Honorable James L. Robart

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

Northwest Immigrant Rights Project, et al., Plaintiffs, v. United States Citizenship and Immigration Services, et al., Defendants.	No. C15-0813-JLR Plaintiffs' Third Motion for Class Certification

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

This Court denied, without prejudice, Plaintiffs' Renewed Motion for class certification on the basis that Plaintiffs had failed to provide sufficient evidence of commonality. In particular, the Court found that the Individual Plaintiffs (hereinafter, "Plaintiffs") had not established that "'a classwide proceeding' in this case would 'generate common answers apt to drive the resolution of the litigation.'" Dkt. 80 at 45 (internal citation omitted). Plaintiffs' new proposed class definition puts forward a common legal question on which Plaintiffs seek declaratory judgment: whether USCIS is required to adjudicate applications for employment authorization documents (EADs) within the regulatory timeframe or, failing that, grant interim

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employment authorization. Plaintiffs contend that the answer is yes, and hereby renew their motion for class certification to compel Defendants to do so.

The Court's October 5, 2016 Order ("Order") found that Plaintiffs had established numerosity, typicality and adequacy, and satisfied the requirements of Federal Rule of Civil Procedure 23(b)(2). Dkt. 80 at 40-41, 48-54. Accordingly, Plaintiffs hereby incorporate by reference their prior arguments and supporting evidence regarding those requirements for class certification. *See* Dkt. 59; Dkt. 59-1 to 59-18; Dkt. 75.

To address the Court's concerns about commonality, Plaintiffs propose a simplified class definition that limits the class members to individuals whose claims have accrued. This class definition, set forth below, is consistent with what the Court suggested at oral argument:

> Noncitizens who have filed or will file applications for employment authorization that were not or will not be adjudicated within the regulatory timeframe, namely:
>
> (1) 90 days, for those filing applications for employment authorization under 8 C.F.R. § 274a.13 ("90-Day Subclass"); or
>
> (2) 30 days, for those filing initial applications for employment authorization under 8 C.F.R. § 208.7 ("30-Day Subclass"); and
>
> who have not or will not be granted interim employment authorization.
>
> Subclass 1 consists of only those applicants for whom 90 days has accrued or will accrue under the applicable regulations, 8 C.F.R. §§ 103.2(b)(10)(i), 274a.13(d).
>
> Subclass 2 consists of only those applicants for whom 30 days has accrued or will accrue under the applicable regulations, 8 C.F.R. §§ 103.2(b)(10)(i), 208.7(a)(2), (a)(4).

Plaintiffs do not believe that the class definition needs to specifically identify the ways in which the regulatory timeframe may be tolled because the class includes only those individuals to whom Defendants have not granted interim employment authorization once the

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regulatory timeframe has passed. In this declaratory and injunctive (b)(2) class, the Court is not determining whether the regulatory timeframe has tolled (or been reset) for individual class members. Rather the Court is only being asked to rule on the overarching, common legal question of whether the agency is required to follow the regulations and adjudicate EAD applications within the regulatory timeframe or, if they fail to do so, grant interim employment authorization. If the Court rules on this common legal question, the agency will modify its behavior accordingly. *See, e.g.*, *Khoury v. Asher*, 3 F. Supp.3d 877, 892 (W.D. Wash. 2014), *aff'd*, No. 14-35482, 2016 WL 4137642 (9th Cir. Aug. 4, 2016) ("The court has no reason to expect that the government will not take appropriate action to end its violation of the law.").

However, in case the Court is not satisfied with the class definition proposed above by Plaintiffs, Plaintiffs propose an alternative class that incorporates into the class definition the different ways in which the regulatory timeframe is tolled. The alternative class definition would include the following additional language:

> **Subclass 1** includes only those applicants for whom 90 days has or will accrue under the terms of the applicable regulations, 8 C.F.R. §§ 103.2(b)(10)(i), 274a.13(d). It excludes those with:
>
> (a) EAD applications where the regulatory deadline has not elapsed due to tolling caused by:
>
> (i) The applicant's failure to include all required initial evidence as provided in the I-765 Instructions;
>
> (ii) The applicant's request to reschedule, or failure to appear for, an asylum interview or any scheduled biometrics appointment in relation to the employment authorization application;
>
> (iii) A request by USCIS for additional evidence prior to the expiration of the regulatory time period.

