The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO VACATE

I. Introduction.

For many years, Defendants in this matter routinely violated a mandatory deadline for completing the adjudication of initial requests for employment authorization documents (EADs) filed by applicants with pending asylum applications. Plaintiffs filed this class action lawsuit in 2015 to seek to enforce the regulatory deadline. Defendants resisted Plaintiffs' efforts to enforce the mandatory regulation, claiming that compliance was next to impossible and that following the regulation would raise national security concerns. Dkt. 119 at 15. Yet, after this Court certified the class and issued its injunction in this case, Defendants' compliance rates went from 27.5% in FY2015 to 96.9% in FY2019. Dkt. 148-1 at 1, 2.

Defendants now seek to vacate the injunction in its entirety based on a regulatory change purporting to eliminate the 30-day processing requirement found at 8 C.F.R. § 208.7(a)(1). 85 Fed. Reg. 37,502 (June 22, 2020). Defendants' motion should be denied for two reasons. First,

Northwest Immigrant Rights Project
615 2nd Ave., Suite 400
Seattle, WA 98104
(206) 957-8628

the plain language of the class definition in this matter already limits the class, and accordingly, the injunction, to those who accrue 30 days "under the applicable regulations . . . ." Dkt. 95 at 27. Thus, as Defendants acknowledge, after the proposed regulation takes effect—if it does—"there will no longer be any [new] members of this class because no applicants will accrue 30 days under 8 C.F.R. § 208.7(a) as amended." Dkt. 161, at 7 n.2. As the injunction only provides relief to class members, there is no need to vacate the injunction—the class definition already limits the injunction to those who submit an initial asylum work permit application "under the applicable regulations." Dkt. 95 at 27. While this may be a diminishing class of individuals beginning August 21, 2020 if the regulation is not enjoined, every class member continues to be entitled to the terms of the injunction, i.e., production of their EAD within the 30-day deadline.

Relatedly, the injunction itself merely orders Defendants to comply with the existing regulation. Dkt. 127 at 12 (enjoining Defendants from "further failing to adhere to the 30-day deadline . . . as set forth in 8 C.F.R. § 208.7(a)(1)."). If the repeal takes effect, the injunction will only mandate production of a work permit within 30-days for individuals who filed their applications while the regulation was in effect. However, for all those who have filed under the existing regulation through at least August 20, 2020 (or later if the proposed regulation is enjoined), the injunction is very meaningful and there is absolutely no basis for vacating the injunction as to them, at a minimum. The Court should therefore deny the motion to vacate as both inappropriate and unnecessary.

Alternatively, even if the Court is inclined to review the injunction notwithstanding the confines of the class definition, the Court should modify, but not vacate, the injunction. Defendants do not—and cannot—dispute that the injunction continues to apply to class members who submitted their applications by August 20, 2020. It would be inappropriate to vacate the injunction to strip the relief that should remain available to these class members. Rather, if anything, the injunction should simply be modified to state that it does not apply to applications

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615 2nd Ave., Suite 400
Seattle, WA 98104
(206) 957-8628

for EADs filed after the new regulation's effective date, which currently is scheduled for August 21, 2020.

Finally, even if the Court is inclined to modify the injunction, it would be premature for the Court to address Defendants' motion at this time. This is because of pending litigation seeking to enjoin the new regulation on a nationwide basis. *See Casa de Maryland, Inc., et al. v. Wolf, et al.*, 8:20-cv-02118-PX (D. Md.). Indeed, just last Friday, August 14, 2020, the district court heard arguments on the fully-briefed motion to preliminarily enjoin the rule. To the extent the rule is enjoined, there will continue to be new class members even after August 21, 2020. Even if the preliminary injunction is denied initially, however, the Court should not modify the injunction in this matter until the *Casa de Maryland* case is finally resolved.

