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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NORTHWEST IMMIGRANT  
RIGHTS PROJECT, et al.,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP  
AND IMMIGRATION SERVICES, et  
al.,

Defendants.

CASE NO. C15-0813JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on two motions: (1) a motion to dismiss (MTD (Dkt. # 69)) by Defendants United States Citizenship and Immigration Services (“USCIS”); the Department of Homeland Security (“DHS”), which oversees USCIS; Leon Rodriguez, the Director of USCIS, in his official capacity; and Jeh Johnson, the Secretary of DHS, in his official capacity; and (2) a motion for class certification by



1 **A. Regulatory Structure**

2 For an alien to be eligible to work in the United States, the alien must file Form  
3 I-765 with DHS and obtain an EAD. (Am. Compl. ¶¶ 3-4; Instructions for I-765 (“I-765  
4 Instructions”), U.S. Customs and Immigration Services (Nov. 4, 2015), *available at*  
5 <https://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf>.<sup>2</sup> USCIS, an agency  
6 within DHS, is responsible for adjudicating Form I-765. (Am. Compl. ¶ 4.) Federal  
7 regulations provide a timeline for USCIS to adjudicate EADs; that timeline is different  
8 for individuals seeking an initial EAD based on an underlying asylum application. *See*  
9 C.F.R. §§ 274a.13(d) (excluding from the 90-day deadline “initial application[s] for  
10 employment authorization under 8 CFR 274a.12(c)(8)”), 274a.12(c)(8) (covering aliens  
11 who have “filed a complete application for asylum or withholding of deportation or  
12 removal pursuant to 8 CFR part 208”), 208.7(a)(1) (providing a timeline for adjudicating  
13 asylum-based EAD applications).

14 The regulations confer unfettered discretion on USCIS to approve or deny EAD  
15 applications unless they are filed by an applicant for asylum. 8 C.F.R. § 274a.13(a)(1);  
16 *see also Guevara v. Holder*, 649 F.3d 1086, 1091-92 (9th Cir. 2011) (“[T]he  
17 authorization for such employment is not mandated.”); *Kaddoura v. Gonzales*, No.  
18 C06-1402RSL, 2007 WL 1521218, at \*5 (W.D. Wash. May 21, 2007) (“While plaintiff is  
19 correct that as an ‘alien who has filed an application for adjustment of status’ he is within  
20 the class of aliens ‘eligible’ for an EAD, under the plain language 8 C.F.R. §§ 274a.12

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22 <sup>2</sup> Plaintiffs incorporate the I-765 Instructions into their amended complaint by reference.  
(*See* Am. Compl. ¶ 8.)

1 and 274a.13, his eligibility for an EAD resides within the discretion of USCIS and there  
2 is no appeal from the denial of the application.”). However, the same regulations use  
3 mandatory language when discussing the timeline for adjudicating such applications:

4 USCIS will adjudicate the application within 90 days from the date of  
5 receipt of the application. . . . Failure to complete the adjudication within  
6 90 days will result in the grant of an employment authorization document  
7 for a period not to exceed 240 days. Such authorization will be subject to  
8 any conditions noted on the employment authorization document.  
9 However, if USCIS adjudicates the application prior to the expiration date  
10 of the interim employment authorization and denies the individual’s  
11 employment authorization application, the interim employment  
12 authorization granted under this section will automatically terminate as of  
13 the date of the adjudication and denial.

14 8 C.F.R. § 274a.13(d). In sum, if USCIS has not adjudicated an EAD application within  
15 90 days of receipt, the regulation requires USCIS to issue one or more interim EADs for  
16 240 days or until USCIS adjudicates the EAD application, whichever comes first.

17 The regulations provide a different procedure for an asylum seeker applying for an  
18 initial EAD, which the court will refer to as an initial asylum EAD applicant. *See*  
19 8 C.F.R. §§ 208.7(a)(1), 274a.12(c)(8), 274a.13(d); *see also Carballo v. Meissner*, No.  
20 C00-2145, 2000 WL 1741948, at \*2 (N.D. Cal. Nov. 17, 2000) (describing the process  
21 for an asylum applicant seeking an EAD). Section 274a.13(a)(2) mandates that initial  
22 asylum EAD applications “shall be adjudicated in accordance with [Section] 208.7.” 8  
C.F.R. § 274a.13(a)(2). After filing an application for asylum, an individual typically  
must wait 150 days before filing an initial EAD application. *Id.* § 208.7(a)(1). But there  
are exceptions to this rule. For instance, if asylum is granted within 150 days, the asylee  
may apply for an EAD immediately thereafter. *Id.* Additionally, if asylum is denied at

1 any point, the applicant becomes ineligible for an EAD. *Id.* However, assuming an  
2 individual’s “asylum clock” runs for at least 150 days without delay caused by the  
3 applicant, she may apply for an EAD while her asylum application pends. *Id.*  
4 §§ 208.7(a)(1)-(2), (4). USCIS “shall have 30 days from the date of filing of the request  
5 [sic] employment authorization to grant or deny that application,” except that in no event  
6 may USCIS grant the EAD prior to 180 days after the noncitizen files her asylum  
7 application. *Id.* § 208.7(a)(1); *see also* 8 U.S.C. § 1158(d)(2). Section 208.7 is silent  
8 about whether there is any consequence if USCIS fails to meet this 30-day adjudication  
9 deadline. *See* 8 C.F.R. § 208.7(a)(1); *cf. id.* § 274a.13(d) (providing for interim EADs for  
10 other EAD applicants if USCIS has not decided their EAD applications within 90 days).

11 Plaintiffs contest the manner in which USCIS applies these adjudication deadlines.  
12 The instructions accompanying Form I-765, which USCIS provides, allow applicants  
13 who “have not received a decision within 90 days,” or “within 30 days of a properly filed  
14 initial EAD application based on an asylum application,” to “request interim work  
15 authorization.” (*See* I-765 Instructions at 11.) Plaintiffs contend this interpretation  
16 impermissibly construes the regulatory timeline to be hortatory rather than mandatory.  
17 (*See, e.g.,* Compl. ¶ 11.) Applicants who have requested to qualify for the Deferred  
18 Action for Childhood Arrivals program (“DACA”)<sup>3</sup> also experience delay because

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22 <sup>3</sup> DHS initiated DACA in 2012. The program allows DHS to “exercise prosecutorial discretion as appropriate” to defer deportation or other action against individuals who were brought to the United States as children and meet certain other criteria. DACA Frequently Asked Questions, U.S. Customs and Immigration Services (June 15, 2015), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked->

1 USCIS interprets the 90-day clock to begin only after DHS adjudicates an applicant's  
 2 DACA application. (*See* I-765 Instructions at 1, 6, 11.) Similarly, USCIS tolls the  
 3 asylum clock when an asylum applicant accepts deferred prosecution in deportation  
 4 proceedings, which postpones indefinitely the date on which that individual becomes  
 5 eligible to apply for an asylum-based EAD. *See* Memorandum from the Principal Legal  
 6 Advisor ("11/17/11 Memo"), U.S. Immigrations and Customs Enf't, Case-by-Case  
 7 Review of Incoming and Certain Pending Cases (Nov. 17, 2011) at 3 n.5, *available at*  
 8 [http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-](http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf)  
 9 [certain-pending-cases-memorandum.pdf](http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf).<sup>4</sup>

## 10 **B. Factual Allegations**

11 Based on this regulatory structure, Individual Plaintiffs seek to certify a  
 12 nationwide class consisting of three subclasses. Each Individual Plaintiff seeks to serve  
 13 as a class representative of one of the three putative subclasses. (*See* Am. Compl.

14 ¶¶ 89-91; MCC at 2.) The three subclasses are:

15 Noncitizens who have filed or will file applications for employment  
 16 authorization that were not or will not be adjudicated within the required  
 regulatory timeframe, comprising those who:

17  
 18 questions (last visited August 31, 2016). The court takes judicial notice of this background  
 19 information "as it was made publicly available by government entities" and its accuracy is "not  
 subject to reasonable dispute." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir.  
 2010) (citing Fed. R. Evid. 201).

20 <sup>4</sup> Although a subsequent memorandum superseded the 11/17/11 Memo, the 11/17/11  
 21 Memo's provisions on administrative closure for EAD purposes remain in effect. *See*  
 22 Memorandum from the Sec'y ("11/20/14 Memo"), Dep't of Homeland Sec., Policies for the  
 Apprehension, Det., and Removal of Undocumented Immigrants (Nov. 20, 2014) at 5-6,  
*available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)  
[prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); (*see also* MTD at 9 n.2.)

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1. Have filed or will file applications for employment authorization under 8 C.F.R. § 274a.13, excluding initial applications based on pending asylum applications or requests to renew Deferred 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 authorization. Applications for employment authorization based on Deferred Action for Childhood Arrivals, U or T visa applications, and self-petitions under the Violence Against Women Act are excluded until USCIS has determined eligibility for the underlying immigration benefit or granted deferred action (the “90-Day Subclass”); or

2. Are asylum applicants who have filed or will file initial applications for employment authorization under 8 C.F.R. § 208.7, but who, absent any applicant-caused delay, have not received or will not receive a grant or denial of their EAD applications within 30 days of filing, and who have not received or will not receive interim 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 Deferred 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 authorization (the “DACA Renewal Subclass”).

(Am. Compl. ¶ 88; *see also* MCC at 2.) For background, the court briefly recounts Plaintiffs’ factual allegations.<sup>5</sup>

1. Putative Representatives of the 90-Day Subclass

Mr. Gonzalez Rosario, L.S., K.T., Ms. Diaz Marin, Ms. Salmon, Mr. Shah, and Ms. Arcos seek to represent the 90-Day Subclass. (Am. Compl. ¶ 89.)

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<sup>5</sup> Rather than summarizing the factual evidence provided in conjunction with Individual Plaintiffs’ motion for class certification, the court discusses that evidence as relevant to the court’s analysis of class certification. *See infra* § III.B.

1 On March 10, 2015, USCIS granted Mr. Gonzalez Rosario deferred action based  
2 on his petition for “U Nonimmigrant status.” (*Id.* ¶ 46.) He filed an EAD application on  
3 April 27, 2015, and as of 90 days after he filed the application, USCIS had not  
4 adjudicated that application or granted Mr. Gonzalez Rosario an interim EAD. (*Id.* ¶ 47.)  
5 As of the filing of the amended complaint, he had not been granted an EAD. (*See id.*  
6 ¶ 49.)

7 Like Mr. Gonzalez Rosario, Ms. Diaz Marin filed a petition for U Nonimmigrant  
8 status and an EAD application. (*Id.* ¶ 59.) Ms. Diaz Marin filed both the petition and the  
9 application on March 18, 2014. (*Id.*) On February 24, 2015, USCIS granted Ms. Diaz  
10 Marin deferred action and indicated that she was eligible to apply for an EAD. (*Id.*) Ms.  
11 Diaz Marin then filed a second EAD application on August 2, 2015. (*Id.* ¶ 60.) As of the  
12 filing of the amended complaint, more than 90 days had passed since Ms. Diaz Marin  
13 filed her second EAD application and USCIS had not ruled on Ms. Diaz Marin’s  
14 application or granted her an interim EAD. (*Id.*)

15 Ms. Salmon also applied for an EAD after receiving deferred action. (*Id.* ¶ 64.) In  
16 Ms. Salmon’s case, USCIS granted deferred action on humanitarian grounds due to Ms.  
17 Salmon’s disabled daughter. (*Id.*) USCIS took more than 90 days to adjudicate the EAD  
18 application, and as of the filing of the amended complaint had neither adjudicated the  
19 EAD application nor issued an interim EAD. (*Id.* ¶ 65.)

20 Mr. Shah is a recent law school graduate who applied for employment  
21 authorization based on his law school’s recommendation that he receive post-completion  
22 optional practical training beginning in March 2016. (*Id.* ¶ 68 (citing 8 C.F.R.



1 § 214.2(f)(11)(i)(B)(2)).) Mr. Shah filed his EAD application on November 9, 2015, but  
2 USCIS failed to adjudicate the EAD application within 90 days and had not adjudicated  
3 the application as of the filing of the amended complaint. (*Id.* ¶¶ 68-69.)

4 L.S. and K.T. are both asylum applicants who seek to renew their EADs.  
5 (*Id.* ¶¶ 50, 53.) L.S. filed his application for EAD renewal on November 16, 2015, K.T.  
6 filed his application for EAD renewal on July 30, 2015, and as of the filing of the  
7 amended complaint, USCIS had not adjudicated either renewal application. (*Id.*) The  
8 principal difference between L.S. and K.T. is that USCIS did not schedule a biometrics  
9 appointment for L.S., whereas USCIS did schedule a biometrics appointment for K.T.,  
10 and he completed the biometrics. (*Id.* ¶¶ 19-20.)

