DISTRICT JUDGE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARIA SILVIA GUEVARA ENRIQUEZ, *et al.,* Plaintiffs, v. U.S. CITIZENSHIP & IMMIGRATION SERVICES, *et al*. Defendants.	Case No. 2:23-cv-00097-TSZ **PLAINTIFFS' OPPOSITION TO MOTION TO STAY PROCEEDINGS** NOTE ON MOTION CALENDAR: AUGUST 11, 2023 **ORAL ARGUMENT REQUESTED**

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I. INTRODUCTION

Defendants have not met their burden to stay proceedings in this case. The damage to Plaintiffs and potential class members by further, possibly years-long delays, would be immense—namely, the inability to work and move forward with immigration status, and fear of removal from this country and separation from their families at any time. The impact on Defendants U.S. Citizenship and Immigration Services (USCIS) and Director Jaddou is far less; in fact, they fail to allege any concrete hardships or inequities they may face if required to proceed with the case. Briefing on Plaintiffs' motion for class certification and Defendants' motion to dismiss is complete. Considering the lengthy timeline for appellate proceedings, and the significant harms already experienced by Plaintiffs and potential class members from Defendants' delay in adjudicating their waiver applications, proceedings in this case, including discovery, should not be indefinitely delayed.

For the reasons stated below, this Court should deny Defendants' Motion to Stay Proceedings.

II. LEGAL STANDARD

"A district court has broad discretion to stay proceedings, incidental to the inherent power to control its own docket." *Taie v. Ten Bridges LLC*, No. C21-0526, 2022 WL 17416056, at *1 (W.D. Wash. Dec. 5, 2022). "This power includes staying an action 'pending resolution of independent proceedings which bear upon the case.'" *Id*. (quoting *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983)).

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936) (the

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movant "must make out a clear case of hardship or inequity")).[1] When determining whether a stay is appropriate, "the competing interests [that] will be affected by the granting or refusal to grant a stay must be weighed." *Ali v. Trump*, 241 F. Supp. 3d 1147, 1152 (W.D. Wash. 2017) (citing *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (alteration in original)).

> Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Lockyer, 398 F.3d at 1110 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Defendants agree that the *Lockyer* factors govern this stay analysis. *See* Motion to Stay Proceedings ("Motion"), ECF 53 at 5.

While courts may stay proceedings while related appeals are pending, a "stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F2d 857, 864 (9th Cir. 1979)); *see Taie,* 2022 WL 17416056, at *1 (in granting the stipulated motion to a partial stay, the court assessed that since the Ninth Circuit had already ruled in the relevant appellate case, "any stay in this case is likely to be relatively short in duration").

[1] Defendants' reliance on *Nken v. Holder*, 556 U.S. 418, 433 (2009) for guidance regarding the burden of proof applicable to a stay of proceedings (ECF 53 at 5) is mistaken; *Nken* involved the stay of a particular order rather than of a lawsuit.

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III. ARGUMENT

A. The Stay Factors Weigh in Favor of Denying a Stay

In the present case, the factors the Court must weigh favor proceeding with the case and denying the stay motion. Defendants ignore the concrete and profound harms Plaintiffs and potential class members are facing and will continue to face without resolution of this case and disregard the lengthy and indeterminate timeline of a circuit court appeal.

As the Ninth Circuit has held, in applying long-standing Supreme Court precedent, "if there is even a fair possibility that [a] stay . . . will work damage to some one [sic] else," the stay may be inappropriate absent a showing by the moving party of "hardship or inequity." *Lockyer*, 398 F.3d at 1009 (quoting *Landis*, 299 U.S. at 255); *see also Navigators Ins. Co.*, 498 F.3d at 1066-67. Because the additional delays caused by a stay would damage Plaintiffs immensely, because Defendants can point to no hardship or inequity they would suffer absent a stay, and because it is unclear when any stay would lift, this Court should deny Defendants' Motion.

1. A Stay Will Irreparably Damage Plaintiffs and Potential Class Members

Defendants' Motion, ECF 53, sidesteps the damage a stay will cause Plaintiffs and the potential class members. Defendants suggest a possibility of being subject to overlapping and inconsistent judgments should the stay be denied—a suggestion that is devoid of a factual basis—but fail to mention the damage that will occur from *granting* a stay.

