UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Bianey GARCIA PEREZ, et al., Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, et al., Defendants.	Case No. 2:22-cv-806 **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** Noted on Motion Calendar: July 1, 2022 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs and proposed class members (Plaintiffs) seek preliminary relief from Defendants U.S. Citizenship and Immigration Services' (USCIS) and the Executive Office of Immigration Review's (EOIR) policies and practices that prevent Plaintiffs from obtaining work authorization while their asylum applications are pending. Under the Immigration and Nationality Act (INA), USCIS and EOIR have 180 days to adjudicate asylum applications. In most cases, however, Defendants do not meet that deadline. In recognition of the financial hardships asylum seekers face, the INA and implementing regulations also authorize asylum applicants to apply for an employment authorization document (EAD) when their asylum applications have been pending for 180 days. But, even though asylum cases often drag on for years, Defendants have adopted policies and practices for calculating an applicant's 180-day waiting period—hereinafter called the "asylum EAD clock"—that prevent some asylum seekers from accruing the requisite 180 days. Federal regulations permit Defendants to stop the asylum EAD clock in two limited instances: after applicant-caused delay or a decision denying the asylum application. Significantly, the policies and practices challenged here fall outside these exceptions, violating Defendants' own regulations and preventing Plaintiffs from working and supporting themselves and their families.

Plaintiffs, through their respective subclasses, seek preliminary relief regarding three of the challenged policies and practices.[1] First, the proposed Remand Subclass challenges Defendants' policy and practice of failing to restart their asylum EAD clocks and credit the time

[1] In their complaint, Plaintiffs also challenge Defendants' failure to provide written notice and a meaningful opportunity to contest asylum EAD clock calculations or EAD denials based on inaccurate clock calculations. *See* Compl. ¶¶ 43–53. Plaintiffs do not seek preliminary relief on behalf of this proposed class at this time.

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their cases have been pending after they prevail before the Board of Immigration Appeals (BIA) or a federal court of appeals. While federal regulations permit Defendants to stop the asylum EAD clock after an immigration judge (IJ) has denied an asylum application, that denial cannot serve as a basis to fail to restart the Remand Subclass's asylum EAD clocks. In such cases, the agency's prior decision has been vacated and each subclass member has a complete, pending asylum application before EOIR. Indeed, ten years ago, Defendants faced a similar challenge alleging that their policies unlawfully prevented asylum seekers who prevailed on an administrative appeal or petition for review from obtaining an EAD. *See A-B-T- v. U.S. Citizenship & Immigr. Servs.*, No. 11-cv-2108-RAJ (W.D. Wash.). This Court approved a final settlement on behalf of a nationwide class and subclasses that provided relief for hundreds, if not thousands, of asylum seekers.[2] Even so, Defendants reverted to their prior policy and practice after the settlement expired, obligating Plaintiffs to again seek relief from this Court.

Second, the proposed Unaccompanied Children Subclass (UC Subclass) faces similar unlawful agency action. The INA requires USCIS to adjudicate the asylum applications of unaccompanied children in the first instance, even when they are in removal proceedings. Therefore, IJs are required to adjourn these cases to allow USCIS to adjudicate Subclass members' applications. However, under Defendant EOIR's policy and practice, IJs use an adjournment code that stops the asylum EAD clock, rendering Subclass members ineligible to obtain EADs after the requisite 180 days. This occurs even though UC Subclass members have neither caused a delay nor received a denial of their asylum application.

[2] *See* Maltese Decl. Ex. A, Settlement Agreement in *A-B-T- v. U.S. Citizenship & Immigr. Servs.*, No. 11-cv-2108-RAJ (W.D. Wash.); *see also* Compl. ¶¶ 4–9.

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Third, the proposed Change of Venue Subclass also concerns situations that Defendants inaccurately label "applicant-caused delay." The Change of Venue Subclass includes individuals who are released from detention or from placement in the Migrant Protection Protocols program who successfully move to change venue to the immigration court in the location of their new residence. Yet Defendants have a practice of labeling these subsequent court changes as applicant-caused delay and stopping the asylum EAD clock on this basis.

Each of these policies and practices violates the federal regulations governing the asylum EAD clock, which implement the INA. Absent preliminary relief, Plaintiffs face immense harm because of the guaranteed denial of their EADs due to Defendants' policies. Accordingly, Plaintiffs seek preliminary relief to enjoin these unlawful practices.

II. STATEMENT OF FACTS

A. Defendants' Policies Governing the Asylum EAD Clock

1. The Asylum EAD Clock

Noncitizens present in the United States or who seek admission at a U.S. port of entry may apply for asylum under the INA. 8 U.S.C. § 1158(a)(1). Asylum applications are typically filed in one of two places, depending on whether an individual is filing "affirmatively" with USCIS or "defensively" while in removal proceedings before EOIR. In general, individuals who are not in removal proceedings may submit affirmative applications to USCIS. *See* 8 C.F.R. §§ 103.2(a)(1), (6), 208.3(c)(3);[3] USCIS, I-589 Application for Asylum and Withholding of

[3] Effective May 31, 2022, the Department of Homeland Security's (DHS) and EOIR's regulations were updated to reflect the revisions codified by a new, joint rule issued by DHS and EOIR. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022). These new regulations enact revisions to what is considered a filed asylum application and also change the numbering of relevant regulations. Plaintiffs cite to the regulations as in effect on May 31, 2022.

