UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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| DEEPIKA GONA,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,<br><br>Defendant. | CASE NO. 1:20-cv-3680-RCL |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

The United States Citizenship and Immigration Service ("USCIS") is a paradox. The personnel levels at its Service Center Operations (the division responsible for adjudicating H-4 visa extensions) has increased by 23.6% since Fiscal Year 2016. In the past year the agency has reported an unprecedentedly sharp decline in applications at its service centers. Based on these facts one would expect processing of applications to be unprecedentedly fast. But this is not the case for H-4 applicants using Form I-539. These dependent spouses of H-1B visa holders have seen processing times increase from 3 months in 2016 to up to 11 months at the Vermont Service Center and over 21 months in the California Service Center. Plaintiff Gona has waited over seven months for a final agency action on her applications to extend her H-4 status and Employment Authorization Document. This delay is unreasonable, and the agency cannot justify the harm it has inflicted on Plaintiff and hundreds of thousands of similarly situated applicants.

This District has previously heard cases making similar allegations, but making different arguments and citing different evidence. Most recently, relying on the declaration of Jennifer

Roller, this Court determined that the agency had a rule of reason governing its processing of H-4 visa extensions submitted on Forms I-539, and that an order from the Court would result in plaintiff jumping ahead of others already in line. *Nibber v. U.S. Citizenship & Immigration Servs*., 2020 U.S. Dist. LEXIS 235099, *14, 2020 WL 7360215 (December 15, 2020), and *Muvvala v. Wolf*, 2020 U.S. Dist. LEXIS 177082, *4, 2020 WL 5748104 (September 25, 2020).

However, new evidence, and actual testimony from Ms. Roller, establishes that the agency's claimed first in first out ("FIFO") process does not exist, and the agency has no line to jump. Further, the agency has sufficient resources to process the plaintiff's applications without impacting higher competing priorities. Consequently, nothing impedes this Court from finding the agency has unreasonably delayed the adjudication of Plaintiff's applications.

This Court should find that the agency has intentionally acted in bad faith to create these delays, and enter an order directing the agency to adjudicate H-4 extension petitions and employment authorization renewals within 7 days.

## ISSUES PRESENTED

Plaintiff is a highly skilled information technology professional who has been working to transform the Maryland Department of Human Services IT infrastructure. Her work is vital to the timely and efficient delivery of services to Maryland's most vulnerable residents. Exhibit 4. She is the spouse of an H-1B worker and is eligible for H-4 visa status and employment authorization ("EAD"). She applied for her H-4 and EAD to be extended on July 9, 2020. To date, she has been waiting for 214 days, or seven months for a decision. Her prior H-4 and EAD expired on December 30, 2020.

However, the United States Citizenship and Immigration Service ("USCIS") is forcing her out of work and imperiling the wellbeing of those vulnerable residents. Despite record high

manning levels and record low volume of work to perform the agency will not adjudicate her requests for extension of her visa and employment authorization.

The ultimate question for the Court is whether it is reasonable for these people to lose their jobs because the government agency fails to do its job. The legal questions leading that ultimate answer are:

1. Does the data presented in Exhibit 1, and the testimony of USCIS Section Chief Jennifer Roller (Exhibit 5) refute the agency's claim (and her prior claim) that it has a rule of reason governing the processing of H-4 extensions submitted on Form I-539? Does the agency's failure to consider job loss caused by delay render any claimed rule of reason arbitrary and capricious? Does the agency's reuse of some applicants' previously provided biometrics (Exhibits 2, 3, 11, 14, and 16), but not others, render its claimed rule of reason arbitrary and capricious?

2. Have Congress and the agency already balanced competing policy interests and determined retention of high skilled workers and loss of employment authorization is a greater harm? *See* Pub. Law No. 106-313, § 106(a)-(b) (Oct. 17, 2000), and 80 Fed. Reg. 10284 (February 25, 2015). Does the evidence attached with this motion showing available manning increased while adjudicatable petitions (those with accepted biometrics) has decreased show that ordering USCIS to act on Plaintiff's petition will not harm or prejudice the agency? Exhibit 15, *see* also Exhibit 5, pg. 11 lns. 17-24, and 85 C.F.R. 46793 (August 3, 2020). Does the absence of a rule of reason negate the agency's "line jumping defense?"

3. Does the fact that agency has abandoned its requirement for new biometrics for H-4 extension petitions negate the agency's claim that its delays are justified because of limited biometric appointment availability? Exhibits 2, 3, 11, and 16.

4. Did the agency create a rule of reason that H-4 visa extensions should be processed within 180 days of filing? *See* 80 Fed. Reg. 10298, 10299.

5. Given that the overriding goal of the H-4 EAD is to entice high skilled workers to stay in the United States, and the program was designed to avoid gaps in H-4 employment authorization, is it reasonable for H-4s to lose work authorization (and their jobs) solely because of government inaction? Can the agency's delay be excused by a benign explanation or is it the result of bad faith?

## LEGAL BACKGROUND

### A. H-1B Visa, Retention of Highly Skilled Workers

The Immigration and Nationality Act, as amended (INA), provides for the admission of temporary, skilled workers in H-1B classification to perform services for United States employers in specialty occupations. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b). The spouses of H-1B workers who accompany the H-1B principal are permitted to stay in the United States in H-4 classification during the same period of admission as the H-1B nonimmigrant. *See* 8 C.F.R. § 214.2(h)(9)(iv); 80 Fed. Reg. 10284, 10286 (USCIS) (Feb. 25, 2015).

Although skilled H-1B workers are limited to a six-year period of authorized stay in the United States, employers may file immigrant visa petitions on behalf of those workers to retain their services as permanent residents. *See* 8 U.S.C. §§ 1153(b), 1154(b). However, employment-based immigrant visas are limited to 140,000 for each fiscal year, *see* 8 U.S.C. § 1151(d)(1)(A), stratified according to preference category, *see* 8 U.S.C. § 1153(b), with further specific numerical limits per country. *See* 8 U.S.C. § 1152(a)(2). As a result of those numerical limits, many of the employment-based preference categories are oversubscribed, limiting the ability of skilled H-1B

workers to obtain permanent resident status and continue to fill the sustained needs of American companies. *See* 8 C.F.R. § 245.1(a); 80 Fed. Reg. at 10286-87.

To keep H-1B workers in the country beyond the six-year limit, Congress changed the law. *See* American Competitiveness in the 21st Century Act (AC21), Pub. Law No. 106-313, § 106(a)-(b) (Oct. 17, 2000); Pub. Law No. 107-273 § 11030A(a)-(b) (Nov. 2, 2002). The H-1B may be extended in three-year increments beyond the six-year limit if the employee has an approved petition for an immigrant visa. *Id.* and 8 C.F.R. § 214.2(h)(15)(ii)(B). Under this legislative mandate, USCIS acknowledged that "Congress therefore has passed legislation specifically encouraging, and removing impediments to, the ability of H-1B nonimmigrants to seek [lawful permanent resident] status, such that they may readily contribute permanently to United States economic sustainability and growth." 80 Fed. Reg. at 10289.