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(b) EAD applications that are specifically excluded under 8 C.F.R. § 274a.13(d), *i.e.*, initial EAD applications based on pending asylum applications; EAD applications with a pending permanent residence application under the Haitian Refugee Immigration Fairness Act ("HRIFA"), 8 C.F.R. § 245.15(n); and EAD applications on behalf of certain spouses of H-1B nonimmigrants, 8 C.F.R. § 214.2(h)(9)(iv);

(c) EAD applications where the regulatory deadline has not elapsed because it does not begin to run until USCIS has determined eligibility for the underlying immigration benefit or has granted deferred action, *e.g.* applications based on Deferred Action for Childhood Arrivals (DACA),[1] underlying U or T nonimmigrant status applications; self-petitions under the Violence Against Women Act (VAWA).

Subclass 2 includes only those initial applicants for whom 30 days has or will accrue under the applicable regulations, 8 C.F.R. §§ 103.2(b)(10)(i), 208.7(a)(2), (a)(4). It excludes those with:

EAD applications where the regulatory deadline has not elapsed due to tolling caused by:

(i) The applicant's failure to include all required initial evidence as provided in the I-765 Instructions;

(ii) The applicant's request to reschedule, or failure to appear for, an asylum interview or any scheduled biometrics appointment in relation to the asylum or employment authorization application;

(iii) A request by USCIS for additional evidence prior to the expiration of the regulatory time period;

(iv) Any other delay requested or caused by the applicant.

As discussed in more detail below, this class definition (with or without the excluded groups language) resolves the concerns raised by the Court regarding the previously proposed class definition. The removal of the clause in the previously proposed class definition requiring that class members "are entitled or will be entitled to interim employment authorization"

1 Plaintiffs recognize that this Court, in dismissing the claims of Ms. Osorio, has ruled that DACA renewals would not be included under this class definition. Plaintiffs preserve this issue for any potential appeal.

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alleviates any possibility that the class is "fail-safe." *See* Dkt. 59 at 2. By defining the class to include only those for whom the regulatory timeframe has run, the definition accounts for "scenarios that may also toll the 30-day and 90-day EAD adjudication clocks," as the Court noted in its Order. Dkt. 80 at 43. Though Plaintiffs do not believe it is necessary, the alternative definition specifies each of the circumstances that can, under the regulatory framework, toll the required time period for EAD adjudication. Accordingly, the Court's answer to the common question of whether USCIS is required to grant interim employment authorization in cases where it has failed to adjudicate EAD applications within the time period mandated by the regulations will drive the resolution of the litigation.

Individual Plaintiffs Mr. Gonzalez Rosario, L.S., K.T., Ms. Diaz Marin, Ms. Salmon, Mr. Shah, Ms. Osorio,[2] and Ms. Arcos[3] seek to represent Subclass 1, the 90-day Subclass. Individual Plaintiffs A.A., Mr. Machic Yac, and W.H. seek to represent Subclass 2, the 30-day Subclass.

II. PLAINTIFFS MEET THE COMMONALITY REQUIREMENT FOR CLASS CERTIFICATION.

A. The Class Presents Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, "[a]ll questions of fact and law need not be common." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the contrary, one shared legal issue can be sufficient. *See, e.g., Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) ("So long as there is

2 As noted above, Plaintiffs recognize that this Court has dismissed Ms. Osorio's claim as a DACA renewal applicant, and include her only to preserve the issue for any possible appeal.

3 Plaintiffs recognize that this Court has dismissed the claim of Ms. Arcos, and include her only to preserve the issue for any possible appeal.

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even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2).") (citation and quotation omitted); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement [] asks us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). In determining that a common question of law exists, the putative class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Thus, "[w]hat matters to class certification is not the raising of common 'questions' . . . but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (internal quotation marks omitted)).

