The Honorable James L. Robart
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

NORTHWEST IMMIGRANT RIGHTS PROJECT, ET AL., Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., Defendants.	Case No. 2:15-cv-00813 PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION NOTED ON CALENDAR: Sept. 11, 2015

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INTRODUCTION

Defendants' arguments against class certification reflect a fundamental misunderstanding of Plaintiffs' claims. Plaintiffs filed this case and moved for class certification to address a systemic problem—namely, Defendants' routine failure to timely adjudicate applications for employment authorization documents (EADs) or to issue interim employment authorization, which adversely affects Plaintiffs and proposed class members. Because Plaintiffs are concerned only with the timetable for EAD adjudications, not the results of the adjudications, the factual differences raised by Defendants regarding the basis for each Individual Plaintiff's EAD application are irrelevant. It is telling that Defendants do not dispute the existence of this systemic problem, but instead attempt to manufacture issues to distract the Court from addressing Defendants' failure to follow their own regulations.

The injunctive relief that Plaintiffs seek will resolve all their claims and those of proposed class members. *See Wal-Mart Stores, Inc. v. Dukes,* __ U.S. __, 131 S. Ct. 2541, 2558 (2011). Because Plaintiffs have demonstrated that they meet the requirements of FED. R. CIV. P. 23(a) and 23(b)(2), class certification should be granted.

ARGUMENT

I. The Defendants' standing arguments are without merit.

Reiterating the arguments in their Motion to Dismiss, Defendants allege that the Individual Plaintiffs lack standing and thus cannot serve as class representatives. Dkt. 35 at 6-10. As detailed in Plaintiffs' Opposition to Defendants' Motion to Dismiss (Dkt. 40), these arguments are without merit because each named Plaintiff "[']had the requisite stake in the outcome when the suit was filed.'" *Valle del Sol, Inc. v. Whiting,* 732 F.3d 1006, 1018 n.11 (9th

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Cir. 2013) (citation omitted).[1] Here, all three Individual Plaintiffs were experiencing ongoing injuries when this case was filed, because USCIS had failed to adjudicate their EAD applications within the designated time period, had not issued decisions as of that date, and had failed to issue interim employment authorization, resulting in loss of employment, income, health insurance and/or driver's licenses. Dkt. 1, ¶¶ 17-20, 37-45. No more is required.

Hawkins v. Comparet-Cassani, 251 F.3d 1230 (9th Cir. 2001) (Dkt. 35 at 6), bolsters Plaintiffs' arguments regarding standing and mootness. In *Hawkins*, the district court certified a class seeking injunctive relief from the defendants' use of stun belts on prisoners. While acknowledging that Hawkins' claim may have become moot, the Ninth Circuit noted that "the existence of the class preserves the live case or controversy demanded by Article III." 251 F.3d at 1236. The court ultimately rejected the defendants' standing argument on grounds equally applicable to the present case: as in *Hawkins*, the plaintiffs here challenge a government policy on behalf of a class, and their injuries present at the time of filing may reoccur. *Id.* at 1236-37.[2] Thus, the Individual Plaintiffs have standing to bring this lawsuit.

II. The Individual Plaintiffs Satisfy Rule 23(a) Requirements, and Defendants' Opposition Does Not Support Any Other Conclusion.

A. Defendants do not dispute numerosity or impracticality of joinder.

Plaintiffs satisfy Rule 23(a)(1) based on: (1) the numerous cases they have identified of individuals adversely affected by USCIS' delays in adjudicating EADs;[3] (2) the USCIS Ombudsman's 2015 Annual Report documenting the nationwide scope and breadth of the

[1] The other cases cited by Defendants make the same point. *See O'Shea v. Littleton*, 414 U.S. 488, 496-497 (1974); *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003).

[2] *Hawkins* ultimately reversed class certification due to defects in the class as certified, directing the plaintiffs to "refashion this action to remedy the class defects." 251 F.3d at 1238.

