IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZHERONG KANG
[redacted];

SAURABH AGRAWAL
[redacted];

MOINUDDIN AHMAD
[redacted];

AHMAD BASMA
[redacted];

JOHN BOWEN
[redacted];

JINAL CHOKSHI
[redacted]

PRADNYA WIWEK DESHMUKH
[redacted];

WIWEK DESHMUKH
[redacted];

PRANALI DHARMADHIKARI
[redacted];

RAVIKANTH GAJULA
[redacted];

RICCARDO GHIDDI
[redacted];

Civil Action No.

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

AKHILESH GUPTA
[redacted];

XIAO HAN
[redacted];

ZARIFA ISAKOVA
[redacted];

ALBERTO IVANIER
[redacted];

RAVI JIYYANA
[redacted];

DARSHAN KHEDEKAR
[redacted];

MAMTA KHEDEKAR
[redacted];

S[redacted] K[redacted]
[redacted];

MINAL SAURABH LELE
[redacted];

SAURABH JAYANT LELE
[redacted];

GRISELDA MATOS
[redacted];

ANURADHA MENDU

[redacted];

NADIA MISTRETTA
[redacted];

MAHESWARY MOHANTY
[redacted];

CHANDANA MUTGI
[redacted];

SREEKANTH POTHANIS
[redacted];

MELKOTE SUNDAR RAJAN NAGABRINDA
[redacted]

ALLA RETORNAZ
[redacted];

PHILIPPE RETORNAZ
[redacted];

AKSHIL AKSHAYA SHAH
[redacted];

KARISHMA RAVINDRA SHAH
[redacted];

GAGAN KRISHANGOPAL SHARMA
[redacted];

RUCHY SHARMA
[redacted];

YASHWANTH SHEELAVATHI KAMALANATH
[redacted]
[redacted];

SHYAM SUNDER SINGA REDDY
[redacted]
[redacted];

PRAGYA SINGHANIA
[redacted]
[redacted];

M- S-
[redacted];

SRINIVAS TATIVAKA
[redacted]
[redacted];

AKSHU THULA
[redacted]
[redacted];

ALEXANDRE WAYENBERG
[redacted]
[redacted];

EKATERINA WAYENBERG
[redacted]
[redacted];

BYRD WILLIS PINEDA
[redacted]
[redacted]

SIVA HARSHA YEDLAPATI
[redacted]
[redacted];

FEDERICO ZANELLA
[redacted]
[redacted];

HADAR KANNAR
[redacted]

[redacted];

JUANA MARCHAL EXTREMERA
[redacted]
[redacted];

THERESIA MEIJERS
[redacted]
[redacted]; and

ANAT ZUCKER
[redacted]
[redacted]

Plaintiffs,

v.

Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2120;

Alejandro Mayorkas, in his official capacity of
Secretary of the Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2120;

United States Citizenship and Immigration Services
5900 Capital Gateway Dr. #2040, Camp Springs,
Maryland, 20746;

Ur Jaddou, in her official capacity as Director of United
States Citizenship and Immigration Services
5900 Capital Gateway Dr. #2040, Camp Springs,
Maryland, 20746;

Defendants.

INTRODUCTION

1. Delays in government processing of employment authorization applications and renewals are causing long wait times and long gaps in employment for noncitizens eligible to work in the United States. These excessive delays create disruptions in the U.S. workforce and challenges for businesses across the country.

2. For Plaintiffs who are nonimmigrant visa holders in the "E-2" visa category, the law affords them work authorization incident to their immigration status. Yet, Defendants unlawfully require them to apply for an Employment Authorization Document, Form I-765, and pay a fee when seeking work authorization, including renewals of such authorization. Defendants have compounded this unlawful treatment through egregious processing delays.

3. Processing times for employment authorization and renewals for E-2 Plaintiffs and Plaintiffs seeking Adjustment of Status have stretched from the historically normal 90 days or sooner to well over a year. Noncitizens across the United States are unable to plan their employment, causing personal and family financial crises, and are unable to meet employment obligations due to unnecessary government delays in the processing of this crucial benefit.

4. Historically, Defendants adjudicated employment authorization applications within 90 days. In selective cases where adjudication time went beyond the 90 days, the government had a process already in place to adjudicate the application or issue an interim employment authorization document while the application continued to be processed. Memorandum, *Response to Recommendation 35, Recommendations on USCIS Processing Delays for Employment Authorization Documents*, (Jan. 2, 2009).[1]

[1] https://www.dhs.gov/xlibrary/assets/uscis_response_to_cisomb_recommendation35_01_02_09.pdf (last visited Nov. 8, 2021).

5. In 2017, Defendants rescinded the 90-day processing time while reaffirming a commitment to continue processing employment authorization within 90 days, except in rare cases. *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398, 82456 (Nov. 18, 2016). The change meant that the livelihoods of applicants lawfully present and eligible to work who had filed and paid for their applications were (and are) no longer protected by the 90-day processing time. The public expressed overwhelming concern over long delays and job losses without the protection of the 90-day processing time regulation.

6. Defendants explained that USCIS needed longer than 90 days to process certain applications due to security concerns and countered public objections by explaining that the changes had mechanisms in place to prevent gaps in employment authorization. *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398, 82456 (Nov. 18, 2016).

7. Unfortunately, the public's concerns have turned into a tragic reality. Despite Defendants' assurances and public commitment to adjudicating applications within 90 days, processing times have soared to over one year, leaving thousands of eligible applicants unable to work. Despite Defendants' commitments to a reliable means for seeking support with delayed applications, the process has not provided any dependable recourse.

