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15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 TONY N., KAREN M., JACK S.,  
19 HEGHINE MURADYAN, DAYANA  
20 VERA DE APONTE,  
21 Individually and on Behalf of All Others  
22 Similarly Situated,

23 Plaintiffs,

24 v.

25 U.S. CITIZENSHIP & IMMIGRATION  
26 SERVICES; DEPARTMENT OF  
27 HOMELAND SECURITY; ALEJANDRO  
MAYORKAS, Secretary of Homeland  
Security; UR JADDOU, Director of USCIS

Defendants.

Case No. 3:21-cv-08742-MMC

**PLAINTIFFS' OPPOSITION  
TO DEFENDANTS' MOTION TO  
DISMISS**

District Judge Maxine M. Chesney  
Hearing: March 11, 2022, 9 am

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1           **PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

2           **I.       INTRODUCTION**

3           On January 12, 2022, over two months after Plaintiffs filed this action, Defendants  
4 finally approved the last of Plaintiffs’ employment authorization document (EAD) renewal  
5 applications. Plaintiff Vera de Aponte waited over ten months for Defendant U.S. Citizenship  
6 and Immigration Services (USCIS) to adjudicate her EAD application—an application that  
7 USCIS itself reports should be processed in approximately twelve minutes. During that time,  
8 Ms. Vera de Aponte lost her job as a Registered Behavior Technician for special needs  
9 children and faced the prospect of losing her Medicaid provider number. Defendants have yet  
10 to provide an adequate explanation for why Plaintiffs’ simple applications took between over  
11 seven and over eleven months to process, causing all five plaintiffs to lose their jobs, leaving  
12 them struggling to support themselves and their families, and coping with anxiety and, in  
13 some cases, depression.  
14

15  
16           Instead, Defendants argue that Plaintiffs’ claims should be dismissed as moot because  
17 there is no “reasonable expectation” that Defendant USCIS will again fail to process  
18 Plaintiffs’ EAD renewal applications within the automatic extension period. Dkt. 65 at 16-17.  
19 Yet Defendants simultaneously argue that they are under no obligation to avoid gaps in  
20 employment authorization, *id.* at 18-21, and the processing times continue to increase. As of  
21 February 4, 2022, the average processing time at the Potomac Service Center is 10.5 to 11.5  
22 months<sup>1</sup>—up from 9.5 to 10 months in November 2021. *See* Dkt. 8 ¶ 58. The record shows  
23 that Plaintiffs will likely need to renew their EADs and, even if they apply well-in advance of  
24

25  
26           <sup>1</sup> USCIS, *Check Case Processing Times*, <https://egov.uscis.gov/processing-times/>  
27 (selecting “Form: I-765 Application for Employment Authorization” and “Field Office or  
Service Center: Potomac Service Center” and scrolling down to “Form type: Based on a  
pending asylum application [(c)(8)]”) (last visited Feb. 4, 2022).

1 expiration, there is a reasonable expectation that Defendant USCIS will again allow Plaintiffs  
2 to lose their employment authorization. Accordingly, Plaintiffs ask the Court to deny  
3 Defendants' motion to dismiss.<sup>2</sup>

## 4 **II. BACKGROUND**

5 Plaintiffs are asylum seekers who lost their work authorization due to Defendants'  
6 unreasonable delay in processing their EAD renewal applications. Plaintiff Tony N., a truck  
7 driver who delivered personal protective equipment across the country during the pandemic,  
8 lost his driver's license and his job, and postponed his dreams of starting his own truck  
9 driving business. Tony N. Decl., Dkt. 17-2. Plaintiff Doctor Heggine Muradyan, a medical  
10 doctor, lost her positions at two hospitals caring for underserved populations, and as a result,  
11 she could not provide care to her patients or support herself and her young son. Dr.  
12 Muradyan Decl., Dkt. 17-3. Plaintiff Karen M., now a mother to a newborn and three other  
13 young children, lost her job as a manager at McDonald's a month before she was scheduled  
14 to give birth. *See* Karen M. Decl, Dkt. 17-4. Plaintiff Jack S., an Apple, Inc. employee, lost  
15 his position and his driver's license, which limited his ability to care for his disabled partner.  
16 Jack S. Decl., Dkt. 17-5. Plaintiff Dayana Vera de Aponte lost her job and faced the  
17 possibility of losing her Medicaid provider number, a necessary license for her profession.  
18 Vera de Aponte Decl., Dkt. 17-6. The harms Plaintiffs suffered, including anxiety and  
19 depression, are mirrored in the severe harms suffered by the many asylum seekers who have  
20 lost or will imminently lose their employment authorization because of Defendants' delay.  
21  
22  
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26 <sup>2</sup> Plaintiffs acknowledge that the Court would need to revisit aspects of its December  
27 22, 2021 opinion to deny Defendants' motion. *See* Dkt. 61 at 4-5 (mootness), 6-7 (likelihood  
of success). Plaintiffs respectfully maintain that such reconsideration is warranted and that  
Defendants' motion to dismiss should be denied.

