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' MOTION TO DISMISS NOTED ON CALENDAR: Sept. 11, 2015 ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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

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

Statutes

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

Regulations

Other Authorities

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

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. As discussed in Plaintiffs' Motion for Summary Judgment (Dkt. 24), 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 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]

Nonetheless, Defendants move to dismiss this case for lack of jurisdiction, alleging that none of the five plaintiffs has standing or, alternatively, that their claims are moot. Defendants' standing arguments ignore Supreme Court precedent and Ninth Circuit law, and they have previously stipulated that the "inherently transitory" exception to mootness applies in this case.[4] Accordingly, Defendants' motion should be denied.

STANDARD OF REVIEW

Motions to dismiss are disfavored. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). On a Rule 12(b)(1) motion, 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*,

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[1] Dkt. 1 at ¶¶ 38, 40, 43, 46-47; Dkt. 5-1 – 5-13, Dkt. 24-10 – 24-15; Dkt. 29-4 – 29-6.

[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 August 30, 2015).

[3] Dkt. 24-2 at 9 ("USCIS no longer produces interim EADs."). Defendants regularly issued interim employment authorization until 2006. *Id.*

[4] Dkt. 26 at 2.

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

392 F.3d 358, 362 (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

I. All the Plaintiffs Have Demonstrated a Cognizable Injury and Have Standing to Bring this Lawsuit.

Under Ninth Circuit law, "'the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.'" *Valle del Sol, Inc. v. Whiting,* 732 F.3d 1006, 1018 n.11 (9th Cir. 2013) (citation omitted). Here, all three Individual Plaintiffs were experiencing ongoing injuries on May 22, 2015, when this case was filed, because USCIS had failed to adjudicate their EAD applications within the designated regulatory time period, had not issued decisions as of that date, and had failed to issue interim employment authorization, resulting in loss of employment, income, health insurance and/or driver's licenses. Dkt. 1, ¶¶ 17-20, 37-45. Moreover, Defendants' unlawful EAD adjudication practices have forced the Organizational Plaintiffs to divert substantial staff time and resources to follow up work on their existing clients' pending EAD applications instead of taking on new cases, thereby frustrating their missions of providing legal representation to a high volume of low-income clients to obtain lawful status in the United States. Dkt. 1, ¶¶ 15-16, 46-47.

Both individual and organizational plaintiffs are subject to the same Article III standing requirements — injury in fact, causation, and redressability. *La Asociacion De Trabajadores De Lake v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citation omitted). For the reasons discussed below, each plaintiff has Article III standing to bring suit.

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

A. Both Ms. Arcos and W.H. Demonstrate Cognizable Injuries.

Contrary to Defendants' assertions, Ms. Arcos and W.H., both of whom were asylum applicants when the Complaint was filed, have been injured by Defendants' failure to timely adjudicate their EAD applications or issue interim employment authorization. Defendants adjudicated W.H.'s EAD application more than four months past the regulatory deadline and never granted him interim employment authorization. Dkt. 24-8, Dkt. 5-13 at 3 ¶ 7. As a result, W.H. lost his driver's license. Dkt. 5-13 at 3 ¶ 8. Defendants did not adjudicate Ms. Arcos' EAD application until almost two months after the regulatory deadline and did not grant her interim employment authorization. Dkt. 5-11 at 1 ¶¶ 3, 6. Ms. Arcos is a widow, and her lack of interim employment authorization jeopardized her ability to support her twenty-four-year-old daughter, who resides with her due to an intellectual disability. Dkt. 24-9, Dkt. 5-11 at 1-2 ¶¶ 4, 7. Both Plaintiffs have standing to challenge USCIS' regulatory violation, and the Court thus has subject matter jurisdiction.

1. Both the Administrative Procedure Act and the Mandamus Act permit judicial review of unlawful and erroneous agency action in processing asylum EAD applications.

Defendants allege that 8 U.S.C. § 1158(d)(7) precludes judicial review of Ms. Arcos and W.H.'s claims that their asylum EAD applications were not timely adjudicated. In fact, this provision does not preclude judicial review or abrogate an affected individual's standing to sue under the APA or the Mandamus Act. Rather, it simply reflects Congress's decision not to create an additional private right of action beyond those that already exist.

Defendants cite no case where a court has determined that plaintiffs lack standing to challenge unlawful or erroneous agency action on an asylum EAD. In fact, courts have repeatedly exercised jurisdiction over such cases. *See A.B.T. v. USCIS,* C11-2108-RAJ, 2013 WL 5913323 (W.D. Wash., Nov. 4, 2013) (order approving nationwide class action settlement on

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

determination of eligibility for asylum EADs); *Chowdhury v. Siciliano*, No. C06-07132JW (N.D. Cal., May 13, 2008), Dkt. 24-6 at 7 ("there was no basis in law for Defendants to delay the issuance of interim work authorization after the 90-day period had expired."); *Ramos v. Thornburgh*, 732 F. Supp. 696, 701 (E.D. Tex. 1989) (where EAD is not adjudicated by regulatory deadline, "the agency has a duty to grant interim employment authorization for a period not to exceed 120 days."); *John Doe I v. Meese*, 690 F. Supp. 1572, 1577 (S.D. Tex. 1988) (same); *Najera-Borja v. McElroy*, 1995 WL 151775 * 1 (E.D.N.Y., March 29, 1995) (same).

