The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILMAN GONZALEZ ROSARIO, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' THIRD MOTION FOR CIVIL CONTEMPT AND TO ENFORCE PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR:
FEBRUARY 10, 2023

ORAL ARGUMENT REQUESTED

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I. Introduction

This Court denied Plaintiffs' second motion for contempt based on Defendants' responses to the Court's questions, including Defendants' assurance that the agency expected "to demonstrate full compliance with the 30-day timeline for adjudicating initial EAD applications in their December 2022 status report." *Order on Plaintiffs' Second Motion for Civil Contempt.* ECF No. 207 at 3. Contrary to that representation, Defendants latest status report makes clear that the agency failed to come anywhere close to substantial compliance, but instead maintains abysmal rates, reporting that USCIS timely adjudicated only 12.3% of the applications in November and 14.3% of the applications in December. ECF No. 211-1 at 1.

Across the country, class members and their attorneys have reached out to Class Counsel, begging for assistance so that class members are not left to languish for months without employment authorization. Indeed, Plaintiffs in other cases have requested that their respective courts order Defendants to comply with the 30-day adjudicatory timeline only for Defendants to respond that any request should be addressed by this Court. *See AsylumWorks v. Mayorkas, et al.*, 1:20-cv-03185 (BAH), ECF No. 54 at 23-23 (D.D.C. Aug. 23, 2022) (Defendants' response that the *Rosario* litigation is the only "appropriate forum" for any claims arising from the failure to adjudicate initial EAD applications within 30 days); *Casa de Maryland, et al., v. Mayorkas, et al.*, 8:20-cv-02118 (PX), ECF No. 203 at 8-9 (D. Md. Oct. 18, 2022) (Defendants' oppose Casa de Maryland's argument that the *Rosario* litigation is "insufficient" to ensure compliance with the 30-day processing rule).

This Court denied Plaintiff's second motion for civil contempt without prejudice and instructed that Plaintiffs may "renew their motion for contempt if Defendants do not reach substantial compliance with the court's permanent injunction by December 31, 2022." ECF No.

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207 at 3. Because Defendants have failed to reach substantial compliance by the date specified, Plaintiffs renew their motion, urging this Court to hold Defendants accountable. Absent this Court's immediate intervention, thousands of class members will continue to suffer as a direct result of Defendants' failure to abide by the Court's injunction and the controlling regulations. Those class members will remain without the ability to seek employment, and thus without means to provide food and shelter for themselves and their family members. All that Plaintiffs ask is that Defendants do what they successfully did for over a year and half under this Court's order: adjudicate no less than 95% of all initial asylum EAD applications within the mandated 30-day processing window. *See* March 2021 Compliance Report, ECF No. 170-1.

II. Relevant Facts

For nearly a decade, beginning in 2010, Defendants adjudicated only 22% of initial asylum EAD applications within the 30 days required by 8 C.F.R. § 208.7(a)(1). *Rosario v. U. S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1158 (W.D. Wash. 2018). Only after this Court entered its permanent injunction "enjoin[ing] Defendants from further failing to adhere to the 30-day deadline for adjudicating EAD applications," did Defendants begin to follow their own regulation. *Id.* at 1163; *see* March 2021 Compliance Report, ECF No. 170-1 at 1-2. Under the Court-approved Implementation Plan, Defendants centralized the adjudication of class member applications at the Texas Service Center (TSC) and reallocated 50 officers to work full time on class member applications. ECF No. 134-1 at 1. For over a year and a half, from February 2019 through August 2020, Defendants substantially complied with this Court's clear order, adjudicating no less than 96% of all initial asylum EAD applications within the mandated 30-day processing window. March 2021 Compliance Report, ECF No. 170-1 at 2.

A. The Repeal of the 30-day Rule and Subsequent Litigation

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On June 22, 2020, Defendants published a rule that repealed the 30-day processing deadline for initial asylum EAD applications, effective for applications filed on or after August 21, 2020. 85 Fed. Reg. 37,502-37,546 (June 22, 2020) (eliminating 30-day deadline in 8 C.F.R. § 208.7(a)(1)) (hereinafter "Timeline Repeal Rule"). Several weeks later, on July 21, 2020, membership organizations CASA de Maryland (CASA) and Asylum Seekers Advocacy Project (ASAP), among others, sought vacatur of the rule in *CASA de Maryland, Inc., et al. v. Wolf, et al.,* No. 8:20-cv-02118-PX (D. Md., filed July 21, 2020). On August 21, 2020, the new rule went into effect. 85 Fed. Reg. 37,502. Defendants' efforts to promptly implement the new rule included "making changes to the way employment authorization applications are processed." Decl. of Connie Nolan (Nolan Decl.), ECF No. 170-2 at 3 ¶ 12.

