

*District Judge James L. Robart*

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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. C15-0813-JLR  
PLAINTIFFS’ RENEWED MOTION FOR  
CLASS CERTIFICATION  
ORAL ARGUMENT REQUESTED  
NOTE ON CALENDAR: April 8, 2016

**I. INTRODUCTION AND PROPOSED CLASS DEFINITION**

Individual Plaintiffs filed this action to compel Defendants to comply with mandatory agency regulations requiring Defendants to either adjudicate employment authorization applications within a specific time period or, where the regulatory deadline has passed, issue interim employment authorization. This court denied, without prejudice, Plaintiffs’ first motion for class certification. Plaintiffs have now filed an Amended Complaint and renew their request for class certification. The Amended Complaint alleges widespread, systemic delays impacting individuals throughout the country and causing substantial hardship to Individual Plaintiffs and the class they seek to represent. Accordingly, Individual Plaintiffs seek to represent a class to force Defendants to conform their policies and practices to the applicable regulations.



1 Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Individual  
2 Plaintiffs respectfully move this Court to certify the following nationwide class and to appoint  
3 all Individual Plaintiffs as class representatives of their respective subclasses, as identified  
4 below:

5 Noncitizens who have filed or will file applications for employment author-  
6 zation that were not or will not be adjudicated within the required regula-  
7 tory timeframe, comprising those who:

- 8 1. Have filed or will file applications for employment authorization  
9 under 8 C.F.R. § 274a.13, excluding initial applications based on  
10 pending asylum applications or requests to renew Deferred Action  
11 for Childhood Arrivals, but who have not received or will not re-  
12 ceive a grant or denial of their EAD applications within 90 days of  
13 filing, and who are entitled or will be entitled to interim employ-  
14 ment authorization under 8 C.F.R. § 274a.13(d), but who have not  
15 received or will not receive interim employment authorization. Ap-  
16 plications for employment authorization based on Deferred Action  
17 for Childhood Arrivals, U or T visa applications, and self-petitions  
18 under the Violence Against Women Act are excluded until USCIS  
19 has determined eligibility for the underlying immigration benefit or  
20 granted deferred action (the “90-Day Subclass”); or
- 21 2. Are asylum applicants who have filed or will file initial applica-  
22 tions for employment authorization under 8 C.F.R. § 208.7, but  
23 who, absent any applicant-caused delay, have not received or will  
24 not receive a grant or denial of their EAD applications within 30  
days of filing, and who have not received or will not receive in-  
terim employment authorization (the “30-Day Subclass”); or
3. Have filed or will file applications for employment authorization  
under 8 C.F.R. § 274a.13 on the basis of requests to renew De-  
ferred Action for Childhood Arrivals, but who have not received or  
will not receive a grant or denial of their EAD applications within  
90 days of filing, and who are entitled or will be entitled to interim  
employment authorization under 8 C.F.R. § 274a.13(d), but who  
have not received or will not receive interim employment autho-  
rization (the “DACA Renewal Subclass”).

1 **II. BACKGROUND**

2 This action concerns three subclasses of individuals who are entitled to employment  
3 authorization under the Defendants' regulations, but have been or will be temporarily prevented  
4 from working lawfully due to Defendants' failure to comply with the applicable regulations:  
5 the "90-Day Subclass," the "30-Day Subclass," and the "DACA Renewal Subclass."

6 The 90-Day Subclass consists of individuals who are entitled to interim employment  
7 authorization due to Defendants' "failure to complete the adjudication [of an EAD application]  
8 within 90 days" from the date of receipt as required by the regulation. 8 C.F.R. § 274a.13(d). In  
9 such circumstances, the Defendants are required to grant "an employment authorization  
10 document for a period not to exceed 240 days." *Id.* Defendants have candidly admitted that  
11 they no longer produce interim EADs, notwithstanding the mandatory regulatory language.  
12 Dkt. 55 at 6 n.6 ("At oral argument, Defendants conceded that this is at least for the most part  
13 true.")<sup>1</sup> As a result, class members are suffering and will continue to suffer harm in the form of  
14 lost wages and benefits, lost employment opportunities, and for some individuals, including  
15 Plaintiffs L.S., MACHIC YAK and GONZALEZ ROSARIO, the inability to secure or maintain  
16 valid driver's licenses.<sup>2</sup>

17 \_\_\_\_\_  
18 <sup>1</sup> See Exh. A at 2 (Updated Lawrence Decl. ¶ 8). See also Exh. P at 3 (Letter to León Rodríguez  
19 from Ben Johnson, AILA Executive Director) (stating that USCIS "stopped issuing interim  
20 work authorization years ago").

21 <sup>2</sup> Exh. B at 2 (Matsumoto Decl. ¶ 9); Exh. C at 2 (Statler Decl. ¶ 6); Exh. D at 2-3 (Weisz Decl. ¶  
22 8). See also Exh. E at 2-3 (Updated Scheiderer Decl. ¶¶ 7-10); Exh. F at 2 (Supplemental  
23 McKenzie Decl. ¶ 8); Dkt. 5, Exh. E at 3-6 (McKenzie Decl. ¶¶ 8, 10-15). In many states, an  
24 EAD is one of the primary documents accepted to prove identity or lawful presence in order to  
obtain a driver's license. Exh. P at 3 (Letter to León Rodríguez from Ben Johnson, AILA  
Executive Director). See e.g., Tenn. Department of Safety and Homeland Security, Proof of  
Temporary Legal Presence, <https://www.tn.gov/safety/article/dltemporary> (last visited March 10,  
2016); Tex. Department of Public Safety, Identification Requirements, <http://bit.ly/1gs8khA> (last  
visited March 10, 2016); Wis. Department of Transportation, Acceptable Documents for Proof of  
Citizenship or Legal Status in the United States, <http://1.usa.gov/1wUdkTV> (last visited March  
10, 2016).



