UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Amado de Jesus MORENO; Nelda Yolanda REYES; Jose CANTARERO ARGUETA; Haydee AVILEZ ROJAS,

Plaintiffs,

v.

Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; L. Francis CISSNA, Director, U.S. Citizenship and Immigration Services, in his official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

Case No. 1:18-cv-01135-RRM

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Defendant U.S. Citizenship and Immigration Services' (USCIS) policy and practice of denying adjustment of status to Plaintiffs and proposed class members who now hold Temporary Protected Status (TPS) and who are otherwise eligible to become lawful permanent residents is unlawful and is causing them irreparable harm. Injunctive relief is warranted.

II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM, THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR, AND THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.

A. Plaintiffs have demonstrated irreparable harm.

Plaintiffs demonstrated that they are suffering and will continue to suffer irreparable harm without intervention from this Court. *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction (Pls. P.I. Memo.) at 14-24. Specifically, although they are statutorily eligible for adjustment of status, all are barred from obtaining lawful permanent resident (LPR) status within the United States solely due to Defendants' unlawful policy. As the cases Plaintiffs rely on establish, courts routinely recognize harm such as this as irreparable. *Id*. at 15-16.[1] Thus, this harm alone is sufficient to justify preliminary relief. Additionally, however, three of the four named Plaintiffs—and many of those they seek to represent—face a date certain by which their TPS will terminate, compounding the harm they already suffer. *Id*. at 16-24.

[1] Plaintiffs cite a number of cases to demonstrate that courts routinely recognize that the type of harm Plaintiffs currently suffer warrants preliminary injunctive relief. *See* Pls. P.I. Memo. at 15, 23. Defendants address only one of these cases, arguing that it is irrelevant because it involves individuals blocked from gaining naturalization rather than LPR status. Dfs. P.I. Opp. at 9. (discussing *Kirwa v. U.S. Dep't of Defense*, 285 F. Supp. 3d 21 (D.D.C. 2017). Notably, Defendants misconstrue or ignore altogether the cases which specifically concern individuals blocked from gaining LPR status. Thus, for example, Defendants cite *Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) only for the proposition that the court declined to find irreparable harm due to future deportation, *see* Dfs. P.I. Opp at 11, ignoring that it *did* find such hardship based on possible loss of work authorization, health insurance and homes. *See* 279 F. Supp. 3d at 434-35. And Defendants do not even address *Vargas v. Meese*, 682 F. Supp. 591, 595 (D.D.C. 1987) (finding irreparable harm where plaintiffs blocked from gaining lawful temporary resident status as agricultural workers, the first step to LPR status). *Cf. Sami Al Karim v. Holder*, No. 08-cv-00671-REB, 2010 U.S. Dist. LEXIS 30030, *13-14 (D. Colo. Mar. 29, 2010) (finding plaintiff harmed by inability to adjust from refugee status to LPR). In any event, *Kirwa* is relevant; Plaintiffs' path to citizenship has been blocked, as LPR status is a precondition to ultimate citizenship. *See* 8 U.S.C. 14427(a)(1).

Many other TPS holders—those from Sudan, Nicaragua, Haiti and El Salvador—face uncertainty as to whether their TPS will terminate in the near future. *Id*.

Defendants attempt to minimize this harm, claiming that the preliminary injunction issued in *Ramos v. Nielsen*, No. 18-cv-01554-EMC, -- F. Supp. 3d --, 2018 U.S. Dist. LEXIS 171272, 2018 WL 4778285 (N.D. Cal. Oct. 3, 2018), which enjoined the government from implementing or enforcing its decision to terminate TPS for four countries, "moots" the need for this Court to issue an injunction with respect to those countries. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction (Dfs. P.I. Opp. at 9). This argument ignores that one primary basis for Plaintiffs' irreparable harm with respect to TPS holders from these countries as well as others—Defendants' policy of baring their adjustment to LPR status—will continue to exist even if their TPS is not terminated. Moreover, no Honduran or Nepali TPS holders, including Plaintiffs Cantarero Argueta, Avila-Rojas and Reyes, will benefit from *Ramos*, even if the injunction is upheld on appeal. *See* Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for Sudan, Nicaragua, Haiti, and El Salvador, 83 Fed. Reg. 54764 (Oct. 31, 2018). Defendants' further argument goes to the merits of the case, *see* Dfs. P.I. Opp. at 10-11, that is, whether Plaintiffs' interpretation of the statute is correct. However, that both is irrelevant to the irreparable harm analysis and relies upon an incorrect interpretation of the statute. *See infra* § III.B.

