The Honorable James L. Robart
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

NORTHWEST IMMIGRANT RIGHTS PROJECT, ET AL., Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., Defendants.	Case No. 2:15-cv-00813 PLAINTIFFS' OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS NOTED ON CALENDAR: May 13, 2016 **ORAL ARGUMENT REQUESTED**

INTRODUCTION

Plaintiffs challenge Defendants' policies and practices of unlawfully delaying adjudication of applications for employment authorization documents (EADs) and failing to issue interim employment authorization, as required by Defendants' own mandatory regulations. The material facts in this case are not in dispute. First, Defendants do not adjudicate all EAD applications within the regulatory timetable. In addition to the numerous cases documented by Plaintiffs,[1] the USCIS Ombudsman's Office has documented the

[1] Dkt. 58 at ¶¶ 47, 50, 53, 57, 60, 62, 65, 69, 73-74, 76, 79; Dkt. 59-1 – 59-14; Dkt. 1 at ¶¶ 38, 40, 43, 46-47; Dkt. 5-1 – 5-13; Dkt. 24-10 – 24-15; Dkt. 29-4 – 29-6.

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nationwide scope and breadth of the agency's delays in adjudicating EADs.[2] Second, Defendants, by their own admission, do not issue interim employment authorization when the mandatory regulatory deadline has lapsed.[3]

The individual Plaintiffs' applications for EADs sat unadjudicated for weeks or months past the regulatory deadlines prior to the filing of the Amended Complaint in this case. Promptly after that filing, Defendants adjudicated the new named Plaintiffs' pending applications within a period of 5 to 27 days. *See* 2nd Mot. Dismiss, Dkt. 69 at 14-16. Defendants *can* timely adjudicate EAD applications when they see fit to do so.

Nonetheless, Defendants move to dismiss this case, alleging that the Court lacks subject matter jurisdiction over the claims regarding interim EADs for initial asylum applicants and the claims of Ms. Arcos-Perez and Ms. Osorio-Ballesteros, that the individual Plaintiffs' claims are moot, and that the Organizational Plaintiffs lack standing and have failed to state claims for which relief can be granted.

Defendants' assertions are without merit. First, Plaintiffs have stated a claim as to interim EADs for initial asylum applicants because Defendants routinely violate the 30-day regulatory processing mandate. What Defendants actually dispute are the available remedies. That dispute does not need to be resolved to dispose of Defendants' motion, though the I-765 instructions do require interim EAD issuance in the event of such a violation and are enforceable as part of the regulation.

[2] Dkt. 24-1. The USCIS Ombudsman, a position within USCIS created by statute, provides individual case assistance and makes recommendations to improve the administration of immigration benefits by USCIS. *See* http://www.dhs.gov/topic/cis-ombudsman (accessed May 9, 2016). *See also* Dkt. 59-1 at ¶¶ 6-9; Dkt. 59-16 at 3 (Letter of March 11, 2016 to León Rodriguez, Director, USCIS from Ben Johnson, AILA Executive Director), with data from USCIS processing times charts showing delays between September 22, 2015 and February 11, 2016 in the adjudication of EAD applications (initial and renewal) for asylum applicants.

[3] Dkt. 24-2 at 3 ("USCIS no longer produces interim EADs."). Defendants regularly issued interim employment authorization until 2006. *Id.*

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In addition, the individual Plaintiffs' claims are not moot because they are inherently transitory and brought in the context of a class action. Moreover, even outside the class action context, these claims would not be moot because Plaintiffs challenge ongoing government policies, and the duration of the challenged conduct is too short to be resolved by litigating individual cases. Furthermore, the same individual Plaintiffs will in all likelihood need to file once again for extensions of their employment authorization; thus, their claims are capable of repetition yet evading review.

Finally, the Organizational Plaintiffs have standing because Defendants' challenged policies force them to divert resources to assist and advise clients whose EAD applications have been delayed and frustrates their core mission of assisting immigrants in obtaining legal status in the United States.