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Removal (last updated May 31, 2022), https://www.uscis.gov/i-589. Individuals already in removal proceedings may file an asylum application with EOIR. 8 C.F.R. § 1208.4(b)(3). In addition, DHS and EOIR considers individuals who pass a credible fear interview after being placed in expedited removal proceedings to have submitted a complete asylum application. *See* 87 Fed. Reg. at 18089; *see also* 8 C.F.R. §§ 208.3(a)(2), 1208.3(a)(2).

The filing date for asylum applications is critical. With limited exceptions, an asylum applicant must file an application within one year of their arrival in the United States. 8 U.S.C. § 1158(a)(2)(B). In addition, Congress mandated that "absent exceptional circumstances," asylum applications "shall be completed within 180 days after the date an asylum application is filed." *Id.* § 1158(d)(5)(A)(iii). Congress also permitted DHS to authorize employment for asylum applicants 180 days after the application was filed, which the agency has implemented via regulation. 8 U.S.C. § 1158(d)(2); 8 C.F.R. §§ 274.12(c)(8); 208.7(a)(1). USCIS is charged with adjudicating EAD applications. *See* 8 C.F.R. § 208.7(a)(1). Notably, provided the asylum applicant meets the eligibility requirements, USCIS does not have discretion to deny these EAD applications. *Id.* § 274a.13(a)(1)–(2).

Despite the 180-day statutory deadline to adjudicate asylum applications, in practice, asylum cases take far longer to adjudicate. According to the Transactional Records Clearinghouse (TRAC), an institution that regularly compiles and publishes data related to the immigration system, there are over 1.7 million cases pending before immigration courts t.

In addition, in 2020, DHS amended the regulations governing employment authorization for asylum applications. *See* Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (June 26, 2020). This rule was vacated in *Asylumworks v. Mayorkas*, --- F. Supp. 3d ---, 2022 WL 355213 (D.D.C. Feb. 7, 2022), and the government did not appeal. *See* Docket, *Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH) (D.D.C.). Thus, the regulations have reverted to their prior form, except as modified by the new rule described in the prior paragraph. *See also* Compl. ¶¶ 7–8 & p.8 n.2.

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Maltese Decl. Ex. B, TRAC, Immigration Court Backlog Tool Data—Pending Cases (last accessed May 6, 2022). On average, these cases have been pending well over 800 days before an IJ—far beyond the 180-day timeline mandated by the INA. Maltese Decl. Ex. C, TRAC, Immigration Court Backlog Tool Data—Average Days (last accessed May 6, 2022). This data does not account for additional time spent waiting for a decision on appeal to the BIA or on a petition for review to a court of appeals. That process often takes many years. *See, e.g.*, Maltese Decl. Ex. D, Admin. Off. of U.S. Courts, U.S. Court of Appeals – Judicial Caseload Profile (Dec. 31, 2021) (noting that nationally, courts of appeals took ten months to resolve an appeal on average).

Moreover, these figures account only for cases before EOIR. Individuals whose asylum applications are filed with USCIS face additional delays. USCIS has an immense pending backlog of over 400,000 asylum applications. Maltese Decl. Ex. E, USCIS, Number of Service-wide Forms for Quarter 1, FY2022 (Dec. 31, 2021). The agency also processes fewer cases than it receives, *id.*, meaning many applicants generally wait years for a decision.

The EOIR and USCIS data cited above include, inter alia, all cases in which an asylum application has been filed. These statistics thus underscore that the majority of asylum seekers face lengthy timelines for a decision on their application. The ability to work is thus critical for them to survive while seeking protection in this country.

Defendants USCIS and EOIR are jointly responsible for calculating the 180-day waiting period to file an EAD application. 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2). For both affirmative and defensive asylum applicants, the 180-day asylum EAD clock begins to run on the date the applicant files a complete asylum application. 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1), 208.3(c)(3), 1208.3(c)(3). For cases filed "affirmatively" with USCIS, USCIS tracks the 180-asylum EAD

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clock. *See* Maltese Decl. Ex. F, EOIR & USCIS, The 180-Day Asylum EAD Clock Notice (May 9, 2017). For asylum cases in removal proceedings, EOIR administers the asylum EAD clock. When USCIS adjudicates an EAD application for an asylum applicant in removal proceedings, USCIS uses EOIR's clock to track the accrual of time towards completion of the 180-day waiting period. *Id.*; *see also id.* Ex. G, USCIS, Applicant-Caused Delays in Adjudication of the "Form I-589, Application for Asylum and Withholding of Removal" and Impact on Employment Authorization (Aug. 25, 2020); *id.* Ex. H, Mem. from James R. McHenry III, Director, to All of EOIR, PM 21-06, at 5–6 (Dec. 4, 2020).[4]