Contemporaneously with AC21, Congress passed legislation to eliminate adjudication backlogs and to make improvements in infrastructure to allow legacy INS (now USCIS) to operate more efficiently. *See* Pub. Law No. 106-313 § 204(a) (Oct. 17, 2000). As part of the appropriations for infrastructure improvements, Congress set an outer limit of 30 days for the final adjudication of petitions for nonimmigrant status under INA § 214(c), *id.* § 202(b), which includes petitions for classification of H nonimmigrants. *See* 8 U.S.C. § 1184(c)(1).[1]

**B. H-4 Visas, Employment Authorization, and Agency Manning**

The H-1B visa holder's dependents may be lawfully admitted on H-4 visas. 8 U.S.C. § 1101(a)(15)(H). H-4 visa holders are "derivative beneficiaries" and derive their lawful status from

[1] Congress also set a limit of 180 days for the final adjudication of an "immigration benefit application," Pub. Law No. 106-313 § 202(b), which is defined as "any application or petition to confer, certify, change, adjust, or extend any status granted under the Immigration and Nationality Act." *Id.* § 203(2).

the status of the primary H-1B visa holder. H-4 visas are submitted on a Form I-539, Application to Extend/Change Status Nonimmigrant status. The adjudication of an H-4 visa extension is limited to determining: 1. Has the H-1B extension been approved; 2. Is there a marital relationship between the H-4 and H-1B); and, 3. Does the spouse have an approved Form I-140 (for stays exceeding the six year limit). This is not a complex inquiry and, in most H-4 extensions the agency has made this determination on multiple prior applications.

The agency recently published its past and current workload for different immigration benefit determinations. 84 Fed. Reg. 62289 (Nov. 14, 2019). For fiscal years 2019 and 2020 the agency projected annual H-1B petitions submitted via Form I-129, Petition for Nonimmigrant worker, would total 423,304 per year. *Id.* The agency states that it takes adjudicators 1.10 hours (one hour and six minutes) of touch time to adjudicate an H-1B petition filed on a Form I-129. *Id.* at 62292. The agency stated that in FY 2017 it processed 172,001 Forms I-539, and in FY 2020 it would process 231,000 Forms I-539. *Id.* 62289. Although the Form I-539 is used for multiple categories the vast majority of applicants are H-4 visa holders. The agency states that it takes adjudicators 0.51 hours (30.6 minutes) of touch time to adjudicate an extension of nonimmigrant status filed on a Form I-539. *Id.* at 62292. The agency also states that it takes adjudicators an average of 0.20 hours (12 minutes) to adjudicate employment authorization applications for all visa categories filed on Form I-765. *Id.* at 62292.

An H-4 visa holder is not automatically entitled by statute to seek an accept employment in the United States until their H-1B spouses received green cards. *See* 8 U.S.C. § 1324a(a) and (b). The agency noted that H-1B workers tended to have highly educated spouses who were locked out of the labor force, which created a disincentive for H-1Bs to stay in the United States. *See*

Notice of Proposed Rulemaking, 79 Fed. Reg. 26891 (May 12, 2014).[2] However, the INA authorizes the agency to grant employment authorization to classes of nonimmigrants not explicitly authorized by statute.[3] 8 U.S.C. 1374a. Consistent with AC21, the Agency sought to provide work authorization for H4s in order to retain high skilled professionals for United States employers by providing them most of the same benefits they would enjoy if they had an immigrant visa (green card) immediately available. 79 Fed. Reg. 26891. DHS issued the final rule to extend eligibility for employment authorization to H-4. 80 Fed. Reg. 10284 (February 25, 2015). The agency's own description of the rule states:

> The final rule will also support the goals of attracting and retaining highly skilled foreign workers and minimizing the disruption to U.S. businesses resulting from H–1B nonimmigrants who choose not to pursue LPR status in the United States. *By providing the possibility of employment authorization to certain H– 4 dependent spouses, the rule will ameliorate certain disincentives for talented H–1B nonimmigrants to permanently remain in the United States and continue contributing to the U.S. economy as LPRs*. *This is an important goal considering the contributions such individuals make to entrepreneurship and research and development, which are highly correlated with overall economic growth and job creation.*

In the comments to the final rule, the agency stated that it considered several options but determined the proper duration of the H-4 EAD must match the H-1B and H-4 periods of

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[2] Despite AC21's allowance of extensions beyond the sixth year, many professionals were forced to leave the US because their dependent spouses lacked the ability to work for years on end. 80 Fed. Reg. 10284 (February 25, 2015) ("These waiting periods increase the disincentives for H–1B nonimmigrants to pursue LPR status and thus increase the difficulties that U.S. employers have in retaining highly educated and highly skilled nonimmigrant workers"). The NPRM discussed the statutory authority for extending employment authorization to certain H-4 visa holders, and also laid out the positive impact on the greater United States economy the regulatory change would create. Id. The agency also discussed the financial hardship faced by these nonimmigrants and how it was created by the lack of employment authorization. *Id.*

[3] A nonimmigrant who works without authorization is barred from ever receiving lawful permanent resident status. 8 U.S.C. § 1255(c)(2), (8). The INA also provides stiff civil and criminal penalties for employers who offer employment or to continue employing a non-citizen who does not possess a valid employment authorization document. 8 U.S.C. § 1324a(a)(1), (f) and (h)(3).

admission. 80 Fed. Reg. 10297. The agency also rejected proposed requirements that would make the application process more onerous, stating that: "DHS is not aware of any risk factors—such as fraud, criminal activity, or threats to public safety or national security—associated with H–4 dependent spouses as a whole that would support imposing [additional burdens]." *Id.*

In the rule making process several comments were received expressing concern for job disruption if the agency did not provide timely adjudications. 80 Fed. Reg. 10297-10301. The agency's final rule determined gaps in employment authorization were a significant concern but could be prevented if H-4s filed EAD renewal applications concurrently with their spouses' H-1B extension petitions. In the ideal scenario this would allow both applications to be filed six months prior to expiry. *Id.* at 10297-10299. According to the agency's analysis, concurrent filing "should also help H-4 dependent spouses avoid gaps in employment authorization, as these forms may be filed concurrently up to six months in advance of the date of need." 80 Fed. Reg. 10298, 10299. The agency asserted that gaps in employment authorization could be avoided if "the H-4 dependent spouse timely file all necessary applications." *See id.* By the agency's reasoning, any H-4 extension and H-4 EAD renewal that is submitted in a timely manner should be approved prior to losing employment authorization.

The rule was codified at 8 C.F.R. §§ 214.2(h)(9)(iv), and 274a(c)(26). This rule implemented the congressional intent expressed in AC21 as it encouraged potential H-1B nonimmigrants seeking LPR status and their H-4 dependents to remain in the United States. *See* 80 Fed. Reg. 10284. H-4 visa holders seeking and EAD file the application on the Form I-765.

Immigration benefits like the H-1B, H-4, and EAD are processed by the agency at one of four service centers located in California, Nebraska, Texas, or Vermont. The service centers are part of USCIS's Service Center Operations Directorate. USCIS has steadily increased the manning

of its field operations staff growing from 3,969 employees in 2016 to 5,197 in 2020. The agency recently noted that:

> DHS acknowledges the broad effects of the COVID–19 international pandemic on the United States broadly and the populations affected by this rule. USCIS has seen a dramatic decline in applications and petitions during the COVID–19 pandemic which has also resulted in an unprecedented decline in revenue.

85 C.F.R. 46793 (August 3, 2020). While the agency has more manning than ever, the amount of available work has plummeted.