Here, Plaintiffs' cases raise a common question of fact, namely, whether USCIS has a policy and practice of failing to issue interim employment authorization to individuals whose pending EAD applications have not been timely adjudicated. They also raise a common question of law — namely, whether Defendants' policy and practice of failing to adjudicate EAD applications within the required timeframes or issue interim employment authorization violates the relevant regulations. The same regulatory timeframes and the same requirement to grant interim employment authorization if the applicable timeframe is not met apply to all

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members of the proposed class regardless of the underlying basis of their applications for employment authorization. At issue is the legality of Defendants' practice of ignoring this mandatory, regulatory timetable for adjudication and refusing to comply with the regulation obligating them to provide interim employment authorization, not their ultimate decisions to grant or deny EADs.

Plaintiffs' claims could be remedied by a declaratory judgment that Defendants' policies or practices are unlawful and injunctive relief ensuring that USCIS complies with its regulations regarding EAD adjudication in the future. Should Plaintiffs prevail, all who fall within the class and subclasses will benefit. Thus, a common answer regarding the legality of each challenged policy and practice "will drive the resolution of the litigation." *Ellis*, 657 F.3d at 981 (citing *Dukes*, 131 S. Ct. at 2551); *see also Unthaksinkun v. Porter*, 2011 U.S. Dist. LEXIS 111099 at *38 (W.D. Wash. Sept. 28, 2011) (finding that, because all class members alleged that the same agency conduct violated their constitutional rights, the court's ruling as to the legality of the conduct would apply to all).

B. The Existing Record Establishes that USCIS Routinely Flouts Its Obligation To Grant Interim Employment Authorization To Individuals Whose EAD Applications are Not Timely Adjudicated.

In its Order, the Court expressed concern that USCIS's delays in adjudicating EAD applications may often result from permissible tolling of the required time periods — for example, due to an applicant's failure to provide necessary documentation to USCIS. *See* Dkt. 80 at 46-47. The Court questioned whether there was sufficient factual evidence establishing that adjudication delays are not generally the fault of the applicant. *See id.*

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But a "segregation" of applications based on the cause of delay is unnecessary to resolve the issue of commonality for purposes of class certification. The common question in this case is *whether* USCIS is required to adjudicate EAD applications within the regulatory timeframe (90 or 30 days) or, failing that, to grant interim employment authorization. These are purely legal questions of regulatory interpretation. How often USCIS actually fails to adjudicate EAD applications within the regulatory timeframe is an issue of numerosity, and the Court stated in its order that Plaintiffs have already satisfied this requirement for class certification. *Id*. at 40-41.

In any case, the proposed class is not defined by whether the 30-day or 90-day time period elapses without interruption. If tolling occurred, the regulatory adjudication deadline would not have expired, and the applicant would not be a class member, at least until the problem that gave rise to tolling is remedied and the day-count restarts and reaches either 30 or 90 days. 8 C.F.R. § 103.2(b)(10)(i).[4] As discussed in Section III.B. below, class members can be identified based on USCIS data showing that their EAD applications remain unadjudicated when the time period stated in the regulations has passed and USCIS has not issued interim employment authorization. In any case, the record in this case is replete with factual evidence that USCIS regularly fails to adjudicate EAD applications within the 30 or 90-day time period stated in the regulations, and that a significant number of these delays occur through no fault of the applicant. Indeed, Defendants have admitted that adjudication of the remaining Plaintiffs' EAD applications was delayed beyond the stated regulatory timeframes, despite the fact that none of them generated requests for evidence, and that all the Plaintiffs either timely complied

4 USCIS has Standard Operating Procedures (SOP) for handling EAD applications, among other filings. *See* Dkt. 44-3 at 1, 8.

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with USCIS's request to attend a biometrics appointment or did not receive such a request. Dkt. 81 ¶¶ 18-25, 28.

Moreover, both the Advocates for Human Rights ("AHR") and the Northwest Immigrant Rights Project ("NWIRP") attest that large numbers of their clients have experienced EAD adjudication delays that were not their fault. Dkt. 5-5 ¶¶ 5-6 (McKenzie Dec.) (61% of EAD applications, which included those subject to the 30-day timeframe and those subject to the 90-day timeframe, were not adjudicated within the applicable regulatory timeframe during a 28-month period, with none "due to a request for evidence from USCIS or due to an applicant missing or rescheduling a biometrics appointment"); Dkt. 59-7 ¶¶ 4-6 (Oskouian Dec.) (21 of 101 EAD applications (or over 20%), which included those subject to the 30-day timeframe and those subject to the 90-day timeframe, were not adjudicated within the applicable regulatory timeframe during a four-month period, with none of the delays due to a USCIS request for evidence or the applicant missing or rescheduling a biometrics appointment; during a later four-month period, adjudication of 14 EAD applications (12 in the 30-day and 2 in the 90-day) handled by a NWIRP attorney was delayed and the delays were not caused by the applicants).

