

JUDGE TANA LIN

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

<p>MARIA SILVIA GUEVARA ENRIQUEZ, SOFIO CALLEJAS VENEGAS, KEVIN ALBERTO JIMENEZ RIVAS, AND ISMAEL MONTES CISNEROS, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>v.</p> <p>U.S. CITIZENSHIP &amp; IMMIGRATION SERVICES; UR JADDOU, Director of USCIS</p> <p>Defendants.</p>
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Case No. 2:23-cv-00097-TL

**MOTION FOR CLASS CERTIFICATION  
AND MEMORANDUM OF POINTS OF  
LAW AND AUTHORITY**

NOTE ON MOTION CALENDAR:  
FEBRUARY 24, 2023

**ORAL ARGUMENT REQUESTED**

**MOTION FOR CLASS CERTIFICATION**

Plaintiffs move this Court to certify the following class under Federal Rule of Civil Procedure 23:

All individuals:

(a) who filed, or will file in the future, an application with USCIS for a provisional unlawful presence waiver (Form I-601A or any successor form), and

(b) whose applications have been pending for at least twelve months from the date of filing.

Accompanied herein is a memorandum of law and authorities. This motion is noticed on the motion calendar for **February 24, 2023**.

DATE: January 26, 2023

Respectfully submitted,

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1 **MEMORANDUM OF POINTS OF LAW AND AUTHORITY**  
2 **IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

3 Plaintiffs move this Court to certify an injunctive class pursuant to Federal Rule of  
4 Civil Procedure 23(a) and 23(b)(2). In support of this motion, Plaintiffs rely on the following  
5 facts and points of law and authority.

6 **I. INTRODUCTION**

7 Plaintiffs Maria Silvia Guevara Enriquez, Sofio Callejas Venegas, Kevin Alberto  
8 Jimenez Rivas, and Ismael Montes Cisneros seek to represent a class of non-citizens who all  
9 have pending Form I-601A applications for provisional unlawful presence waiver (“I-601A  
10 waiver applications”). Fed. R. Civ. P. 23(a), 23(b)(2). Plaintiffs and class members challenge  
11 Defendant U.S. Citizenship and Immigration Services’ (USCIS) unlawful delay in  
12 adjudicating I-601A wavier applications under the Administrative Procedure Act. 5 U.S.C.  
13 § 701, *et seq.*

14 A class action is proper because this action meets all of the Rule 23(a) factors: the  
15 complaint raises questions of law and fact common to the class; the class is so numerous that  
16 joinder of all members is impracticable; Plaintiffs’ claims are typical of the claims of the  
17 class; Plaintiffs Guevara Enriquez, Callejas Venegas, Jimenez Rivas, and Montes Cisneros  
18 will fairly and adequately represent the interests of the class; proposed class counsel have the  
19 expertise necessary to litigate the issue on behalf of the class; and Defendants USCIS and  
20 Jaddou have refused to act on grounds that apply generally to the class, so that final  
21 injunctive or corresponding declaratory relief is appropriate with respect to the class as a  
22 whole. Fed. R. Civ. P. 23(a), 23(b)(2).

23 Further, common questions of law and fact predominate over any questions affecting  
24 the class representatives Guevara Enriquez, Callejas Venegas, Jimenez Rivas, and Montes

1 Cisneros (hereinafter “Individual Plaintiffs”). *See* Fed. R. Civ. P. 23(a)(2); 23(b)(2).  
2 Common questions of fact include, *inter alia*, how and why USCIS changed its adjudication  
3 practices to result in a seven-fold increase in waiting times for I-601A waiver applications  
4 since Fiscal Year 2013 and whether USCIS has utilized a “first in, first out” policy in  
5 deciding applications for I-601A waivers. Common questions of law include, *inter alia*,  
6 whether USCIS’s failure to process and adjudicate the putative class’s I-601A waiver  
7 applications for over a year from the date of filing constitutes unreasonable delay. These  
8 questions predominate the individual circumstances of Individual Plaintiffs and class  
9 members.

10 Plaintiffs also satisfy Rule 23’s typicality requirements. Plaintiffs’ claims are typical  
11 of the entire class as they are all I-601A waiver applicants whose applications have been  
12 pending with Defendant USCIS for at least twelve months. Fed. R. Civ. P. 23(a)(3).  
13 Individual Plaintiffs will fairly and adequately represent the interests of the proposed class as  
14 they seek relief on behalf of the class as a whole and they have no interest antagonistic to the  
15 class members. Fed. R. Civ. P. 23(a)(4). Plaintiffs are represented by competent counsel with  
16 extensive experience in both complex class actions and immigration law and can fairly,  
17 competently, and ethically represent the interests of the class. *See* Fed. R. Civ. P. 23(a)(4).