Plaintiffs recognize that the Court has already ruled on Ms. Arcos-Perez and Ms. Osorio-Ballesteros' claims. Dkt. 55 at 20, 29. Plaintiffs hereby preserve for appeal their arguments that Ms. Arcos-Perez and Ms. Osorio-Ballesteros have standing and that this Court has subject matter jurisdiction over their claims, for the reasons set forth in Plaintiffs' opposition to Defendants' initial motion to dismiss, Dkt. 40, and Plaintiffs' supplemental briefing about Ms. Arcos-Perez, Dkt. 53.[4]

STANDARD OF REVIEW

Motions to dismiss are disfavored. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The Court construes the facts in the light most favorable to the plaintiffs and draws all reasonable inferences in their favor. *See, e.g., Wolfe v. Strankman*, 392 F.3d 358, 362

[4] The "law of the case" doctrine cited by Defendants (Dkt. 69 at 22-23) is not applicable as Plaintiffs may address the issue on appeal. *See United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) ("We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata.").

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(9th Cir. 2004). A complaint survives if it contains "sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Lacey v. Maricopa County*, 693 F.3d 896, 911 (9th Cir. 2012) (citations omitted), *superseded by statute on other grounds*, Fed. R. Civ. P. 15 (2010). Because the Complaint establishes that the Court has subject matter jurisdiction, Defendants' motion to dismiss should be denied.

ARGUMENT

A. Plaintiffs Have Stated a Claim That Defendants are Violating Their Regulatory Obligation to Timely Adjudicate EAD Applications from Initial Asylum Applicants or Grant Them Interim Employment Authorization.

Defendants do not—and cannot—dispute that they routinely violate the 30-day processing mandate in 8 C.F.R. § 208.7(a) for adjudicating EAD applications for initial asylum applicants and that they do not grant interim employment authorization. This Court has already ruled that Plaintiffs state a claim on the violation of the initial asylum EAD regulations: "The court concludes that the 30-day deadline for adjudication of asylum EADs supports such a claim, and the court therefore has jurisdiction over W.H.'s APA and Mandamus Act claims." Dkt. 55 at 26. Moreover, Defendants have conceded that they do not grant interim employment authorization in cases where they violate the regulatory adjudication timetable. Dkt. 24-2 at 3.

Defendants do not dispute the *claim* that the regulations require adjudication within thirty days, but instead contest that they are required to provide the *remedy* of interim employment authorization. As this Court previously found, at this preliminary stage in the litigation, the ultimate determination of the proper remedy for Defendants' admitted failure to comply with the mandatory language of 8 C.F.R. § 208.7(a) is not at issue. "W.H. ultimately seeks one of two prospective remedies—either adjudicate his EAD within 30 days or issue an interim EAD after 30 days. … [T]he court reserves judgment as to whether the latter is

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available." Dkt. 55 at 26 n.19. A number of viable remedies exist, none of which need be selected at this stage. One possible remedy would be to direct the agency to produce interim EADs in accordance with the I-765 instructions. Another would be for the Court to order the agency to adjudicate all initial asylum EADs within thirty days, as the regulation requires. In addition, the Court could enjoin Defendants from relying on the absence of a work permit in adjudicating other immigration benefit applications. *See, e.g.,* 8 U.S.C. § 1255(c)(2) (precluding adjustment of status where noncitizen "continues in or accepts unauthorized employment"). Thus, even if the Court were to ultimately conclude that interim EADs are not mandated for initial asylum applicants, that finding goes to the remedy, and Plaintiffs still state a claim for Defendants' admitted violations of 8 C.F.R. § 208.7(a), to the detriment of Plaintiffs and putative class members.

Defendants' motion is also instructive in what it does not argue. Defendants do not dispute that the I-765 instructions are binding and enforceable by the Plaintiffs in this action. *See* 8 C.F.R. § 103.2(a)(1). In fact, Defendants' contentions regarding interim EADs for the 30-Day Subclass rely on nothing more than a misreading of the I-765 instructions. Defendants attach great significance to the use of "may" in the I-765 instructions, but the "may" relates to how an applicant "may" request an interim EAD (by phone or in-person), not to Defendants' duties. Dkt. 69-1 at 11. While an applicant may, or may not, request interim work authorization, Defendants' obligation to grant an interim work permit is not discretionary. Rather, as Defendants acknowledge, the instructions state that "[t]he interim EAD ***will be granted*** for a period not to exceed 240 days . . . ." I-765 instructions, Dkt. 69-1 at 1 (emphasis added). Thus, the I-765 instructions mandate that an interim EAD "will be granted" when an

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EAD has not been adjudicated within the regulatory processing time and the applicant requests interim employment authorization.

