class members were dispersed throughout Vermont weighed in favor of certification); *Brooks v. Roberts*, 251 F. Supp. 3d 401, 417-18 (N.D.N.Y. 2017) ("Plaintiffs' class includes low income residents spread across New York, the sort of population that makes joinder of individual members a difficult proposition due to their geographic dispersion, limited if not non-existent financial resources, and the impracticability of each obtaining legal representation for their individual claims."). Moreover, Plaintiffs' evidence demonstrates that there are potential class members within each of these Circuits.[11]

A class action will preserve judicial resources, saving district courts throughout the United States from litigating the same question of statutory interpretation in individual lawsuits. It similarly will ensure that the issue is resolved for all TPS holders, regardless of their financial resources or ability to pursue an individual action. *See*, *e.g.*, Exh. H, Hohenstein Dec. ¶ 6 (explaining why individual suits are prohibitive for many clients); Exh. D, Pilsbury Dec. ¶ 4 (indicating that many of her clients are low income). Moreover, timing is critical for Plaintiffs and class members, since the majority will lose their TPS status within a year to eighteen months and then become vulnerable to removal. However, USCIS can take

[11] Specifically, for the First Circuit, *see* Exhs. A, Cortes del Olmo Dec., B, Estrada Dec., and C, Liberles Dec.; Second Circuit, *see* Exhs. D, Pilsbury Dec., E, Shafiqullah Dec., F, Friedland Dec., and G, Nowak Dec.; Third Circuit, *see* Exhs. H, Hohenstein Dec. and I, Miller Dec.; Fourth Cir., *see* Exh. J, Volpe Dec.; Fifth Circuit, *see* Exhs. K, Yang Dec., L, Taylor Dec., M, Garcia Dec., and N, Goodwin Dec.; Seventh Circuit, *see* Exh. O, Takhsh Dec.; Eighth Circuit, *see* Exhs. P, Sharma-Crawford Dec., Q, Loesch Dec.; R, Blackford Dec., and S, Peterson Dec.; Tenth Circuit, *see* Exh. T, Hall Dec., and P, Sharma-Crawford Dec.

a year or more to adjudicate an adjustment application. *See, e.g.*, Exh. A, Cortes del Olmo Dec. ¶ 6 (9 to 18 months in Boston, Massachusetts); Exh. J, Volpe Dec. ¶ 9 (more than a year in Washington, DC, Maryland and Virginia region); Exh. N, Goodwin ¶ 5 (same, in Harlingen, Texas); Exh. T, Hall Dec. ¶ 6 (14 to 24 months in Aurora, Colorado). Given the urgency for a speedy resolution of the statutory interpretation issue, class litigation makes the most sense.

Finally, Plaintiffs seek prospective injunctive relief on behalf of future, unknown class members. *Robidoux*, 987 F.2d at 936; *see also Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable.") (citation omitted).

Plaintiffs have demonstrated the large number of current and future class members and the many reasons why "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

2. Because Plaintiffs' Claims Derive from Defendants' Common Practice, the Class Presents Common Questions of Law and Fact

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores*, 564 U.S. at 349-50 (internal quotation omitted). "Courts have found that, despite differing individual circumstances of class members, commonality exists where injuries derive from a unitary course of conduct by a single system." *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 530 (E.D.N.Y. 2017) (internal quotations and citations omitted). Moreover, "'even a single common question'" will satisfy the rule. *Id.* (quoting *Wal-Mart Stores*, 564 U.S. at 359).

To establish the existence of a common question of law, the proposed class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 564 U.S. at 350. Thus, "[w]hat matters to class certification . . . is not the raising of common 'questions' . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation and citation omitted).

Here, the central common legal question is whether Defendants' policy of not treating a grant of TPS as a qualifying inspection and admission for purposes of adjustment of status violates 8 U.S.C. §§ 1254a(f)(4) and 1255. The Court's answer to this question will "drive the resolution" of the case, and a favorable resolution for Plaintiffs will remedy the problem for all class members. *Wal-Mart Stores*, 564 U.S. at 350 (internal quotation omitted); *see also Shahriar*, 659 F.3d at 252 (finding plaintiffs' allegations that defendants' policies violated the Fair Labor Standards Act demonstrated commonality); *Dover v. British Airways, PLC (UK)*, 321 F.R.D. 49, 54 (E.D.N.Y. 2017) (finding "one common question that is central to Plaintiffs' case and undisputedly capable of common resolution: the proper interpretation of the term 'fuel surcharges' in the Contract."); *Hill*, 136 F. Supp. 3d at 354 ("Another common question exists as to whether the City Defendants breached the [collective bargaining agreement] through its leave policies."). The proposed class members thus have raised a "common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 564 U.S. at 350.

There are no factual differences in the circumstances of the proposed class members that are relevant. The salient common facts that all class members, by definition, share—that they have been, or will be, subject to the Defendants' unlawful policy—are central to the case. Notably, Plaintiffs do not ask this Court to order Defendants to grant their adjustment of status applications; they are simply requesting that this Court review whether Defendants' policy—which is rendering them and all class members ineligible for adjustment of status—violates the Immigration and Nationality Act (INA). As such, the questions presented apply equally to all class members regardless of any other factual differences. The commonality requirement is satisfied because all class members allege the same injuries and raise the same set of common questions, and because the relief sought by all class members is the same.

3. Plaintiffs' Claims Are Typical of the Claims of the Members of the Proposed Class

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . of the class." To establish typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation and citations omitted). The "typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux*, 987 F.2d at 936 (citations omitted); *see also Shahriar*, 659 F.3d at 252 (finding typicality where plaintiffs' evidence showed that all class members were subject to the challenged policies of the defendants).