**C. Biometric Collection**

Starting in 2003 the Department of Homeland Security instituted the US VISIT program which collects biometrics from aliens entering or seeking admission to the United States. This program was expanded in 2009 to capture biometrics, and every H-1B and H-4 visa applicant since that date is required to give biometrics at least twice before receiving a visa and entering the United States. The program summary states:

> The US-VISIT program, through U.S. Customs and Border Protection (CBP) officers, collects biometrics (digital fingerprints and photographs) from aliens seeking admission to the United States. 73 FR 22066. The US-VISIT program also receives biometric data collected by Department of State (DOS) consular offices in the visa application process. DHS checks biometric data on those applying for admission to the United States against government databases to identify suspected terrorists, known criminals, or individuals who have previously violated U.S. immigration laws. These procedures assist DHS in determining whether an alien seeking to enter the United States is, in fact, admissible to the United States under existing law. Biometric data collected by US-VISIT assists DOS consular officers in the verification of the identity of a visa applicant and the determination of the applicant's eligibility for a visa. DHS's ability to establish and verify the identity of an alien and to determine whether that alien is admissible to the United States is critical to the security of the United States and the enforcement of the laws of the United States. By linking the alien's biometric information with the alien's travel documents, DHS reduces the likelihood that another individual could assume the identity of an alien already recorded in US-VISIT or use an existing recorded identity to gain admission to the United States.

73 Fed. Reg. 77473 (December 19, 2008). US VISIT requires visa applicants to provide biometrics at a US consulate when applying for a visa. This information is then compared against a second set of biometrics collected from the applicant at the port of entry when seeking admission to the United States. *Id.*

The Department of State shares information in Visa Records with the Department of Homeland Security. 83 Fed. Reg. 28062-63. The Department of Homeland Security's Office of Biometric Information Management ("OBIM") receives biometrics from DOS for use in domestically filed applications for immigration benefits. https://www.dhs.gov/obim (accessed January 25, 2021), and https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim-identappendices-november2019.pdf (accessed January 25, 2021). Plaintiff has previously given biometrics in conjunction with an application for immigration benefits at the United States Consulate in 2017, and the port of entry on June 4th, 2017. She most recently gave biometrics when traveling abroad and her reentry on November 30, 2019.[4] Exhibit 4, Plaintiff's Declaration. The agency, at all times relevant to this case, had access to the plaintiff's previously provided biometrics. The agency had the capacity to her biometrics at any time.

In addition to biometrics collected through US VISIT, USCIS collects new biometrics in conjunction with a limited number of immigration related applications. Prior to March 6, 2019, the agency required some applicants for employment authorization documents (EAD), submitted on Form I-765, to provide new biometrics. Exhibit 6, Instructions to Form I-765 (July 17, 2017). The agency collected these biometrics at Application Support Centers. The agency's ASCs

[4]https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/border-biometrics.html (accessed September 21, 2020) ("Additionally, the Homeland Security Council decided that the U.S. standard for biometric screening is ten fingerprint scans collected at all U.S. Embassies and Consulates for visa applicants seeking to come to the United States.")

collected 3,928,588 new biometrics in Fiscal Year 2017. 85 Fed. Reg. 56371, Table 5 (September 11, 2020). Up until 2017, despite requiring new biometrics from these selected applicants the agency was capable of processing applications in a relatively timely manner. Compare *id*. and Exhibit 7, USCIS Historic Processing Times.

Biometrics are collected by the agency for "identity management." 85 Fed. Reg. 56351. The agency stated that when co

**D. <u>Failed Attempts to Rescind H-4 EAD Regulations</u>**

After the 2016 election the Federation for American Immigration Reform ("FAIR") and anti-immigration advocacy group published its "Immigration Priorities for the 2017 Presidential Transition." Exhibit 12. FAIR's listed priorities mirror the nation's immigration strategy for the following four years. *See id*. at Pgs. 11-18. Among FAIR's greatest priorities for the prior administration was ending employment authorization for H-4 spouses. *Id.* at Pg. 15.[5] The Immigration Reform Law Institute ("IRLI") is FAIR's affiliated legal organization. https://www.fairus.org/about-fair/immigration-reform-law-institute (accessed February 4, 2021). It claims to be "the only public interest non-profit law firm in the United States devoted exclusively to protecting the rights and interests of Americans in immigration-related matters." *Id.*

In 2017 the agency announced that it intended to rescind the regulations granting H-4 EADs. Exhibit 8, Pg. 1, RIN: 1615-AC15, Removing H-4 Dependent Spouses From the Class of Aliens Eligible for Employment Authorization[6]. The anticipated publication date for the new

[5] In part the document states: "DHS must revoke work authorization for H-1B spouses. The INA expressly denies work authorization to H-1B spouses and the Obama administration's decision to ignore the relevant statutes is blatantly illegal."

[6] In November 2020, OMB returned the proposed regulation to DHS instead of publishing it for notice and comment in the Federal Register. The agency continued to pursue publishing the regulation until it was officially withdrawn on January 25, 2021.

regulation was the Spring of 2018. *Id.* The agency was unable to transmit the proposed rule to the Office of Management and Budget ("OMB") until February 20, 2019. *Id*., Pg. 2.

The Immigration Reform Law Institute met with the agency on March 26, 2021 to discuss the "H-4 Recission Rule." Exhibit 13, Pg. 1. IRLI provided the agency with a point paper advocating the elimination of H-4 visa holders from the economy. *Id.* at Pg. 2. This paper expounded in greater detail its desire and reasoning for ending H-4 employment authorization.

### E. Policy Change Requiring New Biometrics for Form I-539 Petitions, H-4 Processing Delays, and COVID

Also, in March 2019, the agency announced that it would begin requiring applications submitted on Form I-539, of which the H-4 is the most numerous, to be accompanied by *newly* provided biometrics. https://www.uscis.gov/archive/uscis-to-publish-revised-form-i-539-and-new-form-i-539a (accessed February 4, 2021). The agency stated it was requiring biometrics for I-539 applicant for identity management. Exhibit 11, Pg. 4. In other words, USCIS collects biometrics to ensure files were not mixed up or confused between applicants with the same name. *Id.* Biometrics were not needed from I-539 applicants for criminal background checks. *Id.* Pg. 4-5. Thus, in the context of the Form I-539 the agency was not concerned about national security, fraud or criminality, it was solely concerned with managing records.

These biometrics would be provided at the agency's ASCs. *Id.* Comparing the most recent published data for biometrics processed at the agency's ASCs (3,928,588 in FY 2017) and Form I-539s adjudications for that same year (172,000 in FY 2017) the new biometric requirement could be expected to increase total biometric appointments by 4.38%. *Compare* 84 Fed. Reg at 62292 and 85 Fed. Reg. at 56371, Table 5.

It is important to note that the agency has endorsed, and recognized the value in reusing previously provided biometrics for the purpose of identity management:

> Identity verification *may be done outside of the United States* (by DHS or DOS) or within the United States (at ASCs, USCIS offices, or other DHS facilities). Identity verification also *allows the reuse of enrolled identity data* (both biometric and biographic) that has already been vetted. Such reuse reduces the amount of erroneous or conflicting data that can be entered into systems and reduces the cost and complexity of repetitive collection and validation. Reusable fingerprints allow for more immediate and recurrent background checks, and reusable photographs allow for quick production of documents with high consistency and integrity. DHS recognizes that biometric reuse is acceptable, when there is identity verification, but in the case of children biometric reuse could be impacted by the rapidly changing physical attributes of children.

85 Fed. Reg. 56351.

The California and Vermont Service Centers publish their Form I-539 processing times by visa category. Prior to the new biometrics policy F, H, J, L, and M visas (all using the Form I-539) had roughly the same processing time of 2.5 to 3 months. Exhibit 9, Pg. 2. Exhibit 10, Pg. 2. On February 24, 2020, nearly a year after new biometrics requirement began, processing times increased at the Vermont Service Center to 5 to 7 months. Exhibit 10, Pg. 7. At the California Service Center I-539 processing times increased at a disparate rate: F and M (4 to 5.5 months); H (7 to 9 months); J (2.5 to 4.5 months); and L (4 to 6 months). Exhibit 9 at Pg. 5. At that time the agency did not explain the emerging discrepancy in processing times.