11 Ms. Arcos is also an asylum applicant who applied to renew her EAD. (*Id.* ¶ 73.)  
12 The court has previously summarized Ms. Arcos's allegations (2/10/16 Order at 8),  
13 analyzed her claim (*id.* at 15-20), and dismissed Ms. Arcos's allegations for lack of  
14 subject matter jurisdiction (*id.* at 37-38). Ms. Arcos's current allegations largely mirror  
15 those in the original complaint, which was operative when the court dismissed her  
16 previous claims. (*Compare* Compl. (Dkt. # 1) ¶¶ 38-39 *with* Am. Compl. ¶¶ 73-75.) The  
17 only update in the amended complaint is that since filing the original complaint, Ms.  
18 Arcos filed another application to renew her EAD on October 15, 2015, and USCIS had  
19 not adjudicated that application as of the filing of the amended complaint. (Am. Compl.  
20 ¶ 74.)

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1       2. Putative Representatives of the 30-Day Subclass

2       A.A., Mr. Machic Yac, and W.H. seek to represent the 30-Day Subclass. (*Id.*  
3 ¶ 90.) All three are asylum applicants seeking initial EADs. (*Id.* ¶¶ 21, 23, 28.) Each of  
4 the applicants filed his EAD application more than 150 days after USCIS received his  
5 asylum application. (*Id.*) Although more than 30 days had passed since they applied for  
6 EADs, neither A.A. nor Mr. Machic Yac had received a ruling as of the filing of the  
7 amended complaint. (*Id.* ¶¶ 21, 23, 57, 62.) However, USCIS approved W.H.'s EAD  
8 application on June 16, 2015—after the filing of the original complaint but before the  
9 filing of the amended complaint. (*Id.* ¶¶ 28, 81.)

10       3. Putative Representative of the DACA Renewal Subclass

11       Ms. Osorio seeks to represent the DACA Renewal Subclass. (*Id.* ¶ 91.) On  
12 December 29, 2014, she applied to renew her EAD in conjunction with her application to  
13 renew her DACA status. (*Id.* ¶ 76.) USCIS failed to adjudicate her application within 90  
14 days and still had not done so when Ms. Osorio filed the initial complaint in this matter;  
15 USCIS did, however, grant Ms. Osorio an EAD on June 3, 2015. (*Id.*) USCIS interprets  
16 the regulation such that the 90-day adjudication clock did not begin until USCIS  
17 approved Ms. Osorio's DACA application, which had not yet occurred. (2/10/16 Order  
18 at 28-29.) After concluding that USCIS's interpretation is not plainly erroneous or  
19 inconsistent with the language of the applicable regulations, the court dismissed Ms.  
20 Osorio's claim for lack of subject matter jurisdiction. (*Id.* at 29, 37-38.)

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1       4. Organizational Plaintiffs

2       NWIRP’s mission is to “assist immigrants in obtaining legal status and the right to  
3 lawfully work in the United States.” (Am. Compl. ¶ 82.) According to NWIRP, many of  
4 its clients, who fall into “all three proposed subclasses,” are “subject to unlawful delay”  
5 in their efforts to “receive EADs and interim EADs.” (*Id.* ¶ 83.) NWIRP alleges that  
6 “Defendants’ untimely adjudication of EADS and failure to grant interim employment  
7 authorization” requires NWIRP to either assist clients in dealing with adjudicatory delays  
8 and serve fewer clients, or turn away clients dealing with adjudicatory delays. (*Id.* ¶ 84.)  
9 NWIRP seeks to compel Defendants to follow the adjudicatory deadline so that NWIRP  
10 may avoid this choice, which inevitably diverts resources and frustrates NWIRP’s  
11 purpose. (*Id.*)

12       The Advocates’ mission is to “provid[e] legal services to asylum seekers in  
13 Minnesota, North Dakota, and South Dakota.” (*Id.* ¶ 85.) In comparison to NWIRP, the  
14 Advocates represent a narrower swath of the putative class members—only initial asylum  
15 EAD applicants and renewal asylum EAD applicants. (*Id.*) Nonetheless, like NWIRP,  
16 the Advocates allege that Defendants’ indifference to the regulatory deadlines poses a  
17 choice to the Advocates that necessarily diverts resources and frustrates its purpose. (*Id.*)

18       **C. Procedural History**

19       Ms. Arcos, Ms. Osorio, W.H., and Organizational Plaintiffs filed this lawsuit as a  
20 putative class action on May 22, 2015. (Compl. (Dkt. # 1).) On February 10, 2016, the  
21 court concluded it lacked subject matter jurisdiction over claims by Ms. Arcos, Ms.  
22

1 Osorio, and Organizational Plaintiffs. (2/10/16 Order.) However, the court granted leave  
2 to amend the complaint to remedy the deficiencies identified in the order. (*Id.* at 37-39.)

3 On March 10, 2016, Plaintiffs filed an amended complaint. (Am. Compl.) The  
4 amended complaint includes the five original plaintiffs and adds eight Individual  
5 Plaintiffs. (*Id.*) Individual Plaintiffs seek to represent the 90-Day Subclass, the 30-Day  
6 Subclass, and the DACA Renewal Subclass. (Am. Compl. ¶ 88; *see also* MCC at 2.)  
7 The day after filing their amended complaint, Individual Plaintiffs moved for class  
8 certification. (MCC.) Several weeks later, Defendants moved to dismiss the amended  
9 complaint. (MTD.)

### 10 III. ANALYSIS

#### 11 A. Defendants' Motion to Dismiss

12 Defendants move to dismiss all claims on various grounds. First, Defendants  
13 argue that the law of the case doctrine should be applied to Ms. Arcos and Ms. Osorio's  
14 claims. (MTD at 11-12.) Even if that doctrine does not apply, Defendants argue, the  
15 court lacks subject matter jurisdiction over Ms. Arcos and Ms. Osorio's claims, and those  
16 claims should accordingly be dismissed. (*Id.* at 12-13.) Second, Defendants seek  
17 dismissal of W.H., A.A., and Mr. Machic Yac's claims on the basis that they fail to  
18 identify a discrete action that USCIS was required to take and the court therefore lacks  
19 subject matter jurisdiction under the APA. (*Id.* at 14 (citing *Norton v. S. Utah Wilderness*  
20 *All.*, 542 U.S. 55, 64 (2004)).) Third, Defendants contend that if class certification fails,  
21 Individual Plaintiffs' claims are moot and should be dismissed. (*Id.* at 14-16 & n.3.)  
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1 Finally, Defendants argue that Organizational Plaintiffs lack standing and fail to state a  
2 claim. (*Id.* at 17-20.) The court addresses each of these arguments in turn.

3 1. Legal Standards

4 a. *Under Rule 12(b)(1)*

5 Defendants argue on several different bases that the court lacks subject matter  
6 jurisdiction over Plaintiffs' claims. A motion to dismiss for lack of subject matter  
7 jurisdiction is either facial or factual. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035,  
8 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations  
9 contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.*  
10 "The district court resolves a facial attack as it would a motion to dismiss under Rule  
11 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable  
12 inferences in the plaintiff's favor, the court determines whether the allegations are  
13 sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749  
14 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.  
15 2013)). However, if the moving party "convert[s] the motion to dismiss into a factual  
16 motion by presenting affidavits or other evidence properly brought before the court, the  
17 party opposing the motion must furnish affidavits or other evidence necessary to satisfy  
18 its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High*  
19 *Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *St.*  
20 *Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). In either instance, the party  
21 asserting its claims in federal court bears the burden of establishing subject matter  
22 jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

1 “To establish Article III standing, an injury must be ‘concrete, particularized, and  
2 actual or imminent; fairly traceable to the challenged action; and redressable by a  
3 favorable ruling.’” *Clapper v. Amnesty Int’l USA*, --- U.S. ---, 133 S. Ct. 1138, 1147  
4 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).  
5 More concisely, these requirements are known as injury, causation, and redressability.  
6 See *Massachusetts v. E.P.A.*, 549 U.S. 497, 540 (2007) (Roberts, C.J., dissenting).  
7 Because Plaintiffs seek “declaratory and injunctive relief only,” “there is a further  
8 requirement that they show a very significant possibility of future harm; it is insufficient  
9 for them to demonstrate only a past injury.” *San Diego Cty. Gun Rights Comm. v. Reno*,  
10 98 F.3d 1121, 1126 (9th Cir. 1996). The party asserting its claims in federal court bears  
11 the burden of establishing standing. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561  
12 (1992).

13 Mootness is “the doctrine of standing set in a time frame: The requisite personal  
14 interest that must exist at the commencement of litigation (standing) must continue  
15 throughout its existence (mootness).” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388,  
16 397 (1980). Even if the plaintiff had standing when the complaint was filed, a case  
17 becomes moot if at any point it “does not satisfy the case-or-controversy requirement of  
18 Article III, § 2 of the Constitution.”<sup>6</sup> *Caswell v. Calderon*, 363 F.3d 832, 836 (9th Cir.  
19 2004).

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22 <sup>6</sup> The court discusses exceptions to mootness as they arise in its analysis.

1 The Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, entitles a  
2 “person suffering legal wrong because of agency action” to “judicial review thereof.” 5  
3 U.S.C. § 702. The reviewing court must “decide all relevant questions of law, interpret  
4 constitutional and statutory provisions, and determine the meaning or applicability of the  
5 terms of an agency action.” *Id.* § 706. As relevant here, the court is empowered to  
6 “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).  
7 However, such a claim “can proceed only where a plaintiff asserts that an agency failed  
8 to take a *discrete* agency action that it is *required to take.*” *Norton v. S. Utah Wilderness*  
9 *All.*, 542 U.S. 55, 64 (2004). “Absent such an assertion, a Section 706(1) claim may be  
10 dismissed for lack of jurisdiction.” *Alvarado v. Table Mountain Rancheria*, 509 F.3d  
11 1008, 1019-20 (9th Cir. 2007); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801,  
12 814 (9th Cir. 2006) (upholding the district court’s dismissal of an APA claim for lack of  
13 jurisdiction because the plaintiffs failed to demonstrate the government’s obligation to  
14 “take discrete nondiscretionary actions”). Furthermore, “when an agency is compelled  
15 by law to act within a certain time period, but the manner of its action is left to the  
16 agency’s discretion, a court can compel the agency to act, but has no power to specify  
17 what the action must be.” *Norton*, 542 U.S. at 65 (clarifying that “law” can include  
18 “agency regulations that have the force of law”).

19 The Mandamus Act operates similarly in this context, empowering district courts  
20 “to compel an officer or employee of the United States or any agency thereof to perform  
21 a duty owed to the plaintiff.” 28 U.S.C. § 1361; *see also Garcia v. Johnson*, No.  
22 14-cv-1775-YGR, 2014 WL 6657591, at \*5 (N.D. Cal. Nov. 21, 2014) (“The

1 jurisdictional dimensions of the APA and the Mandamus Act are considered to be  
2 coextensive for purposes of compelling agency action that has been unreasonably  
3 delayed.”). “Although the exact interplay between these two statutory schemes has not  
4 been thoroughly examined by the courts, the Supreme Court has construed a claim  
5 seeking mandamus under the [Mandamus Act], ‘in essence,’ as one for relief under  
6 [Section] 706 of the APA.” *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir.  
7 1997) (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4  
8 (1986)); *see also Garcia*, 2014 WL 6657591, at \*5 (“Where, as here, the relief sought is  
9 identical under the APA and the mandamus statute, proceeding under one as opposed to  
10 the other is not significant.”).

11 *b. Under 12(b)(6)*

12 When considering a motion to dismiss under Federal Rule of Civil Procedure  
13 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving  
14 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.  
15 2005). The court must accept all well-pleaded allegations of material fact as true and  
16 draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P’ship v.*  
17 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive a motion to  
18 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a  
19 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
20 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus*  
21 *VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility  
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1 when the plaintiff pleads factual content that allows the court to draw the reasonable  
2 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.

3 The court, however, need not accept as true a legal conclusion presented as a  
4 factual allegation. *Id.* at 678. Although the pleading standard announced by Federal  
5 Rule of Civil Procedure 8 does not require “detailed factual allegations,” it demands more  
6 than “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing  
7 *Twombly*, 550 U.S. at 555). A pleading that offers only “labels and conclusions or a  
8 formulaic recitation of the elements of a cause of action” will not survive a motion to  
9 dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.*

10 Motions to dismiss for lack of statutory standing are reviewed for failure to state a  
11 claim under Federal Rule of Civil Procedure 12(b)(6). *See Vaughn v. Bay Env'tl. Mgmt.*,  
12 *Inc.*, 567 F.3d 1021, 1022, 1024 (9th Cir. 2008).