To reiterate Plaintiffs' present legal situation, they, and potential class members, are individuals unlawfully present in the United States who are the beneficiaries of approved

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immigrant visa petitions. To complete the immigrant visa process, they must appear at a U.S. consulate abroad to apply for an immigrant visa and then rejoin their family in the United States. *See* 8 U.S.C. § 1201(a); 22 C.F.R. §§ 42.61-62. A noncitizen who departs the United States after being unlawfully present for more than 180 days without receiving a provisional waiver becomes inadmissible to the United States and ineligible for a visa for a statutorily-set time period.[2] There is a long road ahead for Plaintiffs, as they cannot proceed with permanent residence because they lack a decision on their provisional waiver. A positive decision on the I-601A waiver allows a noncitizen to attend his or her interview outside the United States, without needing to seek a waiver abroad for having remained in the United States for too long. However, provisional waiver adjudications that once took USCIS less than six months to decide, now take the agency almost four years. The Court need not add to the delay given the additional harms that will accrue to Plaintiffs.

Plaintiffs remain without work authorization, subject to removal proceedings, and denied the opportunity to become U.S. lawful permanent residents. By delaying their ability to become lawful permanent residents, Defendants also delay the time in which the Plaintiffs could apply for and enjoy the benefits of becoming U.S. citizens, if eligible.

Processing times have increased from 4.5 months in Fiscal Year 2018, Amended Compl., ECF 27 ¶ 30, to 44.5 months (Nebraska Service Center) and 44 months (Potomac Service Center). U.S. Citizenship and Immigration Services, *Check Case Processing Times*,

[2] The time period is three years from the noncitizen's departure date, for unlawful presence of over 180 days but less than one year, and ten years from departure, for at least one year of unlawful presence. 8 U.S.C. §§ 1182(a)(9)B)(i)(I)-(II).

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https://egov.uscis.gov/processing-times/ (last visited Aug. 7, 2023), attached as Exhibit A.[3] Remarkably, Defendants have further slowed their processing of Plaintiffs' and proposed class members' applications, as this is an increase of up to 10 months in estimated processing times just since the filing of the First Amended Complaint in the present suit in February 2023. *See* ECF 27 ¶ 2.

In essence, USCIS has granted itself a stay and that is why Plaintiffs seek redress from this Court. After paying a fee and properly filing applications, they have been left to wait indefinitely and watch as processing times continue to stretch onward. Indeed, Plaintiffs have provided evidence that Defendants are not handling the I-601A applications at issue on a first-in-first-out basis. *See* ECF 50 at 2, Plaintiffs' Notice of Supplemental Facts Related to Motion to Dismiss. Exhibit B, ECF 50-2, Selected I-601A Cases and Adjudication Statuses, sets forth multiple instances in which Defendants issued decisions on applications filed later than those of Plaintiffs and proposed class members. Defendants have not proffered any policy choices that explain USCIS' disorderly processing. All named Plaintiffs suffer from lost economic opportunities due to the extended delays they are facing. All named Plaintiffs, and indeed all those who file an I-601A application, have U.S. citizen or permanent resident spouses or parents who they allege would suffer extreme hardship if they could not remain in the United States. The proposed class representatives illustrate the irreparable harms:

[3] USCIS' current processing times for Form I-601A are for 80% of cases completed. *Id*. To access the processing times, choose "Form: 601A/Application for Provisional Unlawful Presence Waiver," from dropdown; choose "Form Category: Provisional Waiver of Unlawful Presence;" and "Field Office or Service Center: Nebraska Service Center" or "Field Office or Service Center: Potomac Service Center."

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- Plaintiff Guevara Enriquez bathes and dresses her U.S. citizen husband who suffers from many health problems. Those health problems cause him to struggle to continue working as a mechanic and driver. However, he is the sole breadwinner because Plaintiff Guevara Enriquez cannot work legally. She is anxious for status so that she can create a better life for them. Guevara Enriquez Declaration, ECF 17-1 ¶¶ 5, 7.
- Plaintiff Montes Cisneros and his U.S. citizen wife live in fear of everyday situations, such as his being picked up and taken away while walking down the street. His wife and two-year-old child rely on her job for health insurance, and his wife is pregnant, raising fear of lost coverage if work interruption or pregnancy complication occurs. He cannot get health insurance or join her coverage without a Social Security number and has gone without regular health care for years due to his status. Montes Cisneros Declaration, ECF 17-4 ¶¶ 4-6.
- Plaintiff Callejas Venegas and his U.S. citizen wife cannot make big life decisions. They want to move on with their lives, save enough money and qualify for a home, and start a family. But with only one income earner, such goals seem impossible. His wife has forfeited advancing her education and career because he lacks status and work authorization. Callejas Venegas Declaration, ECF 17-2 ¶¶ 8-9, 11, 13.
- Plaintiff Jimenez Rivas and his family live paycheck to paycheck, often unable to afford essential items such as diapers and formula as they rely exclusively on his U.S. citizen wife's income because he cannot work. He cannot get a driver's license and

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cannot even drive his children to their doctors' appointments. Jimenez Rivas Declaration, ECF 17-3 ¶¶ 5-6.