On March 1, 2020 the agency closed its ASCs because of COVID and ceased collecting new biometrics for all form types. Exhibit 14. At that time the agency determined that it would reuse previously provided biometrics for applicants for employment authorization documents in order to avoid job loss. *Id.* However, the agency refused to reuse previously provided biometrics to adjudicate Forms I-539. This included refusing existing biometrics for H-4 and L-2 beneficiaries who were also applying for employment authorization. As noted earlier, the requirement for I-539 applicants to provide new biometrics was solely designed for file management and was not to prevent fraud or for national security reasons. Exhibit 11, Pg. 4-5.

In the wake of the ASC closures the discrepancy between different visa categories using the Form I-539 persisted. On June 8, 2020, three months after ASC closure, the California Service Center posted the following processing times: F and M (2.5 to 4 months); H (7 to 9 months); J (2.5 to 4.5 months); and L (4 to 6 months). Exhibit 9, Pg. 7. Vermont disclosed it was processing H-4 extensions in 6 to 8 months. Exhibit 10, pg. 8.

On February 4, 2021, the California Service Center published the following processing times: F and M (10 to 13 months); H (16 to 21 months); J (2.5 to 4.5 months); and, L (9 to 11.5 months). Exhibit 10, at Pg. 9. Vermont disclosed it was processing H-4 extensions in 8.5 to 11 months. Exhibit 10, pg. 10.

While the agency allowed the reuse of biometrics when processing applications for non I-539 employment authorizations, it prohibited the reuse of biometrics for nonimmigrants seeking status on the Form I-539 who also sought employment status. Exhibit 14. Curiously, and without explanation, in September 2020 the agency began issuing notices to some, but not all, H-4 applicants that it would reuse their previously provided biometrics. Exhibit 2 (Plaintiffs from *Neema v. USCIS* with reuse notices) and 3 (Plaintiffs from *Kolluri v. USCIS* with reuse notices). The notices in Exhibits 2 and 3 were all dated September 17, 2020. As of January 29, 2021, only one of those plaintiffs' Form I-539 applications has been adjudicated. *Id.* The remainder have been pending more than six months, and ready for adjudication for more than 130 days. *Id.*

In December of 2020 the agency informed the public that it would begin accepting previously provided biometrics for some Form I-539 applicants. Exhibit 16. The criteria for this waiver was imprecise. Given that all H-4s have given biometrics on multiple occasions, and all have biometrics readily available to the agency for document production and file management, it is not clear who still needs new biometrics. Thus, H-4 applications suffer delays far in excess of

historical processing times even when they do not require biometrics. This despite the agency's record high levels of manning at its service centers.

## ARGUMENT

On a motion for a preliminary injunction, plaintiff must make a "threshold showing" of four factors. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 844-845 (9th Cir. 2020) quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Plaintiff must show that (1) she is likely to succeed on the merits, (2) she is likely to "suffer irreparable harm" without relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest. *Id. citing Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). "When the government is a party, these last two factors merge." *Id. quoting Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

### I. Plaintiff is Likely to Prevail on the Merits

The Administrative Procedure Act grants applicants for government benefits the ability to challenge unreasonable processing times and agency action unlawfully withheld. 5 U.S.C. § 706. The APA also gives standards for how agencies should proceed when determining how long to take adjudicating individual applications. 5 U.S.C. § 555(b). The law requires the agency to give "due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." *Id*. Whether or not a delay is unreasonable is determined by analyzing the TRAC factors, which 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[;] [*14] (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.

*Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507, 511 n.7 (9th Cir. 1997) (quoting *Telecomm'ns Research & Action Ctr. V. FCC* ("TRAC"), 750 F.2d 70, 242 U.S. App. D.C. 222, 80 Cir. 1984)).

## A. TRAC Factor 1 and 2: The Evidence Shows the Agency Lacks a FIFO Process and Employs Nothing Approximating a Rule of Reason

The agency cannot prove that it has a rule of reason governing its processing of H-4 extensions. Even if it has an aspirational rule it cannot prove it follows such a rule. Contrary to its prior claims, the evidence refutes its claimed "first in first out" process. Moreover, by statute and structure of the regulation it is clear that any delay in excess of 180 days is unreasonable.

### 1. Actual Data Refutes FIFO

First and foremost, the agency has stated its massive delays in I-539 processing are due to its needs to collect new biometrics. However, this need no longer appears valid for all applicants. However, the agency has not articulated a rule of reason governing which biometrics will be reused, which in turn determines when a petition can be adjudicated.

This factor may weigh in defendant's favor if it can establish it has a rule of reason and actually follows it. *Nibber v. U.S. Citizenship & Immigration Servs*., 2020 U.S. Dist. LEXIS 235099, *14, 2020 WL 7360215. In that case the Court relied on declarations from agency employees which stated the agency followed a "first in first out" ("FIFO") process. *Id.* The Roller declaration the Court relied on is problematic because it failed to address the fact that the agency actually has two different potential "first in" dates: the application date, and the biometric

completion date. The declaration fails to clarify how these two dates interact. Furthermore, the declaration was not supported by independent and objective evidence which confirm the agency actually employs a FIFO process.

In the absence of evidence to the contrary, such declarations were persuasive to the Court. However, Plaintiff in this action brings critical evidence unavailable to the Court in *Nibber* and *Muvvala,* which contradicts the agency's claims.

Plaintiff in this case relies on data from over 300 plaintiffs in *Kolluri v. USCIS*, 20-cv-2987 (NDTX 2020). Exhibit 1. This data is sorted in three separate tables and shows each plaintiffs' H4 application date, new biometric completion date, H4 adjudication date, and time between biometric completion and adjudication.

Using the data from Exhibit 1, pgs. 4-19, and only considering those cases with adjudicated petitions ("out"), defendant's claims of a FIFO process based on application date cannot be supported. Plaintiff Chedalavada, assigned to the California Service Center (WAC receipt numbers) had the earliest filed petition on February 21, 2020, but waited while six other applicants at the California Service Center were adjudicated and approved. The data shows no relationship between application and adjudication dates and shows a complete absence of a FIFO process based on application date. The Vermont Service Center had so few completed ("out") cases that comparisons are difficult, but from the available handful there is no discernable connection to FIFO. For instance, Plaintiff Sravya applied on May 7, 2020, and was approved on December 22, 2020. Plaintiffs Namburi (applied June 25, 2020 and approved December 17, 2020), Kajuluri (applied June 17,2020 and approved December 4, 2020), Sirivolu (applied May 29, 2020 and approved December 22, 2020) all had later filing dates but earlier approval dates. *Id.* Nothing in the available date indicates the agency follows a FIFO system. *Id.*

Alternatively, the agency could argue that the date used for applying FIFO is the date biometrics are completed. If the agency followed FIFO based on biometric completion date one would expect to see the amount of time a plaintiff spends waiting for a decision post biometrics to be relatively standard. However, when sorted by time between biometric completion and adjudication the data shows completed California cases range from 47 days to 209 days. *Id.* at 36-50. Vermont completed cases range from 75 days to 193. *Id.* Post biometric processing times from all four service centers range from 1 to 246 days. *Id*. at 36 and 42.

California Service Center Plaintiffs Voddi, Bhoomi, Ramanujam, Dakaleswaran all completed biometrics on May 21, 2020. *Id.* at 20. However, the California Service Center took between 126 to 209 days to adjudicate these petitions. *Id.*

Vermont Plaintiff Sirivolu completed biometrics on June 12, 2020 yet waited for a final agency action while Plaintiffs Namburi (biometrics completed July 23, 2020), Kajuluri (biometrics completed June 17, 2020), and Sravya (biometrics completed July 23, 2020) received approvals. *Id.* 36-42.

