The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.A., Antonio MACHIC YAC, and W.H., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; *et al.*,

Defendants.

Case No. 2:15-cv-00813-JLR

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
July 16, 2018

Introduction

Even though Defendants are unable to adjudicate all initial employment authorization document ("EAD") applications based on a pending asylum application ("initial asylum EADs") within 30 days, this Court should not order Defendants to meet the regulatory deadline of 8 C.F.R. § 208.7(a) in every single case. As explained in their motion for summary judgment, ECF No. 119, Defendants cannot meet that deadline but are making reasonable efforts to timely process initial asylum EADs. The Court should therefore grant Defendants' motion for summary judgment.

Argument

A. Declaratory judgment is not appropriate in this case.

In their opposition to Defendants' motion for summary judgment, Plaintiffs ask this Court to enter declaratory relief alone as a resolution of their claims. ECF No. 123 at 6.

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Plaintiffs' request would be ineffective in the context of this particular case before the Court. While it is true that in some instances declaratory relief may resolve a case, such as by declaring a patent invalid or a statute unconstitutional, merely stating the regulation is mandatory is not likely to remedy the situation here. *See* 7AA Fed. Prac. & Proc. Civ. § 1775. In the case cited by Plaintiffs, *Khoury v. Asher*, the primary issue was the legal interpretation of a statute, 8 U.S.C. § 1226(c), including the phrase "when . . . released." 3 F. Supp. 3d 877, 883 (W.D. Wash. 2014), *aff'd*, 667 F. App'x 966 (9th Cir. 2016), *cert granted sub. nom. Nielsen v Preap*, 138 S.Ct. 1279 (2018). The action that the government needed to take in response to that declaratory judgment was to classify detained aliens under a different statutory provision. Here, the Parties are not in dispute over the meaning of any word or phrase in the regulation such that an interpretation of that phrase by the Court will require Defendants to alter their course of conduct. Instead, Plaintiffs want Defendants to move more quickly than they can. The nature of the overall outcome sought by Plaintiffs shows that declaratory relief alone would not be sufficient here. Instead, the question remains whether the Court must or should enter an injunction, and the Court should not enter an injunction.

B. It is not mandatory that an injunction issue.

Contrary to Plaintiffs' assertions, ECF No. 123 at 8, and as Defendants asserted in their motion, ECF No. 119 at 10-11, *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002), does not mandate that an injunction must issue in this case. As Defendants noted, the reason that the Ninth Circuit found in that case that an injunction must issue and that there was no space in which a court could exercise its equitable powers was because an explicit *Congressional* command in the Endangered Species Act had displaced those equitable powers. *Biodiversity Legal Found.*, 309 F.3d at 1177 (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)). The principle of separation of powers did not allow the Court to reweigh a Congressional determination. *TVA*, 437 U.S. at 194. Here, while the Court has found that the regulatory language is mandatory, the fact that it is a regulation, and not a statute, permits the Court to retain its equitable discretion in crafting the appropriate relief, if any. As previously stated,

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Defendants are not asserting that regulations are not binding, but rather that this Court has the equitable power to craft an appropriate remedy in this case. ECF No. 119 n.4.

Additionally, the regulatory history shows that the 30-day timeline was not put in place to ensure that asylum applicants received employment authorization as quickly as possible. Rather, the regulation that implemented the 30-day timeline required asylum applicants to wait longer for employment authorization and attempted to strike a balance between discouraging fraudulent asylum applications filed only to obtain immigration benefits and streamlining the processing of asylum applications.[1] *See* ECF No. 119 at 5-6, 10. Plaintiffs mischaracterize Defendants' observations of the purpose of the 1994/1995 regulatory change, improperly construing Defendants to argue that only meritorious asylum claims are entitled to work authorization. ECF No. 123 at 9, 10 (citing ECF No. 119 at 6 n.2). However, in their motion, Defendants merely clarified that the phrase in the 1997 regulatory materials: "ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible," references those whose applications had been *recommended* for approval, though not granted for approval simultaneously. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures (Interim Rule), 62 Fed. Reg. 10,312, 10,317-318 (Mar. 6, 1997) (emphasis added). Read in context, this statement does not indicate that the goal of the 1995 regulatory changes were to make EADs available as quickly as possible for *all applicants*. Instead, the 1995 regulations balanced the concerns of combatting asylum fraud and streamlining the asylum process. This regulatory history does not mandate an injunction requiring strict compliance with the 30-day timeline, and the Court should not impose such an injunction.