B. The balance of equities tips in Plaintiffs' favor regardless of any alleged delay.

The balance of equities tips in Plaintiffs' favor. *See* Pls. P.I. Memo. at 24-25. Contrary to Defendants' assertion, *see* Dfs. P.I. Opp. at 11-13, Plaintiffs have been diligent in seeking preliminary relief. Plaintiffs initially informed Defendants of their plan to seek preliminary relief in April 2018, a little over a month after filing this action. However, following consultation, the

parties agreed that the case could be resolved expeditiously on dispositive motions without the need for discovery, and thus proposed to the Court an accelerated schedule for filing fully briefed disposition motions by May 8, 2018. *See* Dkt. 13; *see also* Dkt. 20 (setting forth this history). The Court did not rule on that request until May 30, when it requested a new briefing schedule. Dkt. 25. Plaintiffs acted promptly to file fully briefed dispositive motions on July 20, 2018. *See* Dkts. 29-31. Because the parties' dispositive motions remained pending before this Court two months later, Plaintiffs returned to their initial plan to seek a preliminary injunction. *See* Dkt. 40. The motion was filed before any of the upcoming TPS terminations, which will cause much of the additional imminent irreparable harm to Plaintiffs, became effective.

Consequently, throughout this litigation, Plaintiffs acted diligently to resolve this case expeditiously to protect their rights. Only after it became clear that a full, expeditious resolution would not be possible, did Plaintiffs resort to filing a motion for a preliminary injunction. Not only have Plaintiffs' efforts to seek relief expeditiously been reasonable, they have in no way prejudiced Defendants.

The cases Defendants cite are distinguishable. *See* Dfs. P.I. Opp. at 12-13. They involve distinct areas of law, in which delay is likely to cause prejudice to the opposing party, like trademark infringement. Furthermore, the delays are without explanation and/or for longer periods of time than those at issue in this case, and the cases often involve repeated instances of the challenged harm, some of which occurred well before the request for preliminary relief. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (involving an "unnecessary, years-long delay" in challenge to an election map that had already been used in three elections); *Central Point Software, Inc. v. Global Software & Accessories, Inc.*, 859 F. Supp. 640, 644-45 (E.D.N.Y. 1994) (involving several years' unexplained delay in bringing copyright infringement case);

Monowise Ltd. v. Ozy Media, Inc., No. 17-CV-8028 (JMF), 2018 U.S. Dist. LEXIS 75312, *4-8 (S.D.N.Y. May 3, 2018) (involving months of unexplained delay in challenge to trademark infringement regarding the name of an annual event that plaintiffs had declined to challenge preceding year); *cf. Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144-45 (2d Cir. 2005) (finding harm despite delay of up to 7 months in trademark case where delay is explained).

C. This Court can grant preliminary or permanent injunctive relief.

Defendants ask this Court to deny preliminary injunctive relief because they allege it is not preliminary in nature; rather, they assert it would afford Plaintiffs all the relief they ultimately seek in this case. Dfs. P.I. Opp. at 13-15. Defendants are wrong. Through this case, Plaintiffs seek not only injunctive relief, but also class certification and declaratory relief. *See* Dkt. 12 at 24, ¶¶ (b)-(g). As such, contrary to Defendants' contention, the preliminary relief Plaintiffs seek through the instant motion is narrower than the ultimate relief sought through this action.

