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Court Decision Ensures Timely Adjudication of Employment Applications Filed by Initial Asylum Applicants

Frequently Asked Questions¹
March 15, 2019

Introduction

On July 26, 2018, in a national class action, the U.S. District Court for the Western District of Washington ruled that the U.S. Citizenship and Immigration Services (USCIS) must adjudicate asylum applicants' *initial* (first time) applications for employment authorization documents (EADs) within 30 days. *Rosario v. U.S. Citizenship & Immigration Servs*, No. 2:15-cv-00813-JLR, 2018 U.S. Dist. LEXIS 222338; 2018 WL 7568371 (W.D. Wash. July 26, 2018). Specifically, the court ordered USCIS to cease "failing to adhere to the 30-day deadline" and to submit status reports every six months informing the court of the agency's compliance rates. 2018 U.S. Dist. LEXIS 222338 at *16; 2018 WL 7568371 at *5. The parties subsequently agreed to a partial plan to implement the court's decision and submitted additional briefing on two outstanding issues to the district court.

Defendants have appealed the district court's decision to the Ninth Circuit Court of Appeals. Defendants have not sought a stay pending appeal, however, and thus the order remains in effect.

The LEXIS version of the district court's order and the partial implementation plan follow this FAQ as Exhibits A and B, respectively.

1. Who is covered by the *Rosario* certified class?

To benefit from the district court's decision and the agreed partial implementation plan, an

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individual must be a member of the certified class, which is defined 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 of only those applicants for whom 30 days has accrued or will accrue under the applicable regulations, 8 C.F.R. §§ 103.2(b)(10)(i), 208.7(a)(2), (a)(4).

2018 U.S. Dist. LEXIS 222338 at *6-7; 2018 WL 7568371 at *2. In short, the class consists of asylum applicants whose pending applications for their *initial* (first time) EADs, filed pursuant to 8 C.F.R. § 274a.12(c)(8), were not adjudicated within the required 30-day regulatory time frame and who did not receive an interim EAD.² Asylum applicants who are applying to renew an EAD are not part of the class and different rules apply to them.

2. What did the district court decide in the July 26, 2018 decision?

The court found Defendants violated 8 C.F.R. § 208.7(a)(1), which provides that, for an *initial* asylum EAD application, USCIS:

shall have 30 days from the date of filing of the request [for] employment authorization to grant or deny that application, except that no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application filed on or after April 1, 1997.

2018 U.S. Dist. LEXIS 222338 at *4, *16; 2018 WL 7568371 at *1, *5. Although the government did not dispute that USCIS failed to adjudicate *initial* asylum EAD applications within 30 days, Defendants argued that injunctive relief was not warranted because USCIS cannot achieve 100% compliance due to limited resources for the large volume of applications, and the government already had made efforts to comply. 2018 U.S. Dist. LEXIS 222338 at *7-8; *13-14; 2018 WL 7568371 at *2, *4. The court found that not only was “an injunction compelling agency action . . . appropriate here” but also that the court was *compelled* to issue such an injunction under the relevant case law. 2018 U.S. Dist. LEXIS 222338 at *8-11; 2018 WL 7568371 at *2-3. According to the court, “the purpose of promulgating the 30-day deadline on top of . . . [the] 150-day waiting period was to cabin what was already—in the agency’s view—an extraordinary amount of time to wait for work authorization.” 2018 U.S. Dist. LEXIS 222338 at *10-11; 2018 WL 7568371 at *3. The court determined that the regulation’s “plain language and clear objectives” intended expeditious adjudications and compelled the court to grant injunctive relief. 2018 U.S. Dist. LEXIS 222338 at *11; 2018 WL 7568371 at *3.

3. What did the district court order in the July 26, 2018 decision?

The district court enjoined the government “from further failing to adhere to the 30-day deadline for adjudicating EAD applications, as set forth in 8 C.F.R. § 208.7(a)(1).” 2018 U.S. Dist. LEXIS

² If USCIS issues a Request for Additional Evidence (RFE), the 30-day adjudication period is paused from the time the RFE is issued until USCIS receives the response to the RFE. 8 C.F.R. § 103.2(b)(10)(i).