[1] Such a concern is still present today. Due to the increase in asylum applications, the wait times to receive an interview for an affirmative asylum application ranged from approximately two years to four years as of October 2017. SAR 93-96. In January 2018, the asylum office began giving priority to the most recently filed affirmative asylum applications when scheduling interviews, in part to reduce the incentive to file an asylum application solely to obtain employment authorization. *See* USCIS, Affirmative Asylum Interview Scheduling, Jan. 26, 2018, https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling.

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C. Defendants' actions are reasonable.

Because an injunction is not mandatory, this Court should consider Defendants' reasonable actions when determining whether to issue an injunction. *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016). Contrary to Plaintiffs' allegation, the efforts made to date are significant and have had a meaningful impact on Defendants' adjudication of initial asylum EADs. First, Plaintiffs assert that extending the validity period for asylum EADs "does nothing to address the actual issue in this case." ECF No. 123 at 12. However, because the time it takes to process applications in the aggregate is a function of the resources available to the agency, increasing the validity period necessarily frees up agency resources that would have been devoted to adjudicating applications each year. For example, instead of adjudicating 50,000 EAD applications for pending asylum applicants, including both initial and renewal, *every* year, those EAD applications only need to be adjudicated every two years, freeing up 50,000 adjudication spots, so to speak, in the alternating year. Compounded over 474,470 applications, the number of initial and renew application received in FY2017, this results in significant resource conservation that can be reallocated. *See* SAR 85. The significant impact of this change is illustrated in the graph of asylum EAD receipts from October 2012 to September 2017. SAR 86.

Plaintiffs also allege that "Defendants offer no explanation for their failure to allocate . . . resources" and imply that extending the validity period for asylum EAD and offering a checklist are all that Defendants have done to attempt to reduce the backlog. ECF No. 123 at 12. However, Defendants have made a concerted effort in FY2017 to reduce the backlog with the resources allocated to USCIS.[2] It is the result of this effort that resulted in 38 percent of all pending application continuing to be over the 30-day timeline. *See* SAR 87. Defendants do not offer this statistic to show that Defendants have almost made it to compliance. As Plaintiffs

[2] Defendants intended to more fully discuss these efforts but were not permitted to include such evidence in the administrative record. *See* ECF No. 103 (seeking to include in the administrative record a declaration from the Associate Director for Service Center Operations, Donald Neufeld, which detailed the efforts undertaken); ECF No. 113 (Order denying Defendants' motion to include the declaration).

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point out, it is a snapshot of the status of the applications pending on one particular day. *Id.* This data does show, however, that even after Defendants purposefully attempted to reduce the initial asylum EAD backlog, they were unable obtain a 100 percent compliance rate. Because Defendants are unable comply with the regulatory deadline 100 percent of the time, this Court should not order them to perform the impossible. *See Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017).

Defendants have recognized that they are unable to comply with the regulatory deadline 100 percent of the time, and therefore, they have undertaken the process to amend the regulation. On July 2, 2018, the proposed rule was submitted to the Office of Information and Regulatory Affairs at the Office of Management and Budget, progressing further toward being published in the Federal Register. *See* Office of Management and Budget, Office of Information and Regulatory Affairs, Pending EO 12866 Regulatory Review, RIN 1615-AC19, *https://www.reginfo.gov/public/do/eoDetails?rrid=128209*. Defendants acknowledge that the process is in its initial stages, but the initiation of that process shows Defendants' efforts to alter the regulations to better fit the realities and competing concerns in adjudication of initial asylum EADs.