8. In 2016, the agency processed applications for employment authorization within 2.6 months on average.[2] After rescinding the processing regulation, the agency never maintained its processing commitment. In 2017, the agency took 3.1 months to process EADs; in 2018,

[2] *See* https://www.uscis.gov/archive/historical-national-average-processing-time-in-months-for-all-uscis-offices-for-select-forms-by (last visited Nov. 8, 2021).

processing times stretched to 4.2 months; in 2019, the agency took 4.5 months; and in 2020, the agency took 4.4 months. *Id.*

9. As of November 2021, USCIS's posted processing times for EAD applications extend well beyond a year, and some will languish approximately 20-21.5 months.[3]

10. There is no longer administrative recourse for suffering applicants to communicate or receive an update from the agency unless applications have been pending since before January 26, 2020. Nor has the agency instituted interim relief, such as granting work authorization for applications pending beyond 90-days, to reduce the harms caused from the exponential growth in processing times and the backlog of applications for which applicants have paid in advance.

11. These system-wide delays prevent EAD-eligible noncitizens from providing for themselves and their families, force them out of employment, and cause disruption for employers. The agency has tools at its disposal to prevent these harms, including a committed return to the 90-day processing timeframe, but has failed to employ them.

12. Defendants' irrational actions, including the departure from committed processing policy, violate the Administrative Procedure Act, 5 U.S.C. §§ 553(b), 706(1), 706(2)(a).

13. Plaintiffs, EAD applicants suffering from Defendants' processing delays seek class-wide relief from DHS's arbitrary, capricious, and unlawful 1) departure from its stated commitment to pre-2017 processing goals; 2) refusal to allow applicants a means to communicate during delays; and 3) pace of processing Plaintiffs' EAD applications.

PARTIES

[3] https://egov.uscis.gov/processing-times/ (last visited Nov. 8, 2021).

14. Named plaintiffs are 49 individuals, listed below, who have filed applications for an EAD. All named plaintiffs have had their cases unreasonably delayed for over six months, and some for over one year, because of Defendants' actions.

First Name	Last Name	Receipt Number	EAD category	Filing Date
Saurabh	Agrawal	[redacted]	[redacted]	[redacted]
Moinuddin	Ahmad	[redacted]	[redacted]	[redacted]
Ahmad	Basma	[redacted]	[redacted]	[redacted]
John	Bowen	[redacted]	[redacted]	[redacted]
Jinal	Chokshi	[redacted]	[redacted]	[redacted]
Pradnya Wiwek	Deshmukh	[redacted]	[redacted]	[redacted]
Wiwek	Deshmukh	[redacted]	[redacted]	[redacted]
Pranali	Dharmadhikari	[redacted]	[redacted]	[redacted]
Ravikanth	Gajula	[redacted]	[redacted]	[redacted]
Riccardo	Ghiddi	[redacted]	[redacted]	[redacted]
Akhilesh	Gupta	[redacted]	[redacted]	[redacted]
Xiao	Han	[redacted]	[redacted]	[redacted]
Zarifa	Isakova	[redacted]	[redacted]	[redacted]
Alberto	Ivanier	[redacted]	[redacted]	[redacted]
Ravi	Jiyyana	[redacted]	[redacted]	[redacted]
Zherong	Kang	[redacted]	[redacted]	[redacted]
Darshan	Khedekar	[redacted]	[redacted]	[redacted]
Mamta	Khedekar	[redacted]	[redacted]	[redacted]
S[redacted]	K[redacted]	[redacted]	[redacted]	[redacted]

Minal Saurabh	Lele	[redacted]	[redacted]	[redacted]
Saurabh Jayant	Lele	[redacted]	[redacted]	[redacted]
Griselda	Matos	[redacted]	[redacted]	[redacted]
Anuradha	Mendu	[redacted]	[redacted]	[redacted]
Nadia	Mistretta	[redacted]	[redacted]	[redacted]
Maheswary	Mohanty	[redacted]	[redacted]	[redacted]
Chandana	Mutgi	[redacted]	[redacted]	[redacted]
Sreekanth	Pothanis	[redacted]	[redacted]	[redacted]
Melkote Sundar	Rajan Nagabrinda	[redacted]	[redacted]	[redacted]
Alla	Retornaz	[redacted]	[redacted]	[redacted]
Philippe	Retornaz	[redacted]	[redacted]	[redacted]
Akshil Akshaya	Shah	[redacted]	[redacted]	[redacted]
Karishma Ravindra	Shah	[redacted]	[redacted]	[redacted]
Gagan Krishangopal	Sharma	[redacted]	[redacted]	[redacted]
Ruchy	Sharma	[redacted]	[redacted]	[redacted]
Yashwanth	Sheelavathi Kamalanath	[redacted]	[redacted]	[redacted]
Shyam Sunder	Singa Reddy	[redacted]	[redacted]	[redacted]
Pragya	Singhania	[redacted]	[redacted]	[redacted]
M-	S-	[redacted]	[redacted]	[redacted]
srinivas	Tativaka	[redacted]	[redacted]	[redacted]
Akshu	Thula	[redacted]	[redacted]	[redacted]
Alexandre	Wayenberg	[redacted]	[redacted]	[redacted]
Ekaterina	Wayenberg	[redacted]	[redacted]	[redacted]

Byrd	Willis Pineda	[redacted]	[redacted]	[redacted]
Siva Harsha	Yedlapati	[redacted]	[redacted]	[redacted]
Federico	Zanella	[redacted]	[redacted]	[redacted]
Hadar	Kannar	[redacted]	[redacted]	[redacted]
Juana	Marchal Extremera	[redacted]	[redacted]	[redacted]
Theresia	Meijers	[redacted]	[redacted]	[redacted]
Anat	Zucker	[redacted]	[redacted]	[redacted]

15. Defendant Alejandro Mayorkas is the Secretary of the Department of Homeland Security. In his official capacity, he is in charge of adjudication of all immigration benefit requests. He is sued in his official capacity.