222338 at *16; 2018 WL 7568371 at *5. The order also requires the government “to submit status reports every six (6) months regarding the rate of compliance with the 30-day deadline.” *Id.*

4. Has the government filed an appeal?

Yes. Defendants filed a notice of appeal to the Ninth Circuit on September 21, 2018. On appeal, the case is called *NWIRP v. USCIS*, No. 18-35806 (9th Cir.). Defendants’ opening brief currently is due April 8, 2019.

5. Is the district court’s order effective now?

Yes. The government has not filed a motion to stay the order pending its appeal of the district court’s decision to the Ninth Circuit. Therefore, USCIS is bound by the order and it is in effect now.

6. How is the order being implemented?

Under the agreed-upon implementation plan, the government has committed to reallocating resources to effectuate the court’s order, including: (a) centralizing *initial* asylum EAD applications at the Texas Service Center (TSC); (b) reallocating 50 USCIS officers to adjudicate these applications; (c) prioritizing these applications at the TSC Background Check Unit; (d) addressing misfiling with the lock box instead of the TSC; and (e) ensuring acceptance of telephonic service requests by the National Customer Service Center after an application has been pending for 25 days.³

USCIS also is providing notice of rights and remedies pursuant to *Rosario* on its processing time webpage (<https://www.uscis.gov/rosario>) and on EAD receipt notices (Form I-797, Notice of Action).

The implementation plan indicates the appropriate steps individuals should take for cases pending 25 days or more, which can be initiated through a telephone call to the National Customer Service Center by the applicant or his or her legal representative. These steps are described below in Q7.

7. What can individuals do if their *initial* (first time) asylum EAD application has been pending for 25 days?

These individuals should take the following steps:

1. After an *initial* EAD application has been pending for 25 days, the applicant or his or her legal representative should initiate a service request to inquire about the status of the application. To initiate a service request, call USCIS at **1-800-375-5283**. Unlike other service requests, these requests must be initiated by a telephone call. They cannot be submitted electronically on the USCIS website. These service requests should be

³ The implementation plan refers to these customer service requests as SMRT Customer Service Requests. SRMT stands for Service Request Management Tool.

completed by the first representative who answers the call, *i.e.* completed at Tier 1.⁴

2. If there is no response to the service request after 8 business days, send an email to the USCIS Texas Service Center (TSC) Class Action email box at tsc.classaction@uscis.dhs.gov and copy class counsel at asylumEAD@nwirp.org. Include the applicant's name, A-number, service request number, date of the service request, Form I-765 receipt number, and date USCIS received Form I-765.
3. If USCIS does not respond within 8 business days of that email, a class member may file an action in district court, though the venue for such an action remains in dispute. *See* Q9.

Information is also available at <https://www.uscis.gov/rosario> and in the implementation plan at the end of this FAQ (Exhibit B).

8. Has USCIS been complying with the court's order?

Defendants have been taking steps to comply with the court's order. In a status report submitted to the court on January 25, 2019, USCIS indicated that it processed 96.3% of *initial* asylum EAD applications within the 30-day deadline and 99.0% within 60 days in December 2018. The report also indicates that compliance within the 30-day deadline steadily increased from August (87.7%) to November (90.2%). However, in January 2019, USCIS's compliance rate decreased to 92.4% for the 30-day deadline and to 97.5% for applications processed within 60 days. These figures were reported to class counsel.

In its July 26, 2018 order, the court enjoined the government "from further failing to adhere to the 30-day deadline for adjudicating EAD applications." Based on this language and the fact that USCIS has not reported 100% compliance, the government seemingly has not complied with this part of the injunction. However, as discussed below in Q9, the parties dispute whether and by when the order mandates full or substantial compliance. The district court has not ruled on this matter, and, therefore, it remains unclear whether USCIS is presently in violation of the order. Nonetheless, the lawsuit has resulted in a significant increase in the 30-day compliance rate.