## 13 2. Ms. Arcos and Ms. Osorio

14 Defendants argue that the law of the case doctrine bars Ms. Arcos’s and Ms.  
15 Osorio’s claims (*id.* at 11-12), which the court previously dismissed for lack of subject  
16 matter jurisdiction (2/10/16 Order at 14-20, 27-29). Plaintiffs respond that the law of the  
17 case doctrine is inapplicable (MTD Resp. at 3 n.4), but they concede that “the Court has  
18 already ruled on Ms. Arcos-Perez and Ms. Osorio-Ballesteros’ claims” (*id.* at 3 (citing  
19 2/10/16 Order at 20, 29)). Plaintiffs indicate that they merely intend to “preserve for  
20 appeal their arguments that Ms. Arcos-Perez and Ms. Osorio-Ballesteros have standing  
21 and that this [c]ourt has subject matter jurisdiction over their claims.” (*Id.*)  
22

1 A review of the amended complaint reveals no new allegations regarding Ms.  
2 Osorio or Ms. Arcos that alters the court’s prior analysis. (*Compare* Compl. ¶¶ 18-19,  
3 38-42 *with* Am. Compl. ¶¶ 26-27, 73-78.) Both individuals add the date on which USCIS  
4 adjudicated their EAD applications (Am. Compl. ¶¶ 73 (indicating that USCIS denied  
5 Ms. Arcos’s EAD application on June 10, 2015), 76 (indicating that USCIS approved Ms.  
6 Osorio’s EAD application on June 3, 2015)), and Ms. Arcos added that she again applied  
7 to renew her EAD on October 15, 2015, and USCIS had not adjudicated it as of the filing  
8 of the amended complaint (*id.* ¶ 74). Ms. Arcos’s additional allegations are irrelevant to  
9 the court’s conclusion that “an ineligible EAD-holder—who obtained her current EAD  
10 only through error—[lacks] a legally cognizable right to compel adjudication of her  
11 renewal application within a certain time period.” (2/10/16 Order at 20.) Furthermore,  
12 Ms. Arcos and Ms. Osorio make no new arguments in their briefing. (*See generally*  
13 MTD Resp.; *see also id.* at 3 (referring exclusively to arguments made in prior briefing in  
14 support of Plaintiffs’ eventual grounds for appeal of the court’s rulings regarding Ms.  
15 Arcos and Ms. Osorio).) Accordingly, for reasons it has previously articulated, the court  
16 dismisses Ms. Arcos’s and Ms. Osorio’s claims for lack of subject matter jurisdiction.<sup>7</sup>

17 3. W.H., A.A., and Mr. Machic Yac

18 W.H., A.A., and Mr. Machic Yac seek to represent the 30-Day Subclass. (Am.  
19 Compl. ¶ 90.) Defendants contend that the court lacks subject matter jurisdiction over all  
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21 <sup>7</sup> Based on Ms. Arcos and Ms. Osorio’s failure to remedy the jurisdictional deficiencies  
22 in their prior allegations, the court concludes amendment would be futile and declines to grant  
these plaintiffs leave to amend. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

1 three individuals' claims because pursuant to the regulations, USCIS is not "required" to  
2 grant interim EADs to initial asylum applicants when USCIS fails to complete  
3 adjudication within the 30-day period allotted. (MTD at 14 (citing *Norton*, 542 U.S. at  
4 64); *see also* MTD Reply (Dkt. # 74) at 1-2.) Accordingly, Defendants argue that USCIS  
5 is not required to perform the "discrete action" that W.H., A.A., and Mr. Machic Yac  
6 seek to compel, and those three plaintiffs lack standing. (MTD at 14; MTD Reply at  
7 1-2.)

8 The court addressed this precise issue in rejecting Defendants' first effort to  
9 dismiss W.H.'s claim:

10 W.H. ultimately seeks one of two prospective remedies—either adjudicate  
11 his EAD application within 30 days or issue an interim EAD after 30  
12 days. . . . The APA and the Mandamus Act contemplate the former  
13 remedy—compelling Defendants to act. However, because the regulations  
14 applicable to asylum applicants make no reference to interim EADs, the  
15 court reserves judgment as to whether the latter remedy is available.

16 (2/10/16 Order at 26 n.19.) As Plaintiffs argue, Defendants dispute the remedy available  
17 to W.H., A.A., and Mr. Machic Yac. (MTD Resp. at 4.) But even if one remedy that  
18 W.H., A.A., and Mr. Machic Yac seek—issuance of interim EADs—is unavailable,  
19 another remedy that they seek—compelling USCIS to adjudicate EAD applications in a  
20 timely fashion—is indeed available. (*See* 2/10/16 Order at 26 n.19); *Norton*, 542 U.S. at  
21 64 (“[W]hen an agency is compelled by law to act within a certain time period, but the  
22 manner of its action is left to the agency’s discretion, a court can compel the agency to  
act, but has no power to specify what the action must be.”). Accordingly, the court

1 denies Defendants' motion to dismiss W.H.'s, A.A.'s, and Mr. Machic Yac's claims for  
2 lack of subject matter jurisdiction.

3 4. Mootness

4 Defendants "do not dispute mootness for class certification purposes," but they  
5 contend that "[I]ndividual Plaintiffs cannot assert independent claims should class  
6 certification fail because their claims have mooted out." (MTD at 14 n.3.) Individual  
7 Plaintiffs contend that even if the court denies class certification, Individual Plaintiffs'  
8 claims fall within one of several narrow exceptions to the mootness doctrine. (MTD  
9 Resp. at 7-9.) The court need not reach either of these arguments because it denies class  
10 certification without prejudice to renewing the motion and providing a further factual  
11 record, and thus the inherently transitory exception to mootness still applies.<sup>8</sup>

12 \_\_\_\_\_  
13 <sup>8</sup> On the other hand, if the court analyzes standing based on the date Plaintiffs filed the  
14 operative complaint, W.H.'s claims are not moot; rather, W.H. lacked standing as of the date  
15 Plaintiffs filed the operative complaint. (See Am. Compl. at 39 (indicating a filing date of March  
16 10, 2016), ¶ 28 (indicating that Defendants approved W.H.'s EAD application on June 16,  
2015)); *Geraghty*, 445 U.S. at 397 (characterizing mootness as "the doctrine of standing set in a  
time frame: The requisite personal interest that must exist at the commencement of the litigation  
(standing) must continue throughout its existence (mootness)"). This conclusion would render  
any exceptions to mootness inapplicable to W.H.

17 In analogous situations, courts have taken different approaches to determining which  
18 complaint governs subject matter jurisdiction. Compare *In re Atlas Van Lines, Inc.*, 209 F.3d  
19 1064, 1067 (8th Cir. 2000) ("[I]n cases where a plaintiff has filed an amended complaint, federal  
20 courts must resolve questions of subject matter jurisdiction by examining the face of the  
21 amended complaint."), with *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202  
22 n.3 (Fed. Cir. 2005) ("The initial standing of the original plaintiff is assessed at the time of the  
original complaint, even if the complaint is later amended."), and *Lynch v. Leis*, 382 F.3d 642,  
647 (6th Cir. 2004) (quoting *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991)) ("A  
careful reading of *County of Riverside* demonstrates that the second amended complaint was  
important not because it was the operative pleading, but because it was that complaint which  
named 'three additional plaintiffs' who were 'still in custody' at the time the complaint was filed,  
and who were the plaintiffs found to have standing by the Court. . . . Therefore, the operative  
complaint is the one adding [the plaintiff] to the action, and the operative date is May 25,

1 In the class action context, inherently transitory claims “relate to [the plaintiff’s]  
2 standing at the outset of the case in order ‘to preserve the merits of the case for judicial  
3 resolution.’” *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997); *see also Hernandez v.*  
4 *Cty. of Monterey*, 70 F. Supp. 3d 963, 971-72 (N.D. Cal. 2014) (“If the inherently  
5 transitory exception applies, the mootness determination merges with the standing  
6 analysis as of the filing of the complaint. . . . If class claims fall within the [inherently]  
7 transitory exception, a plaintiff need not file a motion for class certification before the  
8 mooting of the plaintiff’s claim for injunctive relief, unlike cases in which the  
9 [inherently] transitory exception does not apply.”). Typically, the inherently transitory  
10 doctrine ceases to apply when the court denies class certification, at which point the court  
11 applies traditional mootness analysis. However, because the court denies Plaintiffs’  
12 motion for class certification without prejudice to refining the subclass definitions and  
13 providing further evidence of commonality, *see infra* § III.B., the court rejects the  
14 contention that the remaining Individual Plaintiffs’ claims are moot at this juncture, *see*  
15 *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1035 (5th Cir. 1981) (allowing  
16 plaintiffs’ renewed motion for class certification to relate back to the initial motion for  
17 class certification because the district court’s denial of the initial motion for class  
18 certification was without prejudice and invited plaintiffs to present further evidence of  
19 numerosity). Until the court issues a final determination on the merits of class

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21 \_\_\_\_\_  
22 2000 . . . .”). The court is persuaded that W.H.’s standing is based on the filing of his initial  
complaint, and the inherently transitory exception to mootness therefore saves his claim so long  
as he remains a potential or certified class representative.

1 certification, the remaining Individual Plaintiffs constitute putative class representatives  
2 whose claims are inherently transitory and relate back to the filing of the amended  
3 complaint. *Id.*; (*see also* 2/10/16 Order at 30-31 & n.23.) Accordingly, their claims are  
4 not subject to dismissal on mootness grounds.

#### 5 5. Organizational Plaintiffs

6 Defendants contend that Organizational Plaintiffs again fail to plead sufficient  
7 facts to confer standing. (MTD at 17-18.) Even if Organizational Plaintiffs allege  
8 sufficient facts to confer standing, Defendants argue that Organizational Plaintiffs fail to  
9 state a claim. (*Id.* at 18-20.) The court addresses these arguments in turn.

##### 10 *a. Constitutional Standing*

11 Organizational Plaintiffs can establish injury by demonstrating that they “suffered  
12 ‘both a diversion of [their] resources and a frustration of [their] mission[s].’” *La*  
13 *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088  
14 (9th Cir. 2010) (citing *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.  
15 2002)). Defendants mount a facial challenge to Organizational Plaintiffs’ standing. *See*  
16 *Safe Air for Everyone*, 373 F.3d at 1039 (“In a facial attack, the challenger asserts that the  
17 allegations contained in a complaint are insufficient on their face to invoke federal  
18 jurisdiction.”); (MTD at 17-18 (exclusively referencing the amended complaint).)  
19 Defendants argue that the amended complaint “suffers from the same infirmities” as the  
20 original complaint—namely, that it lacked “any indication of how much of  
21 [Organizational Plaintiffs’] resources were diverted to assisting the types of claims that  
22

1 survived [Defendants’ prior motion to dismiss] or what parts of their mission were  
2 frustrated.” (MTD at 17-18 (citing 2/10/16 Order at 33).)

3         The amended complaint meaningfully alters Individual Plaintiffs’ allegations,  
4 Organizational Plaintiffs’ allegations, and the interplay between the two. In the original  
5 complaint, two Individual Plaintiffs lacked standing. (*See generally* 2/10/16 Order.)  
6 Dismissal of those Individual Plaintiffs’ claims left a putative subclass without a viable  
7 class representative. (*Id.* at 35-36.) Because “the complaint operate[d] on the assumption  
8 that all three Individual Plaintiffs and the broad classes they s[ought] to represent ha[d]  
9 the right to enforce various and varying federal regulations,” and Organizational  
10 Plaintiffs’ allegations addressing organizational standing pertained generally to  
11 “Defendants’ untimely adjudication of EAD applications,” the court concluded it was  
12 “unclear the extent to which Organizational Plaintiffs’ allegations confer standing.” (*Id.*  
13 at 33.)

14         Here, the same two Individual Plaintiffs lack standing. *See supra* § III.A.2.  
15 (dismissing Ms. Arcos and Ms. Osorio). However, nine Individual Plaintiffs remain  
16 parties to this lawsuit. (*See* Am. Compl. ¶¶ 18-25, 28.) Those Individual Plaintiffs seek  
17 timely issued EADs or interim EADs when the regulatory timeline for issuing the EADs  
18 expires, and they seek to represent subclasses of similarly situated individuals. (*See*  
19 *generally id.*) NWIRP alleges that its clients include Individual Plaintiffs in all three  
20 proposed subclasses. (*Id.* ¶ 83.) The Advocates alleges its clients are asylum seekers (*id.*  
21 ¶ 85), some of whom fall into the 90-Day Subclass and others of whom fall into the  
22 30-Day Subclass (*id.* ¶¶ 5, 16; *see also* MTD Resp. at 11).