16. Defendant Department of Homeland Security, a federal agency of the United States, is charged with the responsibility for the implementation and administration of the relevant provisions of the Immigration and Nationality Act.

17. Defendant Ur Jaddou is Director of U.S. Citizenship and Immigration Services. She is the highest-ranking official within the USCIS, a sub-agency of the DHS. As the highest-ranking official at USCIS, she is responsible for the implementation of the Immigration and Nationality Act and for ensuring compliance with applicable federal laws, including the APA. Ms. Jaddou is sued in her official capacity.

18. Defendant United States Citizenship and Immigration Services, a federal sub-agency within the Department of Homeland Security, is charged with the responsibility for the implementation and administration of the relevant provisions of the Immigration and Nationality Act.

JURISDICTION AND VENUE

19. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. *See Califano v. Sanders*, 430 U.S. 99, 106 (1977). The Court has additional authority to grant declaratory relief under 28 U.S.C. §§ 2201-02.

20. The United States has waived sovereign immunity over claims, other than relief seeking money damages, relating to agency action or inaction from which a person has suffered a legal wrong. *See* 5 U.S.C. § 702.

21. Venue is proper under 28 U.S.C. § 1391(e) because (a) this is a civil action in which Defendants are federal officers and agencies of the United States, (b) a substantial part of the events or omissions giving rise to the claim occurred in the District of Columbia, to wit, the national policy decisions to rescind the regulatory 90-day processing time for EADs; and (c) Defendants Mayorkas and DHS are headquartered in this district. There is no real property involved in this action.

LEGAL BACKGROUND

Admission of Noncitizens in the United States

22. Noncitizens seeking admission to lawfully enter the United States are divided into two categories: 1) immigrants; and 2) nonimmigrants. 8 U.S.C. §§ 1101(a)(15). An immigrant is defined within the INA as any noncitizen who does not fall within the specified nonimmigrant categories. 8 U.S.C. §§ 1101(a)(15)(A)-(V).

23. Immigrants are generally "lawfully admitted for permanent residence," which "means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

24. By contrast, nonimmigrants are admitted for specific temporary periods and must depart upon expiration of the period. 8 U.S.C. §§ 1101(a)(15)(A)-(V).

25. "The term 'nonimmigrant visa' means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter." 8 U.S.C. § 1101(a)(26).

26. "The term 'immigrant visa' means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter." 8 U.S.C. § 1101(a)(16).

27. Nonimmigrant visa categories span nearly the entire alphabet, some with sub-categories of visas, and each with a particular purpose. 8 U.S.C. § 1101(a)(15)(A)-(V).

28. The nonimmigrant "E visa" is for a noncitizen entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national. 8 U.S.C. § 1101(a)(15)(E). The spouses and children of an E visa holder are referred to as E-2 visa holders or derivative spouses and children respectively.

29. E-2 spouses are "derivative beneficiaries" and have status that may be concurrent with but not exist independent of the primary nonimmigrant. 8 U.S.C. §§ 1101(a)(15)(E).

30. Nonimmigrants may extend their authorized stay in the United States in one of two ways. First, they may exit the United States and apply for a new visa stamp at a United States consulate. 22 C.F.R. § 41.11(a). *See also* 9 FAM 402.10-14(A)(a); 9 FAM 402.12-16(A)(a). Alternatively, they may extend their stay in the United States without exiting the country by filing an application with the agency to extend the previously approved visa (or change status to a different visa category). 8 C.F.R. § 214.1(c)(2).

31. Immigration law provides a way for a "nonimmigrant"—a foreign national lawfully present in this country on a designated, temporary basis—to obtain an "[a]djustment of status" making him a Lawful Permanent Resident of the United States. 8 U.S.C. § 1255. Under that section, a nonimmigrant's eligibility for such an adjustment to permanent status depends (with exceptions not relevant here) on an "admission" into this country. *Id*.

32. An "admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

Employment of Noncitizens Admitted to the United States

33. Congress has entrusted the Secretary of Homeland Security to "provid[e] documentation or endorsement of authorization of aliens . . . authorized to be employed in the United States, [and] the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement." 8 U.S.C. § 1324a(h)(1); *see also* 8 U.S.C. § 1324a(h)(3)(B).

34. DHS regulations at 8 C.F.R. §§ 274a.12(a)-(c) describe three categories of foreign nationals authorized to work in the United States. Individuals in the first category, described at 8 C.F.R. § 274a.12(a), are authorized to work in the United States incident to their immigration status, without restriction as to the location of their employment or the type of employment they may accept. In many cases, their immigration status and attendant employment authorization is evidenced by the Arrival-Departure Record (Form I-94). Those individuals seeking to obtain an EAD that contains not only evidence of employment authorization, but also a photograph, typically must file a separate application with USCIS. *See* 8 C.F.R 274a.13(a).

35. Individuals in the second category, described at 8 C.F.R. § 274a.12(b), are employment authorized incident to their nonimmigrant status, but each individual's employment authorization

is valid only with a specific employer. Individuals do not file separate requests for employment authorization and are not generally issued EADs. These individuals instead obtain a Form I-94 indicating their nonimmigrant status and attendant employment authorization.

36. Individuals in the third category, described at 8 C.F.R. § 274a.12(c), are required to apply for employment authorization and may begin working only if USCIS approves their application. This employment authorization is subject to the restrictions described in the regulations for the specific employment eligibility category. Generally, the approval of an EAD application by such individuals lies within the discretion of USCIS.