Finally, Plaintiffs point to other cases involving backlogs to attempt to show that with just a little bit of effort, Defendants should be able to adjudicate all 261,447 initial asylum EADs received by USCIS in FY2017 within the 30-day regulatory timeframe. ECF No. 123 at 13-15. However, each case involving administrative backlogs are subject to unique circumstances. The scope of the backlog, the agencies involved, the attention of the legislature which controls the funding of agencies, and other external and internal demands on resources all impact whether, how, and when an issue may be resolved. While Plaintiffs point to three historic cases that were able to be resolved, it is not possible to equate any other case to the issue in this case. For example, the volume of the backlog involving Freedom of Information Requests to Customs and Border Protection ("CBP") was much smaller than the backlog faced by USCIS here. In FY2017, USCIS was unable to process 168,946 of initial asylum EAD applications that were not subject to a request for evidence within the 30-day timeline. *See* SAR 92. In contrast, there

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were only 34,307 backlogged requests to CBP. *See Brown v. CBP*, No. 3:15-cv-01181-JD (N.D. Cal. 2016) (settlement agreement), at 2-3, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/brown_v_cbp_settlement_0.pdf.[3] With regard to the name check delays, USCIS's effort to address FBI name check delay litigation were not the result of an agency decision to reallocate resources, but rather because of additional appropriations to address those delays. *See, e.g.*, *Aronov v. Napolitano*, 562 F.3d 84, 96 (1st Cir. 2009), citing 18 Consolidated Appropriations Act of 2008, Pub.L. No. 110–161, div. E, tit. IV, 121 Stat. 1844, 2067 (Dec. 26, 2007) (Finding that Congress "addressed the delays by appropriating $20 million to USCIS to 'address backlogs of security checks associated with pending applications and petitions' provided that the agency submitted a plan to eliminate the backlogs and ensure that the agency 'has the information it needs to carry out its mission.'").

Because each instance of a backlog is distinctive, the Court should not equate the government's ability to resolve one as an ability to resolve all backlogs. Here, USCIS has made systematic changes to assist with resource allocation and has made concerted efforts to adjudicate initial asylum EADs within the 30-day regulatory timeframe. These effort however, have not been able resolve the backlog. Requiring USCIS to maintain 100 percent compliance with the regulatory timeframe would be requiring an impossibility, and therefore, the Court should decline to enter an injunction in this case.

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[3] Additionally, the *Brown* settlement provides no assistance to the Court's presence analysis because, *inter alia*, the cause of action there arose from a statutory deadline, and notably, the statute provided the defendant agencies several remedies to excuse delays from the statutory processing period. *Brown*, No. 3:15-cv-01181-JD (N.D. Cal. 2016) (settlement agreement), at 2-4. The *Alfaro-Garcia* settlement also offers no help here. That settlement provided for several remedies and a dispute mechanism that permitted processing periods longer than the regulatory guideline there. *See* Exhibit 1 to Final Order Approving Settlement at 5-6, *Alfaro-Garcia v. Johnson*, No. 4:14-cv-1775-YGR (N.D. Cal. Oct. 27, 2015). Moreover, the case, regarding the timely provision of interviews, presented an altogether different volume and processing strain on USCIS's resources, and arguably a much different threat of injury to those plaintiffs as a result of alleged agency delay. The relief Plaintiffs seek here would offer no similar accommodations. Moreover, the decision to settle one matter does not bind future agency actions in other non-related matters.

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Conclusion

For the foregoing reasons, and those expressed in Defendants' motion for summary judgment, the Court should grant Defendants' motion for summary judgment and decline to enter an injunction requiring 100 percent compliance with the 30-day regulatory timeline of 8 C.F.R. § 208.7(a).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 16, 2018, I electronically filed the foregoing Defendants' Reply in Support of Defendants' Motion for Summary Judgment with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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