Additional attorney and organizational declarations provide further evidence that EAD applicants experience delays past the regulatory deadlines through no fault of their own — a proposition that Defendants do not dispute. *See, e.g.*, Dkt. 5-3 ¶¶ 4, 6 (Cortez Dec.) (approximately 20 EAD applications filed during two-month period not adjudicated within 90 days; no requests for evidence justifying the delay); Dkt. 5-6 ¶ 7 (Collopy Dec.) (client's EAD application remained pending for an additional two weeks after USCIS acknowledged the case

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was "outside the normal processing time frame"; approved almost five months after filing); Dkt. 59-5 ¶ 5 (Scheiderer Dec., Freedom House) (during an approximately two-year period, 58 EADs issued after the 30-day regulatory timeframe for initial EAD applications based on asylum; no notice from USCIS of delay); Dkt. 59-8 ¶¶ 3-4 (McCarthy Dec., NIJC) (During a one-year filing period, "none of the applicants whose EAD applications were delayed received an interim EAD," which was approximately 53 of the Center's 400 clients (or over 10%); no notice from USCIS of delay in these cases); Dkt. 59-9 ¶ 4 (N. Cortes Dec., MICA) (EADs of approximately 20 clients during a one-year period issued after the applicable 30-day or 90-day regulatory timeframe; no notice from USCIS of delay).

As Plaintiffs have previously noted, the Citizenship and Immigration Services Ombudsman has also recognized that delayed adjudication of EAD applications is a significant problem, with widespread effects. The Ombudsman has issued two reports in the last two years about the severity of this problem. *See* Dkts. 24-1, 76-1. Even though these reports do not specify the precise number of delayed adjudications caused by the agency or attributable to the applicant, one may infer from the context that the Ombudsman views the problem as being largely due to agency-caused delay. For example, the 2015 Ombudsman's report discusses seasonal increases in delays during particular times of the year. Dkt. 24-1 at 36 (Rpt. at 48). Seasonal delays are caused by increased numbers of pending applications during peak filing periods of which USCIS is well aware, and point to delays caused by the agency's failure to assign appropriate numbers of staff to adjudicate them. Similarly, the 2016 Ombudsman's report notes that "[w]hile some delays are due to the customer's failure to file timely or provide required documentation, other delays occur through no fault of the customer." Dkt. 76-1 at 3

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(Rpt. at 62). The Ombudsman's office was created to assist applicants who experience problems with USCIS and to recommend policy changes the agency could make to eliminate systemic problems. Dkt. 24-1 at 17 (Rpt. at 2). It would have had no reason to publish these reports if the delays were due primarily to applicants' failure to comply with the agency's procedures.

III. THE PROPOSED CLASS DOES NOT REQUIRE INDIVIDUALIZED DETERMINATIONS OF CLASS MEMBERSHIP.

A. Individualized Determinations Are Not an Issue in This Rule 23(b)(2) Class.

In a declaratory and injunctive relief class, a ruling on the common legal question largely resolves the litigation without the need for identification of the individual class members. *Individualized* determinations of class membership are unnecessary when plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, as is the case here. *See Kerrigan v. Philadelphia Bd. of Election*, 248 F.R.D. 470, 475 (E.D. Pa. 2008). "[E]nforcement often does not require identification of individual members in a Rule 23(b)(2) class because if relief is granted the defendants are legally obligated to comply." *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1326 (W.D. Wash. 2015) (citing *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015)).