37. Individuals requesting an EAD must file an application on a Form I-765 with USCIS in accordance with the form instructions and pay a fee to cover the costs of process. *See* 8 C.F.R. § 274a.13.

38. Employment authorization categories are identified by the agency using the paragraph in the regulation they appear (i.e. (a), (b), or (c)), and then the numerical subparagraph specifically discussing them (i.e. (1), (2), (3), etc.). *See* Instructions to Form I-765, Application for Employment Authorization Document.[4]

39. E-2 employment authorization is classified as (a)(17) or "A17."

40. Applicants for adjustment of status are classified under (c)(9) or "C9." 8 C.F.R. § 274a.12(c)(9).

41. Prior to 2017, an applicant would receive an interim document evidencing employment authorization with a validity period not to exceed 240 days if USCIS failed to adjudicate the Form

[4] Available at https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf (last visited November 8, 2021).

I-765 within 90 days from the date USCIS received the application. *See* 8 C.F.R. § 274a.13(d) (2016).

42. USCIS has discretion to grant employment and set the validity period. 8 C.F.R. § 274a.13(b). Where an EAD application is denied, regulations require the agency to notify the applicant "in writing of the decision and [provide] the reasons for the denial." 8 C.F.R. § 274a.13(c). Each EAD application must conclude with an approval or a denial and notice to the applicant. Adjudication is a mandatory duty of the agency. 8 C.F.R. § 274a.12

The 2017 Final Rule Terminating the 90-day Processing Requirement for Applications for Employment Authorization

43. On December 31, 2015, DHS published a Notice of Proposed Rulemaking ("NPRM"). *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*; Proposed Rule, 80 Fed. Reg. 81899 (December 31, 2015). The NPRM proposed to allow for the automatic extension of certain expiring EADs for a period of 180 days contingent upon the timely filing of a renewal application. *Id.* at 81926. In addition, the NPRM proposed to eliminate the 90-day processing requirement. *Id*. at 81927.

44. During the ensuing 60-day comment period, 27,979 public comments on the NPRM were submitted to DHS. *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398, 82412 (Nov. 18, 2016). On November 18, 2016, after the review and consideration of all public comments, DHS published its final rule, which has remained effective since January 17, 2017. *Id*.

45. In the final rule, DHS acknowledged that many commenters disagreed with the elimination of the 90-day processing requirement for EAD applications and expressed concern about a lack of any processing time. 81 Fed. Reg. at 82456. The commenters warned that the elimination of a processing time requirement would cause gaps in employment authorization for noncitizen

workers seeking an extension of work authorization and lead to longer adjudication times for both those seeking initial employment authorization and renewals leading to either gaps in employment or job losses. *Id*. While the agency claimed that rescission of the processing times would allow it to make proper security checks, alleviate operational concerns, and prevent instances of fraud, the commenters noted that the regulations already excused the agency from meeting the 90-day requirement to complete proper security checks. DHS disagreed that the elimination of the 90-day processing time would cause gaps in employment authorization or longer adjudication times. *Id*. at 82405, 82456. DHS reaffirmed that EAD applications "must be adjudicated within reasonable timeframes" and announced its commitment to a 90-day processing time. *Id*. DHS added that the new rule allowing for automatic EAD extensions for certain applicants seeking to extend work authorization would alleviate the commenters' concerns and "ensure continued employment authorization for many renewal applicants and prevent any work disruptions for both the applicants and their employers." *Id*. at 82456

46. In response to further concerns that the elimination of the 90-day processing time would cause job losses and uncertainty, the agency rejected the contention and did not "believe that eliminating the 90-day EAD processing timeframe from the regulation will lead to the issues raised by commenters, except in rare instances. DHS plans to maintain current processing timeframes…" 81 Fed. Reg. at 82458.

47. DHS also averred that "[t]he public will be able to rely on USCIS's announcements regarding Form I-765 processing, which will reflect USCIS's up-to-date assessment of its operational capabilities. Applicants also will continue to have redress in case of adjudication delays by contacting USCIS. *See* https://www.uscis.gov/forms/tip-sheet-employment-authorization-applications-pending-more-75-days." 81 Fed. Reg. at 82456.

48. DHS data shows that EAD applications take an average of twelve minutes of adjudicative staff time to make a decision. *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, Proposed Rule, 84 Fed Reg. 62280, 62292 (Nov. 14, 2019).

FACTUAL ALLEGATIONS

49. Defendants have radically departed avowed processing timeframes and withdrawn opportunities for customer service. Those "rare instances" where adjudications take longer than 90-days became the norm soon after promulgation of the rule, and processing times have now increased exponentially with adjudications typically taking well over one year.

50. Even prior to the COVID-19 pandemic, processing times had extended well beyond a 90-day timeline and had unreasonably stretched well past 1 year.[5]

51. USCIS publishes case processing times on its website that constantly change, but provide the only window into its customer service and operational efficiency.[6] Five USCIS processing centers are listed as processing I-765 EAD applications: the Texas Service Center, the Potomac Service Center, the Nebraska Service Center, the California Service Center, and the National Benefits Center. As of November 3, 2021, USCIS listed the EAD application processing times for these service centers as follows[7]:

i. Texas Service Center: 1.5 to 11 Months;

[5] *See* Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year, available at https://www.uscis.gov/archive/historical-national-average-processing-time-in-months-for-all-uscis-offices-for-select-forms-by (last visited Nov. 8, 2021).

[6] "Check Case Processing Times," available at https://egov.uscis.gov/processing-times/, last visited Nov. 4, 2021.