In all asylum cases, under federal regulations, any "applicant-caused delays" stop the accrual of time toward the 180-day requirement. 8 C.F.R. § 208.7(a)(2). In some circumstances, an applicant's asylum EAD clock will restart as the adjudication of the asylum application progresses. In addition, the regulations provide that once USCIS or an IJ denies an asylum application, the asylum EAD clock stops. *Id.* § 208.7(a)(1). To track these clock stoppages for applicants in removal proceedings, "EOIR houses a 'clock' . . . within its case management system for the convenience of USCIS to assist it with adjudicating applications for [noncitizen] employment authorization based on a pending asylum application. The EAD Clock is updated automatically according to adjournment codes entered by Immigration Judges." Maltese Decl. Ex. H, PM 21-06, at 5 n.14. The current list of proscribed adjournment codes is located in the EOIR Policy Manual. *See id.* Ex. I, EOIR Policy Manual, App'x O – Adjournment Codes (last

[4] EOIR has since rescinded this memo. *See* Maltese Decl. Ex. J, Mem. from David L. Neal, Director, PM 22-05 (Apr. 18, 2022). The recission memo does not explain what policy is now in effect. However, the memo continues to accurately describe the general process EOIR and USCIS use to track the asylum clock.

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updated May 18, 2022). The EOIR Policy Manual contains a list of codes with definitions and earmarks for the codes that "will stop the EAD Clock until the next hearing." *Id.*

2. The Asylum Clock EAD Policies that Plaintiffs Challenge

Defendants USCIS and EOIR have a number of policies and practices that unlawfully bar asylum applicants from accruing the time necessary to receive an EAD. Plaintiffs challenge and seek preliminary relief regarding three USCIS policies and/or practices that violate federal regulations by classifying as "applicant-caused delay" actions that are not, in fact, applicant caused or by continuing to classify a previously denied asylum application as denied even though the denial decision has been vacated.

i. Remand Subclass

First, Plaintiffs Bianey Garcia Perez and Maria Martinez Castro and the members of the proposed Remand Subclass challenge Defendants' policy and practice regarding remands from the BIA or federal courts of appeals. As noted, under federal regulations, the asylum EAD clock stops when an IJ issues a decision denying an asylum application. 8 C.F.R. § 208.7(a)(1). However, Defendants have a policy and practice of refusing to restart the clock following remand from the BIA or a federal court of appeals. *See, e.g.*, Garcia Perez Decl. ¶¶ 8–12. Martinez Castro Decl. ¶ 4, 8; Badger Decl. ¶ 6; Lamberti Decl. ¶¶ 3–7. As a result, an applicant's asylum EAD clock remains stopped even though the BIA or a federal court of appeals has vacated the decision denying the application, which, consequently, restores the applicant to having a pending "complete asylum application." 8 C.F.R. § 208.7(a)(1).

Notably, while Defendants previously fixed this policy following prior litigation before this Court, *see* Maltese Decl. Ex. A, *A-B-T-* Settlement Agreement, Defendants have since resorted to their prior policy, *see id.* Ex. K, USCIS, The ABT Settlement Agreement (last

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updated June 14, 2019) ("The ABT Settlement Agreement has expired. Note: Effective Aug. 25, 2020, USCIS implemented new procedures for determining whether an applicant for asylum would be eligible for employment authorization."). As detailed below, *infra* Sec. III.B, Defendants' policy has harmed Plaintiffs Bianey Garcia Perez and Maria Martinez Castro, as their asylum EAD clocks have not restarted since they prevailed in their petitions for review. Garcia Perez Decl. ¶¶ 8–12. Martinez Castro Decl. ¶ 4, 8.

ii. Unaccompanied Children (UC) Subclass

Plaintiff J.M.Z. and the members of the proposed UC Subclass challenge a policy and practice that improperly considers their cases to be subject to "applicant-caused delay" or an IJ denial even though they have not caused any delay or received a denial on their case. For unaccompanied children in removal proceedings, Congress mandated that USCIS, rather than an IJ, must first adjudicate their asylum claims. 8 U.S.C. § 1158(b)(3)(C). To manage their dockets, IJs have a practice of adjourning these cases until USCIS issues a decision. In some instances, EOIR adjourns the case with code "*7A – DHS Application Process – Respondent Initiated," even though the INA, not the unaccompanied child, requires this process. Maltese Decl. Ex. I, EOIR Policy Manual, App'x O – Adjournment Codes. In others, IJs administratively close the cases and EOIR codes the closures with Code "*8A – IJ Completion Prior to Hearing." *Id*. Both of these codes "stop the [asylum] EAD Clock until the next hearing," *id.*, and therefore prevent an applicant from accruing time towards the 180 days while the application is pending before USCIS, even though the applicant has not requested a delay, *see, e.g.*, Dobrin Decl. ¶¶ 4–7; Dolan Decl. ¶¶ 5–8. Instead, it is the law that requires this procedure. *See* 8 U.S.C. § 1158(b)(3)(C).

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iii. Change of Venue Subclass

Plaintiff Alexander Martinez Hernandez and the members of the proposed Change of Venue Subclass challenge Defendants' practice of attributing delay and stopping the asylum EAD clock when an individual's case is transferred to their new place of residence, including after entering the United States or being released from detention. Pursuant to these practices, Defendants arbitrarily extend asylum EAD clock stoppages for months and even years by inappropriately labeling the change of venue as "delay" attributable to these subclass members.