1 See Kafele Decl., Dkt. 17-7, Reddy Decl., Dkt. 17-8, Castillo Decl., Dkt. 17-9, Gilbert Decl.,  
2 Dkt. 17-10, Sheridan Decl., Dkt. 17-11, Odom Decl., Dkt. 17-13.

3 Defendants failed to process Plaintiffs' EAD renewal applications and the  
4 applications of hundreds of other asylum seekers within the 180-day automatic extension of  
5 employment authorization at 8 C.F.R. § 274a.13(d). They continue to fail to do so despite  
6 their June 22, 2020 assertion—offered as the sole rationale for formal notice and comment  
7 rulemaking—that it was “unnecessary” for asylum seekers to apply to renew their EADs 90  
8 days in advance of expiration because the automatic extension “effectively prevents gaps in  
9 work authorization for asylum applicants.” Removal of 30-Day Processing Provision for  
10 Asylum-Applicant Related Form I-765 Employment Authorization Applications, 85 Fed.  
11 Reg. 37502, 37509 (June 22, 2020). USCIS has previously identified—and does not currently  
12 dispute—that it takes 12 minutes to adjudicate a Form I-765 on average. Fee Schedule and  
13 Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280,  
14 62292 (Nov. 14, 2019) (proposed rule). The task is inherently ministerial. In Fiscal Year  
15 2021, USCIS adjudicated 219,018 EAD renewal applications for asylum seekers and denied  
16 only 6,974 of them—or just 3%. USCIS, *Form I-765, Application for Employment*  
17 *Authorization, Eligibility Category and Filing Type FY 2021*,  
18 [https://www.uscis.gov/sites/default/files/document/reports/I-](https://www.uscis.gov/sites/default/files/document/reports/I-765_Application_for_Employment_FY21.csv)  
19 [765\\_Application\\_for\\_Employment\\_FY21.csv](https://www.uscis.gov/sites/default/files/document/reports/I-765_Application_for_Employment_FY21.csv) (Dec. 15, 2021).

20  
21  
22 Faced with these delays, Plaintiffs filed suit on November 10, 2021, seeking class  
23 certification, and declaratory and injunctive relief under the Mandamus Act or the  
24 Administrative Procedure Act (APA). Dkt. 8. Plaintiffs argued that Defendants have a duty to  
25 process EAD renewal applications, 8 C.F.R. §§ 208.7, 274a.12(c)(8), 274a.13, and that their  
26  
27

1 failure to do so within the automatic extension of employment authorization, excluding time  
2 necessary to resolve any Request for Evidence (RFE), is unreasonable delay under the factors  
3 listed in *Telecomms. Rsch. & Action Ctr. v. FCC* (“*TRAC*”), 750 F.2d 70, 80 (D.C. Cir.  
4 1984). *Id.* ¶¶ 25, 88. Plaintiffs seek a declaratory judgment and an injunction ordering  
5 Defendants to adjudicate EAD renewal applications within the 180-day automatic extension.  
6 *Id.* at 32-33.