[7] The USCIS appears to update its only processing times on an erratic and unpredictable schedule, through an opaque process that it has never fully explained to the public.

ii. Potomac Service Center: 3 to 9.5 Months;

iii. Nebraska Service Center: 4.5 to 8 Months;

iv. California Service Center: 8.5 to 14.5 months;

v. National Benefits Center: 9 to 10 months.

52. In addition, USCIS breaks down I-765 processing times for some of the service centers by category. For example, as of November 3, 2021, USCIS provided further information about the processing of specific categories of EAD applications[8]:

Estimated time range	Form type	Receipt date for a case inquiry
8.5 Months to 13.5 Months	Based on being an H-4 spouse of an H-1B nonimmigrant (filed with I-539 H4) [(c)(26)]	September 26, 2020
9 Months to 14 Months	Based on being an L-2 spouse of an L-1 nonimmigrant [(a)(18)]	September 14, 2020
8.5 Months to 12 Months	Based on being an H-4 spouse of an H-1B nonimmigrant (Standalone; not filed with I-539 H4) [(c)(26)]	November 19, 2020
3 Months to 3.5 Months	Based on an approved, concurrently filed, I-821D [(c)(33)]	July 22, 2021
20 Months to 21.5 Months	Based on a pending I-485 adjustment application [(c)(9)]	January 27, 2020

53. USCIS no longer provides applicants with an opportunity to contact the agency unless the case falls outside of the published processing times. As shown above, for applicants whose EAD application is based on a pending application for adjustment of status, USCIS considers 21.5 months to be within expected processing times. Therefore, an applicant in that category lacks the ability to contact the California Service Center unless the application was received prior to January 27, 2020.

54. In justifying the elimination of the 90-day processing deadline, DHS stated that "[t]he public will be able to rely on USCIS's announcements regarding Form I-765 processing, which will reflect USCIS's up-to-date assessment of its operational capabilities." 81 Fed. Reg. at 82456.

[8] Screenshot from "Check Case Processing Times" with I-765 Application at California Service Center selected in dropdown menus, available at https://egov.uscis.gov/processing-times/ (last visited Nov. 4, 2021).

DHS also assured the public it would continue to have access to case assistance and provided a tip sheet with instructions for EAD applications pending more than 75 days. *Id*. ("Applicants also will continue to have redress in case of adjudication delays by contacting USCIS. *See* http://www.www.uscis.gov/forms/tip-sheet-employment-authorization-applications-pending-more-75-days.")

55. The agency removed the tip sheet, and USCIS instructs applicants *not* to contact the agency unless the case falls outside of normal processing times—including "normal" processing times of up to 21.5 months.

56. When publishing the 2017 final rule, DHS also assured concerned commenters that applicants not protected by 180-day automatic extensions "will continue to be able to call the National Customer Service Center (NCSC) if their application is pending for 75 days or more to request priority processing." 81 Fed. Reg. at 82458. For those covered by the 180-day automatic extension, DHS assured that they would "be permitted to contact the NCSC if their application is still pending at day 165 of the auto-extension to request priority processing." *Id*. Contrary to these assurances, USCIS now instructs applicants only to contact the NCSC if the application is outside of posted processing times.

57. Defendants' refusal to process Plaintiffs' EAD applications in a timely manner has caused immense suffering. Many Plaintiffs have lost their jobs and accompanying health insurance, and the loss of income has forced many to rely on family and friends for support, or to drain their savings. On top of the financial challenges, the emotional trauma from being unable to work or visit family abroad has taken a toll on many Plaintiffs.

58. For many Plaintiffs, including Philippe Rotornaz and his family, the delays in processing their EADs result in extended separation from loved ones. Mr. Rotornaz's 12-year-old stepson,

Plaintiff M- S-, has been unable to travel to see his biological father in the [redacted] for nearly two years. Likewise, Plaintiffs Wiwek Deshmukh and his wife, Pradnya Wiwek Dushmukh, have also endured suffering as a result of an inability to travel. Mr. Dushmukh has been unable to visit his mother, who is currently undergoing cancer treatment in [redacted], and his wife was unable to travel to [redacted] when her father passed away from COVID-19 in May 2021.In many cases, the harm caused by the delay in adjudicating EAD applications reaches far beyond Plaintiffs. One named Plaintiff, Byrd Willis Pineda, is a [redacted] living in [redacted] and caring for patients during the COVID-19 pandemic. Without employment authorization, he reports that he will lose his job and there will be one less healthcare provider serving on the frontlines of the pandemic.

59. Another Plaintiff, Juana Marchal Extremera, works as a [redacted] that is currently experiencing a shortage of [redacted]. If her EAD application is not approved soon, she will lose her job and [redacted]. Furthermore, without her income, Ms. Extremera will be unable to pay the [redacted].

60. Finally, Plaintiff Zherong Kang is a [redacted] living in [redacted]. He has been unable to work since [redacted], when his EAD expired, and without him working, [redacted].

61. The details regarding the harms these aforementioned Plaintiffs have suffered and continue to suffer are just a sampling of the types of harms named Plaintiffs and all EAD applicants in the proposed class have endured because of Defendants' unreasonable delay.