18 Further, class-wide relief under Rule 23(b)(2) is appropriate. Plaintiffs challenge  
19 systemic practices that consistently prevent the timely adjudication of I-601A waiver  
20 applications, for which injunctive relief is the necessary remedy. *See* Fed. R. Civ. P. 23(b)(2).  
21 The factual and legal questions are shared amongst all proposed class members, and the  
22 resolution of the truth or falsity of the claims will resolve the issues in this case “in one  
23 stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

1 Finally, Plaintiffs seek class certification because joinder would be impracticable in  
2 this case; Plaintiffs estimate that at least 70,000 non-citizens are affected by Defendant  
3 USCIS' delays. Fed. R. Civ. P. 23(a)(1).

4 Accordingly, Plaintiffs Guevara Enriquez, Callejas Venegas, Jimenez Rivas, and  
5 Montes Cisneros seek to represent the following class:

6 All individuals:

7 (a) who filed, or will file in the future, an application with USCIS for a provisional  
8 unlawful presence waiver (Form I-601A or any successor form), and

9 (b) whose applications have been pending for at least twelve months from the date of  
10 filing.

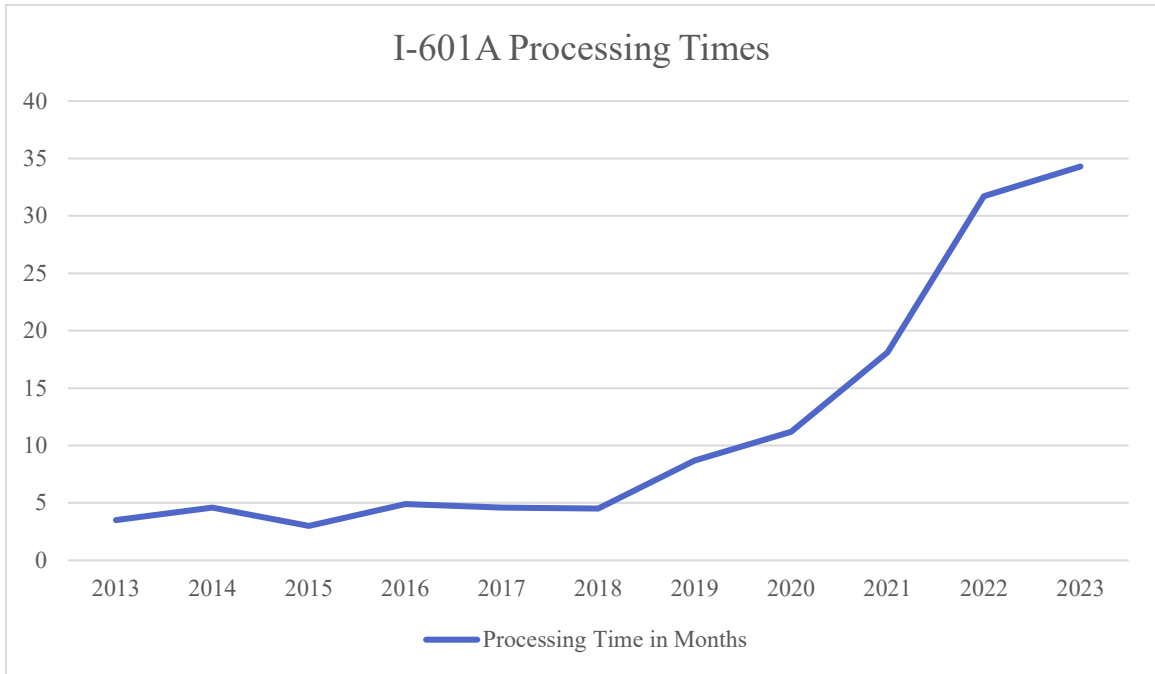
## 11 II. FACTUAL BACKGROUND

### 12 A. USCIS's Processing of Provisional Unlawful Presence Waivers

13 Plaintiffs and class members are non-citizens who seek a provisional unlawful  
14 presence waiver so that they may travel abroad to complete their immigrant visa processing  
15 and promptly return to the United States. But each class member has suffered significant  
16 delays in moving forward with adjudication of their provisional unlawful presence waiver  
17 application—a significant and unexplained departure from USCIS's previous practice of  
18 promptly adjudicating such waiver applications, and the processing times continue to climb.  
19 Between Fiscal Year 2013 and Fiscal Year 2018, USCIS consistently processed I-601A  
20 waivers in less than five months. Between Fiscal Year 2018 through 2022, Defendant  
21 USCIS' median processing time for a Form I-601A increased approximately 600%:<sup>1</sup>

22  
23 <sup>1</sup> See USCIS, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms*  
24 *by Fiscal Year, Fiscal Year 2012 to 2017*, <https://egov.uscis.gov/processing-times/historic-pt-2> (last visited Jan.  
25 24, 2023); USCIS, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select*  
26 *Forms by Fiscal Year, Fiscal Year 2018 to 2023 (up to December 31, 2022)*, [https://egov.uscis.gov/processing-](https://egov.uscis.gov/processing-times/historic-pt)  
27 [times/historic-pt](https://egov.uscis.gov/processing-times/historic-pt) (last visited Jan. 24, 2023).