[3] Dkt. 1 at ¶¶ 38, 40, 43, 46-47; Dkt. 5-1 – 5-13; Dkt. 24-10 – 24-15; Dkt. 29-4 – 29-6.

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agency's delays in adjudicating EADs;[4] and (3) Defendants' admission that they do not issue interim employment authorization when the mandatory regulatory deadline for EAD adjudication has lapsed.[5] Defendants do not contest either numerosity or the impracticability of joinder.

B. Plaintiffs' and class members' claims raise common questions of fact and law.

Rule 23(a)(2) requires Plaintiffs to demonstrate "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores,* 131 S. Ct. at 2551 (internal quotations omitted). Here, Plaintiffs and proposed class members' cases raise a common question of fact—whether USCIS has a policy or practice of failing to issue interim employment authorization to those entitled to it based on the agency's failure to comply with the regulatory timetable for EAD adjudications. They also raise a common question of law—whether Defendants' policy and practice of failing to issue interim employment authorization to those entitled to it violates the relevant regulations. Should Plaintiffs prevail, all who fall within the class will benefit. Thus, a common answer regarding the legality of each challenged policy or practice will "drive the resolution of the litigation." *Id.* Plaintiffs have also satisfied Rule 23(b)(2) because their claims and those of the proposed class members could be remedied by a declaratory judgment that Defendants' policies are unlawful and injunctive relief ensuring that USCIS complies with its regulations regarding EAD adjudication in the future. *See, e.g., Wal-Mart Stores,* 131 S. Ct. at 2557; *Parsons v. Ryan*, 754 F.3d 657, 687 (9th Cir. 2014).

Ignoring the various precedent decisions cited in Plaintiffs' motion for class certification, Defendants seek unsuccessfully to analogize the present case to *Coughlin v. Rogers*, 130 F.3d 1348 (9th Cir. 1997) (Dkt. 35 at 11). The forty-nine plaintiffs in *Coughlin* filed a mandamus action seeking to compel Defendants to adjudicate their immigration petitions or applications,

[4] Dkt. 24-1 at 6, 34-35.
[5] Dkt. 24-2 at 9 ("USCIS no longer produces interim EADs.").

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which had allegedly been unreasonably delayed. Defendants successfully moved the district court to sever the various claims based on misjoinder. The Ninth Circuit affirmed on the grounds that the plaintiffs had not alleged "a pattern or policy of delay," and that the forty-nine cases fell into six distinct categories that involved different legal standards and different time frames. *Id.* at 1350-51. Here, by contrast, the Plaintiffs have alleged, and indeed established, that Defendants have a policy or practice of failing to issue interim employment authorization to individuals whose pending EAD applications have not been adjudicated by the regulatory deadline. Although the legal category entitling Plaintiffs to work authorization may differ, Defendants must adjudicate each EAD application by the deadline specified in Defendants' own mandatory EAD regulations—either 90 days or 30 days from the date of receipt—or issue interim employment authorization. Because this case turns on the existence of a policy or practice that applies equally to all class members, class certification is appropriate. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998).

In an attempt to undermine Plaintiffs' arguments regarding commonality, Defendants assert that eligibility for employment authorization depends on the specific circumstances of their cases. Dkt. 35 at 12. This argument misses the point and has been repeatedly rejected by this district in other immigration class actions.[6] At issue is the legality of Defendants' practice of ignoring the mandatory, regulatory timetable for adjudication and refusing to abide by the interim EAD regulation, not the ultimate decision to grant or deny an EAD. Defendants' own

[6] *See, e.g., Lee v. Ashcroft*, No. 04-449-RSL, Order Granting Motion for Class Certification, Dkt. 97, at 4-5 (W.D. Wash. 2005) (attached as Exh. B) (individualized differences in class members' cases do not defeat class certification where class seeks to "direct the agency to comply with the law"); *Immigration Assistance Project of Los Angeles County Federation of Labor v. INS*, 709 F. Supp. 998, 1004 (W.D. Wash. 1989) (holding that the court may rule on "legality of INS policy and regulations" while leaving "case-by-case review of eligibility to INS"), *relief affirmed by* 306 F.3d 842 (9th Cir. 2002).