The cases Defendants cite for the proposition that added delays are "negligible in the context of stays where the same issues were pending appellate review" are inapplicable. ECF 53 at 11. Defendants have not demonstrated that added delays would be "negligible" in this lawsuit. ECF 53 at 11. The cases cited deal with issues and harms far afield from those before the Court in this case. For example, *Nationstar Mortg., LLC v. RAM LLC*, No. 15-cv-1776, 2017 WL 1752933 (D. Nev. May 4, 2017) involves money damages. Delays certainly do not carry the same impact in a money damages case as in an APA suit brought specifically about unreasonable agency delay affecting immigrant families' ability to stay together, the ability to work, and the ability to remain free from enforcement and removal.

Aliphcom v. Fitbit, Inc., 154 F. Supp. 3d 933, 935 (N.D. Cal. 2015) relates to patent infringement. A delay in a patent infringement case, where the parties are corporations and the party contesting the stay "fail[ed] to articulate what possible damage would result if a stay is granted," is not comparable to a delay in this matter, in which individual Plaintiffs have clearly delineated the specific harms they will experience from further delays. *Id*. at 937.

The court in *Provo v. Rady Children's Hosp.-San Diego*, No. 15-cv-81, 2015 WL 6144029, at *1 (S.D. Cal. July 29, 2015) determined a one-year delay would not significantly prejudice either party in a dispute related to the Fair Debt Collection Practices Act, where Plaintiffs had not alleged that Defendants' misstatements caused them "any harm."

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Defendants' silence—in a motion where they carry the burden of proof —on the harms Plaintiffs will suffer through the grant of a stay speaks volumes about the strength of their argument.

2. Defendants Have Not Carried Their Burden to Show Hardship or Inequity If This Case Goes Forward.

Compared with the extreme harms Plaintiffs face, the hardship to Defendants USCIS and Director Jaddou in being required to go forward is minimal.

Defendants suggest that absent a stay, they may be subject to overlapping or inconsistent judgments. ECF 53 at 10-11. They ignore, however, that at present there *is no* injunction or obligation imposed upon them by any other court that would be inconsistent with a ruling by this Court. Should the stay be denied, they would not be ordered on one hand to adjudicate cases in a timely manner, and on the other hand ordered to halt adjudication of cases entirely. They simply bear the risk that a court *would* order the timely adjudication of these long-pending applications. That is not an inconsistent judgment. Indeed, Defendants may moot the *Mercado* appeal by USCIS approving or denying Mr. Mercado's Form I-601A waiver application during the many months while the appeal is pending.

The only real harm that Defendants point to is that the case would proceed, and the parties would be required to "engag[e] in work." ECF 53 at 8. Defendants use this opportunity to further argue against discovery but fail to address any meaningful hardship or inequity that they may suffer should the case proceed absent a stay. In fact, Defendants have

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already marshaled evidence in support of their position.[4] The possible hardship or inequity to Defendants in denying the stay is minimal, whereas the possible damage to Plaintiffs in granting the stay is immense.

3. Orderly Course of Justice and Expected Timeline for Appeal

Defendants' Motion fails to accurately convey the lengthy and indeterminate amount of time that their requested stay could be in place. A "stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Navigators Ins. Co.*, 498 F.3d at 1067.

Defendants point to only two district court opinions that ruled on jurisdictional issues similar to that before the Court: *Mercado v. Miller,* the case which precipitated the instant Motion, No. 2:22-cv-02182-JAD-EJY, 2023 WL 4406292 (D. Nev. July 7, 2023), *appeal docketed*, No. 23-16007 (9th Cir. July 17, 2023); and *Lovo v. Miller,* which is also on appeal, No. 5:22-cv-00067, 2023 WL 3550167 (W.D. Va. May 18, 2023), *appeal docketed*, No. 23-1571 (4th Cir. May 26, 2023).