In some instances, Defendants stop the asylum EAD clock when an individual is released from immigration detention. Upon release, such individuals relocate to the address they provided to U.S. Immigration and Customs Enforcement (ICE) and/or the immigration court. *See, e.g.*, 8 C.F.R. § 1003.15(d)(2); Maltese Decl. Ex. L, ICE, Form I-352 (last accessed May 10, 2022). Typically, the Department of Homeland Security (DHS) or the individual then files a motion to change venue. Defendant EOIR then transfers the individual's case to the appropriate immigration court, which is generally the court nearest to the individual's new residence. 8 C.F.R. § 1003.20; *see also* Maltese Decl. Ex. M, Mem. from Mary Beth Keller to All Immigration Judges et al., PM 18-01 (Jan. 17, 2018). But in many cases, such as Plaintiff Martinez's, Defendant EOIR codes such change of venue as an "applicant-caused delay." *See* Koop Decl. ¶¶ 22–25 (recounting similar problems with changes of venues following release from detention); Hamill Decl. ¶¶ 5–9 (similar); Miller Decl. ¶¶ 4–14; Tollefson Almeida Decl. ¶ 6 (similar). Defendant EOIR does so even though the case is transferred to a new venue pursuant to an ICE or IJ decision to release the individual from immigration custody.

A similar problem occurs with individuals originally placed in the Migrant Protection Protocols (MPP). Pursuant to MPP, DHS has required thousands of asylum seekers to remain in

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Mexico while waiting for court hearings. *See, e.g.*, Maltese Decl. Ex. N, DHS, Migrant Protection Protocols (last updated Jan. 20, 2021). These hearings take place in immigration courts located along the United States southern border. However, DHS permits some individuals subjected to MPP to enter the United States, while others enter to escape significant danger faced in the tent encampments and cities where they were forced to wait for their hearings. Following entry, they generally must file a motion to change venue so that their case is appropriately transferred to the immigration court nearest to their new residence. *See* Maltese Decl. Ex. M, PM 18-01; Koop Decl. ¶ 10; Badger Decl. ¶ 7. As with any change of venue motion, Defendants routinely code such motions as "applicant-caused delay" in the asylum EAD clock, even though these subclass members are forced to file the motion due to Defendant's practices and decisions regarding the MPP program. Koop Decl. ¶¶ 28–31; Badger Decl. ¶ 7.

B. Named Plaintiffs' Factual Backgrounds

1. Plaintiff Bianey Garcia Perez

Plaintiff Bianey Garcia Perez, a member of the Remand Subclass, is a noncitizen from Mexico who applied for asylum on April 5, 2018. Garcia Perez Decl. ¶¶ 2, 4. Ms. Garcia Perez and her three daughters sought admission to the United States on November 15, 2017, and DHS placed the family in removal proceedings on November 18. *Id.* ¶ 3. At an April 5, 2018, master calendar hearing (MCH) before the Seattle Immigration Court, Ms. Garcia Perez filed her application for asylum and chose a non-expedited date for her individual calendar hearing (ICH). *Id.* ¶ 4. Because she chose a non-expedited date, her asylum EAD clock did not start. *Id.*

On December 19, 2018, Ms. Garcia Perez had her ICH, at which the IJ denied Ms. Garcia Perez's asylum application and ordered her removed. *Id.* ¶ 5. Ms. Garcia Perez appealed to the BIA, and over two years later, on April 19, 2021, the BIA denied the appeal. *Id.* ¶ 6. On May 17,

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2021, Ms. Garcia Perez filed a petition for review with the Ninth Circuit Court of Appeals. *Id.* ¶ 7. The Court remanded Ms. Garcia Perez's case on January 3, 2022, vacating the agency decision denying her asylum and withholding application. *Id.*

However, following the remand, EOIR did not start Ms. Garcia Perez's asylum EAD clock. *Id.* ¶ 12. To this day, the clock remains stopped at zero days. *Id.* As a result, and due solely to Defendants' Remand Policy and Practice, Ms. Garcia Perez cannot accrue time towards EAD eligibility. But for that policy, Ms. Garcia Perez would be eligible for an EAD.

Defendants' policy regarding remands has caused Ms. Garcia Perez harm in several ways. She is the sole provider for her family, and without an EAD, she does not have sufficient income to provide for her family. *Id.* ¶ 14. The father of Ms. Garcia Perez's children does not provide any financial help. *Id.* Consequently, she must depend on the assistance of family and friends to survive. *Id.* Yet even with this assistance, Ms. Garcia Perez and her three daughters have had to rent a single room in an apartment, at times living with strangers. *Id.* ¶ 15. They have been evicted twice and have been homeless, living in an abandoned house. *Id.* Thus, by delaying when Ms. Garcia Perez is eligible for an EAD, Defendants prolong these harms and effectively deprive Ms. Garcia Perez and her family of the ability to obtain basic shelter and financial stability.