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regulations give them a specific timetable for assessing relevant facts—such as the impossibility or impracticality of removal under 8 C.F.R. § 274a.12(c)(18)—and making eligibility determinations.

Plaintiff Arcos' case illustrates this distinction. Even though her EAD was ultimately denied, incorrectly in Plaintiffs' view,[7] she is still a proper class representative and presents a common question for her subclass: whether the agency must follow the regulation and issue interim employment authorization when an EAD application has been pending for more than 90 days. The grant of interim employment authorization is predicated on delay past 90 days, not the final agency decision on whether to grant the EAD.

Defendants note further that the EAD adjudication timetable may be tolled or reset under certain circumstances, including a failure to provide required initial evidence or a request to reschedule biometrics. Dkt. 35 at 12. However, in those circumstances—which do not apply to the Individual Plaintiffs[8]—the deadline would not have expired, and the applicant would not be a member of the class, at least until the problem is remedied and the day-count restarts and reaches either 30 or 90 days. 8 C.F.R. § 103.2(b)(10)(i). For example, USCIS requires an EAD applicant who files by mail to include two photographs and a copy of the applicant's most recent EAD, if issued, or another government-issued identity document. When the EAD application is received, mail room staff review it against a set of requirements and if an item of initial evidence, such as the photographs, was not included, then USCIS has a process for recording the deficiency and

[7] *See* Dkt. No. 40 at 12-13. The proper remedy to address the denial of Ms. Arcos' EAD after this case was filed is separate from this class action. She could refile her I-765 with additional evidence and argument, file a complaint under the ABT Settlement Agreement, or even challenge the denial in a separate district court action.

[8] To ensure their inclusion in the proposed class, the Individual Plaintiffs explicitly acknowledge that they did not receive any requests for evidence or miss any biometrics appointments. Dkt. 1 ¶¶ 18-20.

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taking steps to request the missing evidence.[9] USCIS thus already has procedures in place to request additional documentation for cases filed without required evidence.

In *A.B.T. v. USCIS*, a class action regarding asylum seekers' eligibility for EADs, the government raised very similar arguments about specific factual circumstances that could "stop" the 150-day EAD asylum clock.[10] *See A.B.T. v. USCIS*, No. 11-2108-RAJ, Dkt. 23, at 8 (W.D. Wash. March 12, 2012) (listing 11 different factual inquiries that could stop the EAD clock). Nonetheless, the Government ultimately asked this Court to certify the class, while excluding those asylum seekers who were ineligible for employment authorization. *A.B.T. v. USCIS*, Order Approving Class Action Settlement, Dkt. 76 (W.D. Wash. Nov. 4, 2013), attached at Dkt. 40-1. Here, as in *A.B.T.*, the Individual Plaintiffs share common questions of law and fact with those they seek to represent. Individual differences in the underlying relief applications are no more a barrier to class-wide relief here than they were in *A.B.T.*

C. Defendants' arguments regarding typicality are baseless.

At the time of filing this lawsuit and the motion for class certification, the Individual Plaintiffs were each eligible for interim employment authorization under the Defendants' regulations. The Defendants argue that USCIS may properly deny each Individual Plaintiff *other* benefits; that, as a result, their pending EAD applications may ultimately be denied; and that the Defendants would have a "unique defense" regarding each such denial. Dkt. 35 at 13. But that point is completely irrelevant. The issue in this lawsuit is whether Plaintiffs (and the

[9] USCIS has Standard Operating Procedures (SOP) for handling EAD applications among other filings. *See* "I-765(c)(9) National SOP," at Introduction, § 1 (Mailroom Module), Part 2, Step 2.12, Exh. C at 8, and § 5 (Adjudications Module), Part 2, Step 2.4, Exh. C at 15.

[10] As the Government admits, the asylum EAD clock starts "when a complete asylum application is first filed with USCIS or lodged at the immigration court window." Dkt. 34 at 8.