- FY 2013: 3.5 months
- FY 2014: 4.6 months
- FY 2015: 3.0 months
- FY 2016: 4.9 months
- FY 2017: 4.6 months
- FY 2018: 4.5 months
- FY 2019: 8.7 months
- FY 2020: 11.2 months
- FY 2021: 17.1 months
- FY 2022: 31.7 months
- FY 2023 (first quarter): 34.3 months



All the while, the number of I-601A waiver applicants from Fiscal Year 2017 through Fiscal Year 2022 *decreased*, leaving no logical explanation for the growing increase in processing times:<sup>3</sup>

<sup>2</sup> *Id.*

<sup>3</sup> USCIS Number of Service-wide Forms by Fiscal Year To-Date, Quarter and Form Status 2017, [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY17Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY17Q4.pdf) (last accessed Jan.

- FY 2017: 65,729
- FY 2018: 60,748
- FY 2019: 52,506
- FY 2020: 49,491
- FY 2021: 45,344
- FY 2022: 36,309

In addition to its historical processing information, Defendant USCIS has a tool on its website for checking processing times for certain applications. For the Form I-601A provisional waiver application, USCIS provides the processing time based on completion of “80% of adjudicated applications within the past six months” at the USCIS Nebraska and Potomac Service Centers. The Nebraska Service Center completes 80% of applications within 34 months and the Potomac Service Center completes 80% of applications within 39.5 months. *See* USCIS, Check Case Processing Times, <https://egov.uscis.gov/processing-times/> (for “Form Type” choose “I-601A” and for “Field Office/Service Center” choose “Potomac Service Center” and “Nebraska Service Center”) (last visited Jan. 24, 2023).

USCIS is taking nearly eight times as long to adjudicate a Form I-601A provisional waiver application than it did in FY 2018 – from 4.5 *months* to nearly three *years* at the Nebraska Service Center and *over three years* at the Potomac Service Center. *Id.*

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25, 2023) (hereinafter “USCIS Number of Service Wide Forms”); USCIS Number of Service Wide Forms Fiscal Year 2018, [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY18Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY18Q4.pdf) (last accessed Jan. 25, 2023); USCIS Number of Service Wide Forms Fiscal Year 2019, [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2019Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2019Q4.pdf) (last accessed Jan. 25, 2023); USCIS Number of Service-wide Forms Fiscal Year 2020, [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2020Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf) (last accessed Jan. 25, 2023); USCIS Number of Service-wide Forms Fiscal Year 2021, [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (last accessed Jan. 25, 2023); USCIS Number of Service-wide Forms Fiscal Year 2022, [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2022\\_Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2022_Q4.pdf) (last accessed Jan. 25, 2023).



1           **B. Individual Plaintiffs Await Adjudication on Their Provisional Unlawful**  
2           **Presence Waiver Applications.**

3           Plaintiff Maria Silvia Guevara Enriquez is a citizen of Mexico and is married to a  
4 U.S. citizen. Ex. A, Maria Silva Guevara Enriquez Decl. ¶¶ 1-2. On July 12, 2021, she filed a  
5 Form I-601A with USCIS based on her approved immediate relative petition filed by her  
6 U.S. citizen husband. *Id.* ¶ 2. Her application has been pending for more than 18 months. *Id.*

7           Plaintiff Sofio Callejas Venegas is a citizen of Mexico and is married to a U.S.  
8 citizen. Ex. B, Sofio Callejas Venegas Decl. ¶¶ 1-2. On September 28, 2020, he filed a Form  
9 I-601A with USCIS based on his approved immediate relative petition filed by his U.S.  
10 citizen wife. *Id.* ¶ 2. His application has been pending for almost 28 months. *Id.*

11           Plaintiff Kevin Alberto Jimenez Rivas is a citizen of Mexico and is married to a U.S.  
12 citizen. Ex. C, Kevin Alberto Jimenez Rivas Decl. ¶¶ 1-2. On October 8, 2020, he filed a  
13 Form I-601A with USCIS based on his approved immediate relative petition filed by his  
14 wife. *Id.* ¶ 2. His application has been pending for more than 27 months. *Id.*

15           Plaintiff Ismael Montes Cisneros is a citizen of Mexico. Ex. D, Ismael Montes  
16 Cisneros Decl. ¶ 1. On April 17, 2020, Plaintiff Montes Cisneros filed a Form I-601A with  
17 USCIS based on his approved immediate relative petition filed by his U.S. citizen wife. *Id.*  
18 ¶ 2. His application has been pending for 33 months. *Id.*

19           Each plaintiff has demonstrated to USCIS that they will suffer extreme hardship if  
20 they are separated from their U.S. citizen spouse and have shown that the extended wait for a  
21 provision unlawful presence waiver has caused them harm. Guevara Decl. ¶¶ 5-7; Callejas  
22 Decl. ¶¶ 8-11; Jimenez Decl. ¶¶ 5-6; Montes Decl. ¶¶ 4-6. The Individual Plaintiffs lack  
23 work authorization, which impacts many areas of their life, including housing, health care,  
24 and financial stability, on top of the mental and emotional toll that their uncertain legal status

1 brings to the Plaintiffs and their spouses. Guevara Decl. ¶¶ 5,7; Callejas Decl. ¶¶ 8-9;  
 2 Jimenez Decl. ¶¶ 5-6; Montes Decl. ¶¶ 5-6.