Applicants with earlier application *and* biometric completion dates receive adjudications after those with later dates. This is easily established when looking at *Kolluri* plaintiffs assigned to the California Service Center.

| Name | H-4 Filing Date | Biometric Completion Date | H-4 Adjudicated Date |
|---|---|---|---|
| Chedalavada | 2/21/2020 | 10/6/2020 | 12/1/2020 |
| Sakaleswaran Usha | 3/6/2020 | 5/21/2020 | 12/16/2020 |
| Voddi | 3/13/2020 | 5/21/2020 | 9/24/2020 |
| Kulkarni | 4/15/2020 | 7/28/2020 | 10/14/2020 |
| Ramanujam | 4/28/2020 | 5/21/2020 | 10/2/2020 |
| Bhoomi | 5/11/2020 | 5/21/2020 | 9/25/2020 |
| Mula Ganesh Babu | 6/1/2020 | 6/13/2020 | 10/16/2020 |

*Kolluri* Plaintiff Sakaleswara Usha had both the earliest filing date and biometric completion date but waited while five other plaintiffs with later dates were adjudicated. Other *Kolluri* plaintiffs experienced the same inequality. Even more troubling is the fact that the above table compares only those *Kolluri* whose cases have been completed. Many more plaintiffs with early application dates are still waiting received biometric appointments while later filed applicants' cases are decided.

The lack of a consistent post biometric processing time is further complicated by the fact that USCIS has indicated that it does not actually need new biometrics but is able to reuse previously gather biometrics. Exhibits 2 (*Neema v. USCIS*) and 3 (*Kolluri v. USCIS*). USCIS has been reusing biometrics at least since September 17, 2020. However, even when it reused biometrics the applicants' delays persist. *Id.* The data speaks for itself; the agency does not follow a FIFO system.

**2. Actual Testimony Refutes FIFO**

The Court relied on the agency's declarant Jennifer Roller, a Section Chief at the defendant's Nebraska Service Center ("NSC"). Ms. Roller was called as a witness in a similar case filed in the District of Nebraska, *Neema v. USCIS,* 4:20-cv-3131-RFR (December 30, 2020), and subjected to examination under oath at a hearing on a motion for preliminary injunction.

From her testimony it is clear that the agency more accurately follows a "first in first assigned" [to an adjudicator] model. Exhibit 5, Roller Examination pg. 59 ln. 23- pg. 61 ln. 8. Ms. Roller's testimony established that the agency does not actually follow a FIFO system. Rather Ms. Roller testified that the agency assigns adjudicators petitions based a combination of application date and biometric completion date.

However, once assigned to an adjudicator the agency does not track how long an individual petition lingers prior to adjudication.

Q. So, Ms. Roller, if an applicant applied on June 14th and received biometrics completion on July 8th, 2019, would you expect to see that petition adjudicated before petitions with later filing and later biometrics approval dates?

A. I would expect that file to *reach an officer* before applications with later filing dates with similar biometrics completion dates.

Q. Okay.

A. Or correction, with the hypothetical July 8th completion date.

Q. So it's not so much you would expect it to go out, it's just that you would expect it to be assigned before those other petitions, right?

A. Yes. Our work is *assigned* to officers based on receipt date.

***

Q. So would you agree that a first-in, first-out process would mean application dates that are oldest get adjudicated and finalized first and then go out to the petitioners?

A. Applications that are oldest get *assigned* to officers in the first-in fashion, I would agree with that. And what was the second part of the question?

Q. That they get decided before newer applications.

A. It is my expectation that an officer would adjudicate the cases in date order once they had received them.

Q. But you're really not tracking when they go out. You're not really focused on that. You're focused on when they're assigned?

A. What do you mean by "tracking"?

Q. Do you monitor the number of days that elapse between completion of biometrics and final adjudication?

A. No.

Q. So a petition could, say, be on an adjudicator's desk for 150 days after biometrics are complete and you wouldn't know. You just are tracking when it's assigned?

A. Are you asking what I would know?

Q. Um-hum.

A. As a section chief? I do not monitor individual officer's desk assignments.

Q. Okay. So is anybody in the agency monitoring the amount of time between biometrics completion and final decision on an H-4?

A. In the agency? I do not know.

Q. In the Nebraska Service Center.

A. Our --

Q. Is anybody in the Nebraska Service Center monitoring the time between biometrics completion and final adjudication of the H-4?

A. I don't know.

Q. And you're a section chief, right?

A. That's correct.

***

Q. If you have an adjudicator today, and you found out that they had a file in their desk where biometrics had been completed 150 days ago but there had not been final action, would that be reasonable?

[Discussion of objection deleted]

A. At the Nebraska Service Center, if I found out today that an officer had a file with completed biometrics that were completed five months ago, that would not be reasonable.

Q. But you don't track that data. You don't track how long biometrics have been completed for, for your employees?

A. I don't personally track that data. I supervise supervisory immigration services officers who then supervise the immigration officers. It's their responsibility to monitor their team's work. And our expectation within our division is that they are moving those cases much faster than five months. And the supervisor would have identified that and dealt with that and, if necessary, would have raised it to my level if it weren't being resolved.

Q. So if you had lengthy delays between biometrics and final action, is there a system in place that tracks that?

A. We are able to conduct sweeps of pending applications to identify those applications that have been pending.

Q. You're able to.

A. Yes.

Q. Do you know if that has been done?

A. No.

*Id*. pg. 68, ln 6 to pg. 72, ln. 15.

Again, the agency only monitors when a case is *assigned* to an adjudicator but does not monitor when an adjudication is final. Thus, the agency does not track, and thus cannot prove, it is making final agency actions in a particular order. This lack of accountability over when cases are "out" precludes the agency's claimed rule of reason.

Curiously, as seen above, Ms. Roller admits a 150 day post biometric wait is per se unreasonable. Again, referring to data in the *Kolluri* case at Exhibit 1, pgs. 41-42, Ms. Roller's Nebraska Service Center (with LIN receipt numbers) had eleven applicants who waited more than 150 days for a final adjudication after completing biometrics. This lack of attention to getting cases "out" resulted in what Ms. Roller concedes to be unreasonable delays. This further underscores that the agency does not practice FIFO, does not have a "line," and has no rule of reason governing adjudication timelines.

**B. TRAC Factor 2: Statutory and Regulatory Indications of a Rule of Reason**

Congress, when creating the various immigration benefits, expected that the agency should process nonimmigrant benefits within 30 days and immigrant applications in no more than six months. 8 U.S.C. § 1561(b). While this is not a binding requirement, it is indicative of the duration Congress considered reasonable.

The agency provided an even stronger statement of what it considered a reasonable amount of time for processing of H-4 applications. When creating the regulation authorizing H-4 EADs the agency noted that it had two primary concerns: 1. Increasing incentives for H-1Bs to stay in the United States; 2. Avoiding gaps in employment authorization. *See* 80 Fed. Reg. 10299 ("[a] primary purpose of this rule is to assist U.S. employers in retaining certain highly skilled H–1B nonimmigrants. Allowing certain H–4 dependent spouses to apply for employment authorization removes a disincentive that currently undermines this goal."). To accomplish these two goals USCIS altered its processing of the benefits and allowed concurrent filing of H-1B and H-4, and H-4 EAD applications. 80 Fed. Reg. 10298, 10299. This change allowed applications for H-4 extensions and employment authorization to be filed up to 180 days prior to the expiration of current documents. 80 Fed. Reg. 10298, 10299. The agency determined this would be sufficient

to avoid gaps in employment authorization. *Id.* Thus, the agency itself determined six months to be the presumptive maximum amount of time an H-4 extension would remain pending.