Rule 23(b)(2) was adopted precisely to provide for this type of civil rights action. An Advisory Committee note to Rule 23 states that "illustrative" examples of a Rule 23(b)(2) class "are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R.Civ. P. 23 advisory committee's note to subdivision (b)(2) (1966) (case examples omitted). Courts have applied this analysis to immigration cases. *See Walters v. Reno,* 145 F.3d

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1032, 1047 (9th Cir. 1998); *Lyon v. United States Immigration & Customs Enforcement*, 300 F.R.D. 628, 635 (N.D. Cal. 2014), *modified*, 308 F.R.D. 203 (N.D. Cal. 2015). And, as the Third Circuit has stated: "In light of this guidance, a judicially-created implied requirement of ascertainability—that the members of the class be capable of specific enumeration—is inappropriate for (b)(2) classes." *Shelton*, 775 F.3d at 561; *Dunakin*, 99 F. Supp. 3d at 1326 (W.D. Wash. 2015) (adopting reasoning of other circuits that held "it is improper to require ascertainability"); Dkt. 80 at 39 n.17 ("the court concludes ascertainability presents no obstacle to class certification").[5] Ascertainability and individualized identification of class members are relevant only for those classes to whom notice and opportunity to opt-out must be provided. In such classes, proper notice cannot be provided unless class members are identified. In a Rule 23(b)(2) class action, however, neither notice nor the option to opt-out is required, and therefore the class need not be precisely delimited. *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); *Lyon*, 300 F.R.D. at 642 n.3 (N.D. Cal. 2014); *Shelton*, 775 F.3d at 561.

For these reasons, in the immigration context, courts have repeatedly certified classes seeking declaratory and injunctive relief on a common legal issue, and identification of individual class members has not been an impediment. In the immigration detention context, for example, factual differences among the circumstances of detained individuals do not defeat commonality so long as there is a common factual or legal issue at the core. *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("We have found '[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.'") (quoting *Hanlon v. Chrysler*

5 As the Court noted in *Dunakin*, this legal question is not settled in the Ninth Circuit. 99 F. Supp. 3d at 1326.

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Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)); *Rivera v. Holder*, 307 F.R.D. 539, 550-51 (W.D. Wash. 2015); *Khoury*, 3 F. Supp. 3d at 891. Class-wide resolution of common legal questions was preferable to and more efficient than addressing numerous individual habeas petitions. *Khoury* resolved the "when released" legal question,[6] which had been subject to litigation for decades in the Western District and around the country. *See* 3 F .Supp. 3d at 884-85 (listing cases). Once the Court issued its class-wide declaratory judgment, Defendants had to modify their treatment of detained individuals — despite any factual differences among their claims — to comply with the Court's order. *Id.* at 892.

Similarly, *Rivera* addressed the legal question of whether the agency could release on conditional parole detainees who were eligible for bond. 307 F.R.D. at 548, 551. The individualized question of whether a particular detainee fell under the class definition of those "eligible for bond" did not impede class certification, as the case "concern[ed] a single policy applicable to the entire class that (if unlawful) subjects class members to unnecessary detention." *Id.* at 551.

The present case, which presents the common legal question of whether the agency is required to adjudicate EAD applications within the regulatory timeframe or issue interim work authorization, is analogous to those described above. While differences among individual class members may impact the viability of their particular claims for relief, the class presents a common legal question that the Court may resolve through declaratory and injunctive relief. *See Rodriguez*, 591 F.3d at 1126 ("The particular statutes controlling class members' detention may impact the viability of their individual claims for relief, but do not alter the fact that relief

6 The Court held that mandatory detention under 8 U.S.C. § 1226(c) is applicable only to noncitizens taken into federal custody immediately when released from non-federal custody. *See Khoury*, 3 F. Supp. 3d at 884-85.

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from a single practice is requested by all class members."). Indeed, given this Court's recognition that the Plaintiffs' claims are inherently transitory and unlikely to be addressed through individual litigation, Dkt. 55 at 31, a class action may be the only vehicle to resolve the common legal question presented in this case.

B. Even If Identification of Individual Class Members Were Required for Class Certification, Which It Is Not, Defendants Could Identify Class Members Through Information In Their Administrative Records.

When defendants have the records that enable identification of class members, the class is identifiable and can be certified. *See Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 890 (N.D. Cal. 2015) (class membership was objectively ascertainable from Uber's business records); *Rhodes v. Olson Associates, P.C.*, 83 F. Supp. 3d 1096, 1112 (D. Colo. 2015) ("That Defendant may need to search its existing records does not mean, however, that this class is 'unascertainable.'"); *Torres v. Mercer Canyons, Inc.*, 305 F.R.D. 646, 650-51 (E.D. Wash. 2015), *aff'd*, 835 F.3d 1125 (9th Cir. 2016) (class membership objectively ascertainable from employer and contractor records).