9. What issues remain in dispute before the district court?

There remain two outstanding issues with respect to implementation of the district court's order. First, the parties dispute the extent of compliance required by the court's order. Plaintiffs argue that the order required the government to adjudicate all *initial* EAD asylum applications within the 30-day deadline by January 27, 2019, the due date of Defendants' first status report. In contrast,

⁴ If a USCIS customer service representative indicates that the request is *not* outside the normal processing times and therefore refuses to complete the service request at Tier 1, callers should explain that the service request is made for an *initial* (c)(8) EAD application pursuant to *Rosario*. If the first USCIS representative refuses to lodge the service request or passes the call to another representative, please contact Christopher Strawn at chris@nwirp.org or Devin Theriot-Orr at devin@opensky.law, who are members of the class counsel team.

Defendants argue that they need only demonstrate “substantial compliance” with the court’s order.

Second, the parties disagree on the proper venue for class members filing federal court actions for violations of the district court order after they have completed the service request process discussed above in Q7. Defendants’ assert that the U.S. District Court for the Western District of Washington has sole jurisdiction to adjudicate whether individual class members and USCIS have complied with the service request process and whether USCIS has violated the court’s order. Plaintiffs argue that class members should be permitted to file suit in any district court where venue is proper because requiring class members to file only in the Western District of Washington would unduly burden the court and out-of-state class members.

The parties completed briefing on these two issues on November 27, 2018 and are awaiting a ruling from the district court.

Rosario v. United States Citizenship & Immigration Servs.

United States District Court for the Western District of Washington

July 26, 2018, Decided; July 26, 2018, Filed

CASE NO. C15-0813JLR

Reporter

2018 U.S. Dist. LEXIS 222338 *

WILMAN GONZALEZ ROSARIO, et al., Plaintiffs, v.
UNITED STATES CITIZENSHIP AND IMMIGRATION
SERVICES, et al., Defendants.

Core Terms

applications, asylum, deadline, USCIS, days, regulation, authorization, adjudicate, factors, mandatory, parties, injunction, wait, delayed, injunctive relief, summary judgment, motions, Reply, declaratory, seekers, law law law, agency's, equities, timeline, rule rule rule, unreasonably, endangered, Checklist, concludes, timetable

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Judges: JAMES L. ROBART, United States District Judge.

Opinion by: JAMES L. ROBART

Opinion

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the court are (1) named Plaintiffs A.A., Antonio Machic Yac, and W.H. and class members' (collectively, "Plaintiffs") motion for summary judgment (Pls. MSJ (Dkt. # 118)); and (2) Defendants [*3] United States

Citizenship and Immigration Services ("USCIS"), United States Department of Homeland Security ("DHS"), Director of USCIS L. Francis Cissna, and Secretary of DHS Kirstjen Nielsen's (collectively, "Defendants") motion for summary judgment (Defs. MSJ (Dkt. # 119)). Each party opposes the other's motion. (See Pls. Resp. (Dkt. # 123); Defs. Resp. (Dkt. # 122).) The court has considered the motions, the parties' submissions in support of and in opposition to the motions, the administrative record, and the applicable law. The court also heard oral argument from parties on July 26, 2018. (See Min. Order (Dkt. # 126).) Being fully advised, the court GRANTS Plaintiffs' motion and DENIES Defendants' motion.

II. BACKGROUND

Plaintiffs seek to compel USCIS to abide by regulatory deadlines for adjudicating noncitizens' applications for employment authorization documents ("EADs"). (See generally Am. Compl. (Dkt. # 58).) The court reviews the regulatory structure governing the EAD application process before turning to the factual and procedural background of this case.¹