B. Plaintiffs' Individual Claims Are Not Moot as They are "Capable of Repetition, Yet Evading Review" and Brought in the Context of a Class Action that Challenges Government Policies.

Plaintiffs welcome Defendants' concession that their claims are not moot for class certification purposes. Dkt. 69 at 25 n.3. As the Court explained in its February 10, 2016 order, an exception to the mootness doctrine exists for "inherently transitory" claims that are brought as class actions. Dkt. 55 at 30. "[W]here a named plaintiff's individual claim becomes moot before the district court has an opportunity to rule on the certification motion, and the issue would otherwise evade review, the mootness inquiry may relate back to the filing of the complaint." *Id.* at 30-31 (quoting *Genesis HealthCare Corp. v. Symczyk,* 133 S. Ct. 1523, 1530 (2013) (internal quotations omitted)); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089-90 (9th Cir. 2011). Based on this rationale, the Court held that W.H.'s claim qualifies for the exception to mootness. Dkt. 55 at 31. Plaintiffs Gonzalez Rosario, L.S., K.T., A.A., Diaz Marin, Machic Yac, Salmon and Shah also qualify because, as in W.H.'s case, Defendants failed to adjudicate their EAD applications until after the regulatory adjudication deadline had passed (and they only did so *after* Plaintiffs had sued them) and failed to give them interim employment authorization.[5] This Court has already engaged in a thorough analysis of this issue, and concluded correctly that—for purposes of this class action—these EAD delay claims fall under the inherently transitory exception to mootness.

[5] For the same reasons and those set forth in Plaintiffs' opposition to Defendants' initial motion to dismiss, Plaintiffs maintain that Ms. Arcos-Perez and Ms. Osorio-Ballesteros' claims qualify. Dkt. 40 at 12-18.

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Assuming class certification is granted, the conclusion that Plaintiffs' claims are inherently transitory resolves the question of mootness, and the Court need not address Defendants' alternative arguments. But even prior to class certification, Defendants' assertions are without merit. While acknowledging the additional exception to the mootness doctrine for claims that are "capable of repetition, yet evading review," Defendants claim that it does not apply in this case because the likelihood of repetition is "speculative" due to uncertainty that Plaintiffs will have to apply for EADs again or will face unlawful delay if they do file. Dkt. 69 at 26. However, even outside the class action context, the Ninth Circuit has held that a claim is not moot if the duration of the challenged conduct is too short to be resolved through litigation, and the challenge is to an ongoing agency policy or practice. *See, e.g., Los Angeles Unified School District v. Garcia*, 669 F.3d 956, 958 n.1 (9th Cir. 2012) (suit challenging failure to provide special education services to eligible children incarcerated in county jail not moot after plaintiff was transferred to state prison because policy was ongoing); *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007) (challenge to ongoing policy requiring leg shackling of criminal pretrial detainees was not moot even though individual plaintiffs were unlikely to be subject to this policy again); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1116-17 (9th Cir. 2003) (challenge brought by and on behalf of mentally ill pretrial detainees to continuing detention conditions in county jails was not moot even though the detainee plaintiff and those represented by organizational plaintiff had been transferred to state hospital).