8 Plaintiffs subsequently filed motions for class certification and for a preliminary  
9 injunction, which the Court denied on December 22, 2021. Dkt. 61. In that opinion, the Court  
10 denied the motion for preliminary injunction on behalf of Plaintiffs Tony N., Dr. Muradyan,  
11 and Jack S. as moot, because USCIS had granted their renewal applications. *Id.* at 4-5. The  
12 Court further concluded that Plaintiffs had failed to show a likelihood of success under the  
13 *TRAC* factors. *Id.* at 6-11. Plaintiffs respectfully ask the Court to reconsider its reasoning  
14 underlying these rulings.

16 Defendant USCIS approved Plaintiff Dr. Muradyan’s application on November 23,  
17 2021, after it had been pending for 231 days, or over 7.5 months. Nolan Decl. ¶ 25, Dkt. 48-  
18 1. Defendant USCIS approved Plaintiff Tony N.’s application on November 29, 2021, after it  
19 had been pending for 341 days, or over 11 months. *Id.* Defendant USCIS approved Plaintiff  
20 Jack S.’s application on December 9, 2021, after it had been pending for 276 days, or over 9  
21 months. Dkt. 65-2; Jack S. Decl. ¶ 6. Defendant USCIS approved Plaintiff Karen M.’s  
22 application on January 10, 2022, after it had been pending for 283 days, or over 9 months.  
23 Dkt. 65-1; Karen M. Decl. ¶ 4. Finally, Defendant approved Plaintiff Vera de Aponte’s  
24 application on January 12, 2022, after it had been pending 321 days, or over 10.5 months.  
25 Dkt. 65-3; Vera de Aponte Decl. ¶ 5.



1           **III.    LEGAL STANDARD**

2           Defendants seek dismissal of Plaintiffs’ claims as moot, pursuant to Federal Rule of  
3 Civil Procedure 12(b)(1), and for failure to state a claim, under Federal Rule of Civil  
4 Procedure 12(b)(6). A claim survives a Rule 12(b)(1) motion to dismiss for mootness where  
5 the plaintiff establishes that the issues are capable of repetition yet evading review. *Schaefer*  
6 *v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000). A claim falls within this exception where  
7 “(1) the duration of the challenged action is too short to allow full litigation before it ceases,  
8 and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.”  
9 *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (quoting  
10 *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir.1993)).  
11

12           To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain  
13 sufficient factual matter, accepted as true, ‘to state a claim that relief that is plausible on its  
14 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,  
15 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual  
16 content that allows the court to draw the reasonable inference that the defendant is liable for  
17 the misconduct alleged.” *Id.* “[D]ismissal is proper only where there is no cognizable legal  
18 theory or an absence of sufficient facts alleged to support a cognizable legal theory.”  
19 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 965 (9th Cir. 2018) (quoting *Navarro v.*  
20 *Block*, 250 F.3d 729, 732 (9th Cir. 2001)).  
21

22           Where a plaintiff seeks identical relief under the Mandamus Act and the APA, courts  
23 analyze unreasonable delay claims under the APA standard and apply the six *TRAC* factors.  
24 *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997).  
25  
26  
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1           **IV.    ARGUMENT**

2           **A. Plaintiffs’ Claims Should Not be Dismissed Because They Are Capable of**  
3           **Repetition, But Evading Review**

4           Defendants do not and could not dispute that, notwithstanding Defendants’ delays,  
5 the timely processing of EAD renewal applications is an issue that will resolve before the  
6 appellate process. *See Biodiversity Legal Found.*, 309 F.3d at 1173 (noting that “two years  
7 was [] not enough time to allow for full litigation”). Rather, the question of whether  
8 Plaintiffs’ claims are moot turns on whether there is a “reasonable expectation” that Plaintiffs  
9 will again lose employment authorization because of Defendants’ failure to adjudicate within  
10 the automatic extension period. *See id.* Defendants argue that it is “pure speculation” that  
11 Plaintiffs’ employment authorization will lapse when they seek to renew their current EADs.  
12 Dkt. 65 at 16. Defendants are incorrect.