CLASS ALLEGATIONS

62. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(1), 23(b)(2) and LCv.R 23.1, on behalf of themselves and all other similarly persons affected

by Defendants' actions with respect to EAD adjudications since the abandonment of the 90-day processing deadline, including the inexcusable and unreasonable delays in processing of applications. Plaintiffs seek certification of the following classes and subclasses:

i. Individuals in E-2 nonimmigrant status who are not allowed to work incident to status based on lawful status shown on their I-94 Arrival Departure Record and made to submit or will need to submit an initial application for an employment authorization document or a renewal of an employment authorization document based on the same status through filing for an employment authorization document on Form I-765, including the submission of all necessary documents and fees.

    a. Individuals in E-2 nonimmigrant status who submitted or will need to submit, an initial application for an employment authorization document on Form I-765 based on their employment authorization incident to status under 8 C.F.R. § 274a.12(a), including all necessary supporting documents and fees, but have not and will not receive an adjudication within 180-days of receipt by the agency.

    b. Individuals in E-2 nonimmigrant status who have submitted, or will need to submit, an extension for employment authorization under 8 C.F.R. § 274a.12(a) based on lawful status who have not either received an adjudication within 90 days or received an automatic extension of employment authorization for 180 days or the adjudication of their application, whichever is earlier.

ii. Individuals seeking adjustment of status who have submitted, or will need to submit, an application for an employment authorization document on Form I-765 under 8 C.F.R. § 274a.12(c), including all necessary documents and fees, but have not and will not receive an adjudication within 90 days of receipt by the agency.

iii. Individuals seeking adjustment of status who have submitted, or will need to submit, an extension for employment authorization under 8 C.F.R. § 274a.12(c) based on lawful status who have not either received an adjudication within 90 days or received an automatic

extension of employment authorization for 180 days or the adjudication of their application, whichever is earlier.

63. This action meets all of the Rule 23(a) prerequisites for maintaining a class action.

64. The Plaintiff Classes are so numerous that joinder is impracticable, satisfying Rule 23(a)(1). As of December 2020, the EAD applications in backlog totaled well more than 75,000.[9] The processing times, standing alone, establish that each proposed class meets the numerosity requirement. A class action is an appropriate procedural vehicle to remedy the common wrong to the Plaintiffs and putative class members under the APA.

65. The claims of the Plaintiffs and putative class members share common issues of law and fact and will not require individualized determinations of the circumstances to any plaintiff, satisfying Rule 23(a)(2). Such common questions of law and fact include, but are not limited to:

i. Whether Defendants have unlawfully required E-2 nonimmigrants to file applications for employment authorization and not allowed them to work incident to status.

ii. Whether Defendants arbitrarily, capriciously, and unlawfully departed from their stated commitment to maintain 90-day EAD processing times for EADs, except in rare instances, which it made to the public when justifying their rescission of the regulatory 90-day processing timeline;

iii. Whether USCIS's current processing times for applications for initial employment authorization that extend so far as 21.5 months violate the APA;

iv. Whether, for those class members seeking an extension of employment authorization, the agency has arbitrarily, capriciously, and unlawfully failed to extend employment authorization for 180 days or for the period it takes to complete the adjudication, whichever is earlier.

[9] *See* Letter by Representative Abigail Spanberger to USCIS Director Cuccinelli, available at: https://www.uscis.gov/sites/default/files/document/foia/Employment_Authorization_Documents_EADs_and_Permanent_Resident_Cards_Representative_Spanberger.pdf (last visited Nov.8, 2011)

v. Whether the agency has arbitrarily, capriciously, and unlawfully refused applicants the opportunity to communicate with the agency unless their applications have been delays beyond the published processing times.

66. The claims of the named Plaintiffs are typical of the claims of the members of the Plaintiff Class, satisfying Rule 23(a)(3). Like other members of the class, Plaintiffs have all applied for work authorization from Defendants, but their applications have languished in processing delays that violate the APA. The redress sought for the typical claims would alleviate the similar harms to Plaintiffs and putative class members.

67. The named Plaintiffs will fairly and adequately protect the interests of the Plaintiff Class, satisfying Rule 23(a)(4). The named Plaintiffs have no interest that is now or may become antagonistic to the interests of the putative class members.

68. The attorneys representing the named Plaintiffs include experienced civil rights and immigration attorneys who are considered able practitioners in federal litigation with experience in class representation. These attorneys should be appointed as class counsel.

69. The members of the proposed class are readily ascertainable through Defendants' records.

70. Counsel for Plaintiffs do not anticipate any conflicts of interest between the named Plaintiffs and the other class members nor does Counsel anticipate any reason that the other class members would dispute the adequacy of Counsel's representation. Individual plaintiffs and putative class members seek the same remedy: adjudication of employment authorization on or before the agency's committed 90-day processing goal or other relief, including interim authorization to work, to compensate for the failure to timely process work authorization.

71. Defendants have acted or failed to act on grounds generally applicable to the Plaintiffs and putative class members, thereby making final injunctive and declaratory relief appropriate to

redress harms to the classes. The putative classes may therefore be properly certified under Federal Rule of Civil Procedure 23(b)(2).

72. Pursuit of redress through the filing of separate actions by individual members of the putative classes would result in a needless expense of judicial resources and create the risk of inconsistent or varying adjudications. The putative classes warrant certification under Federal Rule of Civil Procedure 23(b)(1).

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violation of the APA, 5 U.S.C. § 706(2)—Defendants' have Arbitrarily, Capriciously, and Irrationally Departed from Their Commitment to 90-Day Processing Times for EAD Applications

73. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

74. Defendants' departure from their avowed commitment to 90-day processing times for EADs represents final agency action that is arbitrary, capricious, and an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2)(A).

75. Notwithstanding Defendants' discretion to set the pace of adjudications, in promulgating the 2017 final rule, the agency announced a general policy by which its exercise of discretion would be governed. It committed to adjudicating EAD applications within 90-days, except in rare instances. 81 Fed. Reg. at 82456. It never fulfilled its commitment.