Furthermore, courts recognize that, although "it is *generally* inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits," Federal Rule of Civil Procedure 65(a)(2) allows courts to expedite a decision on the merits where parties have been afforded notice and an opportunity to present their respective cases. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added). Here, Plaintiffs and Defendants agree that this putative class action case—which raises purely legal issues—is well suited for resolution following motion briefing. *See* Dkt. 19 at 3-4; Dkt. 20 at 1. Accordingly, the parties already have fully briefed their positions. *See* Dkts. 25, 28-31, 35-36. As such, pursuant to Rule 65(a)(2), this Court can—and should—consolidate the hearings on Plaintiffs' motion for a preliminary injunction and the pending summary judgment motions and issue an order on the

merits of the case. *See, e.g.*, *United States v. N.Y. Fish, Inc.*, 10 F. Supp. 3d 355, 359-60 (E.D.N.Y. 2014) (referencing the Court's decision to consolidate motion for preliminary injunction with trial on the merits "[a]fter briefing by the parties and with their consent"); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 101 (2d Cir. 1985) (noting that courts have "broad discretion" to consolidate preliminary injunction motions with trial of the merits, and that a "court's order of consolidation will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence.").

The cases cited by Defendants acknowledge that it is *generally* inappropriate to grant preliminary injunctive relief when doing so would afford a party substantial relief "*before* there has been any trial of the issues." *Triebwasser & Katz v. Am. Tel. & Tel. Co.*, 535 F.2d 1356, 1360 (2d Cir. 1976) (emphasis added); *see also* Dfs. P.I. Opp. at 14 (citing cases). These cases are inapposite, however, as none involve the situation presented here, where both parties agree that there are no factual disputes and have presented their cases.

If the Court construes the relief sought akin to a mandatory injunction, Plaintiffs have satisfied the heightened legal standard of showing "a clear or substantial likelihood of success on the merits." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quotations omitted); *see also* Pls. P.I. Memo. at 3. Accordingly, the Court should grant a permanent injunction because Plaintiffs have met this more stringent showing. *See, e.g.*, *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985), *overruled on other grounds*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (affirming injunction enjoining prison from refusing to distribute prison conditions report to inmates which would grant prisoners "all the relief they ultimately seek" because they met the more stringent mandatory injunction standard).

In sum, this Court can grant either preliminary or permanent injunctive relief.

III. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

As Plaintiffs have previously demonstrated in their motion and in the course of summary judgment briefing, 8 U.S.C. § 1254a(f)(4), by its plain language, accomplishes the following: it 1) applies without limit to *all* TPS holders; 2) "consider[s]" TPS holders who do not simultaneously hold nonimmigrant status as "being in" nonimmigrant status for purposes of adjustment of status under 8 U.S.C. § 1255 and change of status under 8 U.S.C. § 1258; and 3) "consider[s]" all TPS holders—including both those who simultaneously hold a nonimmigrant status and those who do not—as "maintaining" nonimmigrant status for purposes of §§ 1255 and 1258. This interpretation gives meaning to all statutory terms and is consistent with the statutory structure and Congressional intent. Because the statute is clear, Plaintiffs have a substantial likelihood of succeeding on the merits. In contrast, Defendants' interpretation imposes severe extra-statutory limits on which TPS holders can benefit from § 1254a(f)(4), fails to accord a meaningful purpose to the phrase "being in," and ignores the plain meaning and significance of the term "nonimmigrant."

A. The plain language of § 1254a(f)(4) demonstrates that Plaintiffs have a substantial likelihood of success on the merits.