14           The facts show that Plaintiffs’ future harm is far from speculative. Asylum  
15 applications are currently taking many years to adjudicate. TRACImmigration, *A Mounting*  
16 *Asylum Backlog and Growing Wait Times*, <https://trac.syr.edu/immigration/reports/672/>  
17 (Dec. 22, 2021); *see also* Kafele Decl. ¶ 7 (noting over 350 clients who have been waiting  
18 three or more years for a decision); Castillo Decl. ¶ 14 (describing hearings scheduled as far  
19 out as 2025). Thus, it is likely the Plaintiffs will be forced to renew their EADs. Moreover,  
20 the current backlog has not decreased. Rather, it has increased. It is now taking nearly one  
21 year for the Potomac Service Center to process EAD renewal applications for asylum  
22 seekers. USCIS, *Check Case Processing Times*, <https://egov.uscis.gov/processing-times/>  
23 (selecting “Form: I-765 Application for Employment Authorization” and “Field Office or  
24 Service Center: Potomac Service Center” and scrolling down to “Form type: Based on a  
25 pending asylum application [(c)(8)]”) (last visited Feb. 4, 2022) (showing average processing  
26  
27

1 time of 10.5 to 11.5 months). And Defendants have expressly rejected any obligation to  
2 prevent gaps in employment authorization, even disavowing their express commitment in  
3 notice and comment rulemaking. *See* Dkt. 65 at 18-21. It is reasonable to expect that  
4 Plaintiffs will again be required to renew their EADs and that Defendants will again fail to  
5 adjudicate within the automatic extension period. *See Biodiversity Legal Found.*, 309 F.3d at  
6 1174 (finding plaintiffs challenging government delay in making endangered species  
7 determinations met the capable of repetition component of the exception given their history  
8 of petitioning the government to list certain animals as endangered). While this Court has  
9 found that the claims of several Plaintiffs were moot for the purposes of a preliminary  
10 injunction, Dkt. 61 at 4-5, Plaintiffs respectfully ask the Court to reconsider this  
11 determination and find that all five Plaintiffs present claims that are capable of repetition but  
12 evading review. *See S. Oregon Barter Fair v. Jackson Cty., Oregon*, 372 F.3d 1128, 1136  
13 (9th Cir. 2004) (noting the “general rule that decisions on preliminary injunctions ‘are not  
14 binding at trial on the merits,’ . . . and do not constitute the law of the case”) (quoting *Univ.*  
15 *of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

18 **B. A Decision in This Case Would Not Be Advisory Because Defendants’**  
19 **Failure to Adjudicate Within the 180-Day Automatic Extension Period is**  
20 **Unreasonable**

21 Defendants make related arguments to support dismissal under Rules 12(b)(1) and  
22 12(b)(6). With respect to mootness, Defendants argue that any analysis of the *TRAC* factors  
23 now would be advisory because the *TRAC* analysis will necessarily be different when  
24 Plaintiffs again seek to renew their EADs. Dkt. 65 at 17-18. With respect to whether  
25 Plaintiffs have stated a colorable legal claim, Defendants argue that the *TRAC* factors do not  
26 show Defendants’ unreasonable delay when they fail to adjudicate EAD renewal applications  
27

1 for asylum seekers within the 180-day automatic extension period. *Id.* at 18-21. Plaintiffs  
2 have a single response: notwithstanding any variation in facts, all the *TRAC* factors weigh in  
3 favor of Plaintiffs (or remain neutral) when Defendants fail to adjudicate EAD renewal  
4 applications within the automatic extension period, excluding the time necessary to respond  
5 to an RFE. Plaintiffs have therefore stated a legal claim on which relief can be granted and a  
6 determination in Plaintiffs' favor would not be advisory, but instead would protect them from  
7 future lapses in employment authorization.  
8