### 3 III. STATUTORY & REGULATORY BACKGROUND

4 To become U.S. lawful permanent residents in a family-based category, Plaintiffs and  
 5 class members must complete a two-step process. First, the U.S. citizen or U.S. lawful  
 6 permanent resident must file a petition with USCIS for an immigrant visa classification on  
 7 behalf of their noncitizen relative. *See* 8 U.S.C. § 1154(a)(1); 8 C.F.R. § 204.2. Second, if  
 8 Defendant USCIS approves the petition, Plaintiffs and class members must apply to the State  
 9 Department for an immigrant visa. *See* 8 U.S.C. §§ 1201(a), 1202(a); 22 C.F.R. §§ 42.61,  
 10 42.62.

11 But a noncitizen who is “unlawfully present” in the United States is “inadmissible” to  
 12 the United States under the Immigration and Naturalization Act (“INA”) and cannot obtain  
 13 lawful permanent residence. 8 U.S.C. § 1182(a)(9)(B). A noncitizen is unlawfully present if  
 14 they “are present in the United States after the expiration of the period of stay authorized by  
 15 the [DHS Secretary]<sup>4</sup>” or if the noncitizen “is present in the United States without being  
 16 admitted or paroled.” 8 U.S.C. § 1182(a)(9)(B)(ii). Because of their unlawful presence in the  
 17 United States, Plaintiffs and class members have no avenue to become permanent residents  
 18 from within the United States and must go abroad to consular process.<sup>5</sup> USCIS, Provisional  
 19 Unlawful Presence Waivers (May 5, 2018), [https://www.uscis.gov/family/family-of-us-](https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers)  
 20 [citizens/provisional-unlawful-presence-waivers](https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers).

21  
 22 \_\_\_\_\_  
 23 <sup>4</sup> After Congress transferred immigration authority to DHS in 2003, a statutory reference to the Attorney  
 General is “deemed to refer to the [DHS] Secretary.” 6 U.S.C. § 557.

24 <sup>5</sup> “Consular processing” is the process of applying for an immigrant visa at a consulate or embassy before a  
 25 noncitizen may reenter the country as a permanent resident. *See* USCIS, Consular Processing (May 4, 2018),  
 26 <https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing> (last accessed Jan.  
 25, 2023).

1           However, once Plaintiffs and class members leave the United States to consular  
2 process, they will become subject to the unlawful presence bar, which bars their admission  
3 for three or ten years, depending on their length of unlawful presence. *See* 8 U.S.C. §  
4 1182(a)(9)(B)(i) (2023). Those who have been unlawfully present between 180 days and one  
5 year will be inadmissible for three years, and those noncitizens who have been unlawfully  
6 present for one year or more are subject to a ten-year bar on admission. *See* 8 U.S.C. §  
7 1182(a)(9)(B)(i)(I)-(II) (2023). Despite this restriction, Congress gave the DHS Secretary the  
8 exclusive authority to waive inadmissibility for unlawful presence for “an immigrant who is  
9 the spouse or son or daughter” of a U.S. citizen or U.S. lawful permanent resident, if the  
10 Secretary determines that the U.S. citizen or U.S. lawful permanent resident spouse or parent  
11 of the immigrant would suffer “extreme hardship” if the immigrant is refused admission to  
12 the United States. 8 U.S.C. § 1182(a)(9)(B)(v). DHS exercises this authority through its  
13 component Defendant USCIS.

14           In 2013 and 2016, DHS promulgated detailed regulations providing that individuals  
15 who are present in the United States may request from USCIS a provisional waiver of  
16 inadmissibility before departing the United States for consular processing of their immigrant  
17 visas. *See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final*  
18 *Rule*, 81 Fed. Reg. 50244, 50245 (July 29, 2016) (8 C.F.R. 212(e)(7)); *Provisional Unlawful*  
19 *Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule*, 78 Fed.  
20 Reg. 536, 536 (Jan. 3, 2013) (8 C.F.R. 212(e)(7)). Before these rules, a noncitizen would  
21 have to file their unlawful presence waiver from abroad and await adjudication of that waiver  
22 from outside the country, separated from their family. *See* 81 Fed. Reg. at 50244, 50245  
23 (“For some individuals, the Form I–601 waiver process led to lengthy separations of  
24 immigrant visa applicants from their family members. . . .”). When the provisional unlawful  
25 presence rules were published in 2013 and 2016, DHS reasoned it would “help[] facilitate”  
26

1 DOS’s visa issuance and “streamline[] both the waiver and the immigrant visa processes . . .  
 2 reduc[ing] the time that applicants are separated from their U.S. citizen or LPR family  
 3 members, thus promoting family unity.” 81 Fed. Reg. 50244 (July 29, 2015).