On September 11, 2020, the *CASA de Maryland* court found the plaintiffs likely to succeed on their claims that purported Acting Secretary Chad Wolf lacked authority to promulgate the Timeline Repeal Rule and that the rulemaking violated the requirements of the Administrative Procedure Act. *CASA de Maryland, Inc. v. Wolf,* 486 F. Supp. 3d 928, 957-60, 961-64 (D. Md. 2020). The court preliminarily enjoined enforcement of the new rule against CASA and ASAP members. *Id.* at 973. On December 23, 2020, legal services organizations and individual asylum applicants filed a second lawsuit seeking vacatur of the Timeline Repeal Rule. *AsylumWorks, et al. v. Wolf, et al.,* No. 1:20-cv-03815-BAH (D.D.C., filed Dec. 23, 2020).

B. Defendants Fail to Implement *CASA de Maryland* Injunction in Violation of This Court's Permanent Injunction

Defendants acknowledged that, by virtue of the *CASA de Maryland* preliminary injunction, CASA or ASAP members who filed initial asylum EAD applications were also *Rosario* class members, as the prior regulation continued to require USCIS to adjudicate the applications within 30 days. Nolan Decl., ECF No. 170-2 at 4 ¶14 ("USCIS considers individual

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CASA and ASAP members who filed an asylum-based initial Form I-765 on or after August 21, 2020 to be class members in the *Rosario* litigation[.]"). Yet Defendants failed to timely adjudicate the initial asylum EAD applications, violating this Court's permanent injunction. *See* First Contempt Motion, ECF No. 171. In the first four months of FY2020, Defendants reported a compliance rate of 22.3% and a backlog of 13,515 applications pending more than 30 days. March 2021 Compliance Report, ECF No. 170-1 at 3-4. At the same time, Defendants stopped providing Plaintiffs with monthly compliance reports, ceased issuing timely receipts for class member's applications—which are necessary for the dispute resolution mechanism outlined in the Implementation Plan—and otherwise prevented class members from lodging service requests regarding their delayed applications. First Contempt Motion, ECF No. 171 at 5-7.

For these reasons, on March 25, 2021, Plaintiffs filed a motion for contempt. *Id.* On May 28, 2021, the Court denied Plaintiffs' motion without prejudice, but authorized Plaintiffs to renew their motion if Defendants did not reach substantial compliance within 120 days. ECF No. 184. In addition, the Court further ordered Defendants to submit compliance reports for the months of May, June, July, and August 2021. *Id.* Only after the Court issued its May 2021 order did Defendants again return to a 95% compliance rate. February 2022 Compliance Report, ECF No. 191-1.

C. Vacatur of the Timeline Repeal Rule and Defendants' Continued Failure to Comply with the Court's Permanent Injunction for the Restored Class

Nearly one year ago, on February 7, 2022, the court in *AsylumWorks* granted summary judgment to the plaintiffs, vacating the Timeline Repeal Rule. 2022 WL 355213 at *12. Defendants acknowledged that the *AsylumWorks* order took effect "immediately," that it applied to pending initial EAD applications as well as future applications, and that it "restored" the *Rosario* class to include "all asylum applicants who file a request for an initial EAD." Feb. 17,

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2022 Joint Status Report, ECF No. 190 at 2-3. Defendants did not appeal the district court order, thus accepting that all initial asylum EAD applications must be adjudicated within 30 days. Yet Defendants have failed to take reasonable steps to comply with the Court's permanent injunction as it now applies to the restored class. To the contrary, USCIS's compliance numbers have yet to rise above 15%, failing to comply with this Court's injunction in more than 85% of the cases.