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class members they seek to represent) are entitled to *interim* employment authorization. That is the claim that is typical of the class.

In particular, the Defendants are mistaken in arguing that 8 U.S.C. § 1158(d)(7) provides a "unique defense" to Ms. Arcos and W.H.'s claims. Dkt. 35 at 7, 13. As explained in greater detail in Plaintiffs' Opposition to Defendants' Motion to Dismiss (Dkt. 40 at 3-7), this provision does not impact the mandamus and APA causes of action presented in this case. 8 U.S.C. § 1158(d)(7) merely precludes *implied* causes of action. But Defendants cite to no case in which any court has found that § 1158(d)(7) eliminates existing causes of action that enable aggrieved individuals to challenge unlawful agency action relating to asylum EADs.

Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992) (Dkt. 35 at 13), does not support Defendants' typicality argument. In *Hanon*, the Ninth Circuit affirmed an order denying class certification because "it is predictable that a major focus of the litigation will be on a defense unique to [the sole individual plaintiff.]" 976 F.2d at 509. Here, unlike in *Hanon*, each of the Individual Plaintiffs suffered a common injury due to the Defendants' policy or practice that prevented them from obtaining *interim* employment authorization. Each Individual Plaintiff was eligible for that benefit at the time of filing, and negatively impacted by Defendants' failure to follow their own mandatory regulations. The Individual Plaintiffs have established typicality because they suffered similar injuries to those of the proposed class arising from the same conduct.

III. The Individual Plaintiffs Will Adequately Protect the Interests of the Class.

The Individual Plaintiffs meet the requirements of Rule 23(a)(4) because they share the proposed class members' interest in establishing that Defendants' challenged policies or practices are unlawful and in ensuring that Defendants either timely adjudicate EAD applications or grant interim employment authorization. Moreover, the cognizable injuries the

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Individual Plaintiffs have suffered as a result of Defendants' actions ensure that they will vigorously prosecute this action and make collusion unlikely. *See, e.g., Wal-Mart Stores,* 131 S. Ct. at 2557; *Parsons*, 754 F.3d at 687; *Walters v. Reno*, 145 F.3d at 1046.[11]

Defendants mischaracterize the proposed class as "all individuals who may apply for EADs." Dkt. 35 at 14. In fact, Plaintiffs' proposed class is limited to individuals who, like the Individual Plaintiffs, are entitled or will be entitled to interim employment authorization under Defendants' own regulations.[12] Dkt. 5 at 2. If an individual has not met initial requirements for filing an EAD application, USCIS may issue a request for initial evidence and "any time period imposed on USCIS processing will start over from the date of receipt of the required initial evidence . . . ." 8 C.F.R. § 103.2(b)(10)(i). Even after the day-count restarts, such individuals would be excluded from the proposed class unless and until the regulatory time period expires.

The Court should also reject Defendants' attempt to manufacture a non-existent conflict among EAD applicants. Incongruously, Defendants claim that being held to the regulatory timeframe for adjudicating EADs or issuing interim employment authorization will actually delay EAD applications for three select categories of individuals who are, as a matter of agency policy, permitted to pre-file their EAD applications before they are actually eligible to receive

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[11] Although Defendants do not dispute the adequacy of proposed class counsel, they suggest that the Organizational Plaintiffs may have interests that "conflict with the proposed class members they seek to represent as class representatives." Dkt. 35 at 14 n.6. In fact, neither of the Organizational Plaintiffs seek certification as class representatives. Both have organizational standing in their own right on the basis that Defendants' EAD adjudication delays have forced them to divert resources and frustrated their missions. *See* Dkt. 1 ¶¶ 15-16, 46-47, Dkt. 5-5 ¶¶ 3, 5, 10-13, 16-18, 20-21, Dkt. 5-8 ¶¶ 3, 5-6, 1015, Dkt. 40 at 18-22.

