

District Judge James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

WILMAN GONZALEZ ROSARIO, et al.,
Plaintiffs,
v.
UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES, et al.,
Defendants.

Case No. 2:15-cv-00813

PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT

NOTE ON CALENDAR: July 2, 2018

I. INTRODUCTION

Plaintiffs and class members seek an order compelling Defendant United States Citizenship and Immigration Services (USCIS) to timely adjudicate their initial applications for employment authorization documentation (EAD) so that they may work in the United States while their affirmative applications for asylum are pending before the agency. Defendant USCIS has a duty to adjudicate initial asylum EAD applications within 30 days of receipt. *See* 8 C.F.R. § 208.7(a)(1). This Court “has already concluded that those regulatory deadlines are mandatory.” Dkt. 95 at 21, 21 n.10. The material facts are not in dispute. Defendants failed to

1 timely adjudicate the named Plaintiffs' initial asylum EAD applications, just as they have
 2 systemically failed for years to timely adjudicate the majority of initial asylum EAD
 3 applications filed by members of the certified class. *See* Dkt. 103-4 at 1-4; Dkt. 103-3. This
 4 failure harms Plaintiffs and class members by preventing them from financially providing for
 5 themselves and their families, many of whom rely on that support for basic necessities such as
 6 food and shelter. Accordingly, Plaintiffs ask this Court to declare Defendants' actions unlawful
 7 and order Defendants to comply with 8 C.F.R. § 208.7(a) by adjudicating initial asylum EAD
 8 applications within 30 days of receipt.

9 II. BACKGROUND

10 A. Named Plaintiffs and Class Members

11 This Court has certified a nationwide class of initial asylum EAD applicants as follows:

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

16 Dkt. 95 at 26-27. The Court appointed named Plaintiffs A.A., Machic Yac, and W.H. as class
 17 representatives. *Id.* at 27.

18 The named Plaintiffs demonstrate how Defendants fail to timely adjudicate initial
 19 asylum EAD applications within the deadline. Plaintiff Antonio Machic Yac is a noncitizen
 20 asylum applicant residing in Portland, Oregon. Dkt. 59-3 at ¶¶ 3, 6; Dkt. 67, Machic Yac
 21 Sealed A.R. at 2 (EAD application); Dkt. 81 at ¶ 23 (Answer). Mr. Machic Yac's application
 22 for an initial asylum EAD had been pending for far beyond thirty days from USCIS's receipt of
 23 his application on December 31, 2015, which was more than 150 days after USCIS received
 his asylum application. Dkt. 59-3 at ¶ 3; Dkt. 67; Dkt. 81 at ¶ 23. At the time of filing the

1 Amended Complaint, 208 days had passed since the day that Defendants were obligated to
2 adjudicate Mr. Machic Yac's employment authorization application. Dkt. 58 ¶¶ 62-63. As of
3 the filing of the Amended Complaint, Mr. Machic Yac had not received a Request for
4 Evidence on his EAD or underlying application. *Id.*; Dkt. 81 at ¶ 23. Defendants' failure to
5 timely adjudicate Mr. Machic Yac's EAD application caused him financial hardship. Dkt. 59-3
6 at ¶ 6. An eighteen-year-old high school student, he resided with his aunt and uncle, who were
7 pressuring him to contribute financially to the household or find another place to live. *Id.*
8 Without an EAD, he was unable to obtain employment and thus could not contribute to rent or
9 other living expenses. *Id.* He was also unable to obtain a driver's license without an EAD. *Id.*