In this way, commonality and typicality "tend to merge" because both "serve as guideposts for determining whether, under the particular circumstances presented by the case, maintenance of a class action is economical and whether the named plaintiff's claim and the

class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of the Sw.*, 457 U.S. at 157 n.13.

Here, Plaintiffs' claims are typical of the proposed class because they proceed under the same legal theories, seek the same relief, and have suffered the same injuries. Like each proposed class member, Plaintiffs have been subject to Defendants' policy, which has resulted or will result in the denial of Plaintiffs' adjustment applications. Indeed, "the factual situation and the legal theories upon which the Plaintiff[s] bring[] this action are not only typical of the entire class, but are nearly identical. Therefore, the Plaintiffs ha[ve] established that the typicality requirement is met in this case." *Assif v. Titleserv, Inc.*, 288 F.R.D. 18, 24 (E.D.N.Y. 2012).

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class Members, and Counsel Are Qualified to Litigate this Action

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denny v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) (citations omitted). To defeat certification, any conflict must be "fundamental." *Id.* (citation omitted).

The named Plaintiffs and all class members are subjected to the same challenged USCIS policy. All have the same interest in ensuring that USCIS recognize that their grant of TPS constitutes an inspection and admission for purposes of adjustment of status under 8 U.S.C. § 1255. Their mutual goal is to have this Court declare unlawful Defendants' challenged policy and issue injunctive relief that requires USCIS to treat a grant of TPS as an

inspection and admission for purposes of adjustment of status. The named Plaintiffs are not seeking any monetary damages, but instead seek the same injunctive relief for themselves and the class as a whole. They have no interests antagonistic to those of other class members. Therefore, they will fairly and adequately protect the interests of the class members they seek to represent.

Plaintiffs' counsel also "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy of counsel requirement is satisfied 'where the class attorneys are experienced in the field or have demonstrated professional competence in other ways, such as by the quality of the briefs and the arguments during the early stages of the case.'" *D.S. ex rel. S.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 74 (E.D.N.Y. 2008) (quoting *Schwab v. Philip Morris*, 449 F. Supp. 2d 992, 1106 (E.D.N.Y. 2006), *rev'd on other grounds sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)). Plaintiffs are represented by attorneys from the American Immigration Council and the Northwest Immigrant Rights Project. Counsel have a demonstrated commitment to protecting the rights and interests of noncitizens and have experience in handling complex and class action litigation, including in the immigration field. *See* Exhs. U, Kenney Dec., V, Second Realmuto Dec., and W, Adams Dec. Class counsel have the experience and ability to zealously and effectively represent both named and absent class members. *Id.*

5. Plaintiffs' Class Definition Is Ascertainable

The Second Circuit also recognizes an implied requirement of ascertainability under Rule 23. In *In re Petrobras Sec.*, the Court "clarif[ied] the scope" of the ascertainability doctrine, holding that "a class is ascertainable if it is defined using objective criteria that establish a membership with definite boundaries." 862 F.3d 250, 257 (2d Cir. 2017); *see also*

id. at 265 ("[D]eclin[ing] to adopt a heightened ascertainability theory that requires a showing of administrative feasibility at the class certification stage.").

Here, objective criteria clearly define the boundaries of the class. Membership is defined by type of initial entry into the United States, current immigration status, and application of Defendants' policy to a class member's adjustment application. "[N]either the parties nor the properties that are the subject of this litigation are fundamentally indeterminate," and thus the ascertainability requirement has been met. *Id.* at 270.

B. Plaintiffs Satisfy the Requirements of Rule 23(b)

Rule 23(b)(2), under which Plaintiffs seek certification, requires that Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The underlying premise of subsection (b)(2) is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores*, 564 U.S. at 360 (internal quotation and citation omitted). In other words, Rule 23(b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Id*. Rule 23(b)(2) "is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory." *Coco v. Inc. Vill. of Belle Terre*, 233 F.R.D. 109, 115 (E.D.N.Y. 2005) (citations omitted).

This suit falls directly within the ambit of Rule 23(b)(2). Plaintiffs challenge a policy that is applicable to both Plaintiffs and all class members. Because this policy concerns a threshold eligibility requirement for adjustment of status, it bars review of the merits of any individual adjustment application; thus, it applies without regard to any differences in

Plaintiffs' and class members' cases. Plaintiffs primarily seek declaratory and injunctive relief to remedy Defendants' statutory violations. They ask the Court to declare that Defendants' policy violates the INA; to declare that, pursuant to 8 U.S.C. § 1254a(f)(4), a grant of TPS constitutes an inspection and admission for purposes of adjustment of status; to order Defendants to give effect to the plain language of the statute, acknowledging the grant of TPS as an inspection and admission for purposes of adjudicating Plaintiffs' and class members' adjustment applications; and to reopen cases in which they erroneously applied the challenged policy. Plaintiffs seek no monetary damages for the substantial harms Defendants' actions cause Plaintiffs and their families. The requested declaratory and injunctive relief would apply to Plaintiffs and all proposed class members in identical fashion. Therefore, Defendants' actions have made appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2); *see also Nicholson v. Williams*, 205 F.R.D. 92, 99 (E.D.N.Y. 2001) ("Rule 23(b)(2) is designed to assist litigants seeking institutional change in the form of injunctive relief.") (citing cases).

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Class Certification and enter the accompanying proposed certification order.

Dated February 22, 2018

Respectfully submitted,

/s/ Trina Realmuto

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CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that on February 22, 2018, I electronically filed the foregoing notice of motion for class certification, memorandum of law in support of motion for class certification, index of exhibits, authenticating declaration of Trina Realmuto, exhibits in support of motion for class certification, and proposed order granting class certification, with the Clerk of the Court using the CM/ECF system. In addition, I caused to copies of these documents to be served by U.S. certified mail, return receipt requested to each of the following:

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