1 Organizational Plaintiffs’ allegations support the inference USCIS’s actions  
2 diverted Organizational Plaintiffs’ resources and frustrated their missions. *See La*  
3 *Asociacion de Trabajadores*, 624 F.3d at 1088. NWIRP’s mission is “to assist  
4 immigrants in obtaining legal status and the right to lawfully work in the United States.”  
5 (Am. Compl. ¶ 82.) When “EAD applications are not timely adjudicated, . . . NWIRP  
6 staff must respond to client calls and walk-ins, explain the EAD process, the reasons for  
7 delay, and the lack of remedies,” among other diversions.<sup>9</sup> (*Id.* ¶ 83.) These tasks divert  
8 resources from NWIRP’s mission and thereby frustrate that mission. Contrary to  
9 Defendants’ argument, at this stage NWIRP need not allege the magnitude of the  
10 diversion.<sup>10</sup> *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 & n.21 (1982)  
11 (concluding that dismissal on the pleadings for lack of organizational standing was  
12 inappropriate but recognizing that the organizational plaintiff would nonetheless “have to  
13 demonstrate at trial that it ha[d] indeed suffered impairment in its role of facilitating open  
14 housing before it w[ould] be entitled to judicial relief”). NWIRP’s current allegations

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16 <sup>9</sup> The Ninth Circuit recently acknowledged that “under current precedent it might not be  
17 enough merely to choose to divert resources: current precedent might be understood to require  
18 the organization to show that it was ‘forced’ to divert resources to avoid or counteract an injury  
19 to its own ability to function.” *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, 632 F. App’x  
20 905, 909 (9th Cir. 2015) (citing *Comite de Jornaleros de Redondo Beach v. City of Redondo*  
21 *Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)). The court can plausibly infer that at least  
22 some of the alleged diversions forced Organizational Plaintiffs to respond, and thus at this stage  
the court does not find that this line of cases undermines whether Organizational Plaintiffs have  
standing.

20 <sup>10</sup> Defendants misapply the legal standard on a facial challenge to standing, as evidenced  
21 by phrases such as “fails to show” and “do not show any evidence.” (MTD at 18.) Plaintiffs  
22 need not “show” anything at the pleading stage; rather, their factual allegations, accepted as true,  
and all reasonable inferences arising therefrom must support jurisdiction. *See Leite*, 749 F.3d at  
1121.



1 permit a plausible inference that the magnitude of diversion is sufficient to confer  
2 standing. (*See* MTD at 18.)

3 The Advocates also alleges sufficient detail to confer standing. The Advocates  
4 states that its mission is “providing legal services to asylum seekers in Minnesota, North  
5 Dakota, and South Dakota.” (Am. Compl. ¶ 85.) Instead of providing legal services, the  
6 Advocates “divert[s] scarce resources to resolving and addressing EAD adjudication  
7 delays” for initial and renewal EAD requests. (*Id.*) The Advocates’ “staff attorneys  
8 spend considerable time calling and e-mailing USCIS, working with employees to hold  
9 jobs open until their clients’ EADs are renewed, intervening with the state on driver’s  
10 license issues, and working with agency liaison and congressional offices to try to obtain  
11 EADs for their clients.” (*Id.*) These allegations sufficiently show that the Advocates  
12 must divert resources from advocating in support of asylum applications to addressing  
13 and redressing untimely issued EADs. Accordingly, the court concludes the Advocates  
14 has pleaded sufficient facts to confer standing.<sup>11</sup>

15 *b. Failure to State an APA Claim*

16 Defendants next argue that Organizational Plaintiffs fail to state an APA claim  
17 because Organizational Plaintiffs do not fall within the zone of interests of the  
18 Immigration and Naturalization Act (“INA”), 8 U.S.C. § 1101 *et seq.*, and the related

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21  
22 <sup>11</sup> To be clear, the court concludes that Organizational Plaintiffs’ pleadings withstand a  
facial attack on standing. *See Safe Air for Everyone*, 373 F.3d at 1039. Defendants have not  
mounted a factual attack on standing, nor does the court see reason to raise the issue *sua sponte*  
at this juncture, and accordingly the court expresses no opinion on that distinct question. (*Cf.*  
MTD Reply at 5 n.1.)

1 regulations.<sup>12</sup> (MTD at 18-20.) To bring an APA claim, a plaintiff must assert an interest  
2 that is “‘arguably within the zone of interests to be protected or regulated by the statute’  
3 that he says was violated.” *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v.*  
4 *Patchak*, --- U.S. ---, 132 S. Ct. 2199, 2210 (2012) (quoting *Ass’n of Data Processing*  
5 *Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)); *see also id.* (“[W]e have always  
6 conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any  
7 doubt goes to the plaintiff.”). This inquiry “is not meant to be especially demanding.”  
8 *Id.* (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). “The test forecloses  
9 suit only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the  
10 purposes implicit in the statute that it cannot reasonably be assumed that Congress  
11 intended to permit the suit.’” *Id.* (quoting *Clarke*, 479 U.S. at 399).

12 The “pivotal question here is whether [DHS] intended to create a cause of action  
13 encompassing [Organizational Plaintiffs’] claims when it” formulated the relevant  
14 regulations.<sup>13</sup> *Pit River Tribe*, 793 F.3d at 1156. The court must answer this question

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16 <sup>12</sup> Although “[t]he Supreme Court has often characterized the zone-of-interests test as a  
17 ‘prudential standing’ requirement,” the Court recently “rejected the ‘prudential standing’ label  
18 and made clear that whether a plaintiff’s claims are within a statute’s zone of interests is not a  
19 jurisdictional question.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir.  
20 2015) (citing *Lexmark Int’l, Inc. v. Static Control Components*, --- U.S. ---, 134 S. Ct. 1377,  
1387-88 (2014)). Instead, it is a question of statutory standing, which does not implicate the  
21 court’s subject matter jurisdiction. *Id.*; *see also Nw. Requirements Utils. v. F.E.R.C.*, 798 F.3d  
22 796, 807 n.9 (9th Cir. 2015).

<sup>13</sup> In advocating for and against the zone of interests, neither side differentiates between  
the INA and the regulations enacted thereunder. The Ninth Circuit has cautioned that “courts  
should not use regulations to expand the zone of interest beyond what Congress intended.”  
*Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 944 n.4 (9th Cir. 2005). However, the  
Ninth Circuit issued that caution in a case in which the purported right to sue arose under the

1 “not by reference to the overall purpose of the [regulations] in question . . . , but by  
2 reference to the particular provision of law upon which [Organizational Plaintiffs] rel[y].”  
3 *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997). The regulations governing asylum-based  
4 EAD applicants are intended chiefly to “ensure that bona fide asylees are eligible to  
5 obtain employment authorization as quickly as possible.” Inspection and Expedited  
6 Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings;  
7 Asylum Procedures, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997). The EAD regulations  
8 that apply to non-asylum-based applications are intended to address “the importance of  
9 expeditious processing of employment authorization applications.” Control of  
10 Employment of Aliens, 52 Fed. Reg. 16,216, 16,220 (May 1, 1987).

11 Defendants argue that these regulations were not “enacted to prevent organizations  
12 that represent individuals applying for employment authorization from expending  
13 resources to handle any delay in the adjudication of applicants.” (MTD at 20.)

14 Organizational Plaintiffs respond that the applicable regulations implicate their interests  
15 because Organizational Plaintiffs “have an instrumental role to play in assisting their  
16 clients to obtain EADs.” (MTD Resp. at 17 (“Organizational Plaintiffs play a significant  
17 role in preparation and, where necessary, advocacy on behalf of clients in their  
18 applications for EADs.”).) Because this role is “squarely within the ambit of the  
19 regulations” (*id.*), Plaintiffs contend that they satisfy the zone of interests test.

20 \_\_\_\_\_  
21 statute and not the regulations. *Id.* at 939. Where, as here, the purported substantive right arises  
22 from the regulation itself, it is appropriate to look to both the statute and the regulation that  
underlies it. *See Cox Cable Tuscon, Inc. v. Ladd*, 795 F.2d 1479, 1481 (9th Cir. 1986).

1 Organizational Plaintiffs base their argument that they fall within the zone of  
2 interests on the implicit premise that their “role” equates to their “interest” in the  
3 litigation. (*See* MTD Resp. at 17.) Organizational Plaintiffs cite no authority supporting  
4 this premise. In contrast, the Ninth Circuit and several district courts therein equate a  
5 party’s “interests” with the “injuries” that confer constitutional standing upon that party.  
6 *See, e.g., Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (“In addition  
7 to [Article III’s standing] requirements, a plaintiff bringing suit under the Administrative  
8 Procedure Act for a violation of [a statute] must show that his alleged injury falls within  
9 the ‘zone of interests’ that [the statute] was designed to protect.”); *Oberdorfer v. Jewkes*,  
10 583 F. App’x 770, 773 (9th Cir. 2014) (“[The plaintiff]’s economic injury . . . suffices for  
11 Article III standing but does not fall within [the statute]’s zone of interests. [The  
12 plaintiff]’s environmental injury . . . is within [the statute]’s zone of interests but will not  
13 be redressed by a favorable decision, since the damage in question occurred in the past.”);  
14 *Yount v. Salazar*, No. CV11-8171 PCT-DGC, 2014 WL 4904423, at \*6 (D. Ariz. Sept.  
15 30, 2014) (citing *Lexmark*, 134 S. Ct. at 1387) (concluding that applying the  
16 “single-injury requirement,” which requires that the injury that confers constitutional  
17 standing is also the injury that falls within the relevant statute’s zone of interests,  
18 comports with the purposes of the statutory standing doctrine—ascertaining and heeding  
19 congressional intent); *Kanoa Inc. v. Clinton*, 1 F. Supp. 2d 1088, 1095 (D. Haw. 1998)  
20 (“Plaintiff’s injuries, economic losses, are not within the zone of interests that the  
21 [statute] was enacted to protect.”).  
22

1 Organizational Plaintiffs’ clients, who presumably resemble Individual Plaintiffs  
2 and the putative classes they seek to represent, suffer injuries from delayed adjudication  
3 of EADs. (*See, e.g.*, Am. Compl. ¶¶ 49, 52, 55-56, 58, 61, 63, 66-67, 71, 81.) These  
4 injuries place those plaintiffs within the zone of interests of the relevant INA and  
5 regulatory provisions. *See* 52 Fed. Reg. at 16,216; 62 Fed. Reg. at 10,318. However,  
6 Organizational Plaintiffs allege a markedly different injury—diversion of scarce  
7 resources—and that injury is the toehold that supports Organizational Plaintiffs’ standing.  
8 *See supra* § III.A.5.c.; (Am. Compl. ¶¶ 83-85.) Supreme Court Justice Sandra Day  
9 O’Connor, sitting as the Circuit Justice for the Ninth Circuit, made the following  
10 observations about the Immigration Reform and Control Act (“IRCA”) and the  
11 regulations enacted thereunder:

12 IRCA was clearly meant to protect the interests of undocumented aliens,  
13 not the interests of organizations . . . . Though such organizations did play  
14 a role in the IRCA scheme—during the amnesty period, they were so-called  
15 “qualified designated entities,” which were to “assis[t] in the program of  
16 legalization provided under this section,” [8 U.S.C.] § 1255a(c)(2)—there  
is no indication that IRCA was in any way addressed to their interests. The  
fact that the INS regulation may affect the way an organization allocates its  
resources . . . does not give standing to an entity which is not within the  
zone of interests the statute meant to protect.

17 *I.N.S. v. Legalization Assistance Project of L.A. Cty. Fed’n of Labor*, 510 U.S. 1301,  
18 1305 (1993) (first alteration in original); *see also Immigrant Assistance Project of L.A.*  
19 *Cty. Fed’n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 867 (9th Cir. 2002) (emphases in  
20 original) (interpreting Justice O’Connor’s opinion as holding “that the IRCA did not give  
21 organizational plaintiffs standing to sue on their *own* behalf” but that organizational  
22 plaintiffs had “standing to sue on behalf of their *members* whose claims are ripe”); *Situ v.*

1 *Leavitt*, No. C06-2841 THE, 2006 WL 3734373, at \*10 (N.D. Cal. Dec. 18, 2006)  
2 (“[T]he Court finds that the organizational plaintiffs in this case fail to satisfy the zone of  
3 interests test because they have failed to rebut Defendant’s argument that the Medicare  
4 statutory scheme is intended to protect individuals, not advocacy organizations.”).