Here, Plaintiffs challenge Defendants' ongoing policies and practices of failing to timely adjudicate EAD applications and failing to issue interim EADs to individuals required to receive them. *See* Amended Complaint, Dkt. 58 at 4-5 ¶¶ 10-11. Plaintiffs seek a declaratory judgment that Defendants' failure to timely adjudicate their EAD applications or provide them

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with interim employment authorization is arbitrary and capricious, an abuse of discretion and in violation of the applicable regulations, along with an injunction requiring them to comply with the regulatory timetable going forward. *See* Dkt. 58 at 38-39. Given that Plaintiffs are challenging ongoing government policies and that the duration of the challenged conduct is too short to be resolved by litigating individual cases, the likelihood that any individual Plaintiff will ever file another EAD application or experience an unlawful delay is irrelevant. Defendants have conceded that they do not issue interim EADs, despite the regulatory requirements. *See* Order, Dkt. 55 at 7 n.6 ("At oral argument, Defendants conceded that this is at least for the most part true."); Dkt. 24-2 at 3 (Since September 1, 2006, "USCIS no longer produces interim EADs"). The USCIS Ombudsman's office has documented the nationwide scope and breadth of Defendants' delays in adjudicating EADs. Dkt. 24-1. The American Immigration Lawyers Association has also documented hundreds of examples of delayed adjudications that "reflect widespread delays in the adjudication of EAD applications filed by foreign nationals across the country." Dkt. 59-1 at 2 (¶ 9).

Nevertheless, the individual Plaintiffs' claims are capable of repetition because they have a "reasonable expectation" of being subject to the same action in the future. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999); *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).[6] Given current adjudication backlogs, it is more likely than not that Plaintiffs will have to reapply for EADs in the future and that their applications will not be timely adjudicated—in which case, they will not receive

[6] The cases cited by Defendants are not to the contrary; in fact, they do not invoke the "capable of repetition, yet evading review" exception at all. Dkt. 69 at 26. *See Toyo Tire Holdings of Am., Inc. v. Continental Tire No. Am., Inc.*, 609 F.3d 975, 982-83 (9th Cir. 2010) (interim relief needed; mootness exception not considered); *GATX/Airlog Co. v. U.S. Dist. Court for the N. Dist. of Cal.*, 192 F.3d. 1304, 1306-07 (9th Cir. 1999) (moot because no remedy for the plaintiff's claim).

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interim employment authorization.[7] For example, since USCIS is authorized to grant only 10,000 U visa applications each fiscal year,[8] Mr. Gonzalez Rosario and Ms. Diaz Marin's EADs are likely to expire while they remain on the wait list. Plaintiffs A.A., L.S., K.T. and Mr. Machic Yac's EADs also are likely to expire before their asylum applications are adjudicated given the lengthy backlogs at USCIS asylum offices in scheduling applicant interviews.[9]

Defendants claim further that the mootness exception does not apply because Plaintiffs could obtain review of any future EAD adjudication delays by filing individual challenges under the Mandamus Act and the Administrative Procedure Act. Dkt. 69 at 27. Given that Defendants' actions show that they control the timing of EAD adjudications, their argument is wholly disingenuous. Indeed, Defendants' conduct in this case demonstrates their willingness to try to moot out individual claims by adjudicating EAD applications that are the subject of pending challenges. On a practical level, individuals with pending EAD applications would have great difficulty pursuing individual claims for many reasons, including inability to afford

[7] The current version of Defendants' proposed rule, which would change the existing regulations for adjudicating EAD applications other than initial asylum-based EAD applications, has no bearing on this analysis. *See* 80 Fed. Reg. 81,900 (Dec. 31, 2015). Dkt. 69 at 27 n.4. As Defendants recognize, a final rule must first be published—and that rule may differ from the proposal. *See Flores v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986) ("Appellee's arguments fall by the wayside in light of the black-letter principle that properly enacted regulations have the force of law and are binding on the government until properly repealed.") (Internal citation omitted).

USCIS received more than 20,000 comments on the proposed rule. *See* Docket I.D. USCIS-2015-0008, comments folder, https://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=USCIS-2015-0008 (accessed May 9, 2016).

[8] *See* 8 U.S.C. § 1184(p)(2)(A); *USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year* ("For eligible petitioners who cannot be granted a U-1 visas [*sic*] solely because of the cap, USCIS will send a letter notifying them that they are on a waiting list to receive a U visa when visas become available again"), https://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year (accessed May 9, 2016).

[9] For example, the Arlington VA asylum office, which has jurisdiction over Plaintiff K.T.'s application, scheduled interviews in March 2016 for asylum applicants who had filed in October 2013. *See* Affirmative Asylum Scheduling Bulletin, https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (accessed May 9, 2016).