Plaintiffs have demonstrated that their interpretation of § 1254a(f)(4) is the only one that gives meaning to all its terms and is consistent with the overall structure of the statute. Pls. P.I. Memo. at 9-13; Dkt. 29-2 at 19-24. Because this language is clear, Plaintiffs have a substantial likelihood of success on the merits. *See Tunick v. Saffir*, 228 F.3d 135, 141 (2d Cir. 2000) (Calabresi, J., concurring) (concluding that the plain language of the statute demonstrated that plaintiff was likely to succeed on the merits); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1278

(N.D. Fla. 2018) ("Plaintiffs have established a substantial likelihood of success on the merits. The Voting Rights Act is clear."); *Bode v. Kenner City*, No. 17-5483, 2017 U.S. Dist. LEXIS 117467, *2-3 (E.D. La. July 26, 2017) (granting preliminary injunction where the plain language of the challenged statute dictated the results on the merits).

Significantly, both the Sixth and the Ninth Circuits, following a thorough textual analysis, concluded that § 1254a(f)(4) was unambiguous in providing that TPS holders are considered inspected and admitted for purposes of adjustment and change of status by virtue of being considered to be nonimmigrants. *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017). In contrast, the decision on which Defendants rely, the Eleventh Circuit per curiam decision *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011), contained little analysis and failed altogether to analyze the meaning of the text of § 1254a(f)(4), focusing instead on the meaning of the adjustment statute in response to an argument that Plaintiffs do not make. Pls. P.I. Memo. at 12-13. Defendants thus err in contending that *Serrano* creates a circuit split sufficient to undermine Plaintiffs' likelihood of success. Dfs. P.I. Opp. at 16.

Defendants' reliance on *Guerrero v. Nielsen*, No. 16-30165, 2018 U.S. App. LEXIS 18753 (5th Cir. July 10, 2018), is also misplaced. There, the court addressed whether a TPS holder was exempt from the bar to adjustment of status for noncitizen crewmen, 8 U.S.C. § 1255(c)(1). In addressing the particular issue of the crewman bar, the Fifth Circuit specifically left the issue presented in this case "to be decided another day." *Id.* at *13.

Nevertheless, *Guerrero* remains relevant for two reasons. First, it illustrates that, although TPS holders are considered to be nonimmigrants for purposes of adjustment, this does not guarantee their eligibility for adjustment. Rather, it affords them the same opportunity to

adjust that a nonimmigrant would have. *See Flores*, 718 F.3d at 554 (explaining that not all TPS holders will be eligible to adjust pursuant to § 1254a(f)(4), only those with an independent basis for doing so). Nonimmigrant crewmen—such as Mr. Guerrero—simply are not eligible to adjust due to § 1255(c)(1). In contrast, all nonimmigrants have been inspected and admitted and thus satisfy this adjustment requirement.

Second, although not addressing the inspection and admission issue, the Fifth Circuit did find that the lawful status provided to Guerrero by § 1254a(f)(4) "remove[s] the consequences of him overstaying his visa" for purposes of adjustment of status. Guerrero, 2018 U.S. App. LEXIS 18753 at *11. This conflicts with Defendants' interpretation of § 1254a(f)(4), which would limit its application to those who held valid nonimmigrant status at the time they are granted TPS. Dfs. P.I. Opp. at 15, 17-18. In recognizing that Mr. Guerrero—who already had overstayed his nonimmigrant visa at the time he was granted TPS, 2018 U.S. App. LEXIS 18753, at *2—benefits from § 1254a(f)(4) in this way, the Fifth Circuit directly contradicts Defendants' reading of the provision. Defendants fail altogether to address this conflict.

B. Defendants have not rebutted Plaintiffs' showing that, by considering all TPS holders to be in nonimmigrant status, § 1254a(f)(4) necessarily considers them to have been inspected and admitted.