2. Plaintiff Maria Martinez Castro

Plaintiff Maria Martinez Castro is a class member of the Remand Subclass. She is a noncitizen from Honduras who first applied for asylum on April 19, 2019. Martinez Castro Decl. ¶¶ 2–3. Ms. Martinez's asylum clock began to run over two months later, on July 30, 2019, at her Individual Calendar Hearing (ICH). *Id.* ¶ 4. The clock did not start until this date because Ms. Martinez had not accepted the earliest possible date for her ICH. *Id.*

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On August 9, 2019, the IJ issued a decision denying Ms. Martinez's asylum application, which stopped her asylum EAD clock that same day. *Id.* The BIA dismissed Ms. Martinez's appeal on January 17, 2020. *Id.* Ms. Martinez subsequently filed a petition for review with the Ninth Circuit Court of Appeals, which granted the petition on July 14, 2021, and vacated the agency decision ordering Ms. Martinez removed. *See id.* The court remanded the case for further consideration of Ms. Martinez's asylum application. *Id.*

However, EOIR and USCIS did not restart the asylum EAD clock following this remand and her clock remains stopped at 9 days. *Id.* ¶ 8. But for Defendants' Remand Policy and Practice, Ms. Martinez would have more than 180 days on her asylum EAD clock.

Ms. Martinez's inability to obtain an EAD has caused her and her family significant harm. *Id.* ¶ 9. Ms. Martinez cares for her three teenage grandchildren, two of whom have a U.S. citizen child. *Id.* The family of six depends on Ms. Martinez, but because she is unable to work, the support she can provide is limited. *Id.* This inability to provide for the family has caused Ms. Martinez depression. *Id.*

3. Plaintiff J.M.Z.

Plaintiff J.M.Z. is a member of the UC Subclass. She is a minor and a noncitizen from Honduras who applied for asylum on April 23, 2018. Dobrin Decl. ¶¶ 3–4. J.M.Z. was designated as an unaccompanied child when she entered the United States. *Id.* ¶ 4. She was placed in removal proceedings, but because of her designation as an unaccompanied child, federal law requires USCIS to initially adjudicate her asylum application. *Id.* For this reason, J.M.Z. filed her asylum application with USCIS's San Francisco asylum office, along with a courtesy copy that was filed with EOIR. *Id.* ¶¶ 4–5. EOIR then entered an adjournment code that classified USCIS's adjudication of the asylum application as applicant-caused delay, even

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though federal law requires USCIS to first adjudicate the asylum application. *See id.* ¶ 7. Nevertheless, J.M.Z. filed an application for an EAD on Form I-765 on December 18, 2018, over 180 days after her submission of her asylum application. *Id.* ¶ 6. On January 28, 2019, USCIS denied the EAD application, stating that J.M.Z. had not accrued the 180 days necessary to apply for an EAD. *Id.* ¶ 7. J.M.Z. subsequently filed a request for reconsideration, explaining that her application had been pending 180 days and that there was no applicant-caused delay. *Id.* ¶ 8. USCIS never responded to that request. *Id.* J.M.Z. then filed a new application for an EAD in June 2021, which remains pending and subject to the same unlawful policy and practice that barred J.M.Z. from receiving an EAD in the first place. *Id.* ¶ 10. But for Defendants' UC policy and practice, J.M.Z. would be eligible for an EAD.

4. Plaintiff Alexander Martinez Hernandez.

Plaintiff Alexander Martinez Hernandez is a member of the Change of Venue Subclass and a noncitizen from El Salvador. Martinez Hernandez Decl. ¶ 2. Mr. Martinez applied for asylum while detained at Winn Correctional Center in Winnfield, Louisiana. *Id.* ¶ 3. He submitted his application to the Oakdale Immigration Court on August 16, 2021, and his asylum EAD clock began to run that same day or shortly thereafter. *See id.*

Mr. Martinez was then scheduled to have an ICH in his case on December 6, 2021. *Id.* ¶ 4. However, on December 2, 2021, he was released from detention. *Id.* As a result of that release, Mr. Martinez's ICH was cancelled. *Id.* He and DHS then filed a joint motion to change venue of his immigration case from the Oakdale Immigration Court to the San Francisco Immigration Court, near where Mr. Martinez began to reside after his release. *Id.* ¶ 5.

EOIR stopped Mr. Martinez's EAD clock due to the change of venue motion, freezing it at 148 days. *Id.* ¶ 9. While Mr. Martinez was scheduled to attend an MCH in March 2022—

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which would have restarted his clock—EOIR cancelled that hearing. *Id.* ¶ 10. Mr. Martinez is now scheduled to attend an MCH in September 2022. *Id.* But for Defendants' Change of Venue Policy and Practice, Mr. Martinez would be eligible for an EAD.

Mr. Martinez's inability to obtain an EAD has caused him significant harm. *Id.* ¶ 11. Because he lacked an EAD, Mr. Martinez faced a prolonged, abusive situation in the home of his sponsor and was unable to immediately leave that dangerous environment. *Id.*

III. ARGUMENT

To obtain a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009). Even if Plaintiffs raise only "serious questions going to the merits," the Court can nevertheless grant relief if the balance of hardships tips "sharply" in Plaintiffs' favor, and the remaining equitable factors are satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, the facts and the law favor Plaintiffs, and this Court should accordingly grant their request for a preliminary injunction.

A. Plaintiffs Are Likely to Succeed on the Merits.

Defendants' three challenged policies and practices violate the Administrative Procedure Act (APA) and governing regulations. The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). A court "shall" set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, Plaintiffs are likely to succeed on the merits of their claim, as they are able to

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demonstrate that each policy and practice at issue concerns agency action that violates the agency's own regulations that implement the INA.