Over the course of six months immediately following the *AsylumWorks* decision, through regular email inquiries and four meet and confers, Plaintiffs endeavored to work with Defendants to ensure that USCIS implemented a plan to reach and maintain substantial compliance. Winger Decl. ¶¶ 2-25. Plaintiffs first reached out to Defendants requesting a meet and confer shortly after the *AsylumWorks* decision. At the meet and confer on February 15, 2022, government counsel could not provide Plaintiffs' counsel with any information about how Defendants intended to implement the vacatur of the Timeline Repeal Rule or the number of people who had been subjected to the rule. Winger Decl. ¶ 4. On March 5, 2022, Defendants filed a status report that revealed a backlog of 66,935 class member applications that had been pending for more than 121 days. February 2022 Compliance Report, ECF No. 191-1 at 3. In other words, before the Timeline Repeal Rule was vacated, USCIS had been taking more than four months to adjudicate initial EAD applications for the majority of asylum applicants who did not benefit from the *CASA de Maryland* preliminary injunction. *Id.*

Plaintiffs continued pushing Defendants' counsel to resolve this issue without seeking the Court's intervention. On June 17, 2022, the parties had a meet and confer where Plaintiffs' counsel advised Defendants' counsel that Plaintiffs would move for contempt if Defendants had not reached substantial compliance—that is, adjudicating 95% of class member applications within 30 days—by August 7, six months from the vacatur of the Timeline Repeal Rule. Winger

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Decl.¶ 19. At that time, Defendants' counsel reported that USCIS estimated it would reach compliance by the end of September. *Id.* ¶ 20. On August 11, 2022, after Plaintiffs received Defendants' July 2022 compliance report showing a compliance rate of just 4.4%, and fewer overall adjudications than in June 2022, the parties had another meet and confer. *Id.* ¶¶ 23-24.

Plaintiffs then filed their second motion for civil contempt. ECF No. 196. Plaintiffs noted that each month since the vacatur of the Timeline Repeal Rule, Defendants had adjudicated fewer class member applications than they received. Winger Decl. ¶¶ 14, 17, 18, 22, 23. Accordingly, the compliance rates had plummeted. In July, USCIS adjudicated only 4.4% of applications within 30 days. Winger Decl. Exh. P. Despite the historical low point of compliance, and despite the fact that six months had elapsed since the *AsylumWorks* decision effectively restored the class to its status quo by vacating the unlawful rule that purported to eliminate the 3-day timeline, this Court denied the second motion for civil contempt without prejudice. ECF No. 207 at 3. In doing so, the Court relied on Defendants' assertion that they would "demonstrate full compliance with the 30-day timeline for adjudicating initial EAD applications in their December 2022 status report." *Id*.

Instead, Defendants' December and January status reports continue to demonstrate abysmal compliance rates—rates that *are worse than before* the Court entered its order granting injunctive relief—12.3% in November and 14.3% for December. *Compare* December 2023 Compliance Report, ECF 211 at 2, *with Rosario*, 365 F. Supp. 3d at 1158, 1163 (indicating "no dispute" that Defendants were non-compliant when they timely adjudicated only 22% of applications). Accordingly, pursuant to this Court's prior order, Plaintiffs renew their motion.

Defendants' delays carry serious consequences for class members, all of whom are asylum seekers who have already waited at least 150 days to apply for their first EAD. 8 C.F.R. §

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208.7(a)(1). While waiting for delayed EADs, class members are unable to support themselves and their families, risk loss of housing, are left without access to key employee benefits such as health care, and experience extreme anxiety and depression. *See* Declaration of S.R.R. (detailing harm caused to her and her sibling). *See also* Declaration of Conchita Cruz , ECF No. 198 ¶¶ 9, 11-15 (providing examples of harms suffered by class members, including an HIV-positive class member threatened with losing housing and access to medication, and a doctor unable to accept residency placement). In light of the agency's continued failure to eliminate the backlog and demonstrate any significant progress toward substantial compliance, and in light of the harm they are causing class members, Plaintiffs now renew their motion for civil contempt.

III. Argument

A. Legal Standard for Civil Contempt

"Civil contempt occurs when a party fails to comply with a court order." *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). "Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense." *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992). Once the moving party shows by clear and convincing evidence that the other party has violated a court order, the burden shifts to the non-moving party to show why they were unable to comply. *Stone*, 968 F.2d at 856 n.9; *Puget Soundkeeper All. v. Rainier Petroleum Corp.*, No. C14-0829JLR, 2017 WL 6515970, at *7 (W.D. Wash. Dec. 19, 2017). "[S]ubstantial compliance with a court order is a defense to an action for civil contempt." *Gen. Signal Corp.*, 787 F.2d at 1379. However, "[a party] in violation of a court order may avoid a finding of civil contempt only by showing it took *all* reasonable steps to comply with the order." *Kelly v. Wengler*, 822 F.3d 1085, 1096 (9th Cir. 2016) (emphasis in original).