4 A noncitizen applicant is allowed to wait in the United States while Defendant USCIS  
 5 adjudicates the provisional unlawful presence waiver. However, having a pending or  
 6 approved waiver application does not qualify an individual to seek work authorization or  
 7 grant them any lawful immigration status—thus, they are in legal limbo without means to  
 8 support themselves or their families until USCIS adjudicates their application and they are  
 9 able to consular process. 8 C.F.R. § 212.7(e)(2)(ii) (2012). Until USCIS decides the  
 10 applicant’s I-601A waiver, a noncitizen cannot proceed to their consular interview, and a  
 11 consular officer cannot approve their visa, unless they choose to file an unlawful presence  
 12 waiver from abroad.<sup>6</sup> 8 U.S.C. §§ 1201(g), 1182(a)(9)(B) (2023).

#### 13 IV. ARGUMENT

14 Class certification is appropriate where, as here, the Plaintiffs can satisfy the  
 15 requirements of Federal Rule of Civil Procedure 23. A plaintiff whose suit meets the  
 16 requirements of Rule 23 has a “categorical” right “to pursue his claim as a class action.”  
 17 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). The  
 18 plaintiff must satisfy Rule 23(a) criteria—numerosity, commonality, typicality, and adequacy  
 19 of representation. *Id.* The proposed class must also fall within one of the three categories  
 20 found in Rule 23(b)—the risk that individual suits will result in inconsistent outcomes, the  
 21 appropriateness of declaratory or injunctive relief, and the predomination of common  
 22 questions of law or fact over individual questions. *Id.*

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24 <sup>6</sup> The median processing time for unlawful presence waivers filed abroad by a Form I-601 is 22.5 months. See  
 25 USCIS, Check Case Processing Times, <https://egov.uscis.gov/processing-times/> (for “Form Type” choose “I-  
 26 601” and for “Field Office/Service Center” choose “All Field Offices”) (last visited Jan. 26, 2023).

1 Courts within the Ninth Circuit, including this Court, have granted nationwide class  
 2 certification to plaintiffs seeking declaratory or injunctive relief in challenges to immigration  
 3 policies and practices. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1045-47 (9th Cir. 1998)  
 4 (affirming certification of nationwide class of individuals challenging adequacy of notice in  
 5 document fraud cases).<sup>7</sup> Here, as in the cases cited, a nationwide class is “[]consistent with  
 6 principles of equity jurisprudence” since the challenged adjudicatory policy and practice is  
 7 national and “the scope of injunctive relief is dictated by the extent of the violation  
 8 established, not by the geographical extent of the plaintiff class.” *Califano v. Yamasaki*, 442  
 9 U.S. 682, 702 (1979). Moreover, this issue can be fully resolved only on a nationwide level.  
 10 USCIS delays affect I-601A waiver applicants across the United States, each on the same  
 11 grounds and in the same unlawful manner. Importantly, individual lawsuits will not change  
 12 USCIS policy. For that reason, this issue is particularly amenable to class-wide treatment.

13 *See id.*

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17 <sup>7</sup> *See also MadKudu Inc. v. U.S. Citizenship & Immigr. Servs.*, No. 20-CV-02653, 2020 WL 7389419, at \*5-6  
 18 (N.D. Cal. Nov. 17, 2020) (certifying a nationwide class of U.S. employers whose H-1B petitions for market  
 19 research analysts were denied); *Doe #1 v. Trump*, 335 F.R.D. 416, 437-38 (D. Or. 2020) (certifying a subclass  
 20 of individuals with approved or pending immigration petitions and a subclass of visa applicants challenging the  
 21 President’s Proclamation on healthcare insurance); *Nightingale v. U.S. Citizenship & Immigration Servs.*, 333  
 22 F.R.D. 449, 463 (N.D. Cal. 2019) (certifying two nationwide classes in case challenging immigration agencies’  
 23 failure to timely process FOIA requests); *Alfaro Garcia v. Johnson*, No. 14-cv-01775, 2014 WL 6657591, at  
 24 \*16 (N.D. Cal. Nov. 21, 2014) (certifying nationwide class in case challenging government’s failure to provide  
 25 timely reasonable fear determinations); *Inland Empire—Immigrant Youth Collective v. Nielsen*, No. EDCV 17–  
 26 2048, 2018 WL 1061408, at \*4, 14 (C.D. Cal. Feb. 26, 2018) (certifying nationwide class of Deferred Action  
 for Childhood Arrivals recipients whose benefits were terminated without notice or cause); *Rojas v. Johnson*,  
 No. C16-1024, 2017 WL 1397749, at \*7 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes with  
 two subclasses each of asylum seekers challenging defective asylum application procedures); *A.B.T. v. U.S.*  
*Citizenship & Immigration Servs.*, No. C11–2108, 2013 WL 5913323, at \*1-2 (W.D. Wash. Nov. 4, 2013)  
 (certifying nationwide class and approving a settlement amending practices by EOIR and USCIS that precluded  
 asylum applicants from receiving employment authorization); *Santillan v. Ashcroft*, No. C 04-2686, 2004 WL  
 2297990, at \*12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents  
 challenging USCIS’ delays in issuing documentation of their status).