76. Processing times now extend beyond one year and there is no dispute that the pace of adjudications is at least three times slower than what it announced to the public to downplay concerns that rescission of a mandatory 90-day processing time would result in unreasonable delays.

77. Defendants' "irrational [and radical] departure from [their] policy" constitutes agency action that is arbitrary, capricious and an abuse of discretion under the APA. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). 5 U.S.C § 706(2)(A).

78. DHS's commentary regarding revised section 274a.13(d) demonstrates the arbitrary and capricious treatment of Plaintiffs and the lip-service paid to the public. In the commentary, DHS acknowledged a range of public comments disagreeing with the proposal to eliminate the 90-day processing requirement for adjudicating EAD requests, including concern that eliminating the requirement would "lead to longer adjudication times." *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398, 82456 (Nov. 18, 2016). DHS responded that it had "carefully considered these concerns, but disagree[d] ... that eliminating the 90-day processing time for [Forms I-765] ... will cause ... longer adjudication timeframes"; that "DHS believes that ... Forms I-765 must be adjudicated within reasonable timeframes," and that, "[a]lthough DHS is eliminating the 90-day processing timeframe for Forms I-765 from the regulatory text, USCIS continues to be committed to the processing goals it has established for Form I-765." *Id.*

79. Defendants' willful failure to adhere anywhere close to their stated processing goals they used to justify the 2017 Final Rule is an irrational departure from a stated policy that has harmed Plaintiffs and putative class members and constitutes arbitrary, capricious, and an abuse of discretion under the APA.

80. Defendants' failures to timely process applications have led to loss of employment and employment opportunities for EAD-eligible Plaintiffs and deprived them of the ability to provide for themselves and their families. Defendants' actions have caused, and will continue to cause, ongoing harm to Plaintiffs.

81. The Court should find Defendants' disregard of their stated processing goals represents an irrational departure of their published processing goals in violation of the APA and order Defendants to return to a 90-day processing timeline or otherwise facilitate Plaintiffs' ability to show employment authorization through interim EAD documentation, earlier acceptance of renewal applications, or some combination thereof.

SECOND CAUSE OF ACTION

Violation of the APA, 5 U.S.C. § 706(1)--Defendants' Failure to Adjudicate Plaintiffs' EAD Applications Constitutes Action Unlawfully Withheld or Unreasonably Delayed

82. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

83. The "agency action" covered by the APA includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent to denial thereof, or failure to act." 5 U.S.C. § 551(13).

84. The APA explicitly provides a right of judicial review to a person "adversely affected or aggrieved" by an agency's "fail[ure] to act" or other agency action. 5 U.S.C. § 702.

85. When a proper showing is made, the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

86. Moreover, agencies are separately required to "proceed to conclude a matter presented to it . . . within a reasonable time." 5 U.S.C. § 555(b).

87. Defendants have a mandatory, non-discretionary duty to adjudicate Plaintiffs' EAD applications. *See* 8 C.F.R. § 274a.13(b)-(c). They must make that adjudication within a reasonable time. 5 U.S.C. § 555(b); *see also* 81 Fed. Reg. 82398, 82456 (DHS stating that EAD applications "must be adjudicated within reasonable timeframes."). While Defendants' published data indicates that an EAD application takes an average of just 12 minutes of staff time to adjudicate, each of Plaintiffs' EAD applications have been pending for over 180 days.

88. Courts in this Circuit analyze a claim of unreasonable delay under the six-part standard outlined in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"):

> (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 delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'

In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999) (*quoting TRAC*, 750 F.2d at 80) (quotation marks omitted).

89. Plaintiffs have established that each of the applicable *TRAC* factors weigh in their favor.

90. In 2017, Defendants averred to the public that it would maintain reasonable processing times that would remain tethered to their 90-day processing goals.

91. "[A] reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004).

92. While DHS chose to rescind a mandatory 90-day processing deadline for EAD applications, they avowed not to withhold adjudications for two or three times as long as its stated processing goals because even the agency understood that doing so would plainly frustrate Congress' intent to authorize noncitizens to work in the United States and cause harm to U.S. employers and foreign national employees.

93. Defendants' actions show USCIS has failed to timely process applications, which have caused job losses, gaps in employment, and lost employment opportunities for EAD-eligible

Plaintiffs. The emotional and financial toll is compounding daily. Defendants' actions have caused, and will continue to cause, ongoing harm to Plaintiffs. The first *TRAC* factor strongly favor Plaintiffs.

94. The Second *TRAC* factor does not apply here because there is no statutory deadline for the processing of EADs, though Congress certainly did not intend the agency to keep eligible workers unemployed or have workers suffer from wide gaps in employment due to the gross mismanagement of resources and abandonment of its public commitment to timely process EAD applications within 90-days, except in rare instances. *TRAC*, 750 F.2d at 80; *Cf.* 8 U.S.C. § 1571(b ("It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application.").

95. So do the third, fourth and fifth factors. Delays lasting well beyond six months have caused job losses, gaps in employment, and lost employment opportunities for EAD-eligible Plaintiffs who paid for applications that would allow them to work. This a matter of human health and welfare. There is no rational reason that can excuse the agency's behavior, including the failure to take interim measures to authorize those with long delayed applications, which have prevented thousands of eligible individuals from an adjudication of an EAD that they paid to receive.

96. While Defendants have competing priorities, a return to orbit for processing times or providing alternative interim relief for Plaintiffs, such as interim work authorization during the pendency of long delayed applications, favors Plaintiffs who seek to obtain authorization to work in this country. Without these measures, USCIS cannot "justify its delay to the court's satisfaction" simply by claiming that it should remain the sole arbiter of its operations given the record presented. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). These alternative forms of relief would produce a net benefit to not only Plaintiffs, but Defendants as well as relief would produce

a net benefit by allowing the agency to provide interim relief, if necessary, while they work to return to reasonable pace of adjudications. Relief to plaintiffs would not cause them to "leapfrog" others as they seek class wide relief for all those left in limbo with regard to applications for employment authorization for which they have paid for in advance.