1           The requirement to grant interim employment authorization if an EAD has not been  
 2 adjudicated within 90 days applies to all but three kinds of work permit applications. First,  
 3 initial applications for employment authorization on the basis of pending asylum applications  
 4 have a different regulatory processing requirement of 30 (rather than 90) days, 8 C.F.R. §  
 5 208.7, which the Defendants also routinely violate.<sup>3</sup> Notably, applicants for asylum-based  
 6 EADs who are renewing their asylum EADs fall under the 90-day interim EAD provision. 8  
 7 C.F.R. § 274a.13(d) (the 90-day regulation excludes “an initial application for employment  
 8 authorization under 8 C.F.R. § 274a.12(c)(8) . . . .”) (emphasis added). Thus, applicants seeking  
 9 to renew their asylum-based EADs are covered by the 90-day adjudication deadline, and the  
 10 associated interim EAD requirement. *Cf.* Order, Dkt. 55 at 19 (discussing Ms. Arcos’ asylum-  
 11 based EAD renewal application but stating that all asylum-based EAD applicants are excluded  
 12 from § 274a.13(d)).<sup>4</sup>

13  
 14 <sup>3</sup> See Exh. E at 1 (Updated Scheiderer Decl. ¶ 5) (asserting that of the 58 initial asylum EAD  
 15 applications filed between January 2014 and February 2016, none were issued within the 30-day  
 16 regulatory period, 20 were issued within 30 to 60 days, 22 were issued within 61 to 90 days, and  
 17 16 were issued over 90 days after filing). *See also* Dkt. 5, Exh. E at 2-3 (McKenzie Decl. ¶¶ 5-6)  
 18 (asserting that none of the ten initial asylum EAD applications filed between January 1, 2013 and  
 19 May 13, 2015 were adjudicated within the 30-day regulatory time period; processing times  
 20 ranged from 45 to 100 days).

21 <sup>4</sup> The second exception is for individuals seeking employment authorization with a pending  
 22 permanent residence application under the Haitian Refugee Immigration Fairness Act of 1998,  
 23 Pub. L. 105-277, §§ 901–904, 112 Stat. 2681 (1998), which has an additional waiting period of  
 24 180 days from filing the permanent residence application. 8 C.F.R. § 245.15(n)(2). Upon the  
 expiration of this time period, if the EAD has been pending for 90 days and not adjudicated, “the  
 alien shall be eligible for interim employment authorization in accordance with 8 C.F.R. §  
 274a.13(d) of this chapter.” *Id.* Note that “[DHS] receives very few applications for adjustment  
 of status based on HRIFA.” Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program  
 Improvements Affecting High-Skilled Nonimmigrant Workers, 80 Fed. Reg. 81900, 81930  
 (proposed Dec. 31, 2015). *See id.* at 81930 n.87 (only 8 applications adjudicated in FY 2015).  
 There also is an exception for EADs filed by spouses of certain H-1B specialty occupation  
 workers who apply to USCIS for the H-4 nonimmigrant classification at the same time they file  
 an EAD application. In that limited circumstance, the 90-day time period does not start until  
 USCIS determines the spouse’s eligibility for H-4 classification. *See* 8 C.F.R. § 214.2(h)(9)(iv).



1 The “30-Day Subclass” is comprised of asylum applicants making their first application  
2 for an asylum-based EAD, also called an initial asylum EAD. Asylum applicants are not  
3 entitled to work authorization “prior to 180 days after the date of filing of the application for  
4 asylum.” 8 U.S.C. § 1158(d)(2). The Defendants’ regulations implementing this provision  
5 permit asylum applicants to file their applications for initial EADs only after 150 days have  
6 elapsed since the filing of their underlying asylum applications. 8 C.F.R. § 208.7(a)(1).  
7 Because USCIS sets a biometric appointment for the applicant immediately upon receiving the  
8 applicant’s asylum application, it is able to begin running security and other background checks  
9 on the applicant months before the applicant submits his or her initial EAD application. Upon  
10 receipt of a properly-filed application for an initial asylum EAD, Defendants are required to  
11 grant or deny the application within 30 days:

12 If an asylum application is denied prior to a decision on the application for  
13 employment authorization, the application for employment authorization shall be  
14 denied. If the asylum application is not so denied, the Service *shall have 30 days*  
15 *from the date of filing the employment authorization request to grant or deny that*  
*application*, except that no employment authorization shall be issued to an asylum  
applicant prior to the expiration of the 180-day period following the filing of the  
asylum application . . . .

16 8 C.F.R. § 208.7(a)(1) (emphasis added).

17 Notwithstanding this mandatory directive, Defendants regularly fail to issue initial  
18 asylum EADs to eligible asylum seekers until long after the 30-day period has expired.  
19 Individuals who file initial applications for asylum-based EADs are also eligible for interim  
20 employment authorization, per the Defendants’ instructions to Form I-765:

21 **Interim EAD:** An EAD issued to an eligible applicant when USCIS has failed to  
22 adjudicate an application within 90 days of a properly filed EAD application, *or*  
23 *within 30 days of a properly filed initial EAD application based on an asylum*  
*application* filed after January 4, 1995. The interim EAD will be granted for a  
period not to exceed 240 days . . . .

24

1 U.S. Citizenship and Immigration Services, Instructions for I-765, Application for Employment  
2 Authorization at 1 (emphasis added), *available at* <http://www.uscis.gov/i-765>.<sup>5</sup> Yet, as the  
3 Defendants have candidly admitted, they no longer produce interim EADs. Dkt. 55 at 6 n.6.

4 The members of the “DACA Renewal Subclass” are those who have been harmed by  
5 Defendants’ delays in adjudicating requests to renew work authorization in conjunction with an  
6 extension of Deferred Action for Childhood Arrivals. These EAD applications are governed by  
7 the same regulatory deadline applicable to the 90-Day Subclass, 8 C.F.R. § 274a.13(d).