Through the Administrative Procedure Act (APA) and the Mandamus Act, Congress created private rights of action to challenge unlawful or arbitrary federal agency action. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

Alexander v. Sandoval, 532 U.S. 275 (2001) (Dkt. 34 at 7), has no bearing whatsoever on this analysis. *Sandoval*, which involved a state agency, concerned whether a private right of action could be inferred from a regulation where there was no independent statutory basis for the cause of action. 532 U.S. at 284. But here, Congress has provided a statutory cause of action under the APA and the Mandamus Act to sue federal officials for unlawful agency action, including an agency's failure to follow its own binding regulations. *See* 5 U.S.C. § 702; 28 U.S.C. § 1361; *see also Bennett v. Spear*, 520 U.S. 154, 175 (1997). Ninth Circuit law, which Defendants fail to cite, is clear on this point: "An aggrieved party can sue under the APA to force

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

compliance with [the statute] without having a 'private right of action' under the statute." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096 (9th Cir. 2005). Thus, Defendants' argument that Plaintiffs lack a private right of action falls flat.

Defendants' baseless argument that 8 U.S.C. § 1158(d)(7) specifically precludes judicial review of all agency action on an asylum EAD is unsupported by the plain language of the statute and contrary to case law finding jurisdiction for review of asylum procedure claims. First, the plain language of the statute shows that Congress gave the agency authority to issue regulations regarding employment authorization for asylum applicants: "An applicant for asylum is not entitled to employment authorization, *but* such authorization *may be provided under regulation* by the Attorney General." 8 U.S.C. § 1158(d)(2) (emphasis added). Defendants misleadingly and inaccurately quote only the first half of this statutory provision, incorrectly putting a period after "employment authorization" and leaving out the "*but* . . . ." Dkt. 34 at 7. The statutory phrase omitted by Defendants gives the agency clear authority to issue regulations regarding employment authorization for asylum applicants.

Second, 8 U.S.C. § 1158(d)(7) merely specifies that subsection (d) does not "create" a separate private right of action, which is irrelevant to Plaintiffs' claims here, as Plaintiffs assert jurisdiction under the federal question statute, based on the APA and the Mandamus Act. The fact that the section of the INA addressing asylum procedures does not by itself create a private right of action to challenge unlawful and erroneous agency action relating to those procedures does not preclude judicial review over individual challenges to asylum procedures on distinct statutory grounds such as the APA and the Mandamus Act. For this reason, the courts have repeatedly exercised jurisdiction over cases implicating the asylum procedures in subsection 1158(d). *See, e.g., A.B.T. v. USCIS,* C11-2108 RAJ, Dkt. 76 at ¶ 1 (W.D. Wash., Nov. 4, 2013)

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

(companion order approving class settlement) (attached as Exhibit A); *Choudhury v. Siciliano, supra*, Dkt. 24-6 at 1, 6-7. Thus, APA and Mandamus Act challenges to unlawful or erroneous agency action relating to asylum procedures in § 1158(d), including processing of EAD applications from asylum applicants, are permissible.

Moreover, Defendants fail to acknowledge that the regulations that give rise to Plaintiffs' claims are authorized in whole or in part by separate statutes. The regulatory claims of Ms. Arcos and W.H. are based on 8 C.F.R. §§ 208.7 and 274a.13. The authorizing provision of 8 C.F.R. part 274a makes no reference to 8 U.S.C. § 1158(d). Instead, the authority for those regulations stems from 8 U.S.C. §§ 1101, 1103, 1324a; and 48 U.S.C. § 1806. While 8 U.S.C. § 1158(d) is among the sources of authority for 8 C.F.R. Part 208, so are 8 U.S.C. §§ 1101, 1103, 1226, 1252, 1282; and Title VII of Pub. L. 110-229. More than one of those statutes authorizes the DHS Secretary to establish regulations such as 8 C.F.R. 208.7. *See* 8 U.S.C. § 1103(a)(3) (providing that the Secretary "shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Chapter."). Given this larger statutory framework, Defendants' position is untenable.

Defendants' astounding assertion that mandatory regulations do not apply to the government and cannot create a right or duty that is judicially enforceable is meritless. In *Garcia v. Johnson*, the court rejected this exact argument in an analogous case:

> Defendants next argue that because the agency cannot create a binding regulation where a statute does not impose a corresponding duty, the Court cannot enforce the same. This argument is unpersuasive. Procedures in a regulation, or a requirement to act in a regulation, can be enforceable even where the statute preceding the regulation does not create a similar duty. Where, as here, a regulation creates a duty to act within a particular timeframe, the agency does not have the freedom to abdicate its responsibility.

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

Garcia v. Johnson, No. 14-cv-01775-YGR, 2014 WL 6657591, at *8 (N.D. Cal. Nov. 21, 2014) (citations omitted).[5] Regulations properly enacted "have the force of law and are binding on the government until properly repealed." *Flores. v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954)); *see also Service v. Dulles,* 354 U.S. 363, 388 (1957); *Dong v. Chertoff,* 513 F. Supp. 2d 1158, 1166 (N.D. Cal. 2007) (regulation created a duty to act pursuant to a particular timeframe even though the corresponding statute did not impose a deadline). "Where a party alleges that the agency has failed to act consistently with a regulation, the Court has jurisdiction to hear the party's claim and to compel action pursuant to the APA and federal question jurisdiction." *Garcia,* 2014 WL 6657591, at *11.