10 Plaintiff A.A. is a noncitizen asylum applicant residing in Seattle, Washington. Dkt. 59-
11 13 at ¶ 3; Dkt. 67, A.A. Sealed A.R. at 2; Dkt. 81 at 4. A.A.'s application for an initial asylum
12 EAD was pending for more than thirty days from USCIS's receipt of his application on
13 January 19, 2016, which was more than 150 days after USCIS received his asylum application.
14 Dkt. 59-13 at 1; Dkt. 81 at ¶ 21. At the time of filing the Amended Complaint, 22 days had
15 passed since the day that USCIS was obligated to adjudicate A.A.'s employment authorization
16 application. Dkt. 58 at ¶ 57. As of the filing of the Amended Complaint, A.A. had not received
17 a Request for Evidence on his EAD or underlying application. *Id.*; Dkt. 81 at ¶ 21. When A.A.
18 was unable to obtain employment, it caused him substantial hardship because he had no other
19 means of support while pursuing his application for asylum. Dkt. 59-13 at ¶ 6. He had to rely
20 on some friends who had been willing to support him while his asylum application was
21 pending. *Id.*

22 On January 9, 2015, Plaintiff W.H., who at that time had an EAD based on an approved
23 application for Temporary Protected Status, filed an initial asylum EAD, based on an asylum

1 application that had been pending since March 12, 2014. Dkt. 5-13 at ¶ 3, Dkt. 38, W.H. Sealed
2 A.R. at 4; Dkt. 81 at ¶ 28. USCIS acknowledged receipt of W.H.'s initial asylum EAD
3 application on January 9, 2015. Dkt. 5-13 at ¶ 4. USCIS failed to adjudicate the EAD
4 application by February 9, 2015, the thirtieth day after filing. *Id.* at ¶ 5, Dkt. 38, W.H. Sealed
5 A.R. at 4 (EAD approved June 16, 2015); Dkt. 81 at ¶ 28.

6 W.H.'s lawyer called USCIS's National Customer Service Center (NCSC) hotline twice
7 to inquire about the status of W.H.'s EAD. Dkt. 5-13 at ¶¶ 5-6. On February 25, 2015, W.H.'s
8 lawyer was told to expect a response by mail within 15 days. *Id.* at ¶ 5. On March 3, 2015,
9 W.H.'s lawyer was told that the "application [wa]s currently pending adjudication [but they]
10 regret [they] are unable to provide [W.H.'s lawyer] with a completion date at this time." *Id.* at ¶
11 6. W.H.'s prior EAD expired on March 31, 2015. *Id.* at ¶ 8. As of the filing of the Complaint,
12 W.H. had not received a Request for Evidence on his EAD or underlying application. *Id.* at ¶ 7;
13 Dkt. 81 at 8. Due to USCIS's failure to grant employment authorization, W.H. lost his Missouri
14 driver's license. Dkt. 5-13 at ¶ 8

15 **B. Administrative Record**

16 This Court has clarified the administrative record in this action. It consists of the
17 documents related to individual EAD applications of the named Plaintiffs representing the "30-
18 Day" subclass. Dkt. 113 at 4, *citing* Dkt. 67, 67-6, and 38. The Court permitted Defendants to
19 supplement the record to include background information on the EAD application and
20 adjudication process. Dkt. 113 (admitting Dkt. 103-1, 103-2, 103-3, 103-4 and 103-5, exhibits
21 A-E to Dkt. 103, into the record). The Court granted Plaintiffs request to supplement the record
22 with the March 31, 2017, USCIS Memorandum entitled, "Jurisdiction and EAD Clock
23

1 Procedures for Unaccompanied Alien Children (UACs).” Dkt. 113 at 11 (admitting USCIS
2 Memo, located in the record at Dkt. 116 at 97-101).