B. Defendants Are in Contempt of This Court's Permanent Injunction

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In its September 27, 2022 Order, the Court found "[t]here is no dispute that Defendants have been out of compliance since February 2022." ECF. No. 207 at 3. The agency's own statistics are clear on this point. *See* ECF. No. 211-1 at 1 (demonstrating 12.3% for the month of November, 14.3% compliance for the month of December). Accordingly, it is clear USCIS has failed to reach compliance by December 2022, the bar then set by this Court's Order. ECF. No. 207 at 3. Indeed, Defendants' compliance rates over the last two months, when the agency represented it would eliminate the backlog and achieve substantial compliance, are even worse than the seven-year period before this Court issued its injunction. *See Rosario*, 365 F. Supp. 3d at 1158 (finding "no dispute that USCIS failed to meet its 30-day deadline . . . for class members," where, "from 2010 to 2017, USCIS met its 30-day deadline in only 22% of cases"). Finally, it is clear that Defendants have not taken "*all* reasonable steps to comply." *Kelly*, 822 F.3d at 1096. The most recent status report demonstrates that instead of clearing the backlog and achieving substantial compliance, the backlog has instead increased, from 48,513 in November, 2022, to 53,639, in December of 2022. ECF No. 210-1 at 2; ECF. No. 211-1 at 2. The number of applications pending more than twice the proscribed time period has more than doubled, from 7,145 applications, to 15,087 applications. *Id.*[1] Indeed, while Defendants highlight that they have increased the number of applications adjudicated, those same numbers demonstrate that Defendants continue to adjudicate *fewer* applications than the number of applications received for the corresponding months. *See* Nolan Decl., ECF 211-2 ¶¶ 9-10.

In contrast, Defendants demonstrated ample capacity to comply with the injunction prior to issuing the now-vacated rule which momentarily relieved them of this obligation. At that time

[1] These figures were calculated by contrasting the numbers of applications pending more than 60 days in the months of November and December of 2022, as provided by Defendants in the compliance reports for November and December 2022. ECF No. 211-1 at 2; ECF No. 210-1 at 2.

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Defendants in fact took the reasonable steps necessary to comply, and they reached nearly 100% compliance. From February 2019 through August 2020, Defendants' compliance never dropped below 96%. March 2021 Compliance Report, ECF No. 170-1 at 3. Significantly, Defendants also seek to lower the expectation as to what constitutes substantial compliance. As noted, when complying with the Court order, they never fell below 96%, but they now urge that as long as they reach 90% compliance, their efforts should be approved by the Court. *See* ECF No. 211-2 ¶ 17. But given the current number of applicants, decreasing their compliance level by 5% would deprive 2,200 or more asylum seekers of their right to timely employment authorization. *See* ECF No. 211-2 at 6 (indicating new 44,048 applications in November and 43,667 in December of 2022). Defendants provide no justification for the lowered expectations.

Defendants point to the increasing number of applications as an excuse for their failure to comply. Nolan Decl., ECF No. 211-1 ¶ 6. But this is not a novel phenomenon. It is beyond dispute that the number of initial EAD applications (with the exception of occasional, short-lived deviations) continually trend upwards most years. *See, e.g.*, ECF 170-1 (98,624 adjudicated in FY 2015; 166,701 in FY 2016; 255,414 in FY 2017; 275,673 in FY 2018). There are exceptions, to be sure, as amply demonstrated when the Trump administration issued a series of policies impeding persons from applying for asylum or even entering the country, thereby reducing the numbers in 2019 and 2020. *Id.* But there can be no meaningful dispute that the number of applicants increases as the years go by. Moreover, while the current numbers have increased, as should be expected, they are in line with the historical high number marks from before the vacated rule. *See* March 2021 Compliance Report, ECF No. 170-1 at 1 (showing USCIS adjudicated 33,669 in August 2017 and 37,174 in September 2017).

Thus, it is completely unremarkable that applications are at a "historically high volume."

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Nolan Decl., ECF No. 211-1 ¶ 6. What is remarkable is that Defendants explained that despite the increase in applications, "USCIS did not anticipate that the volume of filings would continue at that level, let alone increase." *Id.* at ¶ 7. Given historical trends, Defendants provide no justification as to why they assumed filings would *decrease*.