Plaintiff has waited 214 days and has exceeded the agency's presumptive reasonable processing time.

## C. TRAC Factor 4: The Evidence Shows a Court Order Granting Relief Will Not Result in Line Jumping

The fourth TRAC factor considers four things: 1. Whether a court order would allow an applicant to jump ahead of other applicants who were waiting in line; 2. Does the agency have scarce resources; 3. Has the agency balanced competing policy concerns; and, 4. The ease with which the agency could remedy an erroneous decision. As will be discussed below, none of these aspects of the fourth TRAC factor weigh in favor of the agency.

### 1. The Evidence Shows the Agency Has Adequate Resources but Chooses Not to Act.

The fourth factor focuses on whether the delay is caused by scarce resources and if the court's order to adjudicate a petition would have an adverse impact on competing and limited resources. *Nibber,* 2020 U.S. Dist. LEXIS 235099, *20-21, 2020 WL 7360215. However, the available evidence and Ms. Roller's testimony show that there is no such competition, and the agency has adequate resources to adjudicate plaintiff's applications without interfering with any other priorities.

The evidence has established that the agency's manning has been growing each year, while at the same time the agency has an unprecedentedly low level of work to perform. Compare Exhibit 15 and 85 C.F.R. 46793 (August 3, 2020). It boggles the mind how agency employees with little work to perform are making applicants suffer substantial waits for basic decisions on

employment authorization. These prolonged waits exist even when biometrics requirements have been satisfied. Exhibit 1, pgs. 36-42 (showing post biometric wait times up to 206 days).

Even if the agency was over worked, USCIS is a fee-based agency. It performs a service (adjudicating petitions and applications) in exchange for a fee collected from applicants. The fees are designed to recoup the cost of adjudication and fund the agency. The agency hires and pays employees from these fees. The agency periodically analyzes the volume of forms, the time required to adjudicate each form, and the cost it must charge to recoup expenses. This analysis and updated fees are published in the Federal Register.

On November 14, 2019, the agency published an updated fee regulation. 84 Fed. Reg. The agency disclosed that in FY 2016/2017 it processed 172,001 Forms I-539. *Id*. at 62289. The agency projected that it would process 231,000 Forms I-539 in FY 2019/2020. *Id.* The agency determined that on average its employees could process a Form I-539 adjudication in 0.51 hours. *Id.* at 62292. The agency determined it would recoup its costs by charging $400 per petition. *Id.* at 62326.

Based on the agency's stated 0.51 man hours for processing a Form I-539 and current volume of 231,000 per year, the expected annual work load could be accomplished by 58.65 employees working full time.

The agency has four service centers processing Form I-539 applications. According to Ms. Roller, in 2018 the Nebraska Service Center alone employed 57 full time employees on its "H-4 team." Roller Testimony, pg. 11, lns 17-20. The agency increased its H-4 team at the Nebraska Service Center to 132 full time employees by January 2020. *Id.* lns. 21-24. Ms. Roller testified that USCIS has not laid off employees during the COVID pandemic. *Id.* at pg. 101, lns. 22-24.

Thus, the Nebraska Service Center's H-4 team alone could process the nation's entire workload of Form I-539 applications in a timely manner. When the adjudicators of all four service centers share the workload there should be no delay in adjudicating these benefits. Indeed, historically the agency was able to process H-4 extensions and EAD applications within 15 days.

The agency cannot seriously maintain that using its adjudicators to process the plaintiff's application would detract from other priorities.

Another fact conclusively establishes that an order to adjudicate the plaintiff's petitions would have zero impact on competing resource priorities. While the number of adjudicators employed by USCIS to process Forms I-539 has remained constant, the volume of petitions available for adjudication has dropped dramatically because of COVID. As Ms. Roller testified:

> Q. Let me rephrase that. According to your testimony, the problem is COVID has limited the amount of appointment slots at the Application Support Centers, correct?
>
> A. There is backlog in the appointments available at the Application Support Centers.
>
> Q. All right. So -- are you familiar with the term "bottleneck"?
>
> A. Yes.
>
> Q. So we have a whole bunch of applications coming in, waiting for these limited number of appointments at the ASC. And is it fair to say that your testimony is that's creating a bottleneck?
>
> [Defense Counsel Objection Overruled]
>
> A. Yes.
>
> Q. Okay. So the concept of a bottleneck is that you have high volume coming in, low volume going out. There's kind of a trickle coming out, right? So is there a trickle of biometrics-completed cases coming to the service centers, or the Nebraska Service Center?
>
> [Defense Counsel Objection Overruled]
>
> Q. So is there a trickle of completed cases, biometric-completed cases, coming to the service centers presently?
>
> A. The number of completed biometric cases has reduced.

*Id*. 99 ln. 17- pg. 101- ln 24.

From all the available evidence it is clear that the agency's service centers are fully manned to perform the expected 231,000 Form I-539 adjudications that were expected. However, because the requirement to collect new biometrics and the ACS closures the number of cases available for adjudication has dropped dramatically. Given this mismatch in manning and available work the agency's adjudicators should be fighting for work! Nothing explains why a fully manned work force capable of processing 231,000 applications in a timely manner each year is now letting applications linger on their desks for over 200 days. *See* Exhibit 1 (time between biometrics and adjudication). Thus, an order from this Court would have no impact on competing priorities within the agency.

**2. The Agency has Already Weighed its Competing Interests and Determined Gaps in Employment Authorization is a Greater Harm than the Likelihood of Fraud.**

As noted above, the agency has sufficient personnel and resources to timely adjudicate all Forms I-539. Here, the agency is weighing its need for ensuring the identity of applicants against Congress's priority in AC21 of retaining highly skilled H-1B workers and the agency's own priority of avoiding gaps in employment authorization. However, as seen above, Congress and the agency have already weighed these competing factors and determined that retention of H-1Bs and gaps in employment for H-4 EAD holders is a greater harm that the possibility of mixing up files. See 80 Fed. Reg. 10299 ("[a] primary purpose of this rule is to assist U.S. employers in retaining certain highly skilled H–1B nonimmigrants. Allowing certain H–4 dependent spouses to apply for employment authorization removes a disincentive that currently undermines this goal.").

The agency viewed gaps in employment authorization due to processing delay as a major problem that could cause highly skilled H-1B employees to relocate to countries with more

favorable countries. Consequently, the agency rejected proposed changes that would thwart timely adjudications:

> Moreover, the administrative burden resulting from additional adjudications and *the possibility of gaps in employment authorization*, together with the burdens this limitation would place on the H–4 dependent spouse, make imposing a six month validity period unreasonable

80 Fed. Reg. 10297 (emphasis added).

The agency made revisions to 8 CFR 214.2(h)(9)(iv) and 8 CFR 274a.13(d) to permit H–4 dependent spouses to concurrently file an Application for Employment Authorization (Form I–765) with an Application to Extend/Change Nonimmigrant Status (Form I–539). The reason for this change was to prevent gaps in employment authorization.

> To avoid any potential gaps in employment authorization when seeking an extension of employment authorization, DHS recommends that the H–4 dependent spouse timely file all necessary applications. DHS's policy to permit concurrent filing of Forms I–539, I–129, and I–765 *should also help H–4 dependent spouses avoid gaps in employment authorization*, as these forms may be filed concurrently up to six months in advance of date of need.