3 The supplemented administrative record in this matter shows that the named Plaintiffs
4 are not alone, and that Defendants systematically fail to timely adjudicate initial asylum EADs.
5 As Defendants’ records show, for every year for which they produced data, the majority of
6 initial asylum EAD applications are not timely adjudicated. *See* Dkt. 103-4. For each quarter of
7 each Fiscal Year (FY) from 2010 to 2017, less than half of the initial asylum EADs were
8 adjudicated within 30 days. Dkt. 103-4 at 1-4. From FY 2010 to 2017, even excluding cases
9 where requests for evidence (RFEs) delayed decision, Defendants timely adjudicated initial
10 asylum EAD applications only 24.7% of the time. *Id.* at 4 (154,344 of 623,865 initial asylum
11 applications adjudicated within 30 days). Many of these applications were delayed well-beyond
12 30 days. For this seven-year time period, over 160,000 applications took more than 60 days to
13 adjudicate, again excluding cases with RFE delays. *Id.* In the most recent snapshot provided by
14 Defendants, on October 18, 2017, 25.5% of EAD applications were pending over 30 days,
15 again excluding cases with RFE delays, with no guarantee that the cases pending under 30 days
16 would be timely adjudicated. Dkt. 103-3 at 1. The administrative record also shows a
17 significant backlog and delay in interviewing asylum seekers on their asylum applications. Dkt.
18 103-5 at 3-4 (showing 2-4 year backlog depending on jurisdiction). Thus, it is crucial for
19 asylum seekers to obtain work authorization while in the U.S. waiting, often for years, for an
20 interview on their asylum applications. The parties have agreed that this matter may be
21 resolved on the administrative record. Dkt. 101 at 2.

III. ARGUMENT

A. Legal Standards

Summary judgment is warranted where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). The moving party bears the burden of demonstrating that he or she is entitled to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has met its burden, however, the nonmoving party must make a “sufficient showing on an essential element of her case with respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, as here, the only issue is a legal question, summary judgment is proper. *See, e.g., Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998) (agency’s statutory interpretation is a question of law).

Under the Administrative Procedure Act (APA), this Court can “compel agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1). *See, e.g., Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979). “[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in the original). Failure to comply with an agency regulation (rule) is a type of discrete agency action covered by § 706(1) claims. *Id.* at 62 citing 5 U.S.C. § 551(13). Properly promulgated agency regulations, such as those at issue in this case, have the force and effect of law. *Chrysler Corp.*, 441 U.S. at 295-96. Thus, where the Defendants are failing to comply with the mandate of a regulation, as they are doing here, their failure to act violates the APA.

Alternatively, this Court can grant Plaintiffs and proposed class members mandamus

relief under 28 U.S.C. § 1361 by ordering the DHS Defendants to timely adjudicate their EAD

1 applications. The relief sought through Plaintiffs’ mandamus claim is identical to that sought
 2 through their APA claim: to compel USCIS to timely adjudicate their EAD applications. “[T]he
 3 Supreme Court has construed a claim seeking mandamus . . . , ‘in essence,’ as one for relief
 4 under § 706 of the APA.” *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir.
 5 1997) (citing *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986)).
 6 Since “the relief sought is essentially the same,” a court can elect to analyze the claim under
 7 either. *Id.*; see also *Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *5 (N.D.
 8 Cal. Nov. 21, 2014) (“Where, as here, the relief sought is identical under the APA and the
 9 mandamus statute, proceeding under one as opposed to the other is not significant.”).

10 **B. Defendants Are Violating Their Non-Discretionary Duty to Timely Adjudicate**
 11 **Plaintiffs’ and Class Members’ EAD Applications**

12 **1. USCIS has a non-discretionary duty to adjudicate EAD applications filed**
 13 **by Plaintiffs and class members within 30 days.**

14 Plaintiffs and class members are initial asylum EAD applications who are eligible for
 15 employment authorization during the pendency of their asylum applications. They either have
 16 filed or will file an initial asylum EAD application by completing and filing Form I-765 with
 17 USCIS. Their applications are subject to binding regulations. Under 8 C.F.R. § 274a.13(a)(2),
 18 USCIS must adjudicate initial asylum EAD applications “in accordance with [Section] 208.7.”
 19 That regulation, 8 C.F.R. § 208.7, in turn, provides that, subject to certain exceptions, the
 20 applicant typically must wait 150 days after his or her asylum application has been submitted
 21 before filing an initial EAD application. 8 C.F.R. § 208.7(a)(1).¹

22 _____
 23 ¹ Exceptions include, inter alia, individuals granted asylum within 150 days, individuals
 denied asylum prior to a decision on the EAD application, individuals with asylum applications
 recommended for approval, and those for whom USCIS has returned an asylum application as
 incomplete. 8 C.F.R. § 208.7(a)(1).