A. Regulatory Structure

Asylum seekers can obtain an employment authorization prior to adjudication of their asylum applications. [*4] See [8 C.F.R. §§ 208.7\(a\)\(1\), 274a.12\(c\)\(8\), 274a.13\(d\)](#); see also [Carballo v. Meissner, No. C00-2145, 2000 U.S. Dist. LEXIS 17028, 2000 WL 1741948, at *2 \(N.D. Cal. Nov. 17, 2000\)](#). To do so, an individual must file Form I-765 with DHS and obtain an EAD, which is evidence that the holder is authorized to work in the United States. (Supp. Admin. Rec. ("SAR") (Dkt. ## 103-1, 103-2, 103-3, 103-4, 103-5) at 2-3.) Generally, an individual must wait 150 days after filing an asylum application to file an initial EAD application. [8 C.F.R. § 208.7\(a\)\(1\)](#). Upon receiving the initial EAD application, the regulation states that USCIS:

shall have 30 days from the date of filing of the request [for] employment authorization to grant or deny that application, except that no employment

authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application filed on or after April 1, 1997.

Id. [§ 208.7\(a\)\(1\)](#); see also 8 U.S.C. § 1158(d)(2).

B. Factual Background

A.A., Mr. Machic Yac, and W.H. are initial asylum EAD applicants who allege that Defendants failed to adjudicate their EAD applications within the required 30-day period. (Am. Compl. ¶¶ 21, 23, 28, 57, 62, 81; see also Machic Yac AR (Dkt. # 67-6) at 3 (EAD application received on December 31, 2015, and adjudicated March 31, 2016); A.A. AR (Dkt. # 67) at 3 (EAD application submitted around [*5] January 12, 2016, and adjudicated March 16, 2016); W.H. AR (Dkt. # 38) at 42-50 (EAD application received on December 15, 2014, and adjudicated June 16, 2015).) There is no dispute that USCIS failed to meet its 30-day deadline, both for the named Plaintiffs and more broadly for class members. (See Defs. MSJ at 7 ("USCIS was not able to adjudicate 100 percent of initial asylum EADs within 30 days.")) Defendants' data reveals that from 2010 to 2017, USCIS met its 30-day deadline in only 22% of cases—that is, out of 698,096 total applications, USCIS resolved only 154,629 applications on time. (See SAR at 89-90.) In 2017, USCIS timely resolved only 28% of applications. (See *id.* at 90.)

USCIS made some changes in response to the need to more quickly adjudicate EAD applications. First, USCIS increased the validity period of an initial asylum EAD from one year to two years. *USCIS Increases Validity of Work Permits to Two Years for Asylum Applicants*, U.S. Citizenship and Immigration Services (Oct. 6, 2016), <https://www.uscis.gov/news/alerts/uscis-increases-validity-work-permits-two-years-asylum-applicants>. Second, USCIS provided checklists on its websites to assist applicants who are submitting applications. [*6] *Form M-1162, Optional Checklist for Form I-765(c)(8) Filings Asylum Applications (With a Pending Asylum Application) Who Filed for Asylum on or after January 4, 1995*, U.S. Citizenship and Immigration Services (July 17, 2017), https://www.uscis.gov/system/files_force/files/form/m01162.pdf.

C. Procedural Background

Plaintiffs brought a putative class action on May 22,

¹ The court has previously detailed at length the background of this case. (See 2/10/16 Order (Dkt. # 55); 10/5/16 Order (Dkt. # 80); 7/18/17 Order (Dkt. # 95); 4/17/18 Order (Dkt. # 113).) Thus, here, the court recounts only the information pertinent to the instant motions.

2015. (See Compl. (Dkt. # 1).) On August 10, 2015, Defendants moved to dismiss the suit and argued that the "30-day regulatory deadline is discretionary." (2/10/16 Order at 21; see MTD (Dkt. # 34) at 10-13.) The court disagreed and held that not only did the "plain language of the regulation favor[] a mandatory interpretation," but "[r]eading the 30-day timeline as mandatory also comports with the regulation's overall goals and related regulations." (2/10/16 Order at 24; see also *id.* at 24-26.)

On July 18, 2017, the court granted Plaintiffs' motion for class certification and certified the following class:

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] [*7] consists of only those applicants for whom 30 days has accrued or will accrue under the applicable regulations, [8 C.F.R. §§ 103.2\(b\)\(10\)\(i\), 208.7\(a\)\(2\), \(a\)\(4\)](#).