2. The Court has jurisdiction to review claims relating to the mandatory regulations governing the deadline for adjudicating EAD applications.

Defendants' invocation of the narrow exception for review of decisions committed to agency discretion ignores the clear and mandatory language of the regulations at issue. Under the APA, judicial review of agency action is foreclosed where the "agency action is committed to agency discretion by law." *Heckler v. Chaney,* 470 U.S. 821, 828 (1985) (quoting 5 U.S.C. § 701(a)). "[T]his is a very narrow exception ... applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* at 830 (citation omitted). However, "the mere fact that a statute contains discretionary language does not make agency action unreviewable." *Pinnacle Armor, Inc. v. United States,* 648 F.3d 708, 719 (9th Cir. 2011) (citation omitted).

[5] After the Court denied the motion to dismiss and certified a nationwide class, the parties entered into a settlement agreement. *See Garcia v. Johnson*, No. 14-cv-01776-YGR, Settlement Agreement, Dkt. 104-1 (N.D. Cal. Aug. 20, 2015) (attached as Exhibit B) Defendants agreed to conduct reasonable fear interviews within an average of 10 days. *See id.* at 5.

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

The asylum EAD regulations do not commit the issuance of EADs or interim employment authorization to the agency's unbridled discretion but, rather, are clear in *requiring* Defendants to: 1) adjudicate EAD applications within the time specified in the regulation; and 2) if they fail to do so, grant interim employment authorization. The use of mandatory regulatory language—"will" and "shall"—leaves no doubt that these requirements are not discretionary. *See Vietnam Veterans of Am. v. CIA*, 791 F.3d 1122, 1127, 1131, 1134 (9th Cir. 2015) ("will" is mandatory); *Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1258 (W.D. Wash. 2008) ("shall" is mandatory).

For asylum applicants seeking to renew their EADs, like Ms. Arcos, the applicable regulation gives the agency 90 days to issue a decision, and if it fails to do so, requires a grant of interim employment authorization. 8 C.F.R. § 274a.13(d). USCIS has repeatedly affirmed these mandatory requirements in memoranda and publications. *See* Dkt. 24-4 at 3; Dkt. 24-1 at 37. For asylum applicants seeking an initial EAD, like W.H. at the time the lawsuit was filed, the applicable regulation provides that USCIS "*shall* have 30 days from the date of filing of the employment authorization request to grant or deny that application . . . ." 8 C.F.R. § 208.7(a) (emphasis added). The Instructions to Form I-765 (Application for Employment Authorization) mandate interim employment authorization when this 30-day deadline is not met. Dkt. 24-3 at 1 ("The interim EAD *will* be granted for a period not to exceed 240 days") (emphasis added). Form instructions are normally incorporated into the regulations. 8 C.F.R. § 103.2(a)(1); *see also Marriage of Khan*, 182 Wash. App. 795, 799, 332 P.3d 1016, 1018 (Wash. Ct. App. 2014).

As detailed in Plaintiffs' Motion for Summary Judgment (Dkt. 24), this regulatory framework, which mandates the automatic provision of interim employment authorization if the agency fails to timely adjudicate EAD applications, has been in place for more than a quarter-

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

century.[6] In 1994, legacy INS extended the waiting period for interim employment authorization issuance from 60 days to 90 days, with the exception of initial asylum-based EAD applications, which had to be adjudicated within 30 days. 59 Fed. Reg. 62284, 62303 (Dec. 5, 1994) (effective Jan. 4, 1995). These deadlines remain in effect. *See* 8 C.F.R. § 274a.13(d); 8 C.F.R. § 208.7(a)(1).

As reflected in the current I-765 Instructions, the change in the required time period for adjudicating initial asylum EADs did not change the long-established rule that asylum applicants are entitled to interim employment authorization when the adjudication of their EAD applications is delayed. *See* Dkt. 24-3 at 1. Rather, the interim employment authorization regulation at 8 C.F.R. § 274a.13(d) simply recognizes that vulnerable asylum applicants seeking an initial asylum EAD (who have already had to wait 150 days prior to filing) are entitled to a faster, 30-day adjudication, with interim work authorization available if the Defendants fail to issue a decision within the 30-day period. This language is unequivocal, and the agency thus has no basis to characterize its own mandatory regulation as a mere "internal processing guideline." Dkt. 34 at 11. The asylum EAD regulations are not one of "those rare instances where … there is no law to apply." *Webster v. Doe,* 486 U.S. 592, 599 (1988).

The recent district court decision in *Garcia v. Johnson* is instructive. The court rejected a similar argument that a regulation was "merely 'hortatory,'" a "procedural rule," or an "internal administrative processing guideline," finding that the agency could not unilaterally disregard its own regulation where "the rights of individuals are affected … even where the internal

[6] Dkt. 24 at 19-20.