1 If 150 days elapses and USCIS has not denied the asylum application, the asylum seeker
2 may finally apply for an EAD so that he or she may work in the U.S. while waiting for her
3 asylum case to be decided. 8 C.F.R. §§ 208.7(a)(1)-(2), (4). Significantly, the regulations
4 provide:

5 If the asylum application is not so denied [within the 150 days period or prior to a
6 decision on the EAD application], [USCIS] **shall have 30 days** from the date of
7 filing of the request [sic] employment authorization **to grant or deny**
8 **that application**, except that no employment authorization shall be issued to an
9 asylum applicant prior to the expiration of the 180-day period following the filing
10 of the asylum application filed on or after April 1, 1997.

11 8 C.F.R. § 208.7(a)(1) (emphasis added); *see also Carballo v. Meissner*, No. C00-2145, 2000
12 WL 174198, at *2 (N.D. Cal. Nov. 17, 2000) (describing the process for an asylum applicant
13 seeking an EAD). The choice of regulatory language—“will” and “shall”—makes these
14 requirements mandatory. *See Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1258 (W.D. Wash. 2008)
15 (“shall” is mandatory); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)
16 (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a
17 requirement.”). Defendants’ own training materials agree that the 30-day requirement is
18 mandatory. Dkt. 103-1 at 62 (“8 C.F.R. 208.7(a)(1) requires USCIS to adjudicate Form I-765
19 within 30 days from the date of receipt of a properly filed initial (c)(8) request.”).

20 In sum, and as this Court has already decided, under the plain language of the regulation,
21 USCIS has a mandatory non-discretionary duty to make a decision—either to grant or deny—
22 EAD applications filed by members of the class within 30 days of receipt of the application. *See*
23 Dkt. 95 at 21 (“the court has already concluded that those regulatory deadlines are mandatory”).

1 **2. USCIS is required to follow its own regulations and adjudicate Plaintiffs’**
 2 **and class members’ EAD applications within 30 days.**

3 The language of 8 C.F.R. § 208.7(a)(1) is clear; USCIS must act on initial asylum EAD
 4 applications of Plaintiffs’ and class members within 30 days of receipt. When individual rights
 5 are affected, “it is incumbent upon agencies to follow their own procedures.” *Morton v. Ruiz*,
 6 415 U.S. 199, 235 (1974). Therefore, agencies are bound to follow regulations they promulgate.
 7 *See Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 267
 8 (1954); *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (citations
 9 omitted). Regulations “have the force of law and are binding on the government until properly
 10 repealed.” *Flores. v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986) (citing *Accardi*, 347 U.S. at 265).
 11 When agency regulations are “intended to protect the interests of a party before the agency ...
 12 [they] ‘must be scrupulously observed.’” *Sameena*, 147 F.3d at 1153 (internal citation omitted).

13 Courts repeatedly have acknowledged the mandatory and straightforward nature of the
 14 EAD regulations. In ruling on a preliminary injunction motion, one court concluded:

15 Any plaintiffs who have had requests for employment authorization pending without a
 16 decision for more than sixty days are almost certain to prevail on the merits. 8 C.F.R. §
 17 274.13(d) requires that the district director adjudicate a request for temporary
 18 employment authorization within sixty days from the date of receipt of the request. If the
 19 INS fails to adjudicate a request for temporary employment authorization within sixty
 20 days from the date of receipt, the agency has a duty to grant interim employment
 21 authorization for a period not to exceed 120 days. *John Doe I*, 690 F. Supp. at 1577 (S.D.
 22 Tex.1988). Defendant does not dispute the mandatory nature of this regulation.