Initially, looking solely to the Ninth Circuit's timeline for an appeal, the Ninth Circuit estimates that it will take 6 to12 months from the notice of appeal until oral argument, and another 3 to12 months after oral argument for the court to render a decision. United States

[4] *See, e.g.,* ECF 31-1 at 10-12, Declaration of Sharon Orise (March 6, 2023) (filed in support of Defendants' Opposition to Plaintiffs' Motion for Class Certification and which includes numerous alleged causes of I-601A adjudication delays); ECF 37, Declaration of Sharon Orise (April 11, 2023) (discussing operational issues and creation of the HART Service Center); ECF No. 38, Defendants' Notice Regarding Announcement of New Service Center, (April 11, 2023); ECF 46, Supplemental Declaration of Sharon Orise to Correct Declaration filed at ECF 31-1 (June 13, 2023) (correcting error regarding processing times).

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Court of Appeals for the Ninth Circuit, Office of the Clerk, *Frequently Asked Questions*, https://www.ca9.uscourts.gov/general/faq/ (last updated Jan. 2023). A stay solely pending appeal from the Ninth Circuit, then, could last anywhere from nine months to potentially *two years*. As this lawsuit is an APA action for unreasonable delay, placing Plaintiffs and potential class members in legal limbo, even for nine months—and potentially multiple years—based on the appeal of an issue that may not even resolve the case, is unreasonable. A stay should not be granted where the related proceedings are unlikely to be completed in a reasonable period of time.

Plaintiffs acknowledge that there may be circumstances where such a delay may not be unreasonable. That is not the case here. Defendants point to *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023), for example. ECF 53 at 7. There, the underlying case involved a putative class alleging Coinbase failed to replace funds fraudulently taken from the users' accounts—in essence seeking money damages. *Coinbase Inc.*, 143 S. Ct. at 1916. A delay in a case ultimately about money damages, however, involves a very different analysis than one about unreasonable agency delay on applications such as those filed by the Plaintiffs. Where damages are at issue, the prevailing party can be made whole at a later date. Where non-monetary damages are at stake, including the constant threat of removal and extended family-separation, there is no getting that time back.

Further, the holding in *Coinbase* was not whether a district court *should* stay proceedings while an appeal is pending in a separate, but related proceeding, but whether it *must* stay proceedings while an interlocutory appeal was ongoing based on the Federal

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Arbitration Act. *Coinbase Inc.*, 143 S. Ct. at 1923. Defendants' quotation from *Coinbase* is out of context. *See* ECF 53 at 8. The Supreme Court was not opining on when it would be reasonable to stay proceedings, but rather when proceedings *must* be stayed during an interlocutory appeal:

> Because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially involved in the appeal. As Judge Easterbrook cogently explained, when a party appeals the denial of a motion to compel arbitration, **whether the litigation may go forward in the district court is precisely what the court of appeals must decide**. Stated otherwise, the question of whether the case should be litigated in the district court . . . is the mirror image of the question presented on appeal. Here, as elsewhere, it makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one. In short, *Griggs* dictates that the **district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing**.

Coinbase Inc., 143 S. Ct. at 1919-20 (internal citations omitted) (emphasis added).

Staying the case also stays the possibility of the Court ordering that the I-601A applications be reasonably adjudicated by a date certain. Rather, a stay would allow Defendants to continue taking money for new Forms I-601A ($715) and not be under any adjudicatory timeline. The USCIS received 16,728 Forms I-601A in the first two quarters of Fiscal Year 2023, for a total of $11,960,520 on applications it will not, based upon "current processing times," adjudicate for almost four years. U.S. Citizenship and Immigration Services, *Number of Service-wide Forms By Quarter, Form Status, and Processing Time, January 1, 2023 – March 31, 2023*,

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https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2023_Q2.pdf (last accessed Aug. 4, 2023).

B. The Government Appellants are Unlikely to Succeed in the *Mercado* Appeal

A stay should be denied for an additional reason: the government-appellants' arguments in the *Mercado* appeal will likely fail. Because their arguments lack merit, this court should not await the outcome of the *Mercado* appeal before proceeding with the fully briefed motions in the present case.

The provisional unlawful presence waiver statute does not bar judicial review of an APA cause of action for unreasonable delay in adjudicating I-601A waiver applications. As discussed below, the *Mercado* court's contrary conclusion is an extreme position that does not withstand careful scrutiny. The *Mercado* decision parrots the decision in *Lovo*. *See Mercado,* 2023 WL 4406292, at *2; *Lovo,* 2023 WL 3550167, at *2-3. The following discussion applies to both decisions.