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representation, lack of awareness that they have a cause of action, and fear of potential government retaliation. Dkt. 59 at 11-12. These are the very reasons that class-wide relief is appropriate in this case. *See United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals . . . who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf."). Moreover, since Defendants promptly adjudicated the long-delayed EAD applications of all the new individual Plaintiffs in the Amended Complaint within 5 to 27 days of the filing of the new action, it can be presumed that the same thing would happen with any new individual mandamus case, thus preventing review on the merits.

C. This Court Has Jurisdiction Over the Organizational Plaintiffs' Claims.

i. The Organizational Plaintiffs have properly pleaded standing.

As this Court previously noted, the Organizational Plaintiffs can establish injury, and thereby demonstrate standing, by showing they "suffered 'both a diversion of [their] resources and a frustration of [their] mission[s]." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest,* 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)); Dkt. 55 at 32-33. The Court held it had jurisdiction to hear the claims of W.H., who seeks to represent the 30-Day Subclass. Dkt. 55 at 33. "[I]t follows that to the extent Organizational Plaintiffs' clients face the same difficulties as W.H., and those difficulties frustrate Organizational Plaintiffs' mission or force Organization Plaintiffs to divert resources, Organizational Plaintiffs have standing to sue." *Id.* The Court dismissed the claims of the two other individual Plaintiffs, Ms. Arcos and Ms. Osorio, who seek to represent the 90-Day Subclass. *Id.* Noting that the Complaint did not specify whether the Organizational Plaintiffs' clients "resemble W.H." or "resemble Ms. Arcos and Ms. Osorio," the Court found

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that the Organizational Plaintiffs had pleaded insufficient facts, but granted them leave to amend. *Id.* at 33-34.

The Organizational Plaintiffs responded to the Court's Order by amending the Complaint to identify the categories under which their clients filed for EADs, and allege with specificity how EAD delays for these clients divert the resources of these organizations and frustrate their missions.

The Advocates allege in the Amended Complaint that they serve clients in both the 90-Day Subclass and the 30-Day Subclass: "The Advocates' clients eligible to receive EADs and interim EADs, who have been subject to unlawful adjudication delays, fall under category 8 C.F.R. § 274a.12(c)(8), and include asylum seekers filing both initial requests for EADs and requests to renew EADs." Dkt. 58 ¶ 16.[10] The Advocates have pleaded sufficient facts to establish that delays in the adjudication of EADs for both these subclasses has diverted their resources and frustrated their mission. *Id.* ¶¶ 16, 85. In particular, the Advocates allege the following underlying facts to establish the diversion of resources: "In addition to fielding calls from and meeting with worried clients, staff attorneys spend considerable time calling and e-mailing USCIS, working with employers to hold jobs open until their clients' EADs are renewed, intervening with the state on driver's license issues, and working with agency liaison and congressional offices to try to obtain EADs for their clients." *Id.* ¶ 85. The Advocates explain further how these additional responsibilities frustrate their "primary mission of helping … clients to apply for asylum." *Id.* ¶¶ 16, 85. "These tasks require significant staff time, forcing the Advocates to divert very limited resources that should be used to screen, place and support asylum cases." *Id.* ¶ 85.

[10] Asylum seekers who have filed initial EAD applications fall within the 30-Day Subclass, while those who have filed requests to renew their existing EADs fall within the 90-Day Subclass.

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In the Amended Complaint, NWIRP also identifies the individual categories under which their clients are eligible to receive EADs, which fall into all three proposed subclasses. Dkt. 58 ¶ 83 ("NWIRP's clients eligible to receive EADs and interim EADs, who have been subject to unlawful delay, include members of all three proposed subclasses.").[11] Like The Advocates, NWIRP alleges that Defendants' unlawful delay in adjudicating EADs diverts its resources and frustrates its mission. *Id.* ¶¶ 15, 82-84. NWIRP alleges the following facts to establish the diversion of resources:

> NWIRP staff must respond to client calls and walk-ins, explain the EAD process, the reasons for delay, and the lack of remedies. NWIRP staff make calls to the 1-800 customer service number, set up InfoPass appointments, and email the USCIS Service Centers regarding delayed EADs. NWIRP is not compensated by its clients for this diversion of resources to address delayed EAD adjudication.