II. Factual and Procedural History.

In May 2015, Plaintiffs filed the present class action lawsuit seeking to compel U.S. Citizenship and Immigration Services (USCIS) to adjudicate work permit applications in compliance with the agency's own regulations. Dkt. 1. The agency subsequently repealed one of the regulations which previously mandated adjudication of certain work authorization applications within 90 days. *See* 81 Fed. Reg. 82, 398 (Nov. 18, 2016). Following the filing of Plaintiffs' Amended Complaint (Dkt. 58) and Renewed Motion for Class Certification (Dkt. 59), the Court certified a class as follows:

> Noncitizens who have filed or will file applications for employment authorization that were not or will not be adjudicated within . . . 30 days . . . and who have not or will not be granted interim employment authorization.
>
> [This class] consists only of those applicants for whom 30 days has accrued or will accrue under the applicable regulations, 8 C.F.R. §§ 103.2(b)(10), 208.7(a)(2), (a)(4).

Dkt. 95 at 26-27.

On the parties' cross-motions for summary judgment, the Court issued a permanent injunction finding that Defendants were "in violation of 8 C.F.R. § 208.7(a)(1)" and enjoining Defendants from "further failing to adhere to the 30-day deadline for adjudicating EAD

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615 2nd Ave., Suite 400
Seattle, WA 98104
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applications, as set forth in 8 C.F.R. § 208.7(a)(1)." Dkt. 127 at 12.[1] According to Defendants' most recent status report, Defendants are presently adjudicating 98.1% of initial asylum EAD applications within 30 days as mandated by the regulation, compared to 27.5% in FY2015. Dkt. 148-1 at 1, 2.

Defendants subsequently promulgated a new regulation which, among other things, eliminates the 30-day processing deadline at 8 C.F.R. § 208.7(a)(1). *See* 85 Fed. Reg. 37,502 (June 22, 2020). The new rule is scheduled to take effect on August 21, 2020. 85 Fed. Reg. at 37,507.

As acknowledged by Defendants, the repeal of the 30-day processing deadline is the subject of a pending legal challenge in the District of Maryland which seeks to vacate the new rule in its entirety. *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX, Dkt. 1 at 53 (D. Md.). The plaintiffs in that case filed a motion for preliminary injunction on July 24, 2020 seeking to delay the effective date of the repeal and a hearing was held on August 14, 2020 on the motion. *See Casa de Maryland*, No. 8:20-cv-02118-PX, Dkt. 23, 29. The *Casa de Maryland* court has ordered supplemental briefing to be filed today on the issue of the availability of preliminary relief under 5 U.S.C. § 705, and additional briefing by August 21, 2020 regarding converting the motion for preliminary injunction into a motion for summary judgment. *Id.*, Dkt. 53.

III. Legal Argument.

A. There is no need to vacate the injunction because it only applies to individuals covered by the current 30-day regulatory deadline.

Defendants' motion is unnecessary because both the class definition and the Court's injunction in this matter limit relief to those initial asylum work permit applications filed while the present regulation is in effect. First, class membership is limited to those "for whom 30 days has accrued or will accrue under the applicable regulations." Dkt. 95 at 27 (emphasis added). Under the new rule, if it goes into effect, new applicants will not accrue 30 days as there will be

[1] Defendants sought review of the Court's decision in the Ninth Circuit, but voluntarily dismissed the appeal following oral argument. Dkt. 150.

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615 2nd Ave., Suite 400
Seattle, WA 98104
(206) 957-8628

no 30-day deadline. Similarly, the Court's injunction prohibits Defendants from "failing to adhere to the 30-day deadline for adjudication EAD applications, as set forth in 8 C.F.R. § 208.7(a)(1)." Dkt. 127 at 12 (emphasis added). The Court's injunction and the class definition in this matter thus only require Defendants to comply with the present regulation as to class members—those who file applications prior to the new rule taking effect.

If the repeal of the 30-day processing regulation takes effect on August 21, 2020, there will not be any new class members after that date, but the injunction will continue to protect class members who have filed their initial work permit applications while the regulation remained in effect. Though overbroad in their assertion, Defendants acknowledge as much in their motion, noting that, if the repeal takes effect on August 21, 2020, "there will no longer be any members of this class because no applicants will accrue 30 days under 8 C.F.R. § 208.7(a) as amended." Dkt. 161 at 7, n.2. Defendants' statement is overbroad as it should have asserted that there would be no *new* class members. There will still be all the class members who have filed applications for work authorization through August 20. Given this, there is not only no need to vacate or modify the injunction but vacating the injunction would be entirely inappropriate.