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

procedures are possibly more rigorous than otherwise would be required." *Garcia,* 2014 WL 6657591, at *8 (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).[7]

Defendants' arguments that the government cannot be "sanctioned" or "lose authority" for noncompliance with a time limitation have no bearing on this case. Plaintiffs here are not asking for sanctions, but only that Defendants follow their own straightforward and sensible regulatory scheme by: (1) adjudicating EADs within the regulatory timeframe; or (2) issuing interim employment authorization. Defendants unsuccessfully raised this same sanctioning argument—citing *United States v. Montalvo-Murillo,* 495 U.S. 711 (1990), *Brock v. Pierce County,* 476 U.S. 253 (1986), and related cases— in two recent cases: (1) *Garcia v. Johnson*, *supra*, which challenged the USCIS's failure to follow its regulatory mandate to conduct reasonable fear interviews within 10 days, absent exceptional circumstances, *Garcia*, 2014 WL 6657591, at *8; and (2) *Khoury v. Asher*, 3 F. Supp. 3d 877, 887 (W.D. Wash. 2014), a challenge to the government's mandatory detention under 8 U.S.C. § 1226(c) of certain noncitizens who have already been released from state custody. The "sanctioning" or "loss of authority" cases are as inapplicable in this matter as they were in *Garcia* and *Khoury.*

In *Brock* and its progeny, Congress framed the statute as a directive that the agency "shall" take certain action within a specified time period. *See, e.g., Brock,* 476 U.S. at 256 (the Secretary "shall" determine the matter "not later than 120 days after receiving the complaint. In *Brock*, the issue was whether Congress intended for the agency to be stripped of its authority to act if it failed to meet the specified deadline. The Court found that Congress did not specify a

[7] Notably, certain cases cited by Defendants make the same point. *See French v. Edwards*, 80 U.S. 506, 511 (1872) (statutory requirements intended to protect rights are "not directory but mandatory"); *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970) (distinguishing rules "intended primarily to confer important procedural benefits upon individuals" from those which an administrative agency has discretion to "relax or modify").

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

consequence or remedy for the agency's failure to act, and that Congress's intent could not be discerned through other statutory construction rules. Thus, *Brock* stands for the proposition that an agency does not lose its jurisdiction to act after a statutory deadline where, after applying traditional tools of statutory construction, a court cannot discern that this was Congress's intent. *See, e.g., Montalvo-Murillo*, 495 U.S. at 717.

Brock, Montalvo, and related cases are inapposite because Plaintiffs are not requesting an extra-regulatory penalty for failure to follow 8 C.F.R. § 274a.13(d). Rather, Plaintiffs are asking simply for the regulation to be followed as written. The regulation itself specifies the consequence for failure to act within the regulatory timeframe. If an EAD application is not timely adjudicated, the applicant receives interim employment authorization. This consequence must be enforced.

The *Garcia* and *Khoury* courts came to the same conclusion when ruling on much less clear regulatory and statutory schemes. The regulation at issue in *Garcia* mandated that the agency conduct a reasonable fear interview within 10 days, absent "exceptional circumstances." *Garcia*, 2014 WL 6657591, at *2, *citing* 8 C.F.R. § 208.31(b). Because, as in the present case, the plaintiffs were seeking compliance with the rule, rather than a penalty, the court found that the "sanctioning" and "loss of authority" cases did not apply:

> Defendants thus contend that the agency does not lose its power to act in cases of noncompliance unless the statute specifies a sanction for missing the deadline. This argument, however, fails to appreciate the nature of the relief requested in this case. Plaintiffs do not pray that defendants be precluded from conducting reasonable fear determinations after the 10 day period elapses, nor are plaintiffs requesting that the Court fashion a sanction in response to the agency's alleged noncompliance with Section 208.31. Plaintiffs merely ask the Court to require the agency to comply with its rule.

Garcia, 2014 WL 6657591, at *8 (citation omitted). *See Khoury,* 3 F. Supp. 3d at 889.

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

The Defendants' arguments, therefore, fail because Plaintiffs are not arguing for an extra-regulatory remedy. Rather, Plaintiffs ask the Court only to hold Defendants to their own regulatory mandate. "A mandate is meaningless if those subject to it can carry it out whenever they please." *Khoury*, 3 F. Supp. 3d at 887.

3. USCIS' reversal of prior decision and recent denial of Ms. Arcos' EAD does not deprive this Court of subject matter jurisdiction.

Regarding Plaintiff Arcos, Defendants make the additional, misguided argument that the Court has no subject matter jurisdiction over her claim because they believe, in hindsight, that she is actually ineligible for an EAD.

On January 12, 2015, Ms. Arcos filed an application for renewal of her EAD, which had been previously granted in conjunction with her pending asylum application. Dkt. 5-11 at 1 ¶ 3. Ms. Arcos lodged a complete application for asylum with the immigration court on March 27, 2013. Dkt. 38, AR-Arcos, at 10. As the Government admits, the asylum EAD clock starts "when a complete asylum application is first filed with USCIS or lodged at the immigration court window." Dkt. 34 at 8. *See also* Settlement Agreement, *A.B.T. v. USCIS*, Case No. 11-2018-RAJ, Settlement Agreement, Dkt. 66-2 ¶ III.A.2.a, at 16 (W.D. Wash., Sept. 18, 2013) (attached as Exhibit C).[8] On February 19, 2014, more than 150 days after the asylum EAD clock started, Ms. Arcos filed an application for employment authorization. This initial application was properly granted in accordance with 8 C.F.R. § 208.7(a).[9]

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[8] In denying Ms. Arcos' application to renew her EAD, USCIS states that Ms. Arcos was ineligible to receive the benefit of lodging her asylum application because she did so prior to the finalization of the ABT settlement. Dkt. 24-9. Some courts, like the Seattle Executive Office for Immigration Review, accepted lodged applications prior to the ABT settlement. The settlement did not invalidate "lodged" stamps previously issued; rather, it acted prospectively to require immigration courts across the country to use the "lodged" stamp consistently.