Id. ¶ 83. NWIRP bolsters its claim of frustration of mission by describing how Defendants' unlawful actions present NWIRP with a Hobson's choice between reducing the number of clients it serves or reducing the scope of the services it provides to each client. *Id.* ¶ 84*; see La Asociacion de Trabajadores de Lake Forest,* 624 F.3d at 1088 ("The organization could not avoid suffering one injury or the other, and therefore had standing to sue.").

Defendants' argument that the Organizational Plaintiffs have suffered no injury because their missions include assisting clients in obtaining EADs is meritless. Defendants effectively argue, without any citation to authority, that Plaintiffs have standing only if they are forced to *depart* from their mission. But case law recognizes injury and standing when an organization's

[11] Those who fall within the three proposed subclasses are distributed as follows. Asylum seekers who have filed initial EAD applications fall within the 30-Day Subclass. Asylum seekers who have filed to renew their EAD applications, applicants for initial and for renewal EADs in the refugee, asylee, adjustment, cancellation, parolee and order of supervision categories fall within the 90-Day Subclass. Applicants for initial EADs based on a grant of deferred action, or for renewal based on deferred action other than DACA, also fall within the 90-Day Subclass. Applicants for EADs based on requests to renew DACA fall within the DACA Renewal Subclass.

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mission is *frustrated* and resources are *diverted* from their core activities. It does not matter that the resources are diverted to assist the same client base in some other way. "An organization may establish a sufficient injury in fact if it substantiates by affidavit or other specific evidence that a challenged statute or policy frustrates the organization's goals and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 943 (9th Cir. 2011) (en banc) ("[T]ime and resources spent in assisting day laborers during their arrests and meeting with workers about the status of the ordinance would have otherwise been expended toward NDLON's [National Day Laborer Organizing Network] core organizing activities"). Here, the Organizational Plaintiffs have sufficiently pleaded diversion of resources and frustration of mission, and their claims should not be dismissed.

ii. The Organizational Plaintiffs have properly stated claims upon which relief can be granted.

The Amended Complaint meets the requirement of "a short and plain statement of the claim," which "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (internal citations omitted). Specifically, the Organizational Plaintiffs allege that Defendants routinely fail to timely adjudicate their clients' EAD applications and to give them interim employment authorization, causing diversion of their scarce resources and frustration of their common mission to help immigrants obtain legal status in the United States. Although a complaint must be "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), Rule 8 of the Federal Rules of Civil Procedure does not require more detailed factual allegations than those included in the Complaint in this case. *See Iqbal*, 556 U.S. at 678. In particular, the Organizational Plaintiffs

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are not required to specify the precise number of their clients who have experienced delayed EAD applications in each category. *See La Asociacion de Trabadores de Lake Forest,* 624 F.3d at 1089 (upholding Plaintiff Colectivo's brief allegations as sufficient to state a claim as an Organizational Plaintiff); *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105-06 (9th Cir. 2004) (reversing dismissal of disability rights organizational plaintiff where complaint alleged disability discrimination had diverted resources "from other efforts to promote awareness of—and compliance with—federal and state accessibility laws").

While maintaining that they have pleaded sufficient facts to state a claim for relief on behalf of the Organizational Plaintiffs, Plaintiffs note that, in support of their motion for class certification, they have submitted declarations from the Organizational Plaintiffs that expand on the scope and impact of EAD adjudication delays on their day-to-day operations. *See* Dkt. 59-6 at 1-2 (¶¶ 3-4, 6, 8); Dkt. 5-5 at 2-9 (¶¶ 4-22); Dkt. 59-7 at 5-7 (¶¶ 11-17). Should the Court dismiss any or all of the Organizational Plaintiffs' claims notwithstanding the above arguments, Plaintiffs request an opportunity to amend the Complaint to incorporate these more detailed factual allegations. *See Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013).