8 Accordingly, the Plaintiffs urge this Court to certify three subclasses as follows: the 90-  
9 Day Subclass with Plaintiffs GONZALEZ ROSARIO, L.S., K.T., DIAZ MARIN, SALMON,  
10 SHAH, and ARCOS-PEREZ as class representatives, the 30-Day Subclass with Plaintiffs A.A.,  
11 MACHIC YAC and W.H. as class representatives, and the DACA Renewal Subclass with  
12 Plaintiff OSORIO BALLESTEROS as the class representative.

### 13 III. CLASS CERTIFICATION

14 Upon a showing that the requirements of Rule 23(a) and (b)(2) have been met,  
15 numerous district courts within the Ninth Circuit have certified classes of noncitizens who  
16 challenge immigration policies and practices. *See, e.g., Khoury v. Asher*, 3 F. Supp. 3d 877  
17 (W.D. Wash. 2014) (certifying district-wide class of certain noncitizens subject to mandatory  
18 detention); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) (reversing district court order  
19 denying class certification for class of immigration detainees subject to prolonged detention);  
20 *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying district-wide class  
21 of certain individuals with delayed naturalization cases); *Santillan v. Ashcroft*, No. 04-2686  
22 MHP, 2004 U.S. Dist. LEXIS 20824 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of

23 \_\_\_\_\_  
24 <sup>5</sup> Regulations provide that “such instructions are incorporated into the regulations.” 8 C.F.R. §  
103.2(a)(1).

1 lawful permanent residents challenging delays in receiving documentation of their status);  
2 *A.B.T. v. United States Citizenship & Immigration Servs.*, No. 11-2108, 2013 U.S. Dist.  
3 LEXIS 160453 at \*11 (W.D. Wash. Nov. 4, 2013) (approving settlement and certifying  
4 nationwide class of persons in removal proceedings challenging procedures governing the  
5 ability of asylum applicants to work while their asylum applications are pending). Like these  
6 cases, the instant action satisfies the requirements for class certification under Rule 23(a) and  
7 (b)(2). Each of these requirements is discussed below.

8 **IV. THIS ACTION SATISFIES THE CLASS CERTIFICATION REQUIREMENTS**  
9 **OF FEDERAL RULE OF CIVIL PROCEDURE 23(a).**

10 **A. Joinder of the Proposed Class Members Is Impracticable.**

11 1. The Class Size Makes Joinder Impracticable.

12 Rule 23(a)(1) requires that the class be “so numerous that joinder is impracticable.”  
13 “[I]mpracticability does not mean ‘impossibility,’ but only the difficulty or inconvenience of  
14 joining all members of the class.” *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-  
15 14 (9th Cir. 1964) (citation omitted). No fixed number of class members is required. *Perez-*  
16 *Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *Hum v. Dericks*, 162  
17 F.R.D. 628, 634 (D. Haw. 1995). In fact, courts have found impracticability of joinder when  
18 relatively few class members are involved. *See Arkansas Educ. Ass’n v. Board of Educ.*, 446  
19 F.2d 763, 765-66 (9th Cir. 1971) (finding 17 class members sufficient); *McCluskey v. Trustees*  
20 *of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674-76 (W.D.  
21 Wash. 2010) (certifying class with 27 known members).

22 “Numerousness—the presence of many class members—provides an obvious situation  
23 in which joinder may be impracticable, but it is not the only such situation.” W. Rubenstein &  
24 A. Conte, 1 Newberg on Class Actions § 3:11 (5th ed. 2014). “Thus, Rule 23(a)(1) is an

1 impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due  
2 process, judicial economy, and the ability of claimants to institute suits.” *Id.* Where it is a close  
3 question, the Court should certify the class. *Stewart v. Associates Consumer Discount Co.*, 183  
4 F.R.D. 189, 194 (E.D. Pa. 1998) (“where the numerosity question is a close one, the trial court  
5 should find that numerosity exists, since the court has the option to decertify the class later  
6 pursuant to Rule 23(c)(1)”). Determining whether plaintiffs meet the test “requires examination  
7 of the specific facts of each case and imposes no absolute limitations.” *Troy v. Kehe Food*  
8 *Distributors*, 276 F.R.D. 642, 652 (W.D. Wash. 2011) (citing *Gen. Tel. Co. of the Northwest,*  
9 *Inc. v. EEOC*, 446 U.S. 318, 330 (1980)).

10 Moreover, in certifying classes of noncitizens, courts have taken notice of  
11 circumstances in which “INS [now DHS] is uniquely positioned to ascertain class  
12 membership.” *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (requiring  
13 Defendants to provide notice to class members). Where DHS has control of the information  
14 proving the impracticability of joinder and does not make such information available, it would  
15 be improper to allow the agency to defeat class certification on numerosity grounds. Currently,  
16 it is not possible to determine the length of time the agency will take to adjudicate EAD  
17 applications. Though the agency publishes the number of EAD applications filed each fiscal  
18 year and the processing times for various applications, it does not publish processing times that  
19 are reliable indicators of the actual time the agency will take to adjudicate these applications.  
20 However, according to the USCIS Ombudsman’s most recent Annual Report, “every year  
21 thousands of eligible individuals encounter processing delays”.<sup>6</sup>

22 Despite these limitations, Plaintiffs have provided compelling evidence that the class of  
23 individuals subject to EAD adjudication delays is numerous and that joinder is impracticable.

24 <sup>6</sup> Dkt. 24-1, Exh. A at 48 (USCIS Ombudsman 2015 Annual Report).



1 Between November 2014 and February 2016, the American Immigration Lawyers Association  
 2 (AILA) collected over 440 examples of EAD adjudication delays in cases handled by AILA  
 3 members throughout the country. *See* Exh. A at 2 (Updated Lawrence Decl. ¶ 9). Various non-  
 4 profit organizations and immigration lawyers also have reported a significant number of EAD  
 5 adjudication delays over the past few years.<sup>7</sup> USCIS did not provide notice of adjudication  
 6 delays or issue interim EADs in any of these cases.<sup>8</sup> In light of the declarants' statements  
 7 regarding the pervasiveness of EAD delays, this Court can reasonably assume that the class is  
 8 numerous. *See Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003) ("the Court does not  
 9 need to know the exact size of the putative class, 'so long as general knowledge and common  
 10 sense indicate that it is large'") (citing *Perez-Funez*, 611 F. Supp. at 995), *aff'd*, 346 F.3d 873,  
 11 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005); Newberg on Class  
 12 Actions § 3:13 ("it is well settled that a plaintiff need not allege the exact number or specific  
 13 identity of proposed class members").