[9] Defendants argue that Ms. Arcos' asylum EAD clock stopped on August 2, 2013, when the immigration judge administratively closed her case and that she was thus ineligible for work authorization. Dkt. 34 at 8-9, *citing* Memorandum from Peter Vincent, Principal Legal

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

In January 2015, when Ms. Arcos filed an application to renew her EAD,[10] she was not required to establish that her asylum application had been pending for more than 180 days. According to the asylum EAD renewal regulations, after employment authorization has been initially granted, employment authorization "*shall be renewable ... for the continuous period of time necessary ... to decide the asylum application* ...." 8 C.F.R. § 208.7(b) (emphasis added). Thus, Ms. Arcos' EAD should have been renewed.

When this lawsuit was filed, Ms. Arcos' EAD renewal application had been pending for more than 90 days, and she was entitled to interim employment authorization, which was never granted. Dkt. 5-11 at 1 ¶¶ 3, 6. USCIS's failure to provide her with employment authorization jeopardized her ability to support herself and her family and gives her standing to be a plaintiff in this lawsuit. Dkt. 5-11 at 1-2, ¶¶ 4, 7. The government's subsequent unlawful denial of her EAD application does not change this fact. Defendants' argument to the contrary has no merit.

Advisor, "Case-by-Case Review of Incoming and Certain Pending Cases," at 3, n.5. However, the Vincent Memorandum was an ICE memo to its trial attorneys. It did not bind USCIS, the agency that makes EAD decisions, and was inconsistent with the governing regulations, which permit USCIS to stop the EAD asylum clock only if the applicant causes a delay in the adjudication of the asylum application, 8 C.F.R. § 208.7(a)(2). No applicant-caused delay occurred in Ms. Arcos' case.

Administrative closure does not constitute applicant-caused delay because it is a form of prosecutorial discretion, which benefits the government by ensuring that its limited enforcement resources are used to advance its enforcement priorities. *See* Memorandum from Jeh Johnson, Secretary of DHS, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" ("Johnson Memorandum"), Exhibit D at 2. When the Government is ready to proceed, it can place the matter back on the court's docket for active consideration by filing a motion to recalendar. *See, e.g.*, *Matter of Avetisyan*, 25 I. & N. Dec. 688, 695 (BIA 2012).

[10] By the time Ms. Arcos applied for renewal of her EAD, the Vincent memo had been rescinded. *See* Johnson Memorandum, Exhibit D at 2.

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

B. Defendants' Failure to Adjudicate Ms. Osorio's EAD Application Within Ninety Days of Receipt Violated the Plain Language of 8 C.F.R. § 274a.13(d) and Caused Her To Lose Her Full-Time Job.

Defendants argue that they did not violate the mandatory 90-day regulatory timetable for adjudicating Carmen Osorio's EAD application because that timetable did not start running until her DACA renewal request had been adjudicated. Alternatively, Defendants argue that, even if the 90-day timetable started running when Ms. Osorio filed her EAD application, she would not have been entitled to an interim EAD. Because both these arguments flatly contradict the plain language of 8 C.F.R. § 274a.13(d), Defendants' claim to judicial deference is misplaced. *See Hart v. McLucas*, 535 F.2d 516, 520 (9th Cir. 1976) (court need not defer when agency's construction "is clearly contrary to the plain and sensible meaning of the regulation").

Plaintiffs do not dispute that USCIS has complete discretion to grant or deny DACA renewal determinations. However, the agency has no discretion to flout its own regulations. *See Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945); *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 831 (9th Cir. 2009). While conceding that 8 U.S.C. § 274a.13(d) requires USCIS to adjudicate an EAD application within ninety days of its receipt by the agency, Defendants suggest that those ninety days do not start running until the accompanying DACA renewal request has been adjudicated.[11] Defendants admit that they follow a policy of ignoring the 90-day regulatory deadline in DACA cases, stating that "EAD applications filed with DACA requests may be decided *more than 90 days after USCIS first received* the entire DACA package." Dkt. 34 at 17 (emphasis added). Unfortunately for Defendants, the regulatory timetable for EAD adjudication is not discretionary.

Defendants suggest that, even if the 90-day deadline for EAD adjudication started running when they received Ms. Osorio's EAD application, USCIS did not have the authority to

[11] *See* Dkt. 24-3 at 6 (§ 8.F.1.b.).

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

issue her interim employment authorization. In fact, 8 C.F.R. § 274a.13(d) authorizes—and indeed requires—USCIS to issue interim employment authorization in any case where it has failed to complete adjudication within ninety days. The regulation provides, with exceptions not relevant here, that USCIS "will adjudicate" the application "within 90 days from the date of receipt" and that "[f]ailure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days." 8 C.F.R. § 274a.13(d).