1           **A. Plaintiffs meet the Rule 23 standards for class certification**

2                   1. *Rule 23(a)(1)—Numerosity and the Impracticability of Joinder*

3           The proposed class is so numerous that joinder of all class members is  
 4 impracticable. Fed. R. Civ. P. 23(a)(1). Based on USCIS’ data, Plaintiffs estimate there are at  
 5 least 70,000 affected class members, a number exponentially beyond the 40-person threshold  
 6 that courts often use to establish numerosity. *See Rannis v. Recchia*, 380 F. App’x. 646, 651  
 7 (9th Cir. 2010) (“In general, courts find the numerosity requirement satisfied when a class  
 8 includes at least 40 members.”); *see also In re Arris Cable Modem Consumer Litig.*, 327  
 9 F.R.D. 334, 354 (N.D. Cal. 2018). Indeed, Plaintiffs have already identified and named 248  
 10 plaintiffs who each have Form I-601As waiver applications pending for 12 months or longer.  
 11 *See* Compl., ECF No.1, at 1-7. Further, the class is expected to grow. As additional  
 12 noncitizens file I-601A waiver applications and suffer delayed adjudication by USCIS, they  
 13 will meet the class definition; however, because the number of future class members is  
 14 unknown, joinder is impracticable. During Fiscal Year 2022, approximately 8,000-9,000  
 15 non-citizens filed I-601A unlawful presence waivers each quarter, for a total of 36,309 new  
 16 applications filed in Fiscal Year 2022.<sup>8</sup> Given the three-year wait, the class could grow by  
 17 tens of thousands.

18  
 19  
 20 <sup>8</sup> USCIS *Number of Service Wide Forms By Quarter, Form Status, and Processing Time October 1, 2021 –*  
 21 *December 31, 2021*,  
[https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2022\\_Q1.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf) (last  
 22 accessed Jan. 26, 2023) (hereinafter “USCIS Number of Service Wide Forms,” by dates); USCIS Number of  
 23 Service Wide Forms January 1, 2022 – March 31, 2022,  
[https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2022\\_Q2.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2022_Q2.pdf) (last accessed  
 24 Jan. 26, 2023); USCIS Number of Service Wide Forms April 1, 2022 – June 30, 2022,  
[https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q3.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q3.pdf) (last accessed  
 25 Jan. 26, 2023); USCIS Number of Service Wide Forms July 1, 2022 – September 30, 2022,  
[https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2022\\_Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2022_Q4.pdf) (last accessed  
 26 Jan. 26, 2023).

1 While a court may find numerosity based solely on the number of potential class  
2 members, other factors also make joinder impracticable in this case. *See Jordan v. Cnty. of*  
3 *L.A.*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982)  
4 (“Although the absolute number of class members is not the sole determining factor, where a  
5 class is large in numbers, joinder will usually be impracticable.”). Potential class members  
6 lack geographic proximity and are spread across the country. For example, the Individual  
7 Plaintiffs are from Washington, Arizona, and Utah. Compl., ECF No. 1, at ¶¶ 4-7. The larger  
8 group of plaintiffs named in the complaint live in disparate areas such as Florida, Virginia,  
9 New York, Minnesota, Illinois, and Texas, and thus reside in several different circuits. *See*  
10 Compl., ECF No. 1, at 10-18 (listing plaintiffs’ city and state of residence). If a class is not  
11 certified, this geographic dispersion of potential plaintiffs could result in lawsuits in multiple  
12 courts in various circuits, resulting in the possibility of inconsistent results and a lack of  
13 judicial economy. *See MadKudu*, 2020 WL 7389419, at \*6 (“[T]he practical consequences  
14 of not certifying a geographically limited class weigh in favor of nationwide certification.”)  
15 (internal citation omitted). Indeed, “courts have certified nationwide classes that challenge  
16 the government’s actions in enforcing the country’s immigration laws.” *Garcia*, 2014 WL  
17 6657591, at \*16 (collecting cases). Accordingly, a certified nationwide class in this matter  
18 preserves judicial resources and prevents disparate results.

19 2. *Rule 23(a)(2)—Common Questions of Law and Fact*

20 The proposed class shares common questions of law and fact, in accordance with  
21 Federal Rule of Civil Procedure 23(a)(2). For commonality to exist, the putative class  
22 members’ claims “must depend upon a common contention” that is “of such a nature that it is  
23 capable of class-wide resolution—which means that determination of its truth or falsity will  
24 resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-*  
25 *Mart Stores*, 564 U.S. at 350. However, “[a]ll questions of fact and law need not be  
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1 common” to meet the requirement. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th  
2 Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the  
3 contrary, one shared legal issue can be sufficient. *See, e.g., Walters*, 145 F.3d at 1046 (“What  
4 makes the plaintiffs’ claims suitable for a class action is the common allegation that the  
5 INS’s procedures provide insufficient notice.”).