80 Fed. Reg. 10299 (emphasis added).

In response to commenters who asked the agency to impose additional burdens to ensure H-4s were complying with the law that agency stated:

> DHS is not aware of any risk factors—such as fraud, criminal activity, or threats to public safety or national security—associated with H–4 dependent spouses as a whole that would support imposing [additional burdens].

80 Fed. Reg. 10297.

Thus, the agency has already weighed the competing policy priorities and has unequivocally stated that preventing gaps in H-4 employment authorization outweigh any concerns of fraud, let alone the possibility of file mix ups. Thus, this aspect of the fourth TRAC factors does not weigh in the agency's favor.

### 3. The Absence of a "Line" Precludes a Finding that Plaintiff is Jumping Ahead of Other Applicants

The fourth TRAC factor "requires the Court to consider the effect of expediting Petitioner's application on other USCIS priorities." *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1145 (DAZ 2008). When the agency does not have a line or FIFO process this factor does not weigh in favor of the agency. *Id.*, and *Ying He v. Gonzales*, 2007 U.S. Dist. LEXIS 89127, *14-16, 2007 WL 4259453 (NDCA 2008) ("In any event, it cannot be said that plaintiff will gain an unfair advantage by having her application processed expeditiously, given the reality that many applicants were actually second-in-line (compared to plaintiff) but 'first-served.'").

This Court's decision in *Nibber* determined that ordering the agency to adjudicate plaintiffs' applications would disadvantage some applicants at the cost of others. *Nibber*, at *2020 U.S. Dist. LEXIS 235099, *20, 2020 WL 7360215*. The Court's analysis hinged on the existence and agency's adherence to a FIFO process. *Id.* However, as seen above, the agency does not have a FIFO process. It has a first in first assigned process, where an applicant's final agency action depends on the caprice of adjudicators. There is no line to jump.

In *Nibber* this Court relied on *Mashpee Wamapnoag Tribal Council, Inc. v. Norton* to show the prejudice the agency would face from a court order compelling adjudication of Plaintiff's applications. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D.C. Cir. 2003). *Mashpee* is however inapposite for two reasons. First, as already established there is no line to jump.

Second, the agency operations involved in this case are markedly different than those involved in *Mashpee*. In *Mashpee*, a putative Indian tribe claimed a five-year wait was an unreasonable delay. *Id* at 1094. However, to determine whether a people-group qualified as an Indian tribe under the relevant law, the Board of Indian Affairs would have to engage in a

sophisticated, years-long analysis. Under the statute, each adjudication required a team of experts to review and determine whether a people-group had successfully proven they constituted an Indian tribe: "Each petition is evaluated against a demanding set of regulatory criteria by a three-person team comprising an historian, a cultural anthropologist, and a genealogist." *Id.* Further, the decisionmaker had only 13 total petitions in front of it and a total staff of 11. *Id.* It was undisputed in Mashpee that the agency could only adjudicate one such application at a time and each application would take years to complete. In such situation, compelling adjudication of one application would necessarily push the other pending applications back by years. *Id.* And even in the face of such, a separate court in the District of Columbia compelled agency action under identical circumstances. *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 40 (D.D.C. 2000) (granting mandamus relief).

It is not reasonable to equate the massive, time-consuming adjudication required by *Mashpee* to the adjudication required to make an H-4 or H-4 EAD decision; this would be like equating the decision to approve a new nuclear power plant to a decision on a work authorization. The competing priorities factor may weigh heavy when an agency can only do adjudications *consecutively* and those adjudications take years on end, but it should weigh far less (or be considered weightless) where an agency can do hundreds of adjudications *concurrently* and each adjudication can be done in hours. While it may take discovery or the production of a "record" with apposite documents to determine how many adjudicators the Agency has on these cases, it cannot be disputed, at most, the Agency takes 0.51 hours at most to make a decision on an I-539. *See* 84 Fed. Reg. 62280, 62292 (Nov. 14, 2019). H4 and EADs are decisions that the Agency can make concurrently and that take at most 45 minutes. This is a far cry from the situation in *Mashpee*, and thus, *Mashpee* actually weakens the government's case.

**4. The Ability to Easily Rescind or Revoke Approvals Weighs Against the Agency.**

First, and foremost, the agency no longer requires all H-4 extension applicants to provide new biometrics. Exhibits 2, 3 and 16. To the extent it requires new biometrics, this information is only used to supplement biographic detail in existing files (name, date of birth, place of birth, parents' names, etc.). Exhibit 11, pgs. 4-5. The agency is requiring biometrics to avoid the remote possibility of applicants for benefits with similar biographic information (name, birth date, etc) from being confused. The agency could take post adjudication biometrics and quickly remedy any misfiling that could occur. To be sure, this fear of misfiling is a remote possibility.

To the extent the agency selects some applicants to this requirement (and not others) the miniscule threat posed by erroneous grants of H-4 status can easily be remedied by the agency. In *Singh v. Still*, 470 F. Supp. 2d 1064, 1068-1069 (N.D. Cal. 2007) this District faced a scenario remarkably similar to this case: a nonregulatory background check performed by the FBI was causing significant delays in the adjudication of immigration benefits. There, the agency was balancing the need to prevent terrorists from procuring immigration benefits against the applicant's need for timely adjudication. *Id.* Unlike this case where the agency had no concerns regarding fraud or national security, in *Singh* the agency's desire to protect the nation from terrorists was a significant, if not primary, concern. *Id.*

When arguing the fourth TRAC factor, the agency in *Singh* claimed that an order forcing adjudication would compromise its ability to ensure terrorists did not receive immigration benefits. *Id.* The Court weighed that agency's need for background checks against the agency's duty to perform reasonable adjudications and the interests of the applicant in timely adjudications. *Id.* Ultimately the Court determined the fourth TRAC factor did not weigh in the government's favor stating:

> Finally, it is worth noting that a court order requiring Respondents to rule on Mr. Singh's applications does not leave Respondents without a remedy should facts become known to Respondents that suggest that Mr. Singh is in fact a national security threat. As noted by Mr. Singh, Respondents always have the option of moving to rescind the grant of residency or initiate removal proceedings if that situation truly were to arise.

*Id.* at 1070.

Thus, the fact that the government could address any error through revocation of benefits eliminated any prejudice claimed by the government.

As in *Singh,* the law provides an easy mechanism to revoke the H-4 visa if it was approved in error. 8 C.F.R. § 214.2(h)(11)(i)(B)(iii)(2), (3), and (5). The law creates an even easier mechanism for revoking employment authorization. 8 C.F.R. § 274a.14. Consequently, any potential harm created by erroneous benefit approvals can be swiftly remedied. This aspect of the fourth criteria does not favor the government.

**D. TRAC Factors 3 and 5: Human Health and Welfare & the Interests Prejudiced by the Delay**

The third and fifth TRAC factors are often analyzed together in the context of evaluating delays in adjudicating immigration benefits. *See Khan v. Johnson*, 65 F. Supp. 3d 918, 930 (C.D. Cal. 2014) *See also Ray* at 14. The plaintiff in this case is being forced to give up her and income that is needed to support her family. Exhibit 4. She is also providing highly skilled services the State of Maryland Department of Human Services where she is streamlining the infrastructure and delivery of services to that state's most vulnerable residents. *Id.* Her patients and employer will also suffer harm by her absence from the work force.

As noted by the Court in *Nibber* "the inability of Plaintiffs to 'be able to work in the United States or renew [their] driver's license[s]…almost certainly has a negative effect on [Plaintiffs' welfare' and weights the third and fifth factors in favor of Plaintiffs." *Id.* at 2020 U.S. Dist. LEXIS

235099, *17-18, 2020 WL 7360215 *see also Muvvala v. Wolf*, No: 1:20-cv-02423 (CJN), 2020 WL 5748104, at *4.