14 Joinder is also inherently impracticable because of the unnamed, unknown future class  
 15 members who will be subjected to Defendants' unlawful refusal to comply with mandatory

16 <sup>7</sup> *See, e.g.*, Exh. E at 1-2 (Updated Scheiderer Decl. ¶¶ 5-6); Exh. G at 2-3 (Updated Oskouian  
 17 Decl. ¶¶ 4-5) (asserting that, of 101 applications filed by the Northwest Immigrant Rights  
 18 Project between November 2014 and early 2015, 21 were adjudicated after the regulatory  
 19 deadline, including 7 initial asylum EAD applications and 14 applications subject to the 90-  
 20 day deadline); Exh. H at 1 (Updated McCarthy Decl. ¶¶ 3-4) (asserting that, of approximately  
 21 400 EAD applications filed by the National Immigrant Justice Center (NIJC) during calendar  
 22 year 2015, approximately 53 clients did not receive an EAD within 90 days of filing or within  
 23 the 30-day period for initial asylum-based EAD applications); Exh. I at 1 (Updated Cortes  
 24 Decl. ¶¶ 3-4) (asserting that, of approximately 70 EAD applications filed by the Migrant and  
 Immigrant Community Action Project (MICA) within the past year, approximately 20 clients  
 did not receive their EADs within the regulatory time period); Exh. J at 1 (Updated Collopy  
 Decl. ¶¶ 3-4) (asserting that she and her two partners file "approximately 80-90 EAD  
 applications each year" and, since the spring of 2014, have "seen an increase in EADs not  
 being issued to our clients within the required time frame"); Dkt. 5, Exh. B at 1 (Parson Decl.  
 ¶¶ 4-5); Dkt. 5, Exh. C at 1 (Cortez decl. ¶ 3); Dkt. 5, Exh. D at 1 (Segal Decl. ¶ 4).

<sup>8</sup> *See, e.g.*, Exh. G at 3 (Updated Oskouian Decl. ¶ 5); Exh. H at 1 (Updated McCarthy Decl. ¶ 4); Exh. I at 1 (Updated Cortes Decl. ¶ 4); Exh. J at 1 (Updated Collopy Decl. ¶ 4).



1 regulations governing the timetable for adjudication of employment authorization applications.  
 2 *Ali*, 213 F.R.D. at 408-09 (“where the class includes unnamed, unknown future members,  
 3 joinder of such unknown individuals is impracticable and the numerosity requirement is  
 4 therefore met,’ regardless of class size.”) (citations omitted); *see also Hawker v. Consovoy*, 198  
 5 F.R.D. 619, 625 (D.N.J. 2001) (“The joinder of potential future class members who share a  
 6 common characteristic, but whose identity cannot be determined yet is considered  
 7 impracticable.”); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D.Cal. 1984) (“Joinder in the  
 8 class of persons who may be injured in the future has been held impracticable, without regard  
 9 to the number of persons already injured”). Future unnamed, unknown class members will be  
 10 unable to obtain EADs in a timely manner and will suffer a loss of income and possibly their  
 11 jobs, and employers will be forced to forgo hiring or lay off qualified workers.

12 2. Other Relevant Factors Also Indicate That Joinder Would Be Impracticable.

13 In addition to class size and future class members, factors that inform the  
 14 impracticability of joinder include: “[1] the geographical diversity of class members, [2] the  
 15 ability of individual claimants to institute separate suits, and [3] whether injunctive or  
 16 declaratory relief is sought.” *McCluskey v. Tr. of Red Dot Corp. Employee Stock Ownership*  
 17 *Plan and Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010) (quoting *Jordan v. Los Angeles*  
 18 *County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)).  
 19 Application of these factors also establishes the impracticability of joinder in the present case.

20 The attached declarations from lawyers and nonprofit organizations from across the  
 21 United States leave no doubt about the geographical diversity of the proposed class members.  
 22 Evidence from the nonprofit organizations establishes that USCIS regularly takes longer than  
 23 the regulatory time period to adjudicate EAD applications in numerous states across the  
 24 country. *See* Exh. E at 1-2 (Updated Scheiderer Decl. ¶¶ 1-2, 5-6) (Michigan); Exh. F at 1-2



1 (Supplemental McKenzie Decl. ¶¶ 1, 4-8) (Minnesota); Exh. G at 1-3 (Updated Oskouian Decl.  
2 ¶¶ 1, 5-6) (Washington); Exh. H at 1 (Updated McCarthy Decl. ¶¶ 2-4) (Wisconsin, Indiana,  
3 and Illinois); Exh. I at 1 (Updated Cortes Decl. ¶¶ 2-4) (Missouri); Exh. P at 3 (Letter to León  
4 Rodríguez from Ben Johnson, AILA Executive Director) (“Applications for employment  
5 authorization are particularly problematic, and the issue of lengthy delays has risen to the level  
6 of systemic on a number of occasions over the past few years.”). *See also* Dkt 5, Exhs. B  
7 (Texas), C (California), D (New York) (immigration practitioners discussing EAD adjudication  
8 delays). The far-reaching nature of this problem makes joinder impracticable and militates in  
9 favor of class certification.

