IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

A.B.T., K.M.-W., G.K., L.K.G., D.W., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Janet NAPOLITANO, Secretary, Department of Homeland Security; Alejandro MAYORKAS, Director, U.S. Citizenship and Immigration Services; Eric H. HOLDER, Jr., Attorney General of the United States; Juan OSUNA, Director, Executive Office for Immigration Review,

Defendants.

Case No. 2:11-cv-02108 A.B.T.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Noted For Consideration On: January 13, 2012

Oral Argument Requested

I. MOTION AND PROPOSED CLASS DEFINITION

Plaintiffs bring this action to challenge Defendants' unlawful policies and practices that deprive Plaintiffs and others similarly situated of effective, timely notice of determinations having to do with the 180-day statutory waiting period before an asylum applicant is eligible to apply for employment authorization; a meaningful opportunity to correct errors in such determinations; and the opportunity to obtain a work permit, known as an Employment Authorization Document (EAD).

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Defendants' policies and practices prevent Plaintiffs and class members from working during the often prolonged period during which their asylum applications are adjudicated. This process may take months, or even years, beyond the 180-day waiting period. As a consequence of the unlawful denial of an opportunity to obtain work authorization, Plaintiffs and proposed class members are left in often untenable situations, unable to support themselves and their dependent family members, and forced to rely solely on charity to survive.

Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move this Court to certify the following class with all named Plaintiffs being appointed class representatives:

> All noncitizens in the United States who have filed or will file with Defendants a complete I-589 (Application for Asylum and Withholding of Removal); who have been or will be issued a Notice to Appear or Notice of Referral for removal proceedings; whose applications for employment authorization have been or will be denied; and whose asylum EAD clock determinations have been or will be made without legally sufficient notice or a meaningful opportunity to challenge such determinations ("Notice and Review Class").

In addition, Plaintiffs seek certification of two subclasses:

> **Hearing subclass**: Individuals who have been or will be issued a Notice to Appear or Notice of Referral for removal proceedings; who have filed or sought to file or who will file or seek to file a complete asylum application with the immigration court; but whose asylum EAD clocks did not start or will not start on the date that this application was or will be filed because of Defendants' policy requiring asylum applications to be filed at a hearing before an immigration judge. ("Hearing subclass").

Plaintiffs A.B.T. and K.M.-W. move to be appointed as class representatives of this subclass. Both Plaintiffs fall within this subclass. *See* Exh. 24 and 25.

> **Remand subclass:** Asylum applicants whose asylum EAD clocks were or will be stopped following the denial of their asylum applications by the immigration court, and whose asylum EAD clocks are not or will not be started or restarted subsequent to an appeal in which either the BIA or a federal court of appeals remands their case for further adjudication of their asylum claims ("Remand subclass").

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Plaintiffs G.K., L.K.G. and D.W. move to be appointed as class representatives for this subclass. All three Plaintiffs fall within this subclass. *See* Exh. 26, 27 and 28.

The national class and subclasses consist of members who have been subjected to specific policies and practices of Defendants which they challenge as violating their constitutional right to due process and their statutory and regulatory right to apply for and be granted employment authorization. But for Defendants' unlawful policies and practices, Plaintiffs and the subclasses would be eligible for work authorization.

II. BACKGROUND

Plaintiffs have applied for asylum because they have been persecuted or fear persecution in their home countries and seek safe haven in the United States. Congress directed that agency adjudication of an asylum application must be completed within 180 days, absent exceptional circumstances. 8 U.S.C. § 1158(d)(5)(A)(iii). In recognition of the economic hardship asylum seekers may face during the asylum application process, regulations governing Defendants provide that an asylum applicant who has not committed an aggravated felony is entitled to an EAD if the asylum application is pending more than 180 days. 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1); *see also* 8 U.S.C. § 1158(d)(2). The 180-day waiting period must be tolled for "delay requested or caused by the applicant." 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2). Thus, where the agency is unable to complete adjudication of an asylum application within 180 days (not counting any period of time tolled for applicant delay), asylum applicants are prima facie eligible to obtain employment authorization while awaiting the final adjudication of their pending asylum applications.

Defendants use an asylum EAD clock to calculate the 180-day waiting period for EAD eligibility, including any periods during which the clock has been tolled as a result of applicant delay. The challenged policies and practices result in the 180-day waiting period being extended

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impermissibly, for reasons other than applicant delay. As a result, asylum applicants often wait much longer than the legally mandated timeframe before they are granted employment authorization. In some cases, asylum applicants never receive employment authorization because the asylum EAD clock has been impermissibly "permanently stopped." In addition, because the agency fails to provide timely and effective notice that the asylum EAD clock has been stopped or not started or restarted, asylum applicants are often unaware of the status of their asylum EAD clocks until their applications for employment authorization have been denied. Applicants also are provided no effective procedure to resolve disputes regarding whether the asylum EAD clock should be stopped or running and how many of the 180 days in the waiting period have elapsed.

Plaintiffs' claims arise out of the unlawful policies and practices of the Department of Homeland Security (DHS), through its component, U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), through its Executive Office for Immigration Review (EOIR). This case is ideally suited for class certification as the government has uniform, nationwide policies and practices precluding Plaintiffs and others similarly situated from qualifying for and obtaining employment authorization. Specifically, Plaintiffs challenge