**E. TRAC Factor 6: The Delay in Adjudications Cannot Be Attributed to a Benign Cause**

The agency has claimed that the delay in adjudications has been caused by the requirement to collect new biometrics prior to adjudication of visa extensions filed on Form I-539. However, the evidence shows that this requirement for new biometrics is pretextual, and even when biometrics are available delays persist. Furthermore, delays for H-4s are greater than other categories utilizing the Form I-539.

**1. The Requirement for New Biometrics Has Always Been Unnecessary as Shown by Law and Evidence**

The notices in Exhibits 2 and 3 conclusively establish that the agency does not have a binding requirement or need for *new* biometrics prior to adjudicating H-4 extensions submitted on Form I-539. Rather, it has apparently had authority to reuse previously provided biometrics all along and that every nonimmigrant in the United States has given biometrics at least twice. 85 Fed. Reg. 56351 (noting the efficiency of reusing biometrics gathered at the consulate or domestically for "identity management") and 73 Fed. Reg. 77473 (noting that since 2003 every alien entering the United States has given biometrics at least twice: at the consulate and port of entry). Yet it has persistently claimed the need for new biometrics was the predominant cause of H-4 delays. Further proof that new biometrics are not required can be seen in the related case of *Manvi v. USCIS*, 3:21-cv-542-JSC. In that case, Plaintiff Jyotsna Sharma received notice that the agency would utilize her previously gather biometrics. Exhibit 17. Here, plaintiff has provided the agency with biometrics which the agency can reuse to adjudicate her petition and EAD extension without delay.

The agency justifies the massive upheaval in H-4s' lives by invoking its need for "identity management." Put another way, the agency's fear that it could possibly miss file something justifies hundreds of thousands of people losing immigration status and their jobs.

**2. H-4 Delays are Substantially Longer than Other Categories Using the Form I-539**

Presently, the agency processing times for H-4 visa extensions submitted on Form I-539 are 19-24.5 months (California), 8-10 months (Texas), 7-9.5 months (Nebraska). Regardless of which service center adjudicates the petition the applicant is mathematically guaranteed to lose immigration status and employment authorization. The agency blames these delays on closures of Adjudication Support Centers and a lack of biometric appointments.

The agency claims the biometric requirement is applicable to all Form I-539 applicants, and consequently there is no evidence that it is intentionally targeting H-4 applicants. However, the general applicability of the requirement for new biometrics does not explain the abhorrent disparity in processing times for H-4s and other applicants using the Form I-539. The agency cannot explain why, if biometrics is the problem, the H category has up to ten times longer wait than over categories also requiring new biometrics. *See* Exhibit 9, Pg. 9.

**3. H-4 Delays Caused By Biometrics Coincide with the Agency's Failed Attempt to Rescind the Regulation Authorizing H-4 Employment Authorization**

The prior administration's immigration priorities and policies mirror those that the anti-immigration advocacy group FAIR published its "Immigration Priorities for the 2017 Presidential Transition." Exhibit 12, Pgs. 11-18. Among FAIR's greatest priorities for the prior administration was ending employment authorization for H-4 spouses. *Id.* at Pg. 15. Consistent with FAIR's agenda, in the agency announced that it intended to rescind the regulations granting H-4 EADs. Exhibit 8, Pg. 1, RIN: 1615-AC15, Removing H-4 Dependent Spouses From the Class of Aliens

Eligible for Employment Authorization. The agency failed to rescind the regulation through legal channels.

The Immigration Reform Law Institute met with the agency on March 26, 2021 to discuss the "H-4 Recission Rule." Exhibit 13, Pg. 1. IRLI provided the agency with a point paper advocating the elimination of H-4 visa holders from the economy. *Id.* at Pg. 2. This paper expounded in greater detail its desire and reasoning for ending H-4 employment authorization.

In the wake of COVID 19 closures the agency waived requirements for new biometrics for nearly all applicant categories entitled to an EAD. Exhibit 11. It doggedly maintained the need for the 231,000 Form I-539 applicants to submit new biometrics to avoid misfiling, despite the fact it meant they would lose jobs, income, and mobility. When the agency failed to legally accomplish its objective, it was able to accomplish its goal of impeding the H-4 EAD program through insurmountable red tape.

When the all of the above facts are taken into consideration and compared against the agency's stated intent to kill the H-4 EAD program, the conclusion is clear: the current delays are the result of intentional actions meant to harm H-4 EADs.

## II. Plaintiff Faces Actual and Imminent Irreparable Harm

A Plaintiff seeking a preliminary injunction must establish that they will likely experience harm. The general rule is that monetary losses alone do not constitute irreparable harm because the plaintiff can be made whole if successful in litigation. *See Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 65-66 (D.D.C. 2004), citing *American Federation of Government Employees, AFL-CIO v. U.S.*, 104 F. Supp. 2d 58 (D.D.C. Jun 30, 2000) (finding "irreparable harm" where the plaintiffs were likely to be prevented from recovering damages by federal back pay statute); and, *Nat'l Trust For-Historic Pres. in the United States v. FDIC*, 1993 U.S. Dist.

LEXIS 21469, 1993 WL 328134, at *3 (D.D.C. May 7, 1993) (finding irreparable harm where no remedy was available at law). In *Clarke* the plaintiff sought a preliminary injunction against an agency action that would create losses by prohibiting his ability to exercise rights to exercise stock options. *Id.* Although his harm was strictly monetary, the court found irreparable harm because there was no ability to make him whole following litigation. *Id.*

Here, like the plaintiff in *Clarke*, the plaintiff in this case will suffer a gap in employment authorization and job loss as a result of government delay. She will also lose her ability to drive, as her license expired in January of 2021. Exhibit 4. Moreover, while a mere gap in employment authorization would be a purely economic loss, the plaintiff faces losses that transcend monetary value. Plaintiff works as a physical therapist, which is an occupation that the United States Department of Labor has found to be lacking sufficient workers. She cannot be replaced, and her loss will impact her patients. The agency delay is not only taking away the plaintiff's income, but it is destroying her professional life, and ripping her from an environment where she been thriving and contributing to the local economy.

## III. Balance of Equities and Public Interest

When the government is a party, the third and fourth preliminary injunction factors merge. *See Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 854-855 (9th Cir. 2020). Here, the plaintiff faces significant economic and personal loss because a government agency is delaying a purely ministerial act: adjudicating H-4 visa extensions. Moreover, the plaintiff has paid the agency to perform this ministerial task. The government has no equities worth mentioning. The agency has a duty to provide decisions in a reasonable amount of time and is currently in breach of its statutory and contractual duties to plaintiffs.

In balancing the public interest, courts subordinate the agency's desire to solve a pressing problem to the need to respect the rule of law. *See id*., quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.")). Here, the agency perceives a need to protect U.S. workers from competition created by a small group of H-1B spouses. It has sought multiple times to rescind the regulation granting employment authorization to certain H-4 spouses. Curiously the agency's commentary to the H-4 EAD final rule explicitly stated these spouses would have no impact on the U.S. job market. Notwithstanding that, even if the agency was correct and a threat existed, it must follow the legal path to rescission of the regulation. The agency cannot thwart the rule of law and impede H-4 EADs through subterfuge and delay.

## IV. CONCLUSION

For the foregoing reasons, plaintiffs have established they are likely to succeed on the merits, will suffer imminent and irreparable harm, and the balance of equities favor their motion.

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Respectfully Submitted,

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