Several fatal flaws undermine Defendants' interpretation of § 1254a(f)(4). First, Defendants impermissibly narrow the application of § 1254a(f)(4) to only TPS holders who, at the time they were granted TPS, were in lawful nonimmigrant status and subsequently fail to maintain that status. Dfs. P.I. Opp. at 15. Contrary to this reading, however, Congress made clear that § 1254a(f) applies to *all* TPS holders by specifying that it applies to "*an alien* granted [TPS] under this section." (Emphasis added). Significantly, § 1254a(f)(4) refers back to this earlier phrase by referencing "*the* alien." (Emphasis added). *See also Ramirez*, 852 F.3d at 962 (citing §

1254a(f)(4)'s "indication that it benefits all TPS grantees"). Moreover, each of the other three subsections to § 1254a(f) are uniform in their use of the phrase "the alien." This uniformity in the statutory structure belies Defendants' attempt to limit the universe of TPS holders to whom § 1254a(f)(4) applies. *See United States v. Balogun*, 146 F.3d 141, 145 (2d Cir. 1988) ("[W]e presume that Congress does not employ the same word to convey different meanings within the same statute . . . .") (citing *Sullivan v. Stroop*, 496 U.S. 478 (1990), and *Sorenson v. Secretary of Treasury*, 475 U.S. 851 (1986)).

Additionally, Defendants fail in their attempt to provide an independent meaning for the phrase "being in." Defendants consistently have asserted that the sole purpose of § 1254a(f)(4) is to allow those granted TPS while simultaneously holding a nonimmigrant status to be considered as maintaining their nonimmigrant status even if, in fact, they are at risk of losing it. *See* Dfs. P.I. Opp. at 15 (stating that § 1254a(f)(4) "is best understood . . . to bridge the statutory gap created" when a noncitizen admitted as a nonimmigrant is granted TPS and then subsequently falls out of nonimmigrant status); Dkt. 28-1 at 17 ("Section 1254a(f)(4) is only a 'bridge' for aliens in lawful immigration status who obtain TPS and deems them to be maintaining lawful status as a nonimmigrant."); Dkt. 30 at 13 ("TPS's 'lawful status' provision serves as a booster shot for a nonimmigrant status that is set to expire and keeps it 'live' while the alien is in TPS."). Defendants now attempt to give independent meaning to the term "being in," Dfs. P.I. Opp. at 17, but nevertheless apply it to the same subset of TPS holders—those who already are in nonimmigrant status when TPS is granted but later face possible loss of their nonimmigrant status. *See id.* 17-18. However, the phrase "being in" nonimmigrant status serves no purpose when applied to individuals who are already in nonimmigrant status. Pl. P.I. Memo. at 10; Dkt. 29-2 at 21.

In contrast, Plaintiffs' interpretation gives independent meaning to the term "being in" by applying it to TPS holders who are not already "in" nonimmigrant status. Because all noncitizens

who are "in" nonimmigrant status—both those already holding nonimmigrant status at the time TPS is granted and those who, pursuant to § 1254a(f)(4), are considered to be in that status due to the grant of TPS—must also "maintain" that status, Plaintiffs' interpretation gives independent meaning to both terms.

Defendants' interpretation also ignores the meaning and significance of the term "nonimmigrant" in § 1254a(f)(4), attempting to reframe it as merely "a lawful status" that a noncitizen acquires when granted TPS. Dfs. P.I. Opp. at 17. Congress specifically chose the phrase "lawful status *as a nonimmigrant*." 8 U.S.C. § 1254a(f)(4) (emphasis added). Because all nonimmigrants are inspected and admitted in that status, this designation necessarily means that all TPS holders must be considered to have been inspected and admitted for purposes of adjustment and change of status. *Ramirez*, 852 F.3d at 960 (discussing the significance of the term "nonimmigrant" in § 1254a(f)(4)); *Medina v. Beers*, 65 F. Supp. 3d 419, 430-32 (E.D.Pa. 2014) (same).

IV. CONCLUSION

The Court should grant Plaintiffs' motion or consolidate any hearing on the instant motion with a hearing on the pending motions for summary judgment pursuant to Rule 65(a)(2) and issue an order on the merits of the case in response to this motion.

Respectfully submitted,

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Dated November 16, 2018

CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that on November 16, 2018, I electronically filed the foregoing REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

Executed in Boston, Massachusetts, on November 16, 2018.

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