District Judge James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

A.A., *et al.*, Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, Defendants.	Case No. 2:15-cv-00813-JLR **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: July 16, 2018

I. INTRODUCTION

As all parties agree, Defendant U.S. Citizenship and Immigration Services (USCIS) has violated its duty to adjudicate applications for initial employment authorization (EAD) filed in conjunction with applications for asylum within 30 days of receipt pursuant to 8 C.F.R. § 208.7(a)(1). *See* Dkts. 118 at 10-11; 119 at 7, 9; 122 at 2; 123 at 1, 8. In fact, Defendant USCIS does not even adjudicate half of the initial asylum EAD applications within 30 days of receipt as required by 8 C.F.R. § 208.7(a)(1). Dkt. 119 at 9; Dkt. 123 at 4. Though Defendants

Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957- 8628

1 continue to dispute that this duty is mandatory, *see* Dkt. 112 at 2 n.1, this Court already has
2 ruled otherwise. Dkt. 95 at 21 n.10. Thus, the only issue before this Court on summary
3 judgement is whether to grant declaratory and injunctive relief to class members. For the
4 reasons Plaintiffs and class members explained in their opposition to Defendants' cross-motion
5 for summary judgement (Dkt. 123), which are also responsive to the instant reply in support of
6 their summary judgement motion and thus incorporated herein, both declaratory and injunctive
7 relief are warranted. In their opposition to Plaintiffs' motion for summary judgement (Dkt.
8 122), Defendants do not dispute that declaratory relief is warranted and fail to demonstrate any
9 basis that would impede this Court from granting injunctive relief.[1] Accordingly, the Court
10 should grant class members' motion for summary judgment.

11 **II. ARGUMENT**

12 As noted above, Plaintiffs and class members incorporate all arguments and factual
13 statements made in their opposition to Defendants' cross-motion for summary judgment (Dkt.
14 123) because they are also responsive to Defendants' opposition to Plaintiffs' motion for
15 summary judgment. For this reason, Plaintiffs present only a summary of those arguments
16 herein in response to Defendants' skeletal assertions that injunctive relief is not mandated nor
17 appropriate.

18 **A. Injunctive Relief is Required.**

19 In *Biodiversity Legal Found. v. Badgley*, the Ninth Circuit held that courts considering
20 violations of mandatory statutory deadlines should look to whether "an injunction is necessary
21 to effectuate the congressional purpose behind the statute." 309 F.3d 1166, 1177 (9th Cir. 2002).

22

23 [1] This action requests that the Court declare that USCIS has violated the mandatory deadline, *see* Dkt. 58 at 38 ¶ (7), and Defendants have not disputed that such relief is warranted.

Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957- 8628

1 In *Badgley*, the court held that the Department of Interior and the United States Fish and Wildlife
2 Service's failure to make certain determinations on a petition to classify a species as threatened
3 or endangered within twelve months of receipt of the petition violated the plain language of a
4 provision of the Endangered Species Act. *Id.* at 1177-78. Accordingly, the court held that this
5 failure to act timely compelled the district court to grant injunctive relief. *Id.* at 1178.

6 To the extent that intent bears on injunctive relief, it requires granting injunctive relief in
7 Plaintiffs' and class members' favor. The purpose of the initial asylum EAD regulation, as the
8 language makes clear, is to require the agency to adjudicate applications within 30 days. In
9 addition to the plain language of the regulation, the legislative history and agency statements in
10 the Federal Register also establish that the purpose of the 30-day deadline is to ensure that the
11 agency promptly adjudicates work permit applications in cases where it has failed to adjudicate
12 the asylum application within the congressionally-mandated period of 180 days. *See* Dkt. 123 at
13 7-10; *see also* 8 U.S.C. § 1158(d)(5)(A)(iii) ("[F]inal administrative adjudication of the asylum
14 application, not including administrative appeal, shall be completed within 180 days after the
15 date an application is filed . . . ."). The Court, therefore, should consider the regulatory deadline
16 for adjudicating work permit requests in conjunction with the underlying statutory mandate that
17 the agency adjudicate asylum applications within 180 days. [2] *Id.*

18 Thus, because the plain language and purpose of the initial asylum EAD regulation
19 mandate compliance with the regulation, injunctive relief is required.