10       Moreover, the proposed class members would have great difficulty pursuing their  
11 claims individually due to a variety of factors, including lack of representation, lack of  
12 awareness that a cause of action exists, and/or fear of government retaliation. Numerous  
13 courts have found that joinder would be impracticable under comparable circumstances. *See,*  
14 *e.g., United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) (“Only a  
15 representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for  
16 individuals . . . who by reason of ignorance, poverty, illness or lack of counsel may not have  
17 been in a position to seek one on their own behalf.”); *Sherman v. Griepentrog*, 775 F. Supp.  
18 1383, 1389 (D. Nev. 1991) (holding that “poor, and elderly or disabled” plaintiffs dispersed  
19 over a wide geographic area “could not without great hardship bring multiple lawsuits”). In  
20 this case, the likelihood that any significant number of eligible individual class members  
21 would sue USCIS for failure to timely adjudicate an EAD application is minimal. During the  
22 twenty-eight years since 8 C.F.R. § 274a.13(d) was promulgated, plaintiffs are aware of only a  
23 handful of cases that have challenged Defendants’ failure to timely adjudicate EAD claims or  
24



1 issue interim employment authorization.<sup>9</sup> In contrast to such piecemeal efforts, a unified  
 2 proceeding would permit resolution of the disputed issues in a systemic manner and result in a  
 3 uniform practice, should Plaintiffs prevail.

4 Equity favors class certification where class members lack the financial means to afford  
 5 legal assistance. *Lynch v. Rank*, 604 F. Supp. 30, 38-39 (N.D. Cal. 1984) (certifying class of  
 6 “poor and disabled” plaintiffs represented by public interest law groups), *aff’d* 747 F.2d 528  
 7 (9th Cir. 1984). Here, class members’ limited means stems directly from their lack of  
 8 employment authorization, which limits their ability to support themselves and their families.<sup>10</sup>  
 9 This predicament makes it virtually impossible for class members to individually retain counsel  
 10 to challenge the Defendants’ illegal actions.

11 Judicial economy also favors certification in this case. The requirements of the  
 12 Defendants’ regulations are clear, as is Defendants’ pattern and practice of violating the  
 13 regulations. Requiring applicants for employment authorization to file separate lawsuits every  
 14 time the agency fails to timely adjudicate EAD applications would be a waste of judicial  
 15 resources.

16 \_\_\_\_\_  
 17 <sup>9</sup> For example, in *Ramos v. Thornburgh*, 732 F. Supp. 696 (E.D. Tex. 1989), five plaintiffs  
 18 alleged that “their requests for temporary employment authorization ha[d] been pending for  
 19 more than sixty days without adjudication, and that they ha[d] not received interim  
 20 employment authorization.” 732 F. Supp. at 698. *See also Najera-Borja v. McElroy*, No. 89-  
 21 2320, 1995 WL 151775 \*1 (E.D.N.Y. Mar. 29, 1995) (court previously certified class of  
 22 asylum applicants, including those whose employment authorization applications were not  
 adjudicated within 90 days due to failure to appear at an interview for which they did not have  
 notice, and ordered agency to provide interim employment authorization); *Doe v. Meese*, 690  
 F. Supp. 1572 (S.D. Tex. 1988) (granting preliminary injunction to named plaintiffs regarding  
 agency’s failure to issue interim employment authorization); *Elmalky v. Upchurch*, No. 06-  
 2359, 2007 U.S. Dist. LEXIS 22353 (N.D. Tex. Mar. 28, 2007) (denying agency’s motion to  
 dismiss delayed EAD adjudication claim).

23 <sup>10</sup> *See, e.g.*, Exh. C at 2 (Statler Decl. ¶ 6); Exh. K at 2 (Walls Decl. ¶ 6); Exh. G at 5 (Updated  
 Oskouian Decl. ¶ 10); Exh. H at 1-2 (Updated McCarthy Decl. ¶¶ 5-6); Dkt 5, Exh. E at 3-4  
 (McKenzie Decl. ¶ 8).

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1 In addition, where, as here, injunctive or declaratory relief is sought, the requirements  
2 of Rule 23 are more flexible. *See Goodnight v. Shalala*, 837 F. Supp. 1564, 1582 (D. Utah  
3 1993). In such cases, smaller classes are less objectionable and the plaintiffs’ burden to identify  
4 class members is substantially reduced. *See Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir.  
5 1984) (citing *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977)  
6 and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975)); *Doe v. Charleston Area Medical*  
7 *Ctr.*, 529 F.2d 638, 645 (4th Cir. 1975) (“Where ‘the only relief sought for the class is  
8 injunctive and declaratory in nature . . . ,’ even ‘speculative and conclusory representations’ as  
9 to the size of the class suffice as to the requirement of many.”) (citation omitted). Plaintiffs  
10 seek only declaratory and injunctive relief. Because Plaintiffs satisfy the stricter numerosity  
11 requirement of Rule 23(a)(1), *a fortiori*, they meet the requirements of the rule when liberally  
12 construed.

13 Moreover, where the class is inherently transitory and “includes unnamed, unknown  
14 future members,” joinder also is impracticable. *Ali v. Ashcroft*, 213 F.R.D. 390, 408-09 (W.D.  
15 Wash. 2003), *aff’d*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795  
16 (9th Cir. 2005) (citations omitted). *See also Pederson v. Louisiana State Univ.*, 213 F.3d 858,  
17 868 n.11 (5th Cir. 2000) (“the fact that the class includes unknown, unnamed future members  
18 also weighs in favor of certification”); *Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala.  
19 2012) (“[T]he fluid nature of a plaintiff class—as in the prison-litigation context—counsels in  
20 favor of certification of all present and future members.”).

21 Plaintiffs’ individual EAD delay claims likely will be resolved during the pendency of  
22 this matter, when Defendants eventually adjudicate their underlying employment authorization  
23 applications, though weeks or months after the regulations require them to have done so. In

24



1 addition, every day, new members will be added to the proposed class because Defendants are  
 2 not adjudicating their EAD applications in accordance with the regulatory timetable, and  
 3 Defendants refuse to issue interim employment authorization.<sup>11</sup> Due to the fluid nature of the  
 4 class and the numerous unnamed future class members, joinder is impracticable.