[12] Defendants allege that the Individual Plaintiffs are not adequate class representatives because none of them was entitled to employment authorization when this lawsuit was filed. Dkt. 35 at 6-10. As detailed in Plaintiffs' Opposition to Defendants' Motion to Dismiss, Dkt. 40 at 2-18, this allegation is unfounded.

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EADs: initial DACA applicants, U visa applicants, and VAWA self-petitioners.[13] Dkt. 35 at 14-17. This is a non-issue because both Plaintiffs and Defendants agree that the 90-day adjudication period does not apply to these individuals until the underlying benefit application is approved or deferred action is granted. Therefore, they are not included in the class as defined by Plaintiffs.[14] Certification of the proposed class will not change the fact that the 90-day regulatory adjudication deadline does not start running for these individuals until such time as their underlying benefit requests are approved.

In the case of initial DACA requesters and DACA beneficiaries seeking renewal, USCIS requires the concurrent submission of the petition and the EAD application. Form I-821D Instructions, Exh. A at 11. As with U visa applicants granted deferred action based on the approval of their underlying petitions who are still waiting for visas to become available,[15] DACA renewal applicants have already received deferred action. As a result, at the time of filing their renewal requests, they are employment authorized under 8 C.F.R. § 274a.12(c)(14). Thus,

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[13] What Defendants call "concurrent" filing of the petition or the underlying application for status and the EAD application (Dkt. No. 35 at 16) is more accurately characterized as ***pre-filing*** of the EAD application. As a matter of agency policy, USCIS accepts the EAD application in these cases before the applicant is eligible to receive work authorization, and the parties agree that the 90-day regulatory timetable does not begin to run until USCIS has determined the applicant's initial eligibility for the underlying benefit classification. Although USCIS has authority to grant work authorization to individuals with "a pending, bona fide application" for a U visa, the agency has not implemented this provision. 8 U.S.C. § 1184(p)(6). *See also* 8 C.F.R. § 274a.12(c).

[14] Plaintiffs believe the class definition is clear as written, but have no objection to modifying it if appropriate to explicitly differentiate these three categories of EAD applicants. The parties disagree about whether DACA renewals for persons who have already been granted deferred action fall under this category, as briefed below and in Plaintiffs' Opposition to Defendants' Motion to Dismiss, Dkt. 40 at 14-18.

[15] Only 10,000 U visas are available for principal applicants each year. When a visa number becomes available to the principal, visas also are available to the derivatives, without numerical limit. This deferred action "workaround" enables those waiting to get their EADs faster. *See* 8 U.S.C. § 1184(p)(2); 8 C.F.R. § 214.14(d).

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DACA renewal applicants are eligible for work authorization at the time of filing, unlike initial DACA applicants who have not yet received deferred action. USCIS urges DACA renewal applicants to submit limited documentation, and specifically asks that applicants *not* submit the same materials sent with their initial requests. Form I-821D Instructions, Exh. A at 10. If there is an intervening factual development impacting eligibility, USCIS may respond to the DACA renewal application by issuing a request for initial evidence within the regulatory timeframe, which will stop the 90-day adjudication clock. *See* 8 C.F.R. § 103.2(b)(10)(ii) ("Interim benefits will not be granted based on an [*sic*] benefit request held in suspense for the submission of requested initial evidence . . . .").

U visa applicants, VAWA self-petitioners, and initial DACA applicants become part of the proposed class at the time their underlying benefits are approved. USCIS can then adjudicate their EAD applications, and the 90-day mandatory regulatory timeframe begins to run. At that point, they become indistinguishable from Plaintiffs Arcos and Osorio, as well as other similarly situated applicants, who applied to renew their EAD applications based on underlying classifications for which they already met the initial eligibility requirements. In addition to DACA renewal applicants (like Ms. Osorio) and asylum applicants seeking to renew their EADs (like Ms. Arcos), the proposed class includes adjustment of status applicants, whose concurrently filed EADs must be adjudicated as long as they satisfy the initial evidence requirements for adjustment. *See* 8 C.F.R. §§ 245.1(a), 274a.12(c)(9); I-765 Instructions, Dkt. 24-3, § 7.a. at 5.