(7/18/17 Order at 26-27.) The court additionally reiterated that the regulatory 30-day deadline is "mandatory" and found "no reason to differentiate those mandatory regulatory deadlines from the mandatory statutory deadlines in [Ninth Circuit precedent]." (*Id.* at 21.) The court explicitly rejected Defendants' argument that the regulations only created a mandatory duty to act and not a mandatory timeline to follow, stating that it will not entertain "Defendants' effort to relitigate whether the 30-day deadline is directory or mandatory." (*Id.* at 21 n.10.)

Subsequently, both parties sought to supplement the administrative record. (Defs. Mot. to Supp. (Dkt. # 103); Pls. Mot. to Supp. (Dkt. # 104).) The court granted in part and denied in part both motions (4/17/18 Order at 13-14), and parties accordingly filed a supplemental administrative record (see Not. of SAR (Dkt. # 116)).

Both parties then moved for summary judgment. (See Pls. MSJ; Defs. MSJ.) The court now addresses both motions.

III. ANALYSIS

The parties agree that USCIS has a duty to adjudicate initial EAD applications within 30 days. ([*8] See Pls. Reply (Dkt. # 124) at 1; Defs. MSJ at 9 (acknowledging that the court "has previously held that Defendants have a mandatory duty to adjudicate initial EAD applications

within 30 days").) The parties further agree that USCIS violates this duty. (See Pls. Reply at 1-2; Defs. MSJ at 9 (acknowledging that "they are unable to meet that [30-day] requirement for every application").) Thus, the sole remaining question is what remedy is proper. (See Pls. Resp. at 2; Defs. MSJ at 9 (stating "a question for this [c]ourt remains: what remedy is appropriate?").)

Plaintiffs request (1) a declaration that USCIS has violated the mandatory deadline, and (2) an injunction compelling Defendants to comply with the regulation. (Pls. MSJ at 11.) Defendants do not dispute the declaratory relief Plaintiffs request.² (See Defs. MSJ; Defs. Resp.) Instead, Defendants focus their arguments on the impropriety of injunctive relief. (See Defs. MSJ at 9-15.) The court disagrees and finds that an injunction compelling agency action is appropriate here.

The *Administrative Procedure Act* ("APA") provides that a court may compel "agency action unlawfully withheld or unreasonably delayed."³ 5 U.S.C. § 706(1). A court may compel [*9] agency action when "an injunction is necessary to effectuate the congressional purpose behind the statute." *Badgley*, 309 F.3d at 1177 (citing *TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)). In *Badgley*, the Ninth Circuit considered whether an injunction should issue for an agency's failure to comply with a deadline laid out in the *Endangered Species Act* (the "ESA"). See *id.* at 1176-78. Because the clear purpose of the ESA was to assure adequate protection for endangered species, and violation of the ESA deadlines impeded that purpose, the court held that the ESA "removed the traditional discretion of courts in balancing the equities

² In reply, Defendants argue for the first time that a declaratory judgment "is not appropriate in this case." (Defs. Reply (Dkt. # 125) at 1 (bolding removed).) As a preliminary matter, the court "need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). But even if the court considered Defendants' argument, Defendants merely purport that a declaratory judgment "alone would not be sufficient" but provide no support that this alleged insufficiency should prevent a declaratory judgment from issuing. (See Defs. Reply at 2.) Indeed, the court finds that the parties are "immersed in a substantial controversy regarding the proper interpretation of" the regulations at issue and thus, the court has the authority to issue a declaratory judgment regarding the rights of Plaintiffs. See *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1172-73 (9th Cir. 2002).

³ Both parties recognize that an injunction pursuant to the APA is identical to mandamus relief under [28 U.S.C. § 1361](#). (See Pls. MSJ at 6-7; Defs. MSJ at 8.)

before awarding injunctive relief." *Id.* at 1177. In other words, because the statute was "abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities," it removed the usual discretion a court exercises in determining whether an injunction should issue and compelled the court to grant injunctive relief. *Id.* at 1177-78 (internal quotation marks omitted) (quoting [TVA, 437 U.S. at 194](#)).