B. Alternatively, the Court should modify—not vacate—the injunction to clarify that it only applies to class member applications filed prior to the effective date of the new regulation—if the proposed regulation goes into effect.

There is no need to alter the injunction because the Court's orders only apply to applications covered by the present regulatory scheme. However, if the Court is inclined to alter the injunction, it should only be modified, not vacated. Any modification should make clear that the Court's injunction continues to apply to any initial applications for work authorization from asylum applicants that are filed with USCIS prior to the effective date of the new regulation. While that date is presently scheduled to be August 21, 2020, it could be later, or never, depending on the outcome of the *Casa de Maryland* litigation.

The repeal of the 30-day regulation is prospective only. 85 Fed. Reg. at 37,507 ("*Rosario* class members who have filed their initial EAD applications prior to the effective date of the rule will be grandfathered into the 30-day adjudication timeframe."). Thus, initial work permit

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615 2nd Ave., Suite 400
Seattle, WA 98104
(206) 957-8628

applications filed by asylum applicants while the regulation remains in effect will continue to be covered by the injunction, providing class members with protection, ensuring that their applications are adjudicated and the accompanying work permit is produced pursuant to the 30-day deadline. The reports Defendants provide to this Court demonstrating their rates of compliance since the Court issued its order readily demonstrate how important the injunction is for class members. Dkt 148-1.

Any modification of the injunction must continue to protect class members who submit applications under the present regulation. Notably, it appears that Defendants' status reports may be including as "completed" applications those that have been approved even where USCIS has not produced the physical EAD card. USCIS' delay in producing EAD cards has led to another class action lawsuit and the issuance of a temporary restraining order requiring USCIS to promptly produce the plastic card. *See Subramanya v. USCIS*, No. 2:20-cv-03707-ALM-EPD, Dkt. 42 (S.D. Oh. Aug. 3, 2020). It appears that USCIS has subjected *Rosario* class members to the same practice. *See* Declaration of Robert H. Cohen, Dkt. 163 at ¶ 4. Class members in this case should continue to be able to enforce this Court's injunction if Defendants approve their EAD applications but do not issue a physical EAD card.

C. It is premature to even modify the injunction given the pending litigation challenging the new regulation.

Defendants acknowledge that there is a lawsuit pending which seeks to postpone the effective date of the regulatory change and to enjoin the new rule entirely. Dkt. 161 at 5, n.1. *See Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX (D. Md.). There was a hearing on the plaintiffs' motion for preliminary injunction on August 14.

As noted above, *supra* Section III.A., there is no need to vacate or modify the injunction as it is self-limiting. However, even if the Court were inclined to modify the injunction, given the uncertainty as to when the new rule will take effect, it is premature to address Defendants' motion. Indeed, regardless of the result of the pending motion before the District of Maryland, it is quite likely that either party will take an appeal, and that there might not be resolution of the case in the immediate future. If the litigation is successful and the regulatory repeal is delayed or

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(206) 957-8628

vacated entirely, the Court's injunction remains necessary to ensure that Defendants continue to comply with the 30-day processing deadline with respect to future class members. Modifying or vacating the injunction at this early stage in the *Casa de Maryland* litigation is thus premature.

IV. Conclusion.

The Court should deny Defendants' motion to vacate as inappropriate, unnecessary, and premature. In the event that the Court does review the injunction, it should only modify the injunction to clarify that it continues to apply to work permit applications filed while the underlying regulation remains in effect.

Respectfully submitted this 17th day of August, 2020.

/s/ Devin T. Theriot-Orr
Devin Theriot-Orr, WSBA 33995
Open Sky Law, PLLC
20415 72nd Ave. S., Ste. 110
Kent, WA 98032
(206) 962-5052

/s/ Matt Adams
Matt Adams, WSBA No. 28287
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611

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

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

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

Emma C. Winger (*pro hac vice*)
American Immigration Council
1318 Beacon Street, Suite 18
Brookline, MA 02446
(617) 505-5375

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 17, 2020, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record *via* transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Devin T. Theriot-Orr

Devin Theriot-Orr, WSBA 33995
Open Sky Law, PLLC
20415 72nd Ave. S., Ste. 110
Kent, WA 98032
(206) 962-5052