The drafting history of 8 C.F.R. § 274a.13(d) clarifies that the 90-day waiting period was intended to address current and anticipated future EAD adjudication backlogs, and that interim employment authorization would be "automatically granted" if EAD adjudication could not be completed within 90 days. According to the agency's preamble, explaining its reasoning for the 1991 amendment to this regulation:

> The Service has experienced a large increase in the number of applications filed for benefits, and anticipates further increases based upon passage of the Immigration Act of 1990 …. Every effect [*sic*] will be made to adjudicate applications for employment authorization as quickly as possible after receipt of the application. However, workload projections and staffing level projections indicate an increase to 90 days for adjudication is more in line with what can be accomplished. In accordance with the change made in paragraph (d) [of Section 274a.13], the INS expects to be able to adjudicate applications for work authorization within the 90-day period. However, if for some reason such an adjudication has not been completed within the 90-day period, the alien is automatically granted employed [*sic*] authorization for a period not to exceed 240 days.

See 56 Fed. Reg. 41767, 41787 (Aug. 23, 1991). *See also* 52 Fed. Reg. 16216, 16220 (May 1, 1987) (explaining that interim employment authorization reflects "importance of expeditious processing" of EAD applications). Numerous courts have affirmed that the agency has a mandatory duty to grant interim employment authorization where the USCIS does not comply with the regulatory adjudication timetable. *See, e.g., Ramos*, 732 F. Supp. at 701; *John Doe I,* 690 F. Supp. at 1577.

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

Defendants suggest that they are justified in violating the EAD adjudication deadline set forth in 8 C.F.R. § 274a.13(d) because the Form I-765 instructions put DACA renewal requestors on notice that "[t]he 90-day period for adjudicating Form I-765 filed together with Form I-821D does not begin until DHS has decided whether to defer action in your case."[12] Although, as previously noted, form instructions are normally incorporated into the regulations that require them, these instructions directly conflict with the plain language of 8 C.F.R. § 274a.13(d), and are thus invalid. *See Hart*, 535 F.2d at 520 (no deference for agency construction "clearly contrary to the plain and sensible meaning of the regulation"); *Commc'ns & Control, Inc. v. FCC*, 374 F.3d 1329, 1337 (D.C. Cir. 2004) (rejecting agency's interpretation where it "would conflict with the regulation's plain language"). The plain meaning of a regulation, promulgated after notice and comment, must take precedence over a conflicting instruction. *See United States v. Hirt*, 465 F.2d 177, 179 (9th Cir. 1972) ("Local Board Memorandum having lesser stature than the Regulation, and being in conflict with the Regulation" could not impose a new requirement).

Furthermore, Defendants ignore the fact that USCIS has already decided to defer action in the cases of applicants whose EAD applications are based on a request to renew DACA. Such individuals "ha[ve] been granted deferred action" at the time their initial DACA applications were adjudicated, and their deferred action (i.e. DACA) has not been terminated or revoked. Therefore, DACA renewal requesters are eligible for EADs under 8 C.F.R. § 274a.12(c)(14).[13]

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[12] Defendants ignore the clear distinction between renewal requestors, for whom USCIS previously determined DACA eligibility, and initial DACA applicants, whom plaintiffs have excluded from the nationwide class for whom they seek certification. As with applicants to adjust status to lawful permanent residence, for whom USCIS adjudicates EAD applications while the adjustment application is pending so long as the applicant has satisfied initial evidence requirements, USCIS must adjudicate EAD applications for DACA renewal requestors, per 8 C.F.R. § 274a.13(d), while their underlying applications are pending.

[13] The I-765 instructions guide applicants to "[e]nter (c)(33) in Question 16 as the letter and number of the category for which you are applying." *See* Dkt. 24-3, at 6. But 8 C.F.R.

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

Additionally, even if Defendants were correct that DACA renewal requesters do not fall into any of the categories of individuals to whom USCIS may grant employment authorization under 8 C.F.R. § 274a.12, USCIS still has authority to grant them interim employment authorization. While noncitizens must fall into one of the categories set forth in 8 C.F.R. § 274a.12 to qualify for EADs, this is not the case for a grant of interim employment authorization. As previously discussed, the primary purpose of interim employment authorization is to mitigate EAD adjudication backlogs which are not the fault of applicants who have timely applied. Thus, for present purposes, under 8 C.F.R. § 274a.13(d), the only prerequisite to interim employment authorization is an EAD application that has been pending for at least ninety days. Any requirement that USCIS adjudicators spend time evaluating EAD applications prior to granting interim employment authorization would only exacerbate existing EAD adjudication backlogs, thereby undermining the purpose of 8 C.F.R. § 274a.13(d).

Next, citing 8 U.S.C. § 1324a(h)(3), Defendants make a circular argument that USCIS cannot issue employment authorization to individuals with pending DACA renewal requests because they are not "authorized to be so employed" in the United States. Defendants' reliance on 8 U.S.C. § 1324a(h)(3) is puzzling because that provision, which merely defines "unauthorized alien," in no way precludes them from granting employment authorization to individuals awaiting DACA renewal. It simply states the syllogism that a noncitizen who has not been granted employment authorization by the U.S. government is an "unauthorized alien" who may not be legally employed.

Finally, Defendants claim that, by not acting on pending EAD applications from DACA renewal requesters within ninety days, they are helping DACA beneficiaries by "avoid[ing] the

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§ 274a.12(c)(33) does not exist in the regulations. 8 C.F.R. § 274a.12(c)(14) is the only regulation that authorizes employment authorization based on a grant of deferred action.