5 Organizational Plaintiffs’ claims are analogous to the claims that Justice O’Connor  
6 confronted. *See Legalization Assistance Project*, 510 U.S. at 1302 (characterizing the  
7 organizational plaintiffs as “organizations that provide legal help to immigrants” and  
8 “believe the INS interpreted” amnesty provisions “too narrowly”). Organizational  
9 Plaintiffs do not argue that the applicable INA and regulatory provisions provide recourse  
10 for advocates’ diverted resources in addition to protection for EAD applicants.<sup>14</sup> (*See*  
11 *MTD Resp.* at 15-17.) Nor can the text of the relevant provisions be fairly read to  
12 implicate Organizational Plaintiffs’ interest in the efficient use of resources. Finally, the  
13 regulatory history shows that the regulations were intended to promote expediency and  
14 predictability for the sake of EAD applicants. *See* 52 Fed. Reg. at 16,216; 62 Fed. Reg.  
15 at 10,318.

16 Accordingly, even though the zone of interests inquiry is not demanding, the court  
17 concludes that Organizational Plaintiffs’ interests are unarguably “so marginally related

18 \_\_\_\_\_  
19 <sup>14</sup> Elsewhere, Organizational Plaintiffs argue that they have third-party standing to sue on  
20 behalf of Individual Plaintiffs. (*MTD Resp.* at 18-19 (arguing that the court “should reject  
21 Defendants’ argument that the Organizational Plaintiffs have not adequately stated a mandamus  
22 claim” for two reasons: “[f]irst,” because it is an issue of prudential standing, and “[s]econd,”  
because “Organizational Plaintiffs meet the prudential standing requirement for asserting the  
rights of third parties”).) Because Organizational Plaintiffs direct that argument only toward  
their Mandamus Act claim, the court declines to consider it as applied to the APA claim. *See*  
*infra* § III.A.5.c.

1 to . . . the purposes implicit in the [regulation] that it cannot reasonably be assumed that  
2 Congress [and the regulators] intended to permit the suit.” *Match-E-Be-Nash-She-Wish*,  
3 132 S. Ct. at 2210. The court therefore dismisses Organizational Plaintiffs’ APA claim  
4 for failure to state a claim.

5 *c. Failure to State a Mandamus Act Claim*

6 Defendants also seek dismissal of Organizational Plaintiffs’ Mandamus Act claim  
7 on the basis that Defendants owe no duty to Organizational Plaintiffs and therefore  
8 Organizational Plaintiffs lack statutory standing. The Mandamus Act confers jurisdiction  
9 on the court “to compel an officer or employee of the United States or any agency  
10 thereof” to take certain actions. 28 U.S.C. § 1361. However, the court may only compel  
11 the officer or employee to “perform a duty owed to the plaintiff.” *Id.* The Ninth Circuit  
12 has concluded “a duty is ‘owed to the plaintiff’ if the plaintiff falls within the ‘zone of  
13 interests’ protected by the underlying statute.” *Silveyra v. Moschorak*, 989 F.2d 1012,  
14 1014 n.1 (9th Cir. 1993) (citing *Jarecki v. United States*, 590 F.2d 670, 675 (7th Cir.  
15 1979)), *superseded by statute on other grounds*, 8 U.S.C. § 1252(i); *see also Blackman v.*  
16 *Taxdahl*, No. CV F 04 6389 AWI NEW (DLB) P, 2007 WL 613862, at \*3 (E.D. Cal.  
17 Feb. 27, 2007).

18 The Ninth Circuit, reasoning that “both the APA and the Mandamus Act are  
19 ‘ordinary element[s] of administrative enforcement schemes,’ and both provide a basis  
20 for compelling an agency to take action which by law it is required to take,” has  
21 concluded that there is “no reason to infer differing [statutory] standing requirements for  
22 these two means of compelling wrongfully withheld agency action.” *See Soler v. Scott*,

1 942 F.2d 597, 605 (9th Cir. 1991) (first alteration in original) (internal citations omitted),  
2 *vacated on other grounds by Sivley v. Soler*, 506 U.S. 969 (1992); *see also*  
3 *Hernandez-Avalos v. I.N.S.*, 50 F.3d 842, 846 (10th Cir. 1995) (“[B]ecause mandamus is  
4 properly sought where government officials ‘owe a duty’ to the plaintiff, and because a  
5 ‘duty’ is ‘owed’ in the administrative context if the plaintiff’s interest is within the ‘zone  
6 of interests’ protected by the underlying statute, all a plaintiff seeking mandamus in  
7 administrative litigation need show is that the interest he seeks to vindicate falls within  
8 the statutory zone of interests.”); *Giddings v. Chandler*, 979 F.2d 1104, 1110 (5th Cir.  
9 1992) (“[S]tanding under the APA is determined by applying the same ‘zone of interest’  
10 test as applied to determine standing in the mandamus context.”). The court has  
11 concluded that Organizational Plaintiffs do not fall within the zone of interests of the  
12 applicable statute and regulations for purposes of their APA claim. *See supra* § III.A.5.b.  
13 By the same reasoning, Organizational Plaintiffs’ Mandamus Act claim fails because  
14 Defendants do not owe a duty to Organizational Plaintiffs. *See* 28 U.S.C. § 1361.

15 Organizational Plaintiffs raise only one argument in support of their Mandamus  
16 Act claim that they did not raise in support of their APA claim: “Organizational  
17 Plaintiffs meet the prudential standing requirement for asserting the rights of third  
18 parties.” (MTD Resp. at 18); *see also supra* n.14. Organizational Plaintiffs therefore  
19 argue that even if Defendants do not owe them a duty, Defendants owe a duty to  
20 Organizational Plaintiffs’ clients, and Organizational Plaintiffs should be treated as  
21 falling within the zone of interests because they have standing to raise their clients’  
22 rights.



1 Generally, a party “must assert his own legal rights and interests, and cannot rest  
2 his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422  
3 U.S. 490, 499 (1975). However, this rule is not absolute, and the Supreme Court has  
4 authorized third-party standing when “the party asserting the right has a ‘close’  
5 relationship with the person who possesses the right” and “there is a ‘hindrance’ to the  
6 possessor’s ability to protect his own interests.”<sup>15</sup> *Kowalski v. Tesmer*, 543 U.S. 125, 129  
7 (2004); *see also id.* at 130 (emphasis in original) (indicating that the Supreme Court has  
8 more leniently allowed third-party standing in the First Amendment context and “when  
9 enforcement of the challenged restriction *against the litigant* would result indirectly in  
10 the violation of third parties’ rights,” but otherwise has “not looked favorably upon  
11 third-party standing”).

12 Here, Organizational Plaintiffs do not have a close relationship with the class they  
13 seek to represent. Organizational Plaintiffs point out that “courts have in some cases  
14 found third-party standing for attorneys representing clients.” (MTD Resp. at 19.)  
15 However, the Supreme Court has held that a “hypothetical attorney-client relationship”  
16 between attorneys and “as yet unascertained Michigan criminal defendants ‘who will  
17 request, but be denied, the appointment of appellate counsel’” is an insufficient  
18 attorney-client relationship to support third-party standing. *Kowalski*, 543 U.S. at  
19 130-31. Much like in *Kowalski*, Organizational Plaintiffs seek to assert the rights of an

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21 <sup>15</sup> The party asserting the right must also have Article III standing, *see Caplin &*  
22 *Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989), which Organizational  
Plaintiffs have adequately alleged, *see supra* § III.A.5.a.

1 “as yet unascertained” class of EAD applicants “who will request” and fail to timely  
2 receive EAD or interim EAD approval. *Id.* This relationship is insufficient to confer  
3 third-party standing on Organizational Plaintiffs.

4 Furthermore, Organizational Plaintiffs’ clients are not sufficiently hindered in their  
5 ability to protect their own interests. As demonstrated by this lawsuit, Organizational  
6 Plaintiffs’ clients are capable of filing a lawsuit to vindicate their rights. (*See Compl.*)  
7 Each Individual Plaintiff has obtained the individual relief that she or he sought. *See*  
8 *Pruitt v. City of Arlington*, No. C08-1107MJP, 2009 WL 1505267, at \*2 (W.D. Wash.  
9 May 28, 2009) (concluding that where a third party was “also a plaintiff in th[e] lawsuit,  
10 her ability to protect her own interests [wa]s not hindered”); *see also Suciu v.*  
11 *Washington*, No. 12-12316, 2012 WL 4839924, at \*4 (E.D. Mich. Oct. 11, 2012)  
12 (“Prisoners may pursue relief through the grievance process and through the courts.  
13 These methods would be effective to resolve the issue before any loss of standing.”).  
14 Furthermore, as Defendants acknowledge, the “inherently transitory” exception to the  
15 mootness doctrine enables Individual Plaintiffs to seek injunctive relief on behalf of a  
16 putative class, even after Defendants adjudicate their EAD applications. (*See MTD* at 14  
17 n.3); *supra* § III.A.4. The permissive nature of standing doctrine and its temporal  
18 permutations in the context of putative class actions further undermines the notion that  
19 Organizational Plaintiffs’ clients suffer a sufficient hindrance to filing this lawsuit.  
20 Finally, difficulty in or reticence to obtaining an attorney does not constitute “the type of  
21 hindrance necessary to allow another to assert” EAD applicants’ rights. *Kowalski*, 543  
22

1 U.S. at 569. Accordingly, the infrequency with which plaintiffs file suits such as this one  
2 is also unpersuasive evidence of a hindrance. (*See* MTD Resp. at 19.)

3         This case thus does not resemble those in which courts have concluded that a third  
4 party’s ability to protect its own interests was sufficiently hindered to warrant third-party  
5 standing. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 411 (“[W]e have permitted criminal  
6 defendants to challenge their convictions by raising the rights of third parties. . . . By  
7 similar reasoning, we have permitted litigants to raise third-party rights in order to  
8 prevent possible future prosecution.”); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)  
9 (allowing physicians to sue on behalf of women seeking abortions after identifying  
10 “several obstacles” to women asserting their own rights, including the chilling effect of  
11 “the publicity of a court suit” and “imminent mootness”); *Homeaway Inc. v. City & Cty.*  
12 *of S.F.*, No. 14-cv-04859-JCS, 2015 WL 367121, at \*11 (N.D. Cal. Jan. 27, 2015)  
13 (“Decisions that have found a sufficient hindrance generally identify more structural  
14 concerns than are present [in a business-customer relationship].”). Accordingly, the court  
15 rejects the contention that Organizational Plaintiffs have statutory standing to pursue their  
16 Mandamus Act claim on behalf of third parties.

17         The court concludes that Organizational Plaintiffs lack statutory standing to assert  
18 their Mandamus Act claim and cannot circumvent that conclusion by asserting the rights

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1 of their clients.<sup>16</sup> Therefore, the court dismisses Organizational Plaintiffs' Mandamus  
2 Act claim.

3 **B. Plaintiffs' Motion for Class Certification**

4 Plaintiffs move to certify three subclasses. As a threshold matter, the court has  
5 dismissed Ms. Osorio, who served as the only putative representative of the DACA  
6 Renewal Subclass. (Am. Compl. ¶ 91; MCC at 6); *supra* § III.A.2. Accordingly, the  
7 court denies Plaintiffs' motion to certify the DACA Renewal Subclass for lack of  
8 adequate representation. However, putative class representatives remain for the 90-Day  
9 Subclass and the 30-Day Subclass, and the court analyzes whether class certification is  
10 appropriate as to those subclasses.

11 1. Legal Standard

12 "Class certification is governed by Federal Rule of Civil Procedure 23."  
13 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Under Federal Rule of Civil  
14 Procedure Rule 23(a), the party seeking certification must first demonstrate that "(1) the  
15 class is so numerous that joinder of all members is impracticable; (2) there are questions  
16 of law or fact common to the class; (3) the claims or defenses of the representative parties  
17 are typical of the claims or defenses of the class; and (4) the representative parties will

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18  
19 <sup>16</sup> The conclusion that Organizational Plaintiffs lack statutory standing under the APA  
20 and Mandamus Act is a determination of law and cannot be remedied by further allegations.  
21 Accordingly, the court concludes that amendment of Organizational Plaintiffs' claims would be  
22 futile and dismisses those claims without leave to amend. *See Cahill v. Liberty Mut. Ins. Co.*, 80  
F.3d 336, 339 (9th Cir. 1996); *Kibby Road, LLC v. N. Tr. Co.*, No. 15-cv-00795-YGR, 2015 WL  
2198724, at \*5 (N.D. Cal. May 11, 2015) (denying leave to amend because "th[e] case  
present[ed] a straightforward disagreement as to a basic legal question, where the relevant  
facts . . . [we]re not in dispute").