As the court has previously found (see 2/10/16 Order at 24), one of the "chief purposes" of the 30-day deadline, as part of the larger regulatory amendments issued in January 1995, was "to ensure that bona fide asylees are eligible [*10] to obtain employment authorization as quickly as possible," 62 Fed. Reg. at 10,318 (1997). The focus on expediency is reinforced by how the agency described the proposed rule: "The INS will adjudicate these applications for work authorization within 30 days of receipt, regardless of the merits of the underlying asylum claim." 59 Fed. Reg. at 14,780 (1994). This elevation of the 30-day deadline above the merits of the underlying asylum claim reflects, as in *Badgley*, that the balance of equities has been struck in favor of adhering to the deadline so that applicants can obtain employment authorization. See 309 F.3d at 1177.

The goal of timely employment authorization is further evidenced by the reason why the 30-day deadline was implemented. The January 1995 amendments imposed a 150-day waiting period before an asylum seeker may submit an initial EAD application. [59 Fed. Reg. at 14,780](#). But even though the agency imposed a waiting period, it made clear that "[i]deally . . . few applicants would ever reach the 150-day point." *Id.* Indeed, the INS selected 150 days because it was a period "beyond which it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated." *Id.* Thus, the purpose of promulgating the 30-day deadline on top of that 150-day [*11] waiting period was to cabin what was already—in the agency's view—an extraordinary amount of time to wait for work authorization. See *id.* This context further elucidates that the 30-day deadline was instituted to promote timeliness.

In light of the plain language and clear objectives behind the regulation at issue, the court concludes that, as in *Badgley*, it is "abundantly clear that the balance [of equities] has been struck in favor" of expedient adjudication of initial EAD applications so that asylum seekers may obtain work authorization when waiting—often for years—to have their asylum applications

resolved. See 309 F.3d at 1177; (see SAR at 93-95 (showing that asylum applicants wait at least two years, and sometimes, up to four years, for an asylum interview).) Thus, much like *Badgley*, the court is compelled to issue injunctive relief. See 309 F.3d at 1177.

Defendants attempt to distinguish *Badgley* on the basis that *Badgley* involved a deadline set by a congressional statute rather than an agency regulation. (Defs. MSJ at 11-12.) But it is settled law that "properly enacted regulations have the force of law and are binding on the government until properly repealed." [Flores v. Bowen, 790 F.2d 740, 742 \(9th Cir. 1986\)](#). And nothing in *Badgley* expressly limits its reasoning to [*12] statutes enacted by Congress. See 309 F.3d at 1176-78. Moreover, Defendants provide no authority interpreting *Badgley* in the way they propose, either in their briefing or at oral argument. (See Defs. MSJ at 11-12.) Indeed, Congress, in its statutory directive, defers to the agency regulations to govern the process of granting work authorization. See 8 U.S.C. § 1158(d)(2) ("[S]uch authorization may be provided under regulation."). Thus, the court discerns no reason to differentiate the mandatory regulatory deadlines at issue here from the mandatory statutory deadlines in *Badgley*.

Badgley also forecloses Defendant's argument that the court should apply the six-factor reasonableness analysis from [Telecommunications Research & Action Center v. F.C.C. \("TRAC"\), 750 F.2d 70, 80, 242 U.S. App. D.C. 222 \(D.C. Cir. 1984\)](#). (See Defs. MSJ at 12-13 (urging the court to apply the TRAC factors).) As the court previously concluded (see 7/18/17 Order at 20-21), *Badgley* rejected the TRAC analysis when the law "specifically provide[s] a deadline for performance," see 309 F.3d at 1177 n.11; see also [Garcia v. Johnson, No. 14-cv-01775-YGR, 2014 U.S. Dist. LEXIS 164454, 2014 WL 6657591, at *12 \(N.D. Cal. Nov. 21, 2014\)](#). Here, there is undisputedly a deadline established by regulation. See [8 C.F.R. § 208.7\(a\)\(1\)](#). Thus, the court rejects the Defendants' contention that the TRAC factors should be applied.