Here, the proposed class is defined to include only those individuals whose pending EAD applications were not adjudicated within the required time period and who have not or will not be granted interim employment authorization. During various discussions of EAD processing delays, USCIS has informed the American Immigration Lawyers Association (AILA) that it has systems in place to track the timetables for pending EAD applications, which would account for any period during which the day-count was tolled. *See* Declaration of Betsy Lawrence, AILA Director of Liaison at ¶ 6 (Nov. 4, 2016) (filed as Dkt. 82-1) (USCIS representatives have informed AILA "in response to questions about EAD delays, that USCIS

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conducts regular reviews to ascertain whether pending EAD applications are within the regulatory time frame during which they are supposed to be adjudicated and has a process in place to identify cases in which the deadline is approaching.") For example, in an April 16, 2015 meeting with AILA's USCIS Benefits Policy Committee, at which Ms. Lawrence was present, USCIS stated:

> USCIS works diligently to give an adjudicative response to each employment authorization request that it receives within the time limits imposed by regulation. To minimize untimely adjudications, numerous reviews are conducted electronically to ensure that cases are worked in a first-in-first-out (FIFO) order. Further data scrapes are completed throughout the lifecycle of the pending application to ensure that the regulatory time frame is met. When cases approaching the regulatory limit are identified, processing steps are in place to attempt to adjudicate them as expeditiously as possible.

Dkt. 24-2 at 3 (USCIS Response to #12 at 9); Lawrence Dec., Dkt. 82-1 at ¶ 6. This type of review is not a recent development. *See* Lawrence Dec., Dkt. 82-1 at ¶ 6. In September 2008, USCIS stated: "Service Centers are actively sweeping cases [EAD applications for applicants to adjust status to permanent residence] at the 60th day mark so that a decision can be made before the 70th day and card produced before the 90th day mark." *See* September 17, 2008 meeting, AILA and USCIS Service Center Operations, Dkt. 82-2 at 2.

USCIS has established procedures whereby applicants or their attorneys can call the National Customer Service Center ("NCSC") to request that an "Approaching Regulatory Timeframe 'service request'" be created if an EAD application subject to the 90-day regulatory time period has been pending more than 75 days. "Tip Sheet", Dkt. 82-2 at 3. These procedures for EAD applications pending more than 75 days also demonstrate that USCIS can track how long an EAD application has been pending. At the April 16, 2015 meeting that Ms. Lawrence

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attended, USCIS stated that USCIS National Customer Service Center (NSCS) "will route the service request to the appropriate office for review." Dkt. 24-2 and Lawrence Dec., Dkt. 82-1 at ¶ 7; *see also* Dkt. 82-2 at 2. As Ms. Lawrence also noted, the "Tip Sheet" that USCIS has on its website contains this same statement. Dkt. 82-1, Lawrence Dec. at ¶ 7 and "Tip Sheet", Dkt. 82-2 at 3. As Ms. Lawrence recognized, "USCIS would have to make a determination as part of that review as the number of days the EAD application had been pending." Dkt. 82-1, Lawrence Dec. at ¶ 7.

Moreover, identifying class members who have not received interim employment authorization is straightforward, given that Defendants have acknowledged that they no longer issue interim employment authorization. Dkt. 80 at 40, citing to Dkt. 55 at 7 n. 6. *See also* Dkt. 24-2. Based on this policy and the above-referenced information in its records, USCIS can easily identify class members whose EAD applications have been pending beyond the applicable regulatory time frame and who did not receive interim employment authorization. Thus, the Court would not be tasked with conducting an individualized determination of each Plaintiff's class membership if the proposed class is certified.