6 Here, common questions of law and fact predominate over any questions affecting the  
7 individually named plaintiffs. All the Individual Plaintiffs and proposed class members have  
8 been or will be forced to suffer the consequences of USCIS’ failure to timely adjudicate their  
9 I-601A waiver applications. When considering unreasonable delay, the *TRAC* analysis sets  
10 forth a set of factors that will determine this case, and each factor presents common  
11 questions. *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)  
12 (“TRAC”). Common questions of fact include whether USCIS has delayed the adjudication  
13 of I-601A waiver applications, whether USCIS is using a first-in, first-out adjudication  
14 method, and whether USCIS has a policy and practice of failing to timely adjudicate I-601A  
15 waiver applications. The common questions of law include whether USCIS’s delay in  
16 adjudicating I-601A waiver applications for more than 12 months is unreasonable, and  
17 whether there is a rule of reason.

18 Thus, a common answer regarding the existence and legality of each challenged  
19 policy and practice will “drive the resolution of the litigation.” *Ellis*, 657 F.3d at 981  
20 (quoting *Wal-Mart*, 131 S. Ct. at 2551). Although factual variations in individual cases may  
21 exist, these are insufficient to defeat commonality where the central allegations are that  
22 USCIS’s policies and practices result in class-wide delays for I-601A waiver applicants,  
23 regardless of their individual circumstances. *See Califano*, 442 U.S. at 701 (“It is unlikely  
24 that differences in the factual background of each claim will affect the outcome of the legal  
25 issue.”); *Walters*, 145 F.3d at 1046 (“Differences among the class members with respect to  
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1 the merits of their actual document fraud cases, however, are simply insufficient to defeat the  
2 propriety of class certification”). Courts have affirmed that such factual questions are well-  
3 suited to resolution on a class-wide basis where the claims turn on a unified policy or  
4 practice. *See, e.g., Stockwell v. City of S.F.*, 749 F.3d 1107, 1114 (9th Cir. 2014) (reversing  
5 denial of class certification motion because movants had “identified a single, well-  
6 enunciated, uniform policy” that was allegedly responsible for the harms suffered by the  
7 class); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1203–04 (W.D. Wash. 2008), *amended*  
8 *in part*, No. C07-1739, 2008 WL 2275558 (W.D. Wash. June 3, 2008) (finding commonality  
9 where plaintiffs challenged delays in naturalization adjudications due to Federal Bureau of  
10 Investigations “name checks”). Moreover, “the court must decide only once whether the  
11 application” of Defendants’ policies and practices “does or does not violate” the law. *Troy v.*  
12 *Kehe Food Distrib., Inc.*, 276 F.R.D. 642, 654 (W.D. Wash. 2011); *see also LaDuke v.*  
13 *Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985), *amended by* 796 F.2d 309 (9th Cir. 1986)  
14 (Mem.) (holding that the constitutionality of an INS procedure “[p]lainly” created common  
15 questions of law and fact). As such, resolution of these common issues will resolve class  
16 members’ claims “in one stroke.” *Wal-Mart*, 564 U.S. at 350.

17 3. *Rule 23(a)(3)—Typicality*

18 Plaintiffs’ claims are typical of the claims of all members of the proposed class. Fed.  
19 R. Civ. P. 23(a)(3). “Typicality refers to the nature of the claim or defense of the class  
20 representative, and not to the specific facts from which it arose or the relief sought.” *Hanon*  
21 *v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation omitted). Nonetheless,  
22 the “commonality and typicality requirements of Rule 23(a) tend to merge.” *Gen. Tel. Co. of*  
23 *Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). “Both serve as guideposts for determining  
24 whether under the particular circumstances maintenance of a class action is economical and  
25 whether the named plaintiff’s claim and the class claims are so interrelated that the interests  
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1 of the class members will be fairly and adequately protected in their absence.” *Id.* In  
2 determining typicality, courts consider “whether other members have the same or similar  
3 injury, whether the action is based on conduct which is not unique to the named plaintiffs,  
4 and whether other class members have been injured by the same course of conduct.” *Hanon*,  
5 976 F.2d at 508 (quotation omitted).

6 The claims of the Individual Plaintiffs, all of whom filed I-601A waiver applications  
7 that have been pending for at least twelve months, are typical of the claims of the proposed  
8 class. As a result of USCIS’ delay in adjudicating their applications, each Plaintiff has  
9 suffered concrete harms related to their and their family’s physical, emotional, and financial  
10 well-being, exactly the type of harms that the expedited I-601A process was designed to  
11 avoid. *See* Guevara Decl. ¶¶ 5-7; Callejas Decl. ¶¶ 8-12; Jimenez Decl. ¶¶ 5-6; Montes Decl.  
12 ¶¶ 4-6. Thus, Individual Plaintiffs, like all members of the proposed class, seek declaratory  
13 and injunctive relief from this Court directing the Defendants to adjudicate I-601A waiver  
14 applications in a timely manner. And such relief applies to the entire proposed class  
15 regardless of their individual circumstances. Because the Individual Plaintiffs and proposed  
16 class members are united in their interests, injury, and proposed relief, their cases raise  
17 common factual and legal claims, the element of typicality is met.