1. Defendants' Remand Policy Violates the APA and Due Process.

USCIS and EOIR's policy and practice of not restarting the asylum EAD clock after a case is remanded by the BIA or a federal court of appeals violates the agency's own regulation. The relevant regulation states that

> An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150–day period shall not be eligible to apply for employment authorization. If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied.

8 C.F.R. § 208.7(a)(1).

Thus, the denial of an asylum application terminates an applicant's ability to acquire an EAD if they have not yet accrued 180 days on the asylum EAD clock. But once the BIA or a federal court grants an administrative appeal or petition for review, respectively, and remands the case, the agency decision denying the application has been vacated, meaning the denial decision has been "null[ified] or cancel[ed]; ma[de] void; invalidate[d]." Black's Law Dictionary (11th ed. 2019). Instead, the agency once again has before it "a complete asylum application submitted in accordance with §§ 208.3 and 208.4" that now must be adjudicated. 8 C.F.R. § 208.7(a)(1).

As a result, pursuant to 8 C.F.R. § 208.7, an applicant's asylum application has been restored to its prior "pending" status and, thus, is entitled to accrue time on the asylum EAD clock from the date it was filed. Defendants' policy and practice of refusing to restart the asylum EAD clock when the asylum application is pending on remand is thus arbitrary and capricious, not in accordance with law, and should be set aside. Defendants should be required to abide by the plain language of their own regulation. *See, e.g.*, *Vista Hill Found., Inc. v. Heckler*, 767 F.2d

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556, 566 (9th Cir. 1985) ("[T]he Secretary has no choice but to follow the rules she has adopted."); *Gonzalez Rosario v. USCIS*, 365 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018) (*Rosario*) (requiring USCIS to honor "the plain language and clear objectives behind the regulation at issue" and adjudicate EAD applications within 30 days).

Following the *A-B-T-* Settlement Agreement, Defendants previously were required to credit *all* the time that the applicant waited for the BIA or federal court of appeals to issue its decision. Maltese Decl. Ex. A, *A-B-T-* Settlement Agreement, at 19. This is because, but for the agency's erroneous decision, Remand Subclass members already would have acquired an EAD. The agency's erroneous decision—that was subsequently overturned on remand—prevented the individual from obtaining an EAD by stopping the accrual of the 180 days. However, after the *A-B-T-* Settlement Agreement expired, the agency implemented a new regulatory framework, which it relied on to assert that it was no longer necessary to restart the asylum EAD clock following remand. The District Court for the District of Columbia has since permanently enjoined and vacated the 2020 regulatory framework. *Asylumworks*, 2022 WL 355213, at *12. As such, there is no legal support for Defendants' refusal to acknowledge that asylum applicants who prevail on an administrative appeal or a petition for review, where the case is remanded for further consideration, continue to accrue time on the asylum EAD clock. To the contrary, Defendants' policy and practice violates its own regulation. Accordingly, the Court should order Defendants to restart Remand Class members' asylum EAD clocks and credit Remand Subclass members with the time they spent waiting for adjudication of their appeal or petition for review.

2. Defendants' Policy Regarding Unaccompanied Children with Pending Asylum Applications Violates Agency Regulations.

Defendants' policy and practice regarding unaccompanied children with pending asylum applications also violates their own regulations and the INA. The UC Subclass is comprised of

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youth in removal proceedings who have been designated unaccompanied children, who have pending asylum applications, and whose asylum EAD clocks have stopped because of EOIR adjournment coding decisions. *Supra* Sec. II.A.2.ii. Because Congress requires USCIS to adjudicate these asylum applications in the first instance, IJs either adjourn or administratively close the cases pending a USCIS decision. In both instances, USCIS uses an adjournment code that classifies the waiting period as applicant-caused delay under 8 C.F.R. § 208.7. *Id.*

This policy and practice violates agency regulations and the INA. Federal law mandates that USCIS adjudicate the application. 8 U.S.C. § 1158(b)(3)(C). Thus, the fact that an IJ adjourns a case while waiting for USCIS to adjudicate the asylum application pursuant to a mandate from Congress does not equate to an "applicant-caused delay" or a "denial;" to the contrary, the UC Subclass members continue to have a "complete asylum application" pending before the proper agency. 8 C.F.R. 208.7(a)(1).

Nor are Defendants justified in stopping or refusing to start the clock by using adjournment code 7A. *See* Maltese Decl. Ex. I, EOIR Policy Manual, App'x O – Adjournment Codes (designating Code 7A as one that stops the "EAD clock until the next hearing" in order "to allow the adjudication of an application pending with DHS"). It is Congress that dictates that USCIS must initially adjudicate the application. The unaccompanied child has no control over what Congress required or how quickly USCIS moves forward in adjudicating the application. *See, e.g.*, Pet. for Writ of Habeas Corpus and Compl., *Cristobal v. Asher*, No. C20-1493-RSM-BAT, 2021 WL 796597 (W.D. Wash. Mar. 2, 2021) (seeking mandamus and habeas relief in case of a detained unaccompanied child in removal proceedings whose asylum application was pending with USCIS for over three years). By stopping the EAD asylum clock in this way,

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Defendants violate their own regulations. Preliminary relief pursuant to the APA is therefore appropriate. *See Vista Hill Found.*, 767 F.2d at 566; *Rosario*, 365 F. Supp. 3d at 1160.[5]

3. Defendants' Practices Affecting the Change of Venue Subclass Violate Agency Regulations and Are Arbitrary and Capricious.