9 As Plaintiffs discussed at length in their motion for a preliminary injunction and  
10 reply, notwithstanding the absence of any statute or regulation setting forth an adjudication  
11 timeframe, the APA itself forbids "unreasonable delay" and the *TRAC* factors dictate the  
12 outcome here. Dkt. 17 at 16-21; Dkt. 52 at 8-17. Defendants rightly focus on the first, "most  
13 important," *TRAC* factor but wrongly conclude that it does not weigh in Plaintiff's favor  
14 when USCIS fails to adjudicate within the automatic extension period. In doing so  
15 Defendants contort the English language and common sense to argue that USCIS's  
16 representation that the automatic extension period "*effectively prevents* gaps in work  
17 authorization" did not mean that it would "eliminate" gaps. Dkt. 65 at 19 (quoting 85 Fed.  
18 Reg. at 37509) (emphasis added); *see* "Effective," *Merriam-Webster.com*,  
19 <https://www.merriam-webster.com/dictionary/effective> (last visited Jan. 31, 2022) (defining  
20 "effective" as "producing a decided, decisive, or desired effect"); "Prevent," *Merriam-*  
21 *Webster.com*, <https://www.merriam-webster.com/dictionary/prevent> (last visited Jan. 31,  
22 2022) (defining "prevent" as "to keep from happening or existing"). Given Defendants' own  
23 commitment during rulemaking, Congress' sense at 8 U.S.C. § 1571(b) that even  
24 immigration benefits that provide immigration status should be adjudicated within 180 days,  
25  
26  
27

1 and the twelve-minute, inherently ministerial nature of these adjudications, the “rule of  
2 reason” in *TRAC* factor one and the congressional timeframe at *TRAC* factor two call for  
3 adjudication within the automatic extension period. Dkt. 17 at 16-19; Dkt. 52 at 9-15.

4  
5 The remaining factors similarly weigh in Plaintiffs’ favor. Loss of employment  
6 authorization brings a host of hardships to all asylum seekers, beginning with the loss of  
7 employment and extending to loss of driver’s licenses and employee benefits and the  
8 attendant emotional distress, such that *TRAC* factors three and five weigh in their favor. *See*  
9 *Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1162 (W.D. Wash.  
10 2018) (finding the *TRAC* factors supported a class-wide permanent injunction and that *TRAC*  
11 factors three and five “strongly weigh in favor of an injunction” because “[a]sylum seekers  
12 are unable to obtain work when their EAD applications are delayed and consequently, are  
13 unable to financially support themselves or their loved ones”); *Santillan v. Gonzales*, 388 F.  
14 Supp. 2d 1065, 1084 (N.D. Cal. 2005) (holding the *TRAC* factors weighed in favor of class-  
15 wide relief, including *TRAC* factors three and five, “where the failure to present  
16 documentation [of lawful permanent resident status] precludes lawful employment and  
17 obtaining certain state benefits”). And Defendants have not offered any evidence to show that  
18 processing Plaintiffs’ twelve-minute applications in 180 days would impact any other  
19 priorities—higher or lower—such that *TRAC* factor four also goes in Plaintiffs’ favor.  
20 Finally, *TRAC* factor six, which addresses any bad faith on the part of the government, is  
21 neutral. Dkt. 52 at 17.

22  
23  
24 Again, Plaintiffs acknowledge that the Court has found that the *TRAC* factors likely  
25 do not support relief in this case. Dkt. 61 at 11. However, Plaintiffs ask that the Court  
26 reconsider that finding and hold that under the *TRAC* factors, Defendants unreasonably delay  
27

1 adjudication when they fail to adjudicate Plaintiffs' EAD renewal applications within the  
 2 automatic extension period, excluding any time necessary to resolve an RFE. *See S. Oregon*  
 3 *Barter Fair*, 372 F.3d at 1136.

#### 4 V. CONCLUSION

5 Throughout this litigation Defendants have minimized the significant harm they cause  
 6 while attempting to avoid responsibility for it. At base, Plaintiffs are not asking for much—  
 7 processing EAD renewal applications within the 180-day automatic extension period should  
 8 not be an insurmountable task. Yet USCIS has proven itself unwilling do its job. *See, e.g.,*  
 9 Gov't Accountability Office, *Report to Congressional Requesters, U.S. Citizenship and*  
 10 *Immigration Services, Actions Needed to Address Pending Caseload* (Aug. 2021),  
 11 <https://www.gao.gov/products/gao-21-529>. Court intervention is necessary. For the foregoing  
 12 reasons, the Court should deny Defendants' motion to dismiss.  
 13  
 14

15  
 16 DATE: February 4, 2022

Respectfully submitted,

17 /s/ Emma Winger

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