The Individual Plaintiffs and the proposed class have a common interest that transcends the various classifications that form the basis for their EAD applications. That interest, which is straightforward and consistent with the policy underlying Defendants' own regulations, is to ensure that Defendants either timely adjudicate EAD applications or issue interim work

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authorization. If USCIS later concludes that certain EAD applicants are not entitled to receive the underlying benefits for which they have applied, then USCIS can use existing regulatory mechanisms to terminate or revoke their employment authorization. *See* 8 C.F.R. §§ 274a.13(d), 274a.14. This court should decline Defendants' invitation to delve into the details of all the different categories contained in 8 C.F.R. § 274a.12(c) because the regulations setting adjudication deadlines and requiring interim EADs encompass them all. [16]

IV. Plaintiffs Properly Defined the Proposed Class.

Plaintiffs agree that the proposed class should include only noncitizens similarly situated to the Individual Plaintiffs. For this reason, the proposed class is divided into two subclasses based on the two distinct timetables for EAD adjudication mandated by the regulations. *See* 8 C.F.R. §§ 208.7(a), 274a.13(d). "A class definition should be 'precise, objective, and presently ascertainable.' However, the class need not be 'so ascertainable that every potential member can be identified at the commencement of the action.'" *O'Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1988) (citation omitted). "As long as 'the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist.'" *Id.* Defendants' proposed changes to the class definition ignore these fundamental principles.

First, Defendants want to limit the 90-Day Subclass to those EAD applicants in the same underlying eligibility classification as Plaintiffs Arcos and Osorio. Dkt. 35 at 18-19. As discussed in § II.B above, the members of Plaintiffs' proposed class derive their common interest

[16] Defendants' claim that the Individual Plaintiffs are not adequate representatives because they lacked "legal entitlement" to employment authorization when the suit was filed (Dkt. 35 at 14 n.7) also lacks merit as the regulatory claim of Plaintiff W.H. is based on 8 C.F.R. §§ 208.7(a) and that of Plaintiffs Arcos and Osorio are based on 8 C.F.R. § 274a.13(d), with which Defendants are mandated to comply. *See* Dkt. 40 at 8-18.

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from their eligibility for EAD adjudication in 90 days, irrespective of the underlying basis for EAD eligibility. The regulations make no distinction in the application of the 90-day rule.

Second, Defendants erroneously ask the Court to exclude from the 90-Day Subclass EAD applicants seeking DACA renewal under 8 C.F.R. § 274a.12(c)(14). Dkt. 35 at 18. As previously discussed, DACA renewal requesters "ha[ve] been granted deferred action" at the time their initial DACA applications were adjudicated, and their deferred action (i.e. DACA) has not been terminated or revoked. Thus, they are eligible for EADs under 8 C.F.R. § 274a.12(c)(14) and should be included in the 90-Day Subclass. *See* § III *supra* and Dkt. 40 at 14-18.

Third, Defendants erroneously ask the Court to delete the provision for interim employment authorization from the 30-Day Subclass. Dkt. 35 at 18. The regulatory framework that mandates automatic interim employment authorization if the agency fails to timely adjudicate initial asylum EADs has existed for more than a quarter-century. *See* Dkt. 24. The interim employment authorization regulation at 8 C.F.R. § 274a.13(d) incorporates by reference the mandate in the Form I-765 Instructions that the "interim EAD will be granted for a period not to exceed 240 days," when the agency does not meet when the 30-day adjudication deadline.[17] *See* Dkt. 40 at 8-9. Thus, members of both the 90-Day Subclass and the 30-Day Subclass are entitled to interim work authorization when USCIS fails to meet the regulatory timetable.

CONCLUSION

For the foregoing reasons, the Court should certify a nationwide class to permit Plaintiffs to seek injunctive and declaratory relief directing Defendants to follow their own mandatory regulations and timely adjudicate EAD applications or issue interim employment authorization.

[17] Dkt. 24-3 at 1.

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Respectfully submitted this 11th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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