Defendants argue that Plaintiffs have failed to state a claim for two additional reasons: (1) that the Organizational Plaintiffs cannot meet a "zone of interests" test under the Administrative Procedure Act (APA) for their clients' EAD delays; and (2) the Organizational Plaintiffs do not have a cause of action under the Mandamus Act because the agency's duty to timely adjudicate EADs is owed to the Organization Plaintiffs' clients, not to the Organizational Plaintiffs. *See* Dkt. 69 at 29-31. For the reasons discussed below, both arguments fail.

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1. The Organizational Plaintiffs' APA claim meets the "zone of interests" test.

The "zone of interests" test precludes the pursuit of a claim under the APA "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). Standing under the APA is extremely broad, applying to any "person suffering legal wrong because of agency action, or *adversely affected or aggrieved by agency action* …" 5 U.S.C. § 702 (emphasis added); *see also Ass'n of Data Processing Serv. Organizations, Inc. v. Camp,* 397 U.S. 150, 153-54 (1970) (applying above APA analysis to commercial enterprise petitioner). The Supreme Court expressed the distinction between the zone of interests for APA claims and other types of claims as follows:

> [T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the "generous review provisions" of the APA may not do so for other purposes.

Bennett v. Spear, 520 U.S. 154, 163 (1997) (citations omitted).

In determining whether a particular claimant meets the "zone of interests" test under the APA, "the benefit of any doubt goes to the plaintiff." *Lexmark*, 134 S. Ct. at 1389 (quoting *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210)). The Supreme Court has held that a plaintiff may bring a claim even if the relevant statutory provision is not designed to benefit that plaintiff. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) ("there need be no indication of congressional purpose to benefit the would-be plaintiff"). Thus, Defendants'

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argument that 8 C.F.R. § 274a.13(d) is not intended to protect the Organizational Plaintiffs is beside the point.

The Supreme Court in *Match-E-Be-Nash-She-Wish* specifically addressed the application of the "zone of interests" test to an APA cause of action, holding that it "is not meant to be especially demanding." 132 S. Ct. at 2210 (quoting *Clarke*, 479 U.S. at 399).[12] "We apply the test in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Id.* (quotations and citations omitted). In *Match-E-Be-Nash-She-Wish*, the plaintiff, a neighboring landowner who filed a complaint based on proposed land use – definitely not within the category of individuals the statute was designed to protect – had standing because the issues being litigated "fall within [the statute's] scope." 132 S. Ct. at 2210 n.7. Even assuming that the requirements of a statute are unclear, a plaintiff can have standing to challenge agency action based on the implementing regulations. *Id.* at 2211 (the regulations "make this statutory concern with land use crystal clear"). Where the plaintiffs' interests "come within [the statute's] regulatory ambit", the plaintiffs have standing. *Id*. at 2212.

The Organizational Plaintiffs have appropriately pleaded standing under Article III and the zone of interests test under the APA. First, they have pleaded actual injury—namely, diversion of resources and frustration of their mission—because of Defendants' failure to follow the regulations, thereby showing that they are "adversely affected or aggrieved by

[12] In *Lexmark,* the Court expressly cited to *Match-E-Be-Nash-She-Wish* for the application of the zone of interests test in the APA context. *See* 134 S. Ct. at 1389. Although *Match-E-Be-Nash-She-Wish* labeled the "zone of interests" test as "prudential standing," the Court in *Lexmark* applied the "zone of interests" test to its statutory analysis of a Lanham Act claim and rejected the label "prudential standing," at least outside the context of third party standing. 134 S. Ct. at 1387 n. 3 ("This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.") The change in label from "prudential standing" to "zone of interests" in determining standing for an APA claim does not change the *Match-E-Be-Nash-She-Wish* analysis.

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agency action." 5 U.S.C. § 702; *see also Ass'n of Data Processing Serv. Organizations,* 397 U.S. at 154 (standing may stem from noneconomic values as well as economic injury).