5 **B. The Class Presents Common Questions of Law and Fact.**

6 Rule 23(a)(2) requires that there be questions of law or fact common to the class. To  
 7 satisfy the commonality requirement, “[a]ll questions of fact and law need not be common.”  
 8 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Hanlon v. Chrysler*  
 9 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the contrary, one shared legal issue can be  
 10 sufficient. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (“What makes the  
 11 plaintiffs’ claims suitable for a class action is the common allegation that the INS’s procedures  
 12 provide insufficient notice.”); *Rodriguez*, 591 F.3d at 1122 (“[T]he commonality requirement []  
 13 asks us to look only for some shared legal issue or a common core of facts.”).

14 “Commonality requires the plaintiff to demonstrate that the class members ‘have  
 15 suffered the same injury.’” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)  
 16 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). In  
 17 determining that a common question of law exists, the putative class members’ claims “must  
 18 depend upon a common contention” that is “of such a nature that it is capable of class-wide  
 19 resolution—which means that determination of its truth or falsity will resolve an issue that is

20 \_\_\_\_\_  
 21 <sup>11</sup> *See* Exh. G at 3 (Updated Oskousian Decl. ¶ 6 (“Those subject to delayed EAD  
 22 adjudications are a frequently changing group. Just as some clients with delayed EADs  
 23 receive a decision, other clients’ pending applications pass the regulatory deadline.”); Exh. H  
 24 at 4 (Updated McCarthy Decl. ¶ 14 (“Delays in the production of EADs, without the  
 opportunity to obtain interim employment authorization, have devastating effects on the lives  
 of NIJC clients and their families.”); Exh. A at 2 (Updated Lawrence Decl. ¶ 7) (noting that  
 “spikes in reports of EAD delays eventually subside,” but that AILA’s “experience has been  
 that an increase in reports of EAD adjudication delays ultimately recurs”).



1 central to the validity of each one of the claims in one stroke.” *Id.* Thus, “[w]hat matters to  
2 class certification is not the raising of common ‘questions’ . . . but, rather the capacity of a class  
3 wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Id.*  
4 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L.  
5 Rev. 97, 132 (2009)).

6 All the Individual Plaintiffs and proposed class members have been or will be forced to  
7 suffer the consequences of USCIS’s failure to timely adjudicate their EAD applications and the  
8 agency’s failure to grant interim employment authorization as required by agency regulations.  
9 Their cases raise a common question of fact, namely, whether USCIS has a policy and practice  
10 of failing to issue interim employment authorization to individuals who are entitled to it based  
11 on the agency’s failure to comply with the regulatory timetable for EAD adjudications. They  
12 also raise a common question of law — namely, whether the Defendants’ policy and practice of  
13 failing to issue interim employment authorization to those who are entitled to it violates the  
14 relevant regulations. Should Plaintiffs prevail, all who fall within the class and subclasses will  
15 benefit. Thus, a common answer regarding the legality of each challenged policy and practice  
16 “will drive the resolution of the litigation.” *Ellis*, 657 F.3d at 981 (citing *Dukes*, 131 S. Ct. at  
17 2551); *see also Unthaksinkun v. Porter*, 2011 U.S. Dist. LEXIS 111099, at \*38 (W.D. Wash.  
18 Sept. 28, 2011) (finding that, because all class members alleged the same agency conduct  
19 violated their constitutional rights, the court’s ruling as to the legality of the conduct would  
20 apply to all).

21 Although factual variations in individual cases may exist, these are insufficient to defeat  
22 commonality. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (“It is unlikely that differences  
23 in the factual background of each claim will affect the outcome of the legal issue.”); *Walters*,

24



1 145 F.3d at 1046 (“Differences among the class members with respect to the merits of their  
2 actual document fraud cases, however, are simply insufficient to defeat the propriety of class  
3 certification”). This case turns on the existence of a policy and practice, which applies equally  
4 to all class members regardless of any factual differences. Courts have affirmed that such  
5 factual questions are well-suited to resolution on a classwide basis. *See, e.g., Stockwell v. City*  
6 *& County of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014) (reversing denial of class  
7 certification motion because movants had “identified a single, well-enunciated, uniform  
8 policy” that was allegedly responsible for the harms suffered by the class). Moreover, “the  
9 court must decide only once whether the application” of Defendants’ policies and practices  
10 “does or does not violate” the law. *Troy*, 276 F.R.D. at 654; *see also LaDuke v. Nelson*, 762  
11 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure  
12 “[p]lainly” created common questions of law and fact). As such, resolution on a classwide basis  
13 also facilitates practical and efficient case management, which is one of the key purposes of the  
14 commonality requirement. *See Rodriguez*, 591 F.3d at 1122.

15 **C. The Claims of the Individual Plaintiffs are Typical of the Claims of the**  
16 **Proposed Class Members.**

17 Rule 23(a)(3) specifies that the claims of the representatives must be “typical of the  
18 claims . . . of the class.” Meeting this requirement usually follows from the presence of  
19 common questions of law. *Falcon*, 457 U.S. at 157 n.13. To establish typicality, “a class  
20 representative must be part of the class and ‘possess the same interest and suffer the same  
21 injury’ as the class members.” *Id.* at 156 (citation omitted). As with commonality, factual  
22 differences among class members do not defeat typicality provided there are legal questions  
23 common to all class members. *LaDuke*, 762 F.2d at 1332 (“The minor differences in the  
24 manner in which the representative’s Fourth Amendment rights were violated does not render





1 their claims atypical of those of the class.”); *Smith v. University of Wash. Law Sch.*, 2 F. Supp.  
 2 2d 1324, 1342 (W.D. Wash. 1998) (“When it is alleged that the same unlawful conduct was  
 3 directed at or affected both the named plaintiff and the class sought to be represented, the  
 4 typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie  
 5 individual claims.”) (citation omitted).

6 The claims of the Individual Plaintiffs, all of whom filed EAD applications that have  
 7 remained pending beyond the strict regulatory deadlines for adjudication, are typical of the  
 8 claims of the proposed class. Each Individual Plaintiff has suffered concrete harms as a result  
 9 of the Defendants’ actions.<sup>12</sup> Thus Individual Plaintiffs, like all members of the proposed class,  
 10 seek declaratory and injunctive relief from this Court directing the Defendants to adjudicate  
 11 EAD applications in a timely manner and, where the regulatory time period has elapsed, issue  
 12 interim employment authorization.