Notably, Defendants' supporting declaration asserts that "USCIS will continue to prioritize resumption of 30-day processing for C8 initial EAD applications," Nolan Decl., ECF No. 211-1 ¶ 15. But their current efforts have barely made a dent as they continue to fail to timely adjudicate more than 85% of the applications, ECF No. 211-1 at 1. Such "prioritization" underscores the need for this Court's intervention. What is more, despite repeated assertions over the last ten months that Defendants will shortly return to substantial compliance, they continue to qualify such assurance with the caveat that "USCIS's ability to clear the backlog and resume 30-day compliance would be further impeded if a further increase in the filing rate occurs." Nolan Decl., ECF No. 211-1 ¶ 6. Given this perspective, it is not surprising that Defendants have made no significant progress and fail to timely adjudicate the vast majority of applications. Given the expected increase in applications decade after decade, it is disingenuous to assert that the agency may not be able to reach substantial compliance if the numbers continue to increase. Such a qualification is akin to a parent advising that they project to have enough food to feed their children as long as the children do not keep growing.

It will now be one year since the vacatur of the Timeline Repeal rule. There has been ample time for the agency to reverse course, and recognize that it must again dedicate the necessary resources to ensure that all initial EAD applications are completed within 30-days.[2]

[2] Indeed, well before the vacatur of the Timeline Repeal rule, Defendants were placed on notice: the September 2020 preliminary injunction order issued in *CASA de Maryland* alerted

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Defendants have the resources to comply, as made clear by the fact that they were able to comply prior to implementing the rule that was subsequently vacated. Moreover, in FY2022, USCIS received an additional $250,000,000 in congressional appropriations specifically to fund application processing and backlog reduction. Consolidated Appropriations Act, 2022, Pub. L. 117-103, 136 Stat. 49, 332 (Mar. 15, 2022). However, USCIS failed to utilize the additional funds provided by Congress, prompting Congress to decline additional appropriations in the new budget released this week. *See* http://ww.appropriations.senate.gov/imo/media/doc/Division%20F%20-%20Homeland%20Statement%20FY23.pdf ("Given projected carryover balances for fiscal year 2024, the agreement does not provide funding for backlog reduction for fiscal year 2023."). Clearly, the agency has not taken all reasonable steps to reduce the backlog. And in any event, as this Court has held, "resource constraints . . . 'do not justify departing from the [law's] clear text.'" *Rosario*, 365 F. Supp. 3d at 1163 n.6.

C. The Court Should Impose Sanctions Designed to Ensure Future Compliance

"A court may employ civil contempt sanctions to coerce compliance with a court order." *N. Seattle Health Ctr. Corp. v. Allstate Fire & Cas. Ins. Co.*, No. C14-1680-JLR, 2017 WL 1325613, at *3 (W.D. Wash. Apr. 11, 2017); *Gen. Signal Corp.*, 787 F.2d at 1380 ("Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, or both."). The Court should order the following sanctions to ensure Defendants' future compliance:

Defendants to the fact that their rulemaking was likely unlawful and that vacatur was, at a minimum, a realistic possibility. 486 F. Supp. 3d at 957-60. Defendants nonetheless allowed a backlog of over 66,000 applications pending more than 121 days to accrue—applications USCIS itself has reported it takes on average 12 minutes to adjudicate. 84 Fed. Reg. 62280, 62292 (Nov. 14, 2019) (proposed rule noting each application takes on average .2 hours to adjudicate).

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First, Order USCIS to Establish and Maintain 95% Compliance Rate: Prior to issuing the vacated rule eliminating the 30-day timeline, Defendants demonstrated substantial compliance, never falling below 96%. *See* March 2021 Compliance Report, ECF No. 170-1 at 2. Defendants should be required to return to that same rate in order to demonstrate substantial compliance. Plaintiffs request this Court order that Defendants maintain a 95% or higher rate of compliance going forward.

Second, Order USCIS to Clear Any Backlog by February 28, 2023: Defendants should clear the backlog in pending class member applications by February 28, 2023. Defendants have previously represented to the court that it would clear the backlog by November 15, 2022. ECF No. 206 at 5.

Third, Order USCIS to Provide Monthly Compliance Reports: Defendants should continue providing class counsel with monthly compliance reports by the 5th day of each month. Monthly compliance reports are the only way class counsel can effectively monitor Defendants' performance and protect class members' rights.

Fourth, Order USCIS to Publish Accurate Case Processing Times: Defendants should be required to publish case processing times as they do for almost all other applications, thus holding themselves accountable to the public. While USCIS and previously published case processing times for initial EAD applications, it has ceased to provide this information to the public, creating more confusion for class members.

IV. Conclusion

Plaintiffs ask the Court to find that Defendants have not substantially complied with the Court's permanent injunction, hold Defendants in contempt, and impose the sanctions requested.

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Respectfully submitted this 26th day of January, 2023.

/s/ Matt Adams
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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 26th day of January, 2023.

s/ Matt Adams
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