97. As for the sixth factor, the maladministration of the agency is beyond cavil. They have never complied with their stated processing goals and they have now stretched beyond one year. They have accepted $410 for the adjudication of each application which takes an officer twelve minutes to process on average. Defendants cannot reasonably suggest that they have acted in good faith and the evidence tips toward an agency acting with impropriety.

98. The Court should find that Defendants have unreasonable delayed or unlawfully withheld the adjudication of Plaintiffs' EAD applications in violation of the APA and order immediate adjudication or automatic authorization of employment for Plaintiffs until the agency adjudicates the pending applications. *See Agbemaple v. INS*, slip opinion, 1998 WL 292441 at *2 (E.D. Ill. 1998) ("Congress could not have intended to authorize potentially interminable delays. We hold that as a matter of law, [plaintiff] is entitled to a decision [on his immigrant visa application] within a reasonable time, and that it is within the power of the court to order such an adjudication."); *Salehian v. Novak*, slip opinion, 2006 WL 3041109 at *2 (D. Conn. 2006) ("the Government simply does not possess unfettered discretion to relegate aliens to a state of 'limbo,' leaving them to languish there indefinitely. This result is explicitly foreclosed by the APA.").

THIRD CAUSE OF ACTION

Violation of the APA, 5 U.S.C. § 706(2)—Defendants have Arbitrarily, Capriciously, and Unlawfully Implemented the Adjudicatory Process for EAD Applications

99. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

100. The agency's implementation of the 2017 final rule constitutes arbitrary, capricious, and unlawful agency action under the APA.

101. Defendants have woefully and willfully failed to comply with anything close to intended processing times for EAD applications.

102. In doing so, it implemented the 2017 rule in an arbitrary and capricious manner that, as of now, contravenes its commitment to customer service and process within reasonable timeframes.

103. In refusing to allow Plaintiffs to make inquiries on the case status for over one year after they paid for an adjudication of an EAD and provide interim relief for applicants waiting more than 90 days, Defendants have "fail[ed] to consider [an] important aspect of the problem" faced by Plaintiffs who have paid for an adjudication of work authorization. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

104. Defendants have irrationally departed from their policy of allowing applicants a means to contact the agency and obtain customer service within its processing goal timeframe.

105. In 2017, Defendants publicly avowed to reduce gaps in employment and job losses by staying within a 90-day processing time, except in rare instances. It also provided those with pending applications, the opportunity to communicate with the agency where it failed to adhere to obligations.

106. Without taking into account the considerable interests of the Plaintiffs or the public, the agency has removed any discernable processing time and a means to communicate with the agency, in some cases until close to two years have passed without adjudication.

107. Moreover, Defendants have failed to take reasonable measures to provide relief to those stuck waiting for an adjudication or means to understand where they stand in the queue.

108. At the very least, Defendants should automatically allow applicants for EADs to work once their applications are pending for more than 90-days and for as long as it takes the agency to adjudicate the application.

109. Defendants' implementation of the 2017 final rule violates the APA.

FOURTH CAUSE OF ACTION

Violation of the APA, 5 U.S.C. § 706(2)—Defendants have Unlawfully Refused to Treat E-2Nonimmigrant Spouses as Work Authorized Incident to Status

110. Immigration laws grant E-2 spouses authorization for employment incident to status. *See* 8 U.S.C. § 1184(c)(2)(E) (requiring the agency to "authorize the alien spouse to engage in employment in the United States and provide the spouse with an 'employment authorized' endorsement or other appropriate work permit.").

111. The regulations omit E-2 visa holders from the list of nonimmigrants who must apply for employment authorization. See 8 C.F.R. 274a.12(c).

112. The regulations also confirm that E-2 visa holders are not one of the categories of visa holders required to separately file a Form I-765, Application for Employment Authorization Document, prior to accepting employment in the United States. *See* 8 C.F.R. 274.12(a) (omitting E-2 spouses from the list of aliens with employment authorization incident to status required to apply for employment authorization).

113. Labeling E-2 EAD applications as "(a)(17)" confirms the category is authorized employment incident to status meaning that they need not pay a fee or apply to receive work authorization. They should be allowed to work based upon showing lawful status with their "I-94" Arrival/Departure Record.

114. Defendants' failure to accord E-2nonimmigrants work authorization incident to status is unlawful and violative of the INA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. Assume jurisdiction over this matter;

B. Certify each class identified above;

C. Declare Defendants have unlawfully refused to treat E-2 nonimmigrants as work authorized incident to status;

D. Declare Defendants have irrationally departed and abandoned their commitment to 90-day processing times for EAD applications in violation of the APA;

E. Find that Defendants have unreasonably delayed or unlawfully withheld the adjudication of Plaintiffs' EAD applications in violation of the APA;

F. Compel Defendants to immediately adjudicate Plaintiffs' EAD applications without further delay;

G. Compel Defendants to rationally return to and maintain 90-day processing for EAD applications and compel Defendants to establish safeguards to guard against gaps in employment authorization by implementing further automatic extensions, issuing interim EAD documents, allowing for earlier filing of renewal EAD applications, or some combination thereof;

H. Award Plaintiffs attorneys' fees under the Equal Access to Justice Act or any other provision of law; and

I. Enter any other relief that is necessary for justice to be done.

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Respectfully submitted,

__/s/ Charles H. Kuck_

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