13 Because the Individual Plaintiffs and proposed class members are united in their  
 14 interests and injury and their cases raise common factual and legal claims, the element of  
 15 typicality is met.

16 **D. The Individual Plaintiffs Will Adequately Protect the Interests of the**  
 17 **Proposed Class, and Counsel are Qualified to Litigate this Action.**

18 Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect  
 19 the interests of the class.” “Whether the class representatives satisfy the adequacy requirement  
 20 depends on ‘the qualifications of counsel for the representatives, an absence of antagonism, a

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22 <sup>12</sup> See Exh. L at 2-3 (Drake Decl. ¶¶ 8-9 ); Exh. B at 2-3 (Matsumoto Decl. ¶ 9); Exh. Q at 2  
 23 (McGrath Decl. ¶ 8); Exh. M at 1-2 (Pauw Decl. ¶ 6); Exh. K at 2 (Walls Decl. ¶ 6); Exh. C at  
 24 2 (Statler Decl. ¶ 6); Exh. N at 1-2 (Shah Decl. ¶¶ 5-6); Exh. D at 2-3 (Weisz Decl. ¶ 8). See  
 also Dkt. 5, Exh. K at 1-2 (Arcos-Perez Decl. ¶¶ 6-7); Dkt. 5, Exh. L at 3-4 (Hoffmann Decl.  
 ¶¶ 11, 15-16); Dkt. 5, Exh. M at 3 (Brown Decl. ¶ 8).



1 sharing of interests between representatives and absentees, and the unlikelihood that the suit is  
2 collusive.” *Walters*, 145 F.3d at 1046 (citation omitted).

3 1. The Individual Plaintiffs Will Protect the Interests of the Class.

4 The Individual Plaintiffs will fairly and adequately protect the interests of the proposed  
5 class because their interests are consistent with those of proposed class members and they seek  
6 relief on behalf of the class as a whole. Their mutual goal is to declare Defendants’ challenged  
7 policies and practices unlawful and to enjoin further violations of the regulations governing the  
8 timetable for adjudication of EAD applications and the granting of interim employment  
9 authorization.

10 All the Individual Plaintiffs have filed EAD applications that have remained pending  
11 longer than the regulations permit. In the case of the 30-Day Subclass, the EAD applications  
12 have remained pending longer than 30 days without being granted or denied by Defendants, as  
13 required by the governing regulation. 8 C.F.R. § 208.7(a)(1). Despite this regulatory violation,  
14 Individual Plaintiffs have not received interim employment authorization. As to the 90-Day and  
15 DACA Renewal Subclasses, the EAD applications have remained pending longer than 90 days,  
16 and the Defendants have failed to comply with the mandate that they provide interim  
17 employment authorization with a validity period not to exceed 240 days. 8 C.F.R. § 274a.13(d).  
18 The Individual Plaintiffs share a common interest with all class members in the timely  
19 adjudication of their pending EAD applications or receipt of interim employment authorization.

20 Some Individual Plaintiffs’ EAD applications will have been adjudicated by the time  
21 this motion is decided. This does not impact their ability to fairly and adequately represent the  
22 class. *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 1000 (C.D. Cal. 1984) (finding  
23 that an immigration detainee representative who won immigration relief and thus left the class  
24 would be an adequate class representative). The short-term nature of the class members’ injury



1 makes their claims “inherently transitory” and protected under the “relation back doctrine.”  
2 Under this doctrine, the certification of the class will “relate back” to the original complaint  
3 despite the fact that a named plaintiff’s individual claim has become moot. *See County of*  
4 *Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (the “relation back doctrine” is appropriate  
5 where “claims are so inherently transitory that the trial court will not have even enough time to  
6 rule on a motion for class certification before the proposed representative’s individual interest  
7 expires”); *Pitts v. Terrible Herbst*, 653 F.3d 1081, 1089 (9th Cir. 2011) (“[T]he termination of a  
8 class representative’s claim does not moot the class claims.”).

9 The Supreme Court has repeatedly held that class relief is appropriate for transitory  
10 claims. For example, in *Gerstein v. Pugh*, the Court considered the viability of a class action  
11 on behalf of pretrial detainees challenging the constitutionality of their detention. By the time  
12 the case reached the Supreme Court, each of the class representatives had been convicted, and  
13 thus were no longer members of the class they purported to represent. This was no obstacle to  
14 class relief in the case because

15 Pretrial detention is by nature temporary, and it is most unlikely that any given  
16 individual could have his constitutional claim decided on appeal before he is  
17 either released or convicted. The individual could nonetheless suffer repeated  
18 deprivations, and it is certain that other persons similarly situated will be detained  
19 under the allegedly unconstitutional procedures. The claim, in short, is one that is  
20 distinctly “capable of repetition, yet evading review.”

21 *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975).

22 Under the “capable of repetition but evading review” doctrine, the named plaintiffs may  
23 proceed even though their interest in the suit has expired, as long as the duration of the  
24 challenged conduct is too short to be resolved through litigation and the case challenges an  
ongoing agency policy or practice. *See, e.g., Los Angeles Unified School District v. Garcia*, 669  
F.3d 956, 958 n.1 (9th Cir. 2012) (challenge to school district’s ongoing failure to provide



1 special education services to children held in county jail was not moot even though the named  
 2 plaintiff had aged out and been transferred to state prison); *United States v. Howard*, 480 F.3d  
 3 1005, 1009-1010 (9th Cir. 2007) (case was not moot where policy still required all pretrial  
 4 detainees to be held in leg shackles at their first court appearance, even though it was purely  
 5 speculative whether plaintiffs would ever be subjected to it again); *Oregon Advocacy Ctr. v.*  
 6 *Mink*, 322 F.3d 1101, 1118 (9th Cir. 2003) (plaintiffs' claims not moot when hospital policy  
 7 resulted in continually recurring delays in the transfer of mentally incapacitated criminal  
 8 defendants to the hospital). Here, the Individual Plaintiffs' EAD applications may be  
 9 adjudicated before the Court rules on the class certification motion, but the problem—which  
 10 reflects a longstanding agency policy—will inevitably recur. Defendants' policy and practice  
 11 violates the regulations dictating that EAD applications must be adjudicated within a specific  
 12 time period. “[Y]et, because of the passage of time, no single challenger will remain subject to  
 13 its restrictions for the period necessary to see such a lawsuit to its conclusion.” *Sosna v. Iowa*,  
 14 419 U.S. 393, 558 (1975). As a result, Defendants' unlawful conduct in this case will never be  
 15 redressed absent class-wide relief.