1 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). “Second,  
2 the proposed class must satisfy at least one of the three requirements listed in Rule  
3 23(b).” *Dukes*, 564 U.S. at 345; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512  
4 (9th Cir. 2013). Here, Plaintiffs seek to certify a class under Rule 23(b)(2), which  
5 requires that “the party opposing the class has acted or refused to act on grounds that  
6 apply generally to the class, so that final injunctive relief or corresponding declaratory  
7 relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); (*see MCC*  
8 *at 6, 21.*) “Rule 23(b)(2) applies only when a single injunction or declaratory judgment  
9 would provide relief to each member of the class.” *Dukes*, 564 U.S. at 360.

10 Rule 23 “does not set forth a mere pleading standard.” *Id.* at 350. Rather,  
11 “certification is proper only if the trial court is satisfied, after a rigorous analysis, that the  
12 prerequisites of Rule 23(a) have been satisfied.” *Id.* at 350-51 (internal quotation  
13 omitted). “[I]t may be necessary for the court to probe behind the pleadings before  
14 coming to rest on the certification question.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S.  
15 147, 160 (1982). This is because “the class determination generally involves  
16 considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s  
17 cause of action.” *Id.* (internal quotation omitted). Nonetheless, the ultimate decision  
18 regarding class certification “involve[s] a significant element of discretion.” *Yokoyama*  
19 *v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010).

## 20 2. Putative Subclasses

21 Plaintiffs propose the following definition for the 90-Day Subclass:  
22

1 Noncitizens who have filed or will file applications for employment  
2 authorization that were not or will not be adjudicated within the required  
3 regulatory timeframe, comprising those who . . . [h]ave filed or will file  
4 applications for employment authorization under 8 C.F.R. § 274a.13,  
5 excluding initial applications based on pending asylum applications or  
6 requests to renew Deferred Action for Childhood Arrivals, but who have  
7 not received or will not receive a grant or denial of their EAD applications  
8 within 90 days of filing, and who are entitled or will be entitled to interim  
9 employment authorization under 8 C.F.R. § 274a.13(d), but who have not  
10 received or will not receive interim employment authorization.  
11 Applications for employment authorization based on Deferred Action for  
12 Childhood Arrivals, U or T visa applications, and self-petitions under the  
13 Violence Against Women Act are excluded until USCIS has determined  
14 eligibility for the underlying immigration benefit or granted deferred action.

15 (MCC at 2.) Plaintiffs contend that this putative subclass constitutes individuals that are  
16 entitled pursuant to 8 C.F.R. § 274a.13(d) to receive an interim EAD or an adjudication  
17 of their EAD application within 90 days of submitting the application, but receive neither  
18 in a timely fashion. (*Id.* at 3.) Acknowledging that Section 274a.13(d) does not apply to  
19 all EAD applications, Plaintiffs exclude three types of EAD applications from their  
20 proposed definition (*see* MCC at 4): (1) initial EAD applications based on a pending  
21 asylum application, *see* 8 C.F.R. §§ 208.7, 274a.12(c)(8); (2) EAD applications with a  
22 pending permanent residence application under the Haitian Refugee Immigration  
Fairness Act (“HRIFA”), 8 U.S.C. § 1151 et seq.; and (3) certain spouses of H-1B  
nonimmigrants, *see* 8 C.F.R. § 214.2(h)(9)(iv).

Plaintiffs propose the following definition for the 30-Day Subclass:

Noncitizens who have filed or will file applications for employment  
authorization that were not or will not be adjudicated within the required  
regulatory timeframe, comprising those who . . . [a]re asylum applicants  
who have filed or will file initial applications for employment authorization  
under 8 C.F.R. § 208.7, but who, absent any applicant-caused delay, have  
not received or will not receive a grant or denial of their EAD applications

1 within 30 days of filing, and who have not received or will not receive  
2 interim employment authorization.

3 (MCC at 2.) According to Plaintiffs, this subclass “is comprised of asylum applicants  
4 making their first application for an asylum-based EAD, also called an initial asylum  
5 EAD.” (*Id.* at 5.) Plaintiffs contend that members of this class are entitled to  
6 adjudication of their EAD application within 30 days pursuant to 8 C.F.R. § 208.7(a)(1).  
7 (*Id.*)

8 Defendants oppose the 90-Day Subclass and the 30-Day Subclass on the same  
9 grounds. First, Defendants restate the standing arguments that the court addressed above.  
10 (MCC Resp. at 8-12.) Defendants then argue that Plaintiffs fail to satisfy the  
11 commonality, typicality, and adequacy requirements. (*Id.* at 12-23.)

### 12 3. Certification

13 Plaintiffs argue that their proposed subclasses satisfy all Rule 23(a) and Rule  
14 23(b)(2) requirements.<sup>17</sup> The court analyzes those requirements below.

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15  
16 <sup>17</sup> For class actions proceeding under Rule 23(b)(3), courts require a putative lead  
17 plaintiff to show that the class definition is ascertainable in addition to the express requirements  
18 of Rules 23(a) and 23(b)(3). *See O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D.  
19 Cal. 1998). However, the Ninth Circuit has not ruled on whether and to what extent this tacit  
20 ascertainability requirement applies to a class proceeding under Rule 23(b)(2), and courts are  
21 split on that issue. *See Bee, Denning, Inc. v. Cap. All. Corp.*, No. 13-cv-02654-BAS(WVG),  
22 2016 WL 3952153, at \*4 (S.D. Cal. July 21, 2016) (collecting cases). This court has previously  
adopted the rationale that “due to the unique characteristics of a Rule 23(b)(2) class, it is  
improper to require ascertainability.” *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1326 (W.D.  
Wash. 2015); *see also Bee, Denning, Inc.*, 2016 WL 3952153, at \*4 (concluding that the majority  
approach “appears to favor either a lower standard for the ascertainability requirement or no  
requirement at all in the 23(b)(2) context”). In addition, Defendants do not contend that an  
ascertainability requirement applies or that the subclass definitions suffer from ascertainability  
flaws. Accordingly, the court concludes that ascertainability presents no obstacle to class  
certification.

1            *a. Numerosity*

2            “The prerequisite of numerosity is discharged if ‘the class is so large that joinder  
3 of all members is impracticable.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th  
4 Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(1)). Plaintiffs note that “DHS has control of the  
5 information proving the impracticability of joinder and does not make such information  
6 available.” (MCC at 8.) If DHS has such information, it is presumably available through  
7 discovery in this action. Plaintiffs have apparently not obtained such information via  
8 discovery.

9            The USCIS Ombudsman’s 2016 report indicates based on information from  
10 USCIS that “more than 2 million EAD applications were filed with the agency in FY  
11 2015,” and 449,307, or 22 percent, of those applications were adjudicated more than 90  
12 days after filing. U.S. Dep’t of Homeland Sec., USCIS Ombudsman Annual Report 2016  
13 [hereinafter, 2016 Ombudsman Report] at 61-62 & nn.474, 487 (June 29, 2016),  
14 available at <https://www.dhs.gov/annual-report-congress> (“While some delays are due to  
15 the customer’s failure to file timely or provide required documentation, other delays  
16 occur through no fault of the customer.”). This evidence does not indicate how many of  
17 the 449,307 applications adjudicated after 90 days were timely—for instance, because  
18 they were subject to tolling. However, Plaintiffs have provided sampled statistical  
19 evidence from numerous sources that demonstrates USCIS fails to timely adjudicate  
20 EAD applications for putative members of both subclasses. (See MCC at 9 n.7  
21 (collecting declarations).) Furthermore, Defendants have conceded that USCIS has for  
22 the most part ceased granting interim EADs. (See 2/10/16 Order at 7 n.6); see also 2016



1 Ombudsman Report at 61 (“Interim EADs are no longer issued by the agency, despite  
2 regulatory language allowing for that option after 90 days.”).

3         Based on this evidence, “general knowledge,” and “common sense,” the court can  
4 infer that both putative subclasses are sufficiently large. *Perez-Funez v. Dist. Dir., I.N.S.*,  
5 611 F. Supp. 990, 995 (C.D. Cal. 1984). Further, each putative subclass includes  
6 “unnamed and unknown future” EAD applicants, and joinder of such “individuals is  
7 inherently impracticable.” *Jordan v. L.A. Cty.*, 669 F.2d 1311, 1320 (9th Cir. 1982),  
8 *vacated on other grounds*, 459 U.S. 810. Finally, Defendants do not argue that either  
9 subclass is insufficiently numerous. (*See generally* MCC Resp.) The court therefore  
10 concludes that the 90-Day Subclass and the 30-Day Subclass are both sufficiently  
11 numerous to satisfy Rule 23(a)(1).

12                 *b. Commonality*

13         The requirement of “commonality” is met through the existence of a “common  
14 contention” that is of “such a nature that it is capable of classwide resolution.” *Dukes*,  
15 564 U.S. at 350. A contention is capable of classwide resolution if “the determination of  
16 its truth or falsity will resolve an issue that is central to the validity of each one of the  
17 claims in one stroke.” *Id.* Accordingly, “what matters to class certification . . . is not the  
18 raising of common questions—even in droves—but, rather the capacity of a classwide  
19 proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.*  
20 This requirement is “construed permissively.” *Hanlon*, 150 F.3d at 1019. Accordingly,  
21 “[a]ll questions of fact and law need not be common to satisfy the rule.” *Id.*; *see also*  
22 *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010).

1 Here, the answers to one legal question and one factual question will “drive the  
2 resolution of the litigation.” *Dukes*, 564 U.S. at 350. The legal question is whether  
3 USCIS is legally obligated to adjudicate EAD applications within a certain timeframe.  
4 (*See* MCC at 15; Am. Compl. ¶¶ 104-17, 125-132.) Although there may be a nuanced  
5 difference between the relief available to the 30-Day Subclass and the 90-Day Subclass  
6 (*see* 2/10/16 Order at 26 n.19), this legal question will at most generate one answer—yes  
7 or no—for each putative subclass. This legal issue is thus a “common contention” that is  
8 “capable of classwide resolution.” *Dukes*, 564 U.S. at 350.

9 The core factual question in this case asks to what degree USCIS fails to timely  
10 adjudicate EAD applications. (*See* MCC at 15.) Although this inquiry appears ripe for a  
11 straightforward answer, the current proposed subclass definitions render the question  
12 “[in]capable of classwide resolution.” *Id.* As exemplified by Individual Plaintiffs,  
13 Defendants’ records will provide some common evidence relevant to that question. (*See*,  
14 *e.g.*, A.R.s (Dkt. ## 38, 67 to 67-8.) However, the proposed subclass definitions suffer  
15 from several flaws that necessitate a substantial individualized inquiry into the timeliness  
16 of USCIS’s adjudications.

17 As Defendants argue, the timeliness of USCIS’s adjudication requires an  
18 individualized inquiry to determine in what circumstances the 30- or 90-day adjudication  
19 period was tolled or reset.<sup>18</sup> (MCC Resp. at 15 (citing 8 C.F.R. §§ 103.2(b)(10),  
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21 <sup>18</sup> Defendants also make the broader argument that of the 40 or more types of aliens  
22 eligible to seek an EAD, a panoply of diverse factual scenarios arise that render some applicants  
eligible for an EAD and some applicants ineligible. (*See* MCC Resp. at 14 (citing 8 C.F.R.

1 208.7(a)(2)) (arguing that depending on the type of EAD applicant, applicant-caused  
2 delay, failure to provide initial evidence, rescheduling requests, requests for evidence,  
3 and missing a biometric appointment may toll or reset the relevant adjudicatory  
4 deadline.) The proposed subclasses exclude most, but not all, individuals whose  
5 adjudicatory time period is tolled or reset. For instance, the 90-Day Subclass excludes  
6 EAD applications based on “Deferred Action for Childhood Arrivals, U or T visa  
7 applications, and self-petitions under the Violence Against Women Act . . . until USCIS  
8 has determined eligibility for the underlying immigration benefit or granted deferred  
9 action.” (MCC at 2.) The 90-Day Subclass further categorically excludes individuals  
10 who base their EAD application on an application for DACA renewal. (*Id.* (excluding  
11 “initial applications based on . . . requests to renew Deferred Action for Childhood  
12 Arrivals”).) The 30-Day Subclass excludes EAD applicants who have “caused delay.”  
13 By excluding from the subclasses these individuals, Plaintiffs temper Defendants’  
14 argument that the proposed subclasses lack commonality.