But even if Defendants [*13] are correct that the TRAC factors apply, they weigh in favor of granting injunctive relief. The TRAC factors measure whether the agency has unreasonably delayed action, as is required to issue injunctive relief under the APA. [750 F.2d at 79-80](#); see 5 U.S.C. § 706(1); [Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 190, 421 U.S. App. D.C. 123 \(D.C. Cir. 2016\)](#) (applying TRAC factors in the mandamus context to determine whether mandamus should issue). The

factors include:

(1) the time agencies take to make decisions must be governed by a "rule of reason," (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason, (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake, (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, (5) the court should also take into account the nature and extent of the interests prejudiced by the delay, and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

[TRAC, 750 F.2d at 80](#) (internal citations omitted). Defendants [*14] discuss only their current efforts to meet the 30-day timeline and the reasons why they cannot achieve 100% compliance, both of which fall within the fourth *TRAC* factor.⁴ (See Defs. MSJ at 13-15.) Specifically, Defendants cite "resource and logistical constraints in the face of an astronomical increase in both asylum applications and subsequent [EAD] applications" and the two changes they have made in an effort to comply: (1) extending the validity of initial asylum EADs; and (2) preparing a checklist for initial EAD applicants so that applications are properly filled out.⁵ (*Id.* at 13-14.)

Even accepting Defendants' assertions on their face and assuming that the fourth *TRAC* factor weighs against an

⁴Although the Defendants urge the court to apply the *TRAC* factors, their briefing does not explicitly make arguments under each factor; instead, they raise general practical concerns involving their resources. (See Defs. MSJ at 12-15.) At oral argument, Defendants identified the fourth *TRAC* factor as the one most likely to encompass resource concerns, and in its own review of the factors, the court agrees that these practical concerns best fit into the fourth *TRAC* factor.

⁵Defendants also indicate that they are in the process of amending the regulations to eliminate the 30-day deadline. (Defs. MSJ at 8; Defs. Resp. at 3.) But the current regulation remains binding until it is properly repealed. See [Flores, 790 F.2d at 742](#). Moreover, the status of the amendment is unclear, and its outcome is equally unclear. Thus, the court declines to rely on a potential amendment in its consideration of the instant motions.

injunction, that factor is outweighed by the remaining factors. Most importantly, the overlapping third and fifth *TRAC* factors, both of which assess the impact of the agency's delay on the public welfare, strongly weigh in favor of an injunction. See [TRAC, 750 F.2d at 80](#). As *TRAC* recognizes, delays are "less tolerable when human health and welfare are at stake." *Id.* And that is exactly what is at stake here: Asylum seekers are unable to obtain work when their EAD applications are delayed and consequently, are unable to [*15] financially support themselves or their loved ones. (See SAR at 3 (noting that asylum seekers "are not authorized to work unless they are specifically granted [EADs]").) This negative impact on human welfare is further compounded by the length of the USCIS's delay. For example, in 2017, 10,103 applications took over 121 days to adjudicate, on top of the 150 days those applicants already had to wait, unable to work, after filing their asylum application. (SAR at 90.)

The first and second *TRAC* factors additionally suggest that Defendants' delay is unreasonable. Although Congress has not included a timetable specific to EAD applications, it has stated that the final adjudication of the asylum application "shall be completed within 180 days after the date an application is filed." 8 U.S.C. § 1158(d)(5)(A)(iii). This timetable syncs up with the regulatory requirements—that after the asylum application has been pending for 150 days, the EAD application should be resolved in 30 days. See [8 C.F.R. § 208.7\(a\)\(1\)](#). Yet, the agency is taking far longer than 30 days. (See Machic Yac AR at 3 (91 days); A.A. AR at 3 (about 64 days); W.H. AR at 42-50 (183 days).)

Considered in combination with the third and fifth factors, the court concludes that the totality of the *TRAC* factors indicates that Defendants' delay [*16] in resolving EAD applications is unreasonable in these circumstances.⁶ Accordingly, the court grants an injunction compelling Defendants to adhere to the 30-day deadline as laid out in [8 C.F.R. § 208.7\(a\)\(1\)](#).