The jurisdictional bar in 8 U.S.C. § 1182(a)(9)(B)(v) states: "No court shall have jurisdiction to review a decision or action by the [DHS Secretary][5] regarding a waiver under this clause." *Mercado* discards the plain meaning of "decision or action." A delay in deciding is neither a decision nor an action, and the entire crux of Plaintiffs' lawsuit is to *compel* a decision or an action. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common

[5] After Congress transferred immigration authority to DHS in 2003, a statutory reference to the Attorney General is "deemed to refer to the [DHS] Secretary." *See* 6 U.S.C. § 557.

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meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The *Mercado* decision also erred in concluding that *Patel v. Garland* "supports" reading § 1182(a)(9)(B)(v) to bar judicial review of a delay claim. 2023 WL 4406292, at *2. In *Patel*, the Supreme Court decided whether an applicant for adjustment of status to lawful permanent resident could receive judicial review of the *denial* of immigration relief in immigration court. *Patel*, 142 S. Ct. at 1619. In contrast, *Mercado* and this lawsuit challenge unreasonable delay in the context of an affirmative benefit. *Mercado,* 2023 WL 4406292, at *1; *Lovo,* 2023 WL at *1.

In *Patel*, the Supreme Court construed 8 U.S.C. § 1252(a)(2)(B)(i), with text very different from the unlawful presence waiver statute, 8 U.S.C. § 1182(a)(9)(B)(v). Section 1252(a)(2)(B)(i) bars judicial review, except for appellate review pursuant to 8 U.S.C. § 1252(a)(2)(D), of "any judgment regarding the granting of relief" under five sections of the INA—8 U.S.C. §§ 1182(h), 1182(i) 1229b, 1229c, or 1255. *Patel*, 142 S. Ct. at 1619. None of these five sections are at issue here. A lack of decision is not a "judgment regarding the granting of relief" and Congress did not even include the unlawful presence waiver within the scope of 8 U.S.C. § 1252(a)(2)(B)(i), while explicitly including two other types of waivers, 8 U.S.C. §§ 1182(h)-(i).

Further, dismissing a claim of unreasonable delay in adjudicating I-601A waivers conflicts with "the presumption favoring judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). The APA definition of "agency action" underscores that "action" is defined differently from its ordinary meaning because Congress specifically included "failure to act." 5 U.S.C. § 551(13). This definition is consistent with Congress'

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direction that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As discussed in *Soneji v. Dep't of Homeland Sec.*, 5 U.S.C. § 551 is clear that "this definition applies only '[f]or the purpose of this subchapter.'" 525 F. Supp. 2d 1151, 1154 n.2 (N.D. Cal. 2007) (quoting 5 U.S.C. § 551). "There is nothing to indicate . . . that this definition also applies to INA section 242, codified at 8 U.S.C. § 1252." *Id.* Without "'clear and convincing evidence' of congressional intent to preclude judicial review," the presumption is that Congress meant judicial review to be available. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)). S*ee also Kucana ,* 558 U.S. at 252.

The *Mercado* court's interpretation disregards the reach of APA unreasonable delay claim. A statutory or regulatory deadline is not a prerequisite for a court to find the delay is unreasonable. In the absence of a statutory deadline, courts assess the delay by examining a non-exhaustive list of six TRAC factors. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002) (citing *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001) (considering whether there was an unreasonable delay in the absence of a firm deadline)). Thus, general timing provisions are sufficient benchmarks, including the APA's "general admonition that agencies conclude matters presented to them 'within a reasonable time[.]'" *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (quoting 5 U.S.C. § 555(b)).

Unlike *Patel*, Defendants have not denied any immigration relief to Plaintiffs and potential class members, and Plaintiffs do not seek review of a decision. . Adopting the

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Mercado interpretation distorts the meaning of a "decision or action by the [agency] regarding a waiver" in 8 U.S.C. § 1182(a)(9)(B)(v) to mean the absence of a decision or action —creating the irrational result where USCIS collects millions of dollars in exchange for adjudicating I-601A waiver applications and takes action without acting on thousands of case files for years, with no judicial review available to the applicants.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs ask the Court to deny Defendants' Motion to Stay Proceedings, ECF No. 53.

DATE: August 7, 2023

Respectfully submitted,

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

I hereby certify that this memorandum contains 4,046 words, in compliance with the Local Civil Rules.

Dated: August 7, 2023

/s/ Leslie K. Dellon
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