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

necessity of denying EAD applications, requiring repetitious filings, and charging DACA requestors multiple fees." Dkt. 34 at 18. But this claim is based on the Defendants' assertion that it is legally precluded from issuing either an EAD or interim employment authorization after ninety days to those whose applications are based on a request to renew DACA. As discussed above, this assertion is incorrect. And in reality, as Ms. Osorio's case demonstrates, their unlawful delays, far from being helpful, are jeopardizing DACA beneficiaries' jobs and their livelihoods. When USCIS failed to adjudicate Ms. Osorio's EAD application or grant her interim employment authorization within ninety days, she lost her full-time job and her health insurance and had difficulties supporting her three U.S. citizen children and paying her utility and medical bills. Dkt. 5-12 at 3-4, ¶¶ 11, 15-16. These circumstances leave no doubt that she has suffered a cognizable injury.

C. By Their Actions, Defendants have Forced the Organizational Plaintiffs to Divert Resources to Address EAD Adjudication Delays Experienced By Their Current Clients and Thereby Frustrated Their Mission of Assisting a High Volume of Low-Income Immigrants to Obtain Legal Status.

For the reasons discussed above, Defendants' arguments that the Organizational Plaintiffs' clients – including asylum seekers and DACA renewal requestors – do not have a legally enforceable right to timely EAD adjudication are fundamentally flawed. Moreover, Defendants' argument that the Organizational Plaintiffs have failed to demonstrate a cognizable injury in their own right ignores governing Ninth Circuit case law.

To satisfy the "injury in fact" prong for Article III standing, an organization must allege it suffered "both a diversion of its resources and frustration of its mission." *Fair Hous. Of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). An organization may be assisting its client base, but still have organizational standing when its resources are diverted away from its core activities. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir.

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

2011) (en banc) ("NDLON's national coordinator testified that the time 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 core organizing activities.").

Both the Northwest Immigrant Rights Project ("NWIRP") and The Advocates for Human Rights ("The Advocates") are non-profits harmed by Defendants' delays in adjudicating their clients' EAD applications. Dkt. 1, ¶¶ 15, 16. As discussed below, the Defendants' regulatory violations have severely disrupted the core mission of both organizations, which is to provide free legal services to a high volume of low-income immigrants for the purpose of helping them obtain legal status in the United States. *Id*. ¶¶ 46-47.

Defendants' failure to timely adjudicate EADs and issue interim employment authorization has forced NWIRP to divert significant resources to addressing and attempting to mitigate EAD delays, frustrating NWIRP's mission of providing direct legal representation to low-income, noncitizens in Washington State with claims for immigration relief. Dkt. 5-8 ¶ 10. Given the serious consequences of these delays for NWIRP's clients — including loss of jobs, difficulty supporting their families, and inability to obtain identity documents — they frequently consult NWIRP about how to address them. *Id.* ¶¶ 6, 10. As a result, NWIRP attorneys and paralegals must spend substantial time fielding calls and appointments with clients whose EAD applications have not been timely adjudicated, coordinating with interpreters or other family members where necessary, writing letters to employers to explain the situation, writing e-mails to USCIS service centers, calling the USCIS customer service line, and documenting these efforts in their client database. *Id.* ¶ 10. NWIRP receives no compensation from clients for time spent addressing these EAD delays, in contrast to the nominal fees NWIRP is often able to charge for its core work, such as filing the I-765 application itself or other applications for status.

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

Id. ¶ 11. Because many of NWIRP's clients are represented by pro bono attorneys, NWIRP staff must also provide technical assistance and advice to attorneys whose clients encounter EAD adjudication delays. *Id.* ¶ 12.

The volume of delayed cases diverting NWIRP resources is significant. Each year, NWIRP provides direct legal assistance in immigration matters to over 10,000 low-income noncitizens in Washington State. Dkt. 1 ¶ 15. Between April 2014 and April 2015, NWIRP filed at least 934 EAD applications on behalf of its clients, including asylum seekers, domestic violence victims, and applicants for family-based visas. Dkt. 5-8 ¶ 3. Over a shorter period, between late 2014 and early 2015, roughly twenty percent of the EAD applications that NWIRP filed were not adjudicated prior to the regulatory deadline. *Id.* ¶ 5 (noting that 21 out of 101 pending EAD applications were adjudicated after the regulatory deadline). NWIRP constantly must deal with clients whose pending EAD applications are not timely adjudicated. *Id.* ¶ 5-6. If Defendants timely adjudicated EADs or issued interim employment authorization, NWIRP would not have to divert scarce resources from direct representation of low-income immigrants in Washington State to respond to the delays. *Id.* ¶ 13. This diversion of resources frustrates NWIRP's mission by forcing the organization to turn away clients it would otherwise have capacity to serve. *Id.* ¶¶ 13-15.

Similarly, USCIS' EAD adjudication delays divert resources away from and frustrate the mission of The Advocates to assist asylum seekers in Minnesota, North Dakota, and South Dakota to obtain permanent protection in the United States. Dkt. 1, ¶ 16; Dkt. 5-5 ¶¶ 16-18. As the largest provider of asylum-related legal services in the region, The Advocates served over 500 asylum seekers in 2014. *Id.* ¶ 3. Between January 1, 2013, and May 13, 2015, sixty-one percent of EAD applications were adjudicated outside of the applicable regulatory timeframe.