20

21

22 [2] Plaintiff class members must wait 150 days after filing their completed asylum applications
23 with Defendants to be able to apply for an EAD. 8 C.F.R. § 208.7(a)(1). Although Defendants are required to adjudicate the EAD applications within 30 days, Defendants will have already had the underlying asylum applications for at least 150 days, during which time the agency can begin any required background checks.

Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957- 8628

1 **B. Injunctive Relief is Warranted.**

2 This Court should reject Defendants' attempt to urge the Court not to issue an
3 injunction as a matter of "equitable discretion." Dkt. 122 at 3. Under the Ninth Circuit's test
4 governing unreasonable delay claims in *Badgley*, discussed above, injunctive relief is required.
5 309 F.3d at 1177 n.11. Moreover, Defendants' insistence that the Court should apply the
6 injunction test set forth in *Telecomm. Res. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)
7 ("*TRAC*"), *see* Dkt. 119 at 12-13 and 122 at 3, ignores the fact that this Court already has
8 rejected the applicability of the *TRAC* analysis. *See* Dkt. 95 at 20-22, 20 n.9; *see also Badgley,*
9 309 F.3d at 1177 n.11 (declining to apply *TRAC* factors when Congress has specifically
10 provided a deadline for performance).

11 Any equitable consideration must favor class members because Defendants have not
12 taken meaningful steps, let alone made "significant efforts" to reduce the backlog of initial
13 asylum EAD applications and improve processing times. Dkt. 122 at 3. Defendants' so-called
14 efforts, which consist of extending the validity of initial asylum EADs and posting a two-page
15 document on its website (*see* Dkt. 119 at 13-15), are grossly inadequate. First, extending the
16 validity period of initial asylum EADs does nothing to affect USCIS' failure to timely adjudicate
17 the initial EAD application in the first instance. Second, Defendants' two-page "guidance and
18 checklists for applicants" simply puts the instructions for Form I-765 into checklist format for
19 class members. *See USCIS, Form M-1162, Optional Checklist for Form I-765 (c)(8) Filings*
20 *Asylum Applications* (July 17, 2017), https://www.uscis.gov/system/files_force/files/form/m-
21 1162.pdf. There would be no need for this new two-page document had the initial EAD
22 application instructions been sufficiently understandable in the first place. As such, Defendant
23 USCIS' most minimal of efforts cannot supplant the appropriateness of injunctive relief. *See*
also Dkt. 123 at 12-13.

Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957- 8628

1 Furthermore, Defendants offer no explanation for their failure to allocate the adequate
2 human and technological resources to reduce the backlog of applications and to comply with
3 the regulatory mandate to timely process initial EAD applications. Defendant USCIS for years
4 has failed to comply with its obligations and has not adequately devoted resources to
5 resolution, not even after this suit was filed. In contrast, when sued, other agencies, including
6 other component agencies with DHS, have responded to reduce processing backlogs. *See, e.g.*,
7 *Roshandel v. Chertoff,* No. 07-1739-MJP, Dkt. Nos. 22-24 (W.D. Wash., filed Oct. 29, 2007)
8 (discussed in full at Dkt.123 at 3) (resolving putative class action challenging delayed
9 adjudication of naturalization applications based on a plan, announced by USCIS and the FBI
10 nine days before oral argument, to eliminate the name check backlog within a year, including
11 over 29,000 cases pending more than two years); *Garcia v. Johnson*, No. 4:14-CV-01775-
12 YGR, 2015 WL 13387594 (N.D. Cal. Oct. 27, 2015) (discussed in full at Dkt. 123 at 3-4)
13 (settling nationwide class action case challenging USCIS' failure to conduct reasonable fear
14 interviews within 10 days as mandated by 8 C.F.R. § 208.31(b) after USCIS agreed to process
15 "reasonable fear" determinations more quickly, provide greater transparency into the
16 processing of cases, and alter its policies and procedures to accomplish these goals); *Brown v.*
17 *CBP*, No. 3:15-cv-01181-JD (N.D. Cal. 2016) (discussed in full at Dkt. 123 at 14-15) (settling
18 cases challenging U.S. Customs and Border Patrol pattern and practice of failing to timely
19 respond to requests under the Freedom of Information Act (FOIA) after agency responded to
20 lawsuit by successfully reducing its FOIA backlog and "implemented processes and devoted
21 staff to ensure timely compliance with this [high] level of FOIA requests"). *Accord Pereira v.*
22 *Sessions*, 138 S. Ct. 2105, 2119 (2018) (rejecting the Department of Homeland Security's plea
23

Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957- 8628

1 of administrative difficulty in properly issuing charging documents, finding it "hard to
2 imagine" that the government could not devise a system to set hearing dates in advance).
3 Lastly, though Defendants claim to continue with a proposal to eliminate the 30-day
4 deadline, this claim is irrelevant to this Court's analysis and speculative at best. *See Flores v.*
5 *Bowen*, 790 F.2d 740, 742 (9th Cir. 1986) ("Appellee's arguments fall by the wayside in light
6 of the black-letter principle that properly enacted regulations have the force of law and are
7 binding on the government until properly repealed.") (internal citation omitted); *Perez Santana*
8 *v. Holder*, 731 F.3d 50, 58 n.6 (1st Cir. 2013) (rejecting government's argument that plans to
9 initiate a rulemaking proceeding regarding the regulation at issue should affect its decision,
10 stating "[t]he status of these proceedings is unclear and their outcome is uncertain."). The
11 speculative regulatory change has not been published in the Federal Register, does not have the
12 force of law, and may never be promulgated. Thus, the Court should disregard this possibility
13 when deciding the pending motions.
14 In sum, this Court should reject Defendants' suggestion that injunction relief is not
15 appropriate. Asylum seekers who need EADs to financially provide for themselves and their
16 families should not suffer because USCIS has not acted to devote additional resources to meet
17 demand.
18
19
20
21
22
23

Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957- 8628

1 **III. CONCLUSION**

2 This Court should declare Defendants' actions unlawful and order Defendant USCIS to
3 comply with 8 C.F.R. § 208.7(a) by adjudicating class members' initial EAD applications
4 within 30 days of receipt.

5 Respectfully submitted this 16th day of July, 2018.

6 */s/ Christopher Strawn*
Christopher Strawn, WSBA No. 32243
7 Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
8 Seattle, WA 98104
(206) 957-8611
9

/s/ Devin T. Theriot-Orr
10 Devin Theriot-Orr, WSBA 33995
Sunbird Law, PLLC
11 1001 4th Avenue, Suite 3200
Seattle, WA 98154
12 (206) 962-5052

13 */s/ Trina Realmuto*
Trina Realmuto (*pro hac vice*)
14 American Immigration Council
100 Summer Street, 23rd Floor
15 Boston, MA 02110
(857) 305-3600
16

/s/ Marc Van Der Hout
17 Marc Van Der Hout (*pro hac vice*)
Van Der Hout, Brigagliano & Nightingale, LLP
18 180 Sutter Street, Suite 500
San Francisco, CA 94104
19 (415) 981-3000

20 *Attorneys for Plaintiffs and Class Members*

21 Leslie K. Dellon (*pro hac vice*)
American Immigration Council
22 1331 G Street, NW, Suite 200
Washington, DC 20005
23 (202) 507-7523

Scott D. Pollock (*pro hac vice*)
Christina J. Murdoch (*pro hac vice*)
Kathryn R. Weber (*pro hac vice*)
Scott D. Pollock & Associates, P.C.
105 W. Madison, Suite 2200
Chicago, IL 60602
(312) 444-1940

Robert H. Gibbs, WSBA 5932
Robert Pauw, WSBA 13613
Gibbs Houston Pauw
1000 Second Avenue, Suite 1600
Seattle, WA 98104-1003
(206) 682-1080

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, 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.

/s/ Christopher Strawn
Christopher Strawn, WSBA No. 32243
Northwest Immigrant Rights Project
615 Second Ave. Suite 400
Seattle, WA 98104
206-957-8628