IV. CONCLUSION

⁶To the extent Defendants rely on resource constraints as a standalone argument, that argument is unavailing. The Supreme Court recently rejected a similar argument from an agency citing "a number of practical concerns." [Pereira v. Sessions, U.S. , 138 S. Ct. 2105, 2118, 201 L. Ed. 2d 433 \(2018\)](#). The Court found these "meritless" considerations "do not justify departing from the [law's] clear text." *Id.* The court concludes the same here.

For the foregoing reasons, the court GRANTS Plaintiffs' motion for summary judgment (Dkt. # 118) and DENIES Defendants' motion for summary judgment (Dkt. # 119). The court FINDS that Defendants are in violation of [8 C.F.R. § 208.7\(a\)\(1\)](#) and ENJOINS Defendants from further failing to adhere to the 30-day deadline for adjudicating EAD applications, as set forth in [8 C.F.R. § 208.7\(a\)\(1\)](#). The court ORDERS Defendants to submit status reports every six (6) months regarding the rate of compliance with the 30-day timeline.

The court DIRECTS the Clerk to provisionally file this order under seal and ORDERS the parties to meet and confer regarding the need for redaction. The court further ORDERS the parties to jointly file a statement within ten (10) days of the date of this order to indicate any need for redaction.

Dated this 26th day of July, 2018.

/s/ James L. Robart

JAMES L. ROBART

United States District Judge

Rosario v. USCIS, No. C15-0813-JLR
AGREED IMPLEMENTATION PLAN

1. Defendants have already taken, and will maintain the following steps with to reallocate resources to address the Court's Order:
 - a. Centralize the initial (c)(8) workload at the Texas Service Center (TSC).
 - b. Deliver (c)(8) applications filed at the lockbox to the TSC rather than shipping such applications.
 - c. Reallocated 50 Immigration Service Officers to work full time on initial (c)(8) applications (subject to modification upward or downward depending on workload, as determined by USCIS).
 - d. Recalculate compliance rates to take into account the requests for initial evidence.
 - e. Accept SRMT Customer Service Requests for initial (c)(8) applications pending for 25 days.

2. Defendants have implemented the following reallocation of resources to address the Court's Order:
 - a. The TSC Background Check Unit (BCU) will re-prioritize their work load so that the initial (c)(8)s sent to them are a top priority.
 - b. Take steps, to include internal training and customer outreach, to address misfiling with the lock box (e.g., (c)(8) extension requests that have been misrouted to the TSC, either due to applicant filing error or lock box error).
 - c. Take steps to ensure that SRMT Customer Service Requests are accepted at 25 days.

3. Defendants will provide notice to all class members as follows:
 - a. Defendants will amend the processing time webpage to inform putative class members of their rights as class members and the remedies discussed herein.
 - b. USCIS will include on subsequently issued I-797 receipt notices issued to newly filed I-765 applications, informing them of the implementation mechanisms outlined in sections 1.e. above and 4 below.
 - c. The webpage language and receipt notices will be updated on December 8, 2018, so long as the parties agree to final language by September 30, 2018. If the parties have not finalized language by that date, then the webpage and receipt notices will be updated February 23, 2019.
 - d. Defendants will report to class counsel initial (c)(8) adjudication rates, in the format previously used by Defendants, on a monthly basis, on the 15th day of each month beginning on October 15th (or the following business day if the 15th day is a weekend or holiday), until Defendants file their first six month status report with the Court. Thereafter, the parties will meet and confer regarding the requirement and frequency on further reporting.

4. Dispute Resolution: For individual cases that remain pending beyond 30-days following use of the SRMT process, individuals seeking resolution must:

- i. Initiate this process no earlier than 8 business days after SRMT request.
- ii. Provide name, A-number, SRMT receipt number and date of SRMT request, Form I-765 receipt number, and date of filing to a USCIS email address.
- iii. Copy class counsel via email to an agreed-upon email address.
- iv. Allow 8 business days for response before the individual may file an action as specified by further Order of this Court.