16           2.       Class Counsel Are Qualified To Represent the Class.

17           The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified  
 18 when they can establish their experience in previous class actions and cases involving the same  
 19 area of law. *See, e.g., Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528  
 20 (9th Cir. 1984), *amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985); *Marcus v. Heckler*, 620 F.  
 21 Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md.  
 22 1979), *aff'd sub nom. Adams v. Harris*, 643 F.2d 995 (4th Cir. 1981).

23           Plaintiffs are represented by counsel from the American Immigration Council,  
 24 Northwest Immigrant Rights Project, and four private law firms that do extensive immigration



1 litigation — Gibbs Houston Pauw, Scott D. Pollock & Associates, P.C., Van Der Hout,  
 2 Brigagliano & Nightingale, LLP, and Sunbird Law, PLLC. Counsel are experienced in  
 3 protecting the interests of noncitizens and, collectively, have extensive experience in handling  
 4 complex immigration litigation and class action claims.<sup>13</sup> Counsel have served as counsel of  
 5 record in numerous immigration-related cases in which class certification and class relief were  
 6 granted, including several in this district. In sum, Plaintiffs’ counsel will vigorously represent  
 7 both the named and absent class members.

8 **V. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2) OF**  
 9 **THE FEDERAL RULES OF CIVIL PROCEDURE**

10 In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet  
 11 at least one of the requirements of Rule 23(b) for a class action to be certified. This action  
 12 meets the requirements of Rule 23(b)(2), namely “the party opposing the class has acted or  
 13 refused to act on grounds generally applicable to the class, thereby making appropriate final  
 14 injunctive relief or corresponding declaratory relief with respect to the class as a whole.”  
 15 Individual Plaintiffs challenge—and seek declaratory and injunctive relief from—systemic  
 16 policies and practices that consistently prevent the timely adjudication of EAD applications  
 17 that they and other proposed class members have submitted. Accordingly, classwide relief is  
 18 appropriate under Rule 23(b)(2). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195  
 19 (9th Cir. 2001) (finding certification under Rule 23(b)(2) appropriate “only where the primary  
 20 relief sought is declaratory or injunctive”), *amended by* 273 F.3d 1180 (9th Cir. 2001).

21 **VI. CONCLUSION**

22 Plaintiffs’ Amended Complaint alleges that Defendants continue to violate mandatory  
 23 regulatory language intended to protect noncitizens’ right to seek lawful employment while

24 <sup>13</sup> See Exh. O (Theriot-Orr Updated Decl.). See also Dkt. 5, Exh. N, O, P, Q, and R (Declarations of Counsel). Defendants have not challenged the qualifications of class counsel in this matter.



1 their immigration cases are pending. The Court should certify three proposed subclasses as  
2 follows: the 90-Day Subclass with Plaintiffs GONZALEZ ROSARIO, L.S., K.T., DIAZ  
3 MARIN, SALMON, SHAH, and ARCOS-PEREZ as class representatives; the 30-Day  
4 Subclass with Plaintiffs A.A., MACHIC YAC and W.H. as class representatives; and the  
5 DACA Renewal Subclass with Plaintiff OSORIO BALLESTEROS as the class representative.

6 This will enable the Individual Plaintiffs to seek redress for themselves and all  
7 similarly-situated individuals who are experiencing ongoing harm as a result of the  
8 Defendants' actions.

9 Respectfully submitted this 11<sup>th</sup> day of March, 2016.

10 /s/ Devin T. Theriot-Orr  
11 Devin Theriot-Orr, WSBA No. 33995  
12 Sunbird Law, PLLC  
13 1001 4<sup>th</sup> Avenue, Suite 3200  
Seattle, WA 98154  
(206) 962-5052

14 /s/ Christopher Strawn  
15 Christopher Strawn, WSBA No. 32243  
16 Northwest Immigrant Rights Project  
615 Second Avenue, Suite 400  
Seattle, WA 98104  
(206) 957-8611

17 /s/ Melissa Crow  
18 Melissa Crow (*pro hac vice*)  
19 Leslie K. Dellon (*pro hac vice*)  
20 American Immigration Council  
1331 G Street, NW, Suite 200  
Washington, DC 20005  
(202) 507-7523

21 /s/ Robert H. Gibbs  
22 Robert H. Gibbs, WSBA No. 5932  
23 Robert Pauw, WSBA No. 13613  
Gibbs Houston Pauw

24



1 1000 Second Avenue, Suite 1600  
Seattle, WA 98104-1003  
2 (206) 682-1080

3 /s/ Scott D. Pollock  
Scott D. Pollock (*pro hac vice*)  
4 Christina J. Murdoch (*pro hac vice*)  
Kathryn R. Weber (*pro hac vice*)  
5 Scott D. Pollock & Associates, P.C.  
105 W. Madison, Suite 2200  
6 Chicago, IL 60602  
(312) 444-1940

7 /s/ Marc Van Der Hout  
8 Marc Van Der Hout (*pro hac vice*)  
Van Der Hout, Brigagliano & Nightingale, LLP  
9 180 Sutter Street, Suite 500  
San Francisco, CA 94104  
10 (415) 981-3000

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