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

Id. ¶ 5 (noting that 22 out of 36 applications filed during this period were not timely adjudicated). In addition to subjecting The Advocates' clients to the same hardships that NWIRP's clients experience, USCIS delays in adjudicating EAD applications also impact asylum seekers' ability to drive in Minnesota. *Id.* ¶¶ 10-13. As with NWIRP, attorneys and paralegals with The Advocates dedicate significant time to resolving and addressing these delays through client calls and meetings, calls and e-mails to USCIS, efforts to convince employers to hold jobs open until clients' EADs are renewed, intervention with the state on driver's license issues, and work with agency liaison and congressional offices. *Id.* ¶ 16. These tasks, along with the time spent advising pro bono attorneys representing clients whose EAD applications are not timely adjudicated, take The Advocates' staff away from the program's mission of screening, placing, and supporting asylum cases. *Id.* ¶¶ 16-18, 20, 21.

Defendants incorrectly argue that neither Organizational Plaintiff "has done anything more than their regular mission in assisting with requests for interim EADs." Dkt. 34 at 21.[14] In fact, Defendants' unlawful policies and practices force NWIRP and The Advocates to spend countless uncompensated hours trying to resolve EAD adjudication delays experienced by their existing clients. As a result, their attorneys and paralegals have far fewer hours to devote to direct representation in new cases. By reducing the total number of clients that the Organizational Plaintiffs can serve during a given period, Defendants have frustrated their core mission of providing legal representation—either directly or through pro bono lawyers—to low-income individuals with viable claims for immigration relief. "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

[14] Given that USCIS itself has conceded that it no longer issues interim EADs, Dkt. 24-2 at 3, the task of assisting clients with such requests is an exercise in futility.

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

resources in representing clients they otherwise would spend in other ways.'" *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 943 (citation omitted). These circumstances leave no doubt that both organizations have standing.

II. The Individual Named Plaintiffs Satisfy the Exception to the Mootness Doctrine for Inherently Transitory Claims.

Like standing, the mootness doctrine is founded in the "case or controversy" clause of Article III of the U.S. Constitution. *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 123-124 (1974); *United States v. Howard*, 480 F.3d 1005, 1009 (9th Cir. 2007). An action will become moot "when the issues presented are no longer live and therefore the parties lack a legally cognizable interest for which the courts can grant a remedy." *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1116 (9th Cir. 2002) (citations omitted).

An exception to the mootness doctrine exists for "inherently transitory" claims that are brought as class actions; the ultimate certification of the class action is found to "relate back" to the original complaint, thus overriding the intervening fact that the individual plaintiff's claim has become moot. *See, e.g., Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011). In addition to requiring an inherently transitory claim, courts have indicated that the affected population must be a "fluid" one. *See*, *e.g.*, *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (noting the "constantly changing putative class that will be subject to these allegedly unconstitutional conditions").

Here, both requirements are easily met. Illustrating the inherently transitory nature of the claims at issue, the Individual Plaintiffs' EAD applications were adjudicated even before Defendants filed their opposition to Plaintiffs' class certification motion. Moreover, USCIS continues to adjudicate EAD applications on an ongoing basis, thus ensuring that the class is fluid. *See, e.g.,* Dkt. 5-8, ¶ 6 ("Those subject to delayed EAD adjudications are a frequently

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

changing group. Just as some clients with delayed EADs receive a decision, other clients' pending applications pass the regulatory deadline.").

Defendants are well aware of the "inherently transitory" exception to mootness. Indeed, Defendants stipulated at Plaintiffs' request that the exception applied to the motion for class certification. Dkt. 26. While acknowledging this stipulated agreement, Defendants argue in their motion to dismiss that "the individual Plaintiffs cannot be named plaintiffs in the lawsuit because their claims have mooted out." Dkt. 34 at 5 n.2. However, because this case is a putative class action involving inherently transitory claims, the termination of the Individual Plaintiffs' claims does not deprive the Court of jurisdiction. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) ("the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution" where the claim is "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires") (citations omitted). Such claims, which are "capable of repetition, yet evading review," do not become moot. *Pitts*, 653 F.3d at 1090. In any case, the Individual Plaintiffs who have been granted employment authorization will need to apply again before their authorization expires. Hence, Defendants' argument fails.[15]

[15] Even outside the class action context, the Ninth Circuit has held that a case is not moot where the plaintiff's claim has been resolved if the duration of the challenged conduct is too short to be resolved through litigation *and* the case challenges 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) (failure to provide special education services to children held in county jail); *United States v Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007) (policy still required all pretrial detainees to be held in leg shackles at their first court appearance, even though it was purely speculative whether plaintiffs would ever be subjected to it again); *United States v. Brandau*, 578 F.3d 1064, 1068 (9th Cir. 2009) (applying exception in case involving pretrial detainees held in body shackles at first criminal appearance); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1117 (9th Cir. 2003) (challenge brought by mentally ill pretrial detainees to continuing detention conditions in county jails was not moot even though all plaintiffs had been transferred to the state hospital). Here, Plaintiffs challenge Defendants' policy and practice of failing to timely adjudicate EAD

Northwest Immigrant Rights Project
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(206) 957- 8628

CONCLUSION

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

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applications and failing to issue interim employment authorization to individuals who are entitled to receive it. Dkt. 1 at ¶ 58.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, 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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