Defendants' practices with respect to the Change of Venue Subclass also violate the APA. Noncitizens may change the location of their residence, including after they are released from detention or after they enter the United States following placement in the MPP program. In such situations, asylum applicants move to change venue to have their applications adjudicated by the immigration court nearest to their new residence. 8 C.F.R. § 1003.20; *Matter of Rahman*, 20 I&N Dec. 480, 482–85 (BIA 1992); *see also* Maltese Decl. Ex. M, PM 18-01. Yet Defendants frequently code such motions as "applicant-caused delay" even though their own regulations and policies recognize the necessity of such motions. Maltese Decl. Ex. M, PM 18-01 (recognizing that such motions are necessary to move a case from a detained to a non-detained court except in limited circumstances); *see also supra* Sec. II.A.2.iii. Indeed, the noncitizen cannot proceed before the immigration court initially assigned to hear their case—either because it is a detained court and they have been released or because the subclass member now lives far from that border court presiding over MPP cases. Moreover, the subclass member has no control over how quickly the new court sets the case for a hearing. *See, e.g.*, Martinez Hernandez Decl. ¶ 10; Hamill Decl. ¶ 8; Koop Decl. ¶ 25; Miller Decl. ¶¶ 11–12; Rogoff Decl. ¶ 4; Tollefson Almeida Decl. ¶ 7. Such "delay" cannot be attributed to these subclass members, when it is Defendants' policies and practices that necessitate the motions to change venue, and where the new

[5] Moreover, the transfer of the asylum application to USCIS is not a denial of this application. The IJ makes no decision on the application; instead, USCIS continues to adjudicate it. Accordingly, the asylum application has not been "denied" under 8 C.F.R. 208.7(a)(1).

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immigration court determines how quickly to schedule the next hearing.

As such, Defendants' practice of stopping the asylum EAD clock for such change of venue subclass members violates agency regulations. *See* 8 C.F.R. § 208.7(a)(1)–(2). Counting such transfers as delay also is arbitrary and capricious as it is not "based on non-arbitrary, 'relevant factors.'" *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); 5 U.S.C. § 706(2)(A). This Court should enjoin Defendants' practice of counting such transfers as applicant-caused delay and stopping the asylum EAD clock on that basis.

B. Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief.

Parties seeking preliminary injunctive relief also must show they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Irreparable harm is harm for which there is "no adequate legal remedy, such as an award of damages." *Ariz. Dream Act. Coal. v. Brewer (Ariz. I)*, 757 F.3d 1053, 1068 (9th Cir. 2014).

Plaintiffs suffer irreparable harm by being deprived of work authorization they are otherwise entitled to receive, and by suffering the severe financial consequences of that deprivation. As noted above, *supra* p. 4, federal regulations grant an asylum applicant the right to apply for work authorization and USCIS has no discretion to deny such an application if the asylum-seeker is otherwise eligible, *Compare* 8 C.F.R. § 274a.13(a)(1) *with id.* § 274a.13(a)(2). Defendants' policies and practices cause Plaintiffs significant harm, including being unable to pay for housing or living expenses, and losing drivers' licenses, which are frequently linked to proof of immigration status. *See Rosario*, 365 F. Supp. 3d at 1162 ("Asylum seekers are unable to obtain work when their EAD applications are delayed and consequently, are unable to financially support themselves or their loved ones. . . . This negative impact on human welfare is

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further compounded by the length of the USCIS's delay."); *see also Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 434 (E.D.N.Y. 2018), *vacated and remanded on other grounds sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (noting that Defendants' policy, which stripped plaintiffs of work authorization, would cause irreparable harm such as "imminent loss of . . . employment" and cause plaintiffs to "lose their homes or need to drop out of school" and employers "unrecoverable economic losses").

Plaintiff Garcia Perez's inability to obtain an EAD has led her and three children to live in a single room or be homeless, Garcia Perez Decl. ¶¶ 14–15, while another Plaintiff has been subjected to an unsafe living situation, Martinez Hernandez Decl. ¶ 11. *See also* Martinez Castro Decl. ¶ 9 (explaining how one named plaintiff struggles to care for her family of 6 because she lacks work authorization); Drake Decl. ¶ 6 (describing how Change of Venue Subclass member who was forced to move with her children to a new jurisdiction on short notice to flee from her abuser had to live with her children in a homeless shelter due to lack of work authorization); Badger Decl. ¶ 6 (describing how Change of Venue Subclass member could not obtain adequate healthcare after major surgery to repair damage caused by gunshot wounds related to his asylum claim, because he was underinsured due to his lack of employment authorization); *id.* ¶ 7 (describing similar difficulty accessing healthcare for Change of Venue Subclass member suffering from cancer); *id.* ¶ 5 (explaining that Remand Subclass member's abusive relationship was "aggravated by lack of employment authorization"); Koop Decl. ¶ 16 (summarizing harms that Remand Subclass member faces, which include the "constant threat of homelessness); *id.* ¶ 25 (explaining how Change of Venue Subclass member "has been unable to maintain stable housing" or "support himself"); Joseph Decl. ¶ 10 (explaining that Remand Subclass member and his family of five U.S. citizen children and a U.S. citizen partner "are in a dire situation" due