23 *Ramos v. Thornburgh*, 732 F. Supp. 696, 701 (E.D. Tex. 1989). The court ultimately concluded
 that: “The regulations are clear. INS has a mandatory duty to grant interim employment
 authorization if INS fails to complete the adjudication within 60 days from the date of receipt of
 the application.” *John Doe I v. Meese*, 690 F. Supp. 1572, 1577 (S.D. Tex. 1988).

1 Likewise, one court granted class certification and a preliminary injunction ordering
2 legacy-INS to issue interim EADs to applicants with pending asylum applications that INS
3 denied based on administrative errors. That decision held “[i]f INS fails timely to adjudicate such
4 [an EAD] request then it shall issue interim work authorization pursuant to 8 C.F.R. §
5 274a.13(d).” *Najera-Borja v. McElroy*, No. 89-CV-2320, 1995 WL 151775, at *1 (E.D.N.Y.
6 March 29, 1995) (citation omitted); *see also Chowdhury v. Siciliano*, No. C06-07132JW, Dkt.
7 24-6 at 7 (N.D. Cal. May 13, 2008) (awarding attorney’s fees where USCIS failed to timely issue
8 an interim EAD, concluding “there was no basis in law for Defendants to delay the issuance of
9 interim work authorization after the 90-day period had expired.”).

10 Indeed, where, as here, USCIS is violating its own regulations, the Court should grant
11 summary judgement in Plaintiffs’ favor. *See, e.g., Ghafoori v. Napolitano*, 713 F. Supp. 2d 871
12 (N.D. Cal. 2010) (granting summary judgment in favor of asylee who challenged USCIS’ denial
13 of derivative asylee status for her child where agency failed to comply with regulation requiring
14 disclosure of evidence on which denial was based); *Singh v. Bardini*, No. C-09-3382 EMC, 2010
15 WL 2292320 (N.D. Cal. June 7, 2010) (granting summary judgment where USCIS terminated
16 family’s asylum status in violation of regulation requiring USCIS to give detailed advanced
17 notice of the reasons for its intention to terminate).

18 **3. The record before the Court demonstrates that USCIS is not adjudicating**
19 **the initial asylum EAD applications of class members within 30 days.**

20 There is no genuine issue of material fact because Defendants’ own records demonstrate
21 that initial asylum EAD applications are not timely adjudicated. *See* Dkt. 103-4 at 1-4; Dkt. 103-
22 3 at 1. For all the Fiscal Years for which Defendants have provided data, there is not one, nor
23 even a single quarter, when Defendants were able to adjudicate even half of initial asylum EAD
applications on time. *See* Dkt. 103-4 at 1-2 (including RFE delays), 3-4 (excluding RFE delays).

1 Many of these delays stretched well beyond the 30-day period, exceeding even 120 days. *Id.* In
2 the most recent snapshot of pending applications, slightly more than 25% were pending over 30
3 days, with no guarantee that those pending under 30 days would be timely adjudicated. Dkt. 103-
4 3 at 1-2. Defendants have systemically failed, for years, to timely adjudicate initial asylum
5 EADs. *See also* Section II, *supra*.

6 IV. CONCLUSION

7 There is no genuine issue of material fact as to Defendant USCIS's practices and
8 policies of failing to timely adjudicate Plaintiffs' and class members' initial asylum EAD
9 applications in violation of its non-discretionary regulatory mandate. Plaintiffs ask this Court to
10 declare Defendants actions unlawful and order Defendants to comply with 8 C.F.R. § 208.7(a)
11 by adjudicating initial asylum EAD applications within 30 days of receipt.

12 Respectfully submitted this 17th day of May, 2018.

13 /s/ Christopher Strawn

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2018, 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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