15       However, the subclass definitions fail to account for several scenarios that may  
16 also toll the 30-day and 90-day EAD adjudication clocks. For instance, if an EAD  
17 application “is missing required initial evidence, or an applicant, petitioner, sponsor,  
18 beneficiary, or other individual who requires fingerprinting requests that the  
19 fingerprinting appointment or interview be rescheduled,” the adjudication clock is tolled

20 \_\_\_\_\_  
21 §§ 274a.12(a), (c)).) This argument sidesteps Plaintiffs’ claim, which is that irrespective of an  
22 applicant’s ultimate eligibility for an EAD, USCIS must either adjudicate applications within 90  
days for members of the 90-Day Subclass and 30 days for members of the 30-Day Subclass, or  
issue interim EADs. (*See, e.g.*, Am. Compl. ¶ 5.)

1 during the delay. 8 C.F.R. § 103.2(b)(10)(i).<sup>19</sup> Each putative class member’s claim  
 2 would need to be evaluated to see if this situation had occurred—a substantial  
 3 individualized undertaking.

4 Plaintiffs respond that in the event Section 103.2(b)(10)(i) tolls or resets the  
 5 adjudicatory period, “the deadline would not have expired, and the applicant would *not*  
 6 be a member of the class, at least until the problem is remedied and the day-count restarts  
 7 and reaches either 30 or 90 days.” (MCC Reply (Dkt. # 75) at 5 (citing 8 C.F.R.  
 8 § 103.2(b)(10)(i)).) Plaintiffs do not clearly indicate which aspect of the class definition  
 9 they view as imposing this limitation. However, the overarching, opening clause to the  
 10 class definition, which applies to both subclass definitions, arguably incorporates the  
 11 limitation.<sup>20</sup> That clause includes in each subclass only noncitizens whose EAD  
 12 applications “were not or will not be adjudicated within the required regulatory  
 13 timeframe.” (MCC at 2.) This language could be read to exclude individuals whose

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14  
 15 <sup>19</sup> On August 29, 2016, an amended version of 8 C.F.R. § 103.2 went into effect, but the  
 16 amendment merely remedied several typographic errors in the prior version of the regulation.  
 Compare 8 C.F.R. § 103.2(b)(10)(i) (effective Jan. 27, 2015) with 8 C.F.R. § 103.2(b)(10)(i)  
 (effective Aug. 29, 2016).

17 <sup>20</sup> Neither subclass-specific definition incorporates this limitation. The 90-Day Subclass  
 18 proposes to include noncitizens “who have not received or will not receive a grant or denial of  
 19 their EAD applications within 90 days of filing.” (MCC at 2.) The 30-Day Subclass similarly  
 20 proposes to include noncitizen asylum applicants “who, absent any applicant-caused delay, have  
 21 not received or will not receive a grant or denial of their EAD applications within 30 days of  
 22 filing.” (*Id.*) Although this definition’s reference to “applicant-caused delay” (*id.*) could be read  
 to except from the subclass definition the missing evidence or rescheduling circumstances that  
 lead to tolling, *see* 8 C.F.R. § 103.2(b)(10)(i), the better reading is that “applicant-caused delay”  
 refers to one of the provisions of Section 208.7, *see* 8 C.F.R. § 208.7(a)(2) (“Any delay requested  
 or caused by the applicant shall not be counted as part of these time periods . . .”). Both  
 subclass definitions thus fail to exclude EAD applicants who have waited the requisite 30- or  
 90-day period but whose adjudications are not overdue because of tolling or resetting.

1 adjudicatory deadline has tolled or reset because those individuals’ “regulatory  
2 timeframe” has not passed; it could also be read to include all individuals whose EAD  
3 had not been adjudicated within the 30- or 90-day regulatory timeframe. At most, this  
4 argument merely transmutes the factual question underlying this case into a question of  
5 class membership.<sup>21</sup> However, it does nothing to eliminate the individualized inquiry  
6 necessary to answer that factual question, and accordingly moves the court no closer to  
7 concluding that “a classwide proceeding” in this case would “generate common answers  
8 apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350.

9 Ultimately, whether USCIS has “unlawfully withheld or unreasonably delayed”  
10 action, 5 U.S.C. § 706(1), or owes a “duty . . . to the plaintiff[s],” 28 U.S.C. § 1361, goes  
11 to the merits of the APA and Mandamus Act claims, respectively. But the court’s  
12 “rigorous analysis” under Rule 23 “[f]requently . . . entail[s] some overlap with the merits  
13 of the plaintiff’s underlying claim.” *Dukes*, 564 U.S. at 351. Here, Plaintiffs

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14  
15 <sup>21</sup> As Plaintiffs appear to read this limitation, it renders the class fail-safe. A fail-safe  
16 class is one with a definition that aligns with the elements of the class’s claim such that finding  
17 no liability for the defendants would necessarily exclude all members from the class. *See In re*  
18 *AutoZone, Inc. Wage & Hour Emp’t Practices Litig.*, 289 F.R.D. 526, 545-46 (N.D. Cal. 2012);  
19 *see also Kamar v. RadioShack Corp.*, 375 F. App’x 734, 736 (9th Cir. 2010). Fail-safe classes  
20 are problematic because they preclude a defendant in a class action from obtaining a binding  
21 judgment on the merits against the would-be class members. *See AutoZone*, 289 F.R.D. at  
22 545-46; *see also Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011)  
(holding a class constituted “an improper fail-safe class that shields the putative class members  
from receiving an adverse judgment” by defining the class in such a way that “[e]ither the class  
members win or, by virtue of losing, they are not in the class and, therefore, not bound by the  
judgment”); *Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 487-88 (C.D. Ill. 2007)  
(finding that a proposed class “fail[ed] to meet the requirements of Rule 23(c)(3) because the  
Court cannot enter an adverse judgment that is enforceable against at least some of the proposed  
class members”); *but see AutoZone*, 289 F.R.D. at 546 (“[I]t is not clear that the Ninth Circuit  
forbids fail-safe classes.”).

1 acknowledge that certain circumstances toll or reset the adjudication timetable (*see, e.g.*,  
 2 MCC Reply at 5), but Plaintiffs provide no evidence of the frequency with which this  
 3 occurs (*see generally* MCC); *see also* 2016 Ombudsman Report at 61-62 (indicating that  
 4 in fiscal year 2015, 449,307 EAD applications were adjudicated after more than 90 days,  
 5 but failing to apportion between delays that “are due to the customer’s failure to file  
 6 timely or provide required documentation” and “other delays [that] occur through no fault  
 7 of the customer”). The court will not permit Defendants’ speculation to defeat class  
 8 certification. *Agne*, 286 F.R.D. at 568. However, the onus is on Individual Plaintiffs to  
 9 come forward with evidence demonstrating that the timeliness of adjudication is “a  
 10 common question of liability that can be resolved ‘in one stroke’ and ‘is central to the  
 11 validity of . . . the [class] claim.’”<sup>22</sup> *Id.* (alterations in original) (quoting *Dukes*, 564 U.S.

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13  
 14 <sup>22</sup> At oral argument, Plaintiffs cited *Walters v. Reno* as an analogous case in which this  
 15 court and the Ninth Circuit found the commonality element satisfied. *See Walters v. Reno*  
 16 (*Walters I*), No. C94-1204C, 1996 WL 897663 (W.D. Wash. Oct. 2, 1996); *Walters v. Reno*  
 17 (*Walters II*), 145 F.3d 1032 (9th Cir. 1998). In *Walters I*, Judge Coughenour certified a class of  
 18 “[a]ll non-citizens who have or will become subject to a Final Order under § 274C of the INA  
 19 because they received notice forms that did not adequately advise them of their rights, of the  
 20 consequences of waiving their rights or of the consequences of failing to request a hearing.”  
 21 *Walters I*, 1996 WL 897663, at \*1. This definition “limit[ed] the class to those who became  
 22 subject to a final order through their failure to request a hearing, and who failed to request a  
 hearing because their notice forms did not adequately advise them of their rights or the  
 consequences of failing to exercise those rights.” *Id.* By so limiting the class, Judge  
 Coughenour excluded class members who “received constitutionally adequate notice” and thus  
 lacked a claim. (*Id.*) Here, in contrast, the proposed class definition fails to limit the class  
 members to individuals whose claim has accrued.

In *Walters II*, the Ninth Circuit affirmed Judge Coughenour’s conclusion regarding  
 commonality because “[d]ifferences among the class members with respect to the merits of their  
 actual document fraud cases . . . are simply insufficient to defeat the propriety of class  
 certification.” 145 F.3d at 1046 (“What makes the plaintiffs’ claims suitable for a class action is  
 the common allegation that the INS’s procedures provide insufficient notice.”). The Ninth  
 Circuit decided *Walters II* more than a decade before the Supreme Court acknowledged that the

1 at 350); *see also Dukes*, 564 U.S. at 350 (“A party seeking class certification must  
2 affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to  
3 prove that there are in fact sufficiently numerous parties, common questions of law or  
4 fact, etc.”). The court cannot make this conclusion based on the anecdotal evidence in  
5 the record and thus cannot conclude that Individual Plaintiffs satisfy the commonality  
6 requirement.<sup>23</sup>

7 The court has discretion to “construe the complaint or redefine the class to bring it  
8 within the scope of Rule 23.” 7A Charles Alan Wright & Arthur R. Miller, *Federal*  
9 *Practice and Procedure* § 1759 (3d ed. 2004); *see also Powers v. Hamilton Cty. Pub.*  
10 *Def. Comm’n*, 501 F.3d 592, 619 (6th Cir. 2007); *Wolph v. Acer Am. Corp.*, 272 F.R.D.  
11 477, 483 (N.D. Cal. 2011). However, the court does not readily identify such a  
12 modification. As illustrated by the already cumbersome proposed subclass definitions,  
13 satisfying Rule 23 is complex in light of the statutory and regulatory scheme at issue and  
14 the discretion Defendants have to interpret that regime. However, in light of the court’s  
15 conclusion that the other Rule 23 requirements are met, counsel’s familiarity and facility

16  
17 “rigorous analysis” performed at the Rule 23 stage frequently “will entail some overlap with the  
18 merits of the plaintiff’s underlying claim.” *Dukes*, 564 U.S. at 351. In the instant case, unlike in  
*Walters II*, Plaintiffs have failed to show that factual differences between putative class members  
do not preclude class adjudication.

19 <sup>23</sup> In their argument supporting numerosity, Plaintiffs point out that Defendants uniquely  
20 possess information pertinent to class certification. (*See* MCC at 8.) Plaintiffs first moved for  
class certification the same day they filed their complaint (*see* Dkt. ## 1, 5), and Plaintiffs again  
21 moved for class certification the day after filing their amended complaint (*see* Dkt. ## 58-59.)  
Plaintiffs make no argument that they sought data from Defendants on the prevalence of tolling  
22 or resetting deadlines pursuant to 8 C.F.R. § 103.2(b)(10)(i). The court will not make  
unsupported inferences or lower Plaintiffs’ burden solely because Plaintiffs have performed  
inadequate discovery.

1 with the regulatory scheme at issue, and the potential for Individual Plaintiffs to refine  
2 their class definitions and collect further evidence supporting commonality, the court  
3 grants Individual Plaintiffs leave to renew their class certification motion in a manner that  
4 resolves the definitional and evidentiary issues associated with commonality.

5 *c. Typicality*

6 “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with  
7 those of absent class members; they need not be substantially identical.” *Hanlon*, 150  
8 F.3d at 1020. “Typicality refers to the nature of the claim or defense of the class  
9 representative, and not to the specific facts from which it arose or the relief sought.”  
10 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Nonetheless, the  
11 “commonality and typicality requirements of Rule 23(a) tend to merge.” *Falcon*, 457  
12 U.S. at 157 n.13. “Both serve as guideposts for determining whether under the particular  
13 circumstances maintenance of a class action is economical and whether the named  
14 plaintiff’s claim and the class claims are so interrelated that the interests of the class  
15 members will be fairly and adequately protected in their absence.” *Id.* In determining  
16 typicality, courts consider “whether other members have the same or similar injury,  
17 whether the action is based on conduct which is not unique to the named plaintiffs, and  
18 whether other class members have been injured by the same course of conduct.” *Hanon*,  
19 976 F.2d at 508.