Second, the issues being litigated fall directly within the scope of the APA, as the Organizational Plaintiffs are challenging the agency's failure to follow the regulations regarding EAD adjudications. *See Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2211. Indeed, the Organizational Plaintiffs have an instrumental role to play in assisting their clients to obtain EADs, thus placing the Organizational Plaintiffs within the "zone of interests" of the regulations at issue. As Defendants note, attorneys employed by the Organizational Plaintiffs enter Form G-28 notices of appearance and "file applications on behalf of their clients." Dkt. 69 at 30; *see also* 8 C.F.R. §§ 292.5(a), (b) (right of attorney to receive notice and right of counsel at any examination). The EAD application (Form I-765) requires staff at NWIRP and The Advocates who assist with its completion to identify themselves and provide contact information, as well as to certify that all the information provided therein is correct.[13] Far from being "marginally related" to the purposes of the statute or the regulations, the Organizational Plaintiffs play a significant role in preparation and, where necessary, advocacy on behalf of clients in their applications for EADs. Because the interests that the Organizational Plaintiffs assert are squarely within the ambit of the regulations, Plaintiffs meet the "zone of interests" test.

2. The Organizational Plaintiffs have stated a claim for relief regardless of whether the regulations create a duty that applies only to the Individual Plaintiffs.

As Defendants note, the APA and mandamus causes of action are in essence the same. Dkt. 69 at 30; *see also Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1161-62 (N.D. Cal. 2007)

[13] Form I-765, Application for Employment Authorization, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at https://www.uscis.gov/sites/default/files/files/form/i-765.pdf (accessed May 9, 2016).

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("Where the relief the plaintiff is seeking is identical under either the APA or the mandamus statute, proceeding under one as opposed to the other is not significant.") (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir.1997)). Since the Organizational Plaintiffs have standing to raise the APA claim, and therefore enforce the applicable regulations, the Court need not reach the question of standing under mandamus in order to compel Defendants to comply with their mandatory regulations.

Nonetheless, if the Court reaches the issue, it should reject Defendants' argument that the Organizational Plaintiffs have not adequately stated a mandamus claim. First, the ability of Organizational Plaintiffs' to raise this claim is a question of prudential standing. *See Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979); *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1127 n.2 (9th Cir. 2004) ("third-party standing is a prudential, judge-made doctrine"). Where, as here, a plaintiff has Article III standing, recent Supreme Court precedent counsels that the case should not be dismissed based on prudential considerations. *Lexmark*, 134 S. Ct. at 1388; *see also Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2347 (2014); *but cf. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, No. C11–2043JLR, 2014 WL 3579639 at *10 (W.D. Wash. July 21, 2014) (addressing prudential ripeness concerns absent more definitive guidance by the Supreme Court).

Second, the Organizational Plaintiffs meet the prudential standing requirement for asserting the rights of third parties, which consists of three factors: (1) the Organizational Plaintiffs suffered an injury in fact; (2) the Organizational Plaintiffs have a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991); *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). Courts balance all three factors to determine whether prudential standing

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considerations weigh in favor of permitting the claim to go forward. *See Powers*, 499 U.S. at 412-415; *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624 n.3 (1989).

The balance of the three factors weighs in favor of finding prudential standing for the Organizational Plaintiffs' claims. The Organizational Plaintiffs, as argued above, have suffered an injury in fact. The Organizational Plaintiffs have a very close relationship to the third parties, representing individuals who have been harmed by Defendants' unlawful adjudication delays, and have a mutual interest in enforcing the regulations. Indeed, courts have in some cases found third-party standing for attorneys representing clients. *See Caplin & Drysdale, Chartered,* 491 U.S. at 624 n.3 (1989); *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990). Finally, there are a number of clear hindrances to third parties bringing suit. *See Singleton v. Wulff*, 428 U.S. 106, 116-17 (1976) (finding doctors had third party standing to challenge abortion restrictions). In practice, there have been almost no cases in the last decade, since USCIS stopped issuing interim employment authorization, where individuals have challenged Defendants' failure to follow the regulations, despite repeated complaints to USCIS. Dkt. 24-1 at 6. As previously noted, individual noncitizens may fear filing suit against the government or may lack the necessary expertise or resources. Moreover, as this litigation demonstrates, individual third-party claims are almost certain to be mooted out before litigation resolves, since the delay may be a matter of weeks or months. This leaves individual third parties damaged by the delay, but without any effective remedy. For these reasons, Organizational Plaintiffs meet the prudential standing requirement.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

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Respectfully submitted this 9th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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