18 4. *Rule 23(a)(4)—Adequacy*

19 Plaintiffs are adequate representatives of the class. Fed. R. Civ. P. 23(a)(4). To  
20 determine whether named Individual Plaintiffs will adequately represent the interests of the  
21 class, the Court must consider two questions: “(a) do the named plaintiffs and their counsel  
22 have any conflicts of interest with other class members and (b) will the named plaintiffs and  
23 their counsel prosecute the action vigorously on behalf of the class?” *In re Mego Fin. Corp.*  
24 *Secs. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). The Court only needs to find one plaintiff to  
25 be adequate in order to satisfy Rule 23(b)(4). *See Chambers v. Whirlpool Corp.*, 980 F.3d  
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1 645, 670 (9th Cir. 2020) (“[T]he adequacy-of-representation requirement is satisfied as long  
2 as one of the class representatives is an adequate class representative.”) (quotation omitted).  
3 Plaintiffs’ counsel are deemed qualified when they possess experience in previous class  
4 actions and cases involving the same area of law, and “[a]dequate representation is usually  
5 presumed in the absence of contrary evidence.” *Californians for Disability Rights, Inc. v.*  
6 *California Dep’t of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008); *see also Local Joint*  
7 *Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th  
8 Cir. 2001); *MadKudu*, 2020 WL 7389419, at \*8 (finding Plaintiffs’ counsel adequate where  
9 “Plaintiffs’ attorneys are experienced class action attorneys”).

10 Individual Plaintiffs have no interests separate from those of the class and seek no  
11 relief other than the relief sought on behalf of the class. Plaintiffs will fairly and adequately  
12 represent the interests of the class because (a) they are willing and able to represent the  
13 proposed class and have every incentive to pursue this action to a successful conclusion; (b)  
14 their interests do not in any way conflict with those of absent members of the class; and (c)  
15 they have retained counsel who are competent and experienced in litigating class actions civil  
16 and immigrants’ rights. Further, Plaintiffs seek the exact same relief for themselves and for  
17 members of the class: declaratory and injunctive relief.

18 In addition, the Individual Plaintiffs possess the ability to vigorously prosecute the  
19 interests of the classes through qualified counsel. Plaintiffs’ counsel have extensive class  
20 action experience. *See* Ex. E, Katherine E. Melloy Goettel Decl.; Ex. F, Jesse M. Bless Decl.,  
21 Ex. G, Aaron C. Hall Decl., Ex. H, Charles H. Kuck Decl.; Ex. G, Gregory H. Siskind Decl.  
22 Proposed class counsel have robust knowledge of the legal issues and have federal court  
23 immigration litigation experience related to unreasonable delay actions under the  
24 Administrative Procedure Act. Accordingly, counsel will be able to vigorously and ethically  
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1 protect the interests of the class based on their collective experience and will therefore  
2 adequately represent the interests of the class.

3 5. *Plaintiffs Satisfy the Requirements for a Rule 23(b)(2) Class*

4 In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet  
5 at least one of the requirements of Rule 23(b) for a class action to be certified. This action  
6 meets the requirements of Rule 23(b)(2), namely “the party opposing the class has acted or  
7 refused to act on grounds generally applicable to the class, thereby making appropriate final  
8 injunctive relief or corresponding declaratory relief with respect to the class as a whole.”  
9 Individual Plaintiffs challenge—and seek declaratory and injunctive relief from—systemic  
10 failure to timely adjudicate I-601A waiver applications. Accordingly, class-wide relief is  
11 appropriate under Rule 23(b)(2). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,  
12 1195 (9th Cir. 2001) (finding certification under Rule 23(b)(2) appropriate “only where the  
13 primary relief sought is declaratory or injunctive”), *amended by* 273 F.3d 1180 (9th Cir.  
14 2001).

15 **V. CONCLUSION**

16 For all of the foregoing reasons, Plaintiffs ask the Court to certify a class as follows:

17 All individuals:

18 (a) who filed, or will file in the future, an application with USCIS for a  
19 provisional unlawful presence waiver (Form I-601A or any successor form), and

20 (b) whose applications have been pending for at least twelve months from the  
21 date of filing.

1  
2 DATE: January 26, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that my office mailed a courtesy copy by United States Postal Service first-class mail to:

Civil Processing Clerk  
United States Attorney's Office  
700 Stewart Street, Suite 5220  
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A courtesy copy has been sent by e-mail to Assistant United States Attorney Michelle Lambert at [Michelle.Lambert@usdoj.gov](mailto:Michelle.Lambert@usdoj.gov).

Dated: January 26, 2023

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