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to class member's inability to obtain an EAD); Franco Decl. ¶ 13 (explaining that Remand Subclass member and her minor son "struggle[] with food insecurity" and have been at risk of homelessness); Rogoff Decl. ¶ 4 (explaining that Change of Venue Subclass member was only "able to eat and enjoy shelter" because of help from family); Gai Decl. ¶ 9 (explaining that inability to obtain an EAD "leads to significant disruptions" to ability to become lawfully employed); Dolan Decl. ¶ 10 (explaining that UC Subclass member has to rely exclusively on the family she lives with to survive, and cannot "contribute to the costs of her care").

Moreover, without an EAD, Plaintiffs generally cannot receive a government identification or social security card (which provide access to other forms of vital services), obtain driver's licenses in some states, or open a bank account. Koop Decl. ¶ 8 (stating that clients rely on EADs "in order to get a social security number, which allows them to access critical social services, including medical and educational programming, as well as drivers' licenses in [certain] states"); Hamill Decl. ¶ 9 (explaining that "for many asylum seekers, who are unable to avail themselves of basic government services . . . an EAD can serve as their sole form of government-issued identification," without which they cannot "obtain[] a driver's license, contract[] utilities services, or rent[] a property"); Lamberti Decl. ¶ 8 (explaining that Remand Subclass member cannot renew his expired driver's license and "is at risk of imminent termination"); Tollefson Almeida Decl. ¶ 10 (explaining that Change of Venue Subclass member "struggled to obtain basic necessities like food, housing, and electricity for lack of financial resources and for lack of valid identification").

In addition, the "loss of opportunity to pursue one's chosen profession constitutes irreparable harm." *Ariz. Dream Act Coal. v. Brewer (Ariz. II)*, 855 F.3d 957, 978 (9th Cir. 2017); *see also Medina v. DHS*, 313 F. Supp. 3d 1237, 1251 (W.D. Wash. 2018) (finding DACA

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recipient's potential loss of opportunity to pursue his profession constituted irreparable harm). The inability to obtain EADs results in such harm here. *See, e.g.*, Martinez Hernandez Decl. ¶ 12 (named plaintiff explaining that he cannot work in telecommunications, which he studied in El Salvador, due to his lack of work authorization).

Last, Defendants' unlawful policies and practices inflict substantial emotional and mental stress on proposed class members. *See* Martinez Castro Decl. ¶ 9 (named plaintiff explaining the depression she feels because she is unable to adequately care for her family). Such "emotional stress, depression and reduced sense of well-being" further support a finding of irreparable harm. *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709 (9th Cir. 1988); *see also Moreno Galvez v. Cuccinelli*, 492 F. Supp. 3d 1169, 1181–82 (W.D. Wash. 2020) (*Moreno II*).

C. The Balance of Hardships and Public Interest Also Weigh Heavily in Plaintiffs' Favor.

The final two factors for a preliminary injunction also demonstrate that such relief is appropriate in this case. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The same facts that demonstrate irreparable harm also weigh in Plaintiffs' favor for the balance of hardships and public interest factors. The balance of hardships and public interest favor ensuring that Plaintiffs are not impeded from obtaining lawful employment and the accompanying benefits that status would provide, including the ability to independently care for themselves and their family members. This further ensures that Plaintiffs would be permitted to "work in this country legally, pay[] taxes and operat[e] in the above-ground economy." *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018), *rev'd in part, vacated in part on other grounds sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).

Indeed, this Court previously granted a permanent injunction in a closely-related context.

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In *Rosario*, this Court employed the six-factor reasonableness analysis elucidated in *Telecommunications Research & Action Center v. F.C.C. (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984) to assess whether USCIS's delay in adjudicating asylum seekers' initial EAD applications warranted permanent injunctive relief compelling USCIS to adhere to the 30-day regulatory deadline for adjudicating such applications. 365 F. Supp. 3d at 1162. This Court found in particular that the specific *TRAC* factors "which assess the impact of the agency's delay on the public welfare," "strongly" favored an injunction, reasoning that "human health and welfare are at stake" where "[a]sylum seekers are unable to obtain work when their EAD applications are delayed and consequently, are unable to financially support themselves or their loved ones." *Id.* The same reasoning applies with equal force to the present case.

Finally, because "the government's . . . policy is inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in favor of a preliminary injunction." *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019) (*Moreno I*). This is because "it would not be equitable or in the public's interest to allow the [government] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). Indeed, Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Accordingly, the balance of hardships and the public interest overwhelmingly favor ensuring that Defendants comply with the law in their treatment of Plaintiffs and members of the proposed subclasses for whom injunctive relief is sought.

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IV. CONCLUSION

For all the foregoing reasons, Plaintiffs have demonstrated that they and the proposed subclasses meet the criteria for injunctive relief. According, this Court should grant this motion and issue the accompanying proposed order.

DATED this 9th day of June, 2022.

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Matt Adams, WSBA No. 28287

s/ Leila Kang
Leila Kang, WSBA No. 48048

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** Pro hac vice application forthcoming*