20 Aside from the Individual Plaintiffs that the court dismissed above, Plaintiffs  
21 convincingly argue that as of the filing of the complaint, all Individual Plaintiffs suffered  
22 the same injury as the putative class—a wait beyond the regulatory deadline for EAD



1 adjudication. (MCC at 16-17.) Defendants respond with examples of Individual  
2 Plaintiffs that Defendants contend are not typical of the putative classes. (MCC Resp. at  
3 16-17.) For instance, Defendants argue that Ms. Salmon and Ms. Diaz Marin’s “own  
4 mistake[s]” caused their EAD delays. (*Id.*) According to Defendants, Ms. Salmon  
5 “incorrectly filed her application with the Vermont Service Center, rather than with the  
6 Chicago Lockbox.” (*Id.* (citing Salmon A.R. (Dkt. # 67-7) at 7).) Ms. Diaz Marin erred,  
7 according to Defendants, by “incorrectly indicating that she was the recipient of a U  
8 nonimmigrant visa, rather than the recipient of deferred action.” (*Id.* at 17 (citing Diaz  
9 Marin A.R. (Dkt. # 67-2) at 8).)

10 Even assuming they were applicant-caused, the minor mistakes in Ms. Salmon’s  
11 and Ms. Diaz Marin’s applications minimally impacted the roughly 200 days that USCIS  
12 took to adjudicate their EAD applications. (Salmon A.R. at 6; Diaz Marin A.R. at 8.) In  
13 other words, Defendants have described “the specific facts from which” Ms. Salmon’s  
14 and Ms. Diaz Marin’s claims arose, but Defendants’ argument does not undermine the  
15 conclusion that “the nature of the claim or defense of the class representative[s]” is  
16 typical of the putative class. *Hanon*, 976 F.2d at 508. Accordingly, although these  
17 examples provide a modicum of further evidence that undermines commonality, *see*  
18 *supra* § III.B.3.b., they otherwise fail to call typicality into question, *see Falcon*, 457 U.S.  
19 at 157 n.13 (“The commonality and typicality requirements of Rule 23(a) tend to  
20 merge.”); (MCC Resp. at 17 (“These unique factual patterns amongst just 11 named  
21 plaintiffs demonstrate the variety of factual situations experienced by applicants for  
22 EADs and the filing mistakes made by EAD applicants.”)).

1 Defendants' other arguments in opposition to typicality are similar and no more  
2 persuasive, and the court concludes that Individual Plaintiffs are typical of the subclasses  
3 they seek to represent.

4 *d. Adequacy*

5 The parties also dispute whether Individual Plaintiffs would "fairly and adequately  
6 protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Defendants contend that  
7 several types of EAD applicants have interests that are misaligned with Individual  
8 Plaintiffs' interests.<sup>24</sup> (MCC Resp. at 18-19.) Specifically, Defendants contend that  
9 Individual Plaintiffs inadequately represent H-4-based EAD applicants, initial TPS-based  
10 EAD applicants, spouses and children of diplomats and dignitaries, students with an F-1  
11 visa who apply for pre-completion Optional Practical Training, and certain parolees. (*Id.*  
12 at 18-21.)

13 Defendants first argue that USCIS's "90 day period to adjudicate the EAD  
14 application" of an H-4 applicant "will commence on the latest date that a concurrently  
15 filed benefit request is approved." (*Id.* at 19 (citing 8 C.F.R. § 214.2(h)(9)(iv)).)  
16 However, EAD applications grounded in H-4 applications are not governed by 8 C.F.R.  
17 § 274a.13, which is the regulation by which Individual Plaintiffs propose to define  
18 membership in the 90-Day Subclass. (MCC at 2 (including in the 90-Day Subclass

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19  
20 <sup>24</sup> As the Supreme Court has recognized, "the commonality and typicality  
21 requirements . . . tend to merge with the adequacy-of-representation requirement, although the  
22 latter requirement also raises concerns about the competency of class counsel and conflicts of  
interest." *Falcon*, 457 U.S. at 157 n.13. The commonality concern that the court expressed  
above, *see supra* § III.B.3.b., extends to the adequacy requirement, but the court does not restate  
that issue here.

1 noncitizens who “[h]ave filed or will file applications for employment authorization  
2 under 8 C.F.R. § 274a.13”); *see* 8 C.F.R. § 274a.13(d) (excepting from the 90-day  
3 deadline employment authorization considered pursuant to 8 C.F.R. § 214.2(h)(9)(iv)); 8  
4 C.F.R. § 214.2(h)(9)(iv) (describing the EAD application process and adjudicatory  
5 deadline for “[t]he spouse and children of an H nonimmigrant,” who may be admitted “as  
6 H-4 nonimmigrants”). Defendants correctly argue that the regulations provide for a  
7 different calculation of H-4 applicants’ adjudicatory deadline. 8 C.F.R. § 214.2(h)(9)(iv)  
8 (“If such [EAD] Application . . . is filed concurrently with another related benefit  
9 request(s), in accordance with and as permitted by form instructions, the 90–day period  
10 described in 8 CFR § 274.13(d) will commence on the latest date that a concurrently filed  
11 related benefit request is approved.”). However, because the subclass definition excludes  
12 these applicants, whether Individual Plaintiffs would adequately represent H-4-based  
13 EAD applicants is irrelevant.

14 Defendants’ argument that Individual Plaintiffs inadequately represent initial  
15 TPS-based EAD applicants is also unpersuasive. (*See* MCC Resp. at 19-20.) TPS-based  
16 applicants who make a prima facie showing of TPS eligibility are immediately granted  
17 temporary benefits. 8 C.F.R. §§ 244.5(b), 244.10(a). Defendants posit that USCIS  
18 adjudicates Form I-765 only after making this prima facie determination, and Defendants  
19 therefore argue that much like a DACA applicant, the 90-day adjudicatory clock begins  
20 only after USCIS makes the prima facie evaluation. (MCC Resp. at 20.) At most, this  
21 argument reinforces the court’s conclusion regarding commonality, but it does not  
22

1 demonstrate that Individual Plaintiffs would inadequately represent TPS-based EAD  
2 applicants.

3 The court is also unpersuaded by Defendants' hypotheticals regarding spouses and  
4 children of diplomats and dignitaries, students with F-1 visas, and parolees. (MCC Resp.  
5 at 20-21.) Defendants argue that Individual Plaintiffs' success on behalf of the putative  
6 class would be unhelpful to certain members of those groups.<sup>25</sup> But Defendants'  
7 speculation cannot defeat class certification. *Agne*, 286 F.R.D. at 568. Moreover, even  
8 assuming Defendants' posited scenarios occur with some regularity, at most they show  
9 that not all class members would benefit from a successful class action. This showing  
10 falls short of constituting a "conflict[] of interest between named parties and the class  
11 they seek to represent," and discerning such conflicts is the purpose of the adequacy  
12 requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

13 Finally, Defendants set forth a more overarching argument that allocation of  
14 insufficient resources may create conflicting interests between subgroups of the  
15 subclasses. (MCC Resp. at 21-22 (arguing that because USCIS is "a self-funded agency  
16 with finite resources," a spike in one type of EAD application could lead the agency to

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17  
18 <sup>25</sup> (MCC Resp. at 20 ("[Certain spouses and children of diplomats and foreign dignitaries]  
19 have an interest that could conflict with the Plaintiffs' request that a decision be issued within 90  
20 days of filing with USCIS, if for instance, these applicants wanted a decision within 90 days of  
21 filing with the State Department."), 21 ("[I]f the [F-1 student] applicant files less than 90 days  
22 before the job begins, then the 2 month employment period may have already begun, or even  
expired, by the time USCIS completes adjudication of the Form I-765. In this case, issuing an  
interim EAD for a time period that is different from the period that [the applicant] requested to  
work would not make any sense and would not redress any injury."), 21 ("If they are only here  
for a short time, USCIS may not be able to adjudicate the application before the parolee would  
have to return to his or her home country.")).

1 pay less attention to other types of EAD applications).) The court recognizes that  
2 Defendants have limited resources. However, to the extent the putative class obtains  
3 injunctive relief in this class action, the sufficiency of Defendants’ resources to effectuate  
4 that relief is a function of budgeting and the regulatory timelines established by  
5 Defendants, not this court’s determination that Defendants must abide by those timelines.

6 Accordingly, the court concludes that aside from the commonality issues noted  
7 above, Individual Plaintiffs and their proposed counsel constitute adequate class  
8 representatives.<sup>26</sup>

9 *e. Common Grounds*

10 Plaintiffs contend that their class action satisfies Rule 23(b)(2) because Defendants  
11 have “acted or refused to act on grounds that apply generally to the class, so that final  
12 injunctive relief or corresponding declaratory relief is appropriate respecting the class as  
13 a whole.” Fed. R. Civ. P. 23(b)(2). “Class certification under Rule 23(b)(2) is  
14 appropriate only where the primary relief sought is declaratory or injunctive.” *Zinser v.*  
15 *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001). The court treats  
16 [p]redominance and superiority a[s] self-evident,” *Dukes*, 564 U.S. at 363, and requires  
17 “[o]nly a showing of cohesiveness of class claims,” *Herskowitz v. Apple, Inc.*, 301 F.R.D.  
18 460, 481 (N.D. Cal. 2014) (citing *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625,  
19 635 (W.D. Wash. 2011)).

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20  
21 <sup>26</sup> At oral argument, the court expressed its hesitancy to appoint as class counsel a  
22 member of NWIRP because NWIRP is an Organizational Plaintiff to this action. However,  
because the court dismisses Organizational Plaintiffs, *see supra* § III.A.5., that concern is moot.

1 Here, the only relief Plaintiffs seek is declaratory and injunctive. Plaintiffs seek a  
2 declaration that Defendants have violated the applicable EAD regulations and an order  
3 prospectively requiring Defendants to comply with the regulatory timelines set forth in  
4 those regulations. (Am. Compl. at 37-39; *see also* MCC at 21.) Those claims are  
5 sufficiently cohesive to satisfy Rule 23(b)(2). *See Herskowitz*, 301 F.R.D. at 481.  
6 Furthermore, in opposing class certification, Defendants do not argue that this case is  
7 unsuited to proceed as Rule 23(b)(2) class action. (*See generally* MCC Resp.)  
8 Therefore, the court concludes that Rule 23(b)(2) is satisfied.

9 **C. Leave to Renew Motion**

10 Although Plaintiffs have previously moved for class certification, this order marks  
11 the first time the court has addressed class certification on the merits. (*Cf.* 2/10/16 Order  
12 at 35-36 (declining to decide Plaintiffs' motion for class certification after dismissing two  
13 of the three putative class representatives for lack of subject matter jurisdiction).) After  
14 analyzing commonality, the court finds Individual Plaintiffs have not demonstrated that  
15 their current class definitions satisfy that element. *See supra* § III.B.3.b. The confluence  
16 of a complex regulatory scheme, necessary deference to agency interpretations, and  
17 Individual Plaintiffs' expansive proposed class may render this Rule 23(a) issue  
18 intractable. Indeed, the court's own efforts to cure the flaws in the subclass definitions  
19 proved fruitless. In sum, Individual Plaintiffs may have bitten off more than Rule 23  
20 permits them to chew.

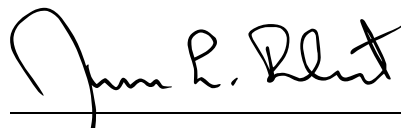
21 However, the court will provide putative class counsel an opportunity to cure the  
22 Rule 23 deficiencies identified herein by modifying the subclass definitions, providing

1 further evidence, and renewing their motion for class certification.<sup>27</sup> The court GRANTS  
2 Individual Plaintiffs leave to renew their motion for class certification no later than 30  
3 days from the date of this order.<sup>28</sup>

4 **IV. CONCLUSION**

5 Based on the foregoing analysis, the court GRANTS in part and DENIES in part  
6 Defendants' motion to dismiss (Dkt. # 69), DENIES without prejudice Individual  
7 Plaintiffs' motion for class certification (Dkt. # 59), and GRANTS Individual Plaintiffs  
8 leave to renew their motion for class certification within 30 days of the date of this order.

9 Dated this 5th day of October, 2016.

10  
11 

12 JAMES L. ROBART  
13 United States District Judge  
14  
15  
16  
17

18 \_\_\_\_\_  
19 <sup>27</sup> In this order, the court identifies the possible utility of further discovery. *See supra*  
20 n.23. Such further discovery may warrant granting Individual Plaintiffs more than 30 days to  
21 renew their motion for class certification. The court will consider granting an extension of  
22 Plaintiffs' deadline on an appropriate motion.

<sup>28</sup> If Plaintiffs fail to timely renew their motion for class certification, the court will deny  
the motion for class certification with prejudice and, on an appropriate motion, determine  
whether the remaining Individual Plaintiffs' claims are subject to dismissal. *See supra* § III.A.4.