IV. THE PROPOSED CLASS IS NOT "FAIL-SAFE."

A class is fail-safe when class membership is defined in terms of the validity of the plaintiffs' claims. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2014). "[T]he class members either win or are not in the class …." *In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 545 (N.D. Cal. 2012) (citations and internal quotation marks omitted). But that is not the case here, as the Court could certify the class as proposed, but conclude that Plaintiffs have no valid legal claim – if, for example, the Court finds that USCIS is not required to issue interim employment authorization when it fails

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to adjudicate EAD applications within the time period mandated by the regulations, as Defendants argue. *See* Dkt. 34 at 17, 20-23 (Defs.' 1st Mot. to Dismiss); Dkt. 69 at 25 (Defs.' 2nd Mot. to Dismiss).

The *Auto-Zone* case is illustrative of how Plaintiffs' proposed class definition is not fail-safe. The plaintiffs in *Auto-Zone* proposed a fail-safe class defined in terms of liability: "employees to whom Defendant *failed to fully reimburse* all mileage …." 289 F.R.D. at 545 (emphasis added). The class definition was based on the legal merits of the plaintiffs' claims: class members were only those who were not fully reimbursed. The Court held that it could, if it wished, avoid the fail-safe problem by redefining the class as "all employees who sought and did not receive reimbursement for mileage." *Id.* at 546. The modified class is not fail-safe because the class is not defined to include only those with valid legal claims.

Similarly, Plaintiffs' proposed class definition in this case is not fail-safe because it is not *defined* in terms of Defendants' liability. The proposed class members are those for whom the 30 or 90-day regulatory timeframe has run, but who have not been granted interim employment authorization. By certifying this class, the Court will not decide the merits or determine the ultimate validity of the Plaintiffs' claims for interim employment authorization. Because the proposed class is not defined in terms of Defendants' liability, it is not fail-safe.[7]

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7 The counter-example of a class definition that presupposes liability might be: "Applicants *entitled* to receive, but *unlawfully denied*, interim employment authorization." *See Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM EX, 2008 WL 8128621 at *10 (C.D. Cal. Jan. 7, 2008), *aff'd and remanded*, 492 F. App'x 710 (9th Cir. 2012) (defining class in terms of legal entitlement and violation of the law raises fail-safe class issue). In this counter-example, Plaintiffs arguably either win on the merits (as they are entitled to interim employment authorization), or else they are not class members (because they are not entitled to interim employment authorization).

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The fact that the Court has ruled on a number of Defendants' legal arguments, in response to their motions to dismiss, does not make the proposed class fail-safe. While it may seem likely that the agency is required to follow its own regulations—in the same way that the California employer in *Auto-Zone* likely has to reimburse for mileage—this is a merits issue separate from the question of whether Plaintiffs meet the requirements for class certification under Rule 23. *See Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013). While Plaintiffs have attempted to craft a class definition that avoids referencing eligibility, even if the class definition is so construed, certification as a Rule 23(b)(2) class action would still be appropriate. The courts "have certified very broadly defined Rule 23(b)(2) classes in which members are defined by their eligibility for certain types of services or by a qualifying condition." *Dunakin,* 99 F. Supp. 3d at 1326 (W.D. Wash. 2015) (citing cases).[8]

V. CONCLUSION.

Plaintiffs believe that, through their proposed class, alternative class, and sub-classes, they have addressed all of the concerns expressed by the Court regarding the previously proposed class definition, both at the hearing in this matter on September 7, 2016 and in the Court's Order of October 5, 2016. In particular, Plaintiffs have: redefined the proposed class to include only those EAD applicants for whom the regulatory adjudication timeframe has run; clarified the common questions of fact and law; explained why a class-wide proceeding would generate common answers that would drive the resolution of this case; highlighted evidence that the agency's adjudication delays regularly occur through no fault of the applicant;

8 The Ninth Circuit has also not explicitly held that fail-safe classes are precluded. *Heffelfinger*, 2008 WL 8128621 at *10 n.57, *citing Vizcaino v. United States Dist. Ct. for W.D. Wash.*, 173 F.3d 713 (9th Cir. 1999).

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explained why identification of proposed class members would not impose an undue burden on Defendants; and outlined the reasons that the proposed class is not fail-safe.

For all of the reasons set forth above and in Plaintiffs' prior briefing on the other class certification requirements the Court has found to have been satisfactorily met, Plaintiffs request that this Court certify the proposed class or the proposed alternative class.

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Certificate of Service

I certify that on November 4, 2016, I electronically filed the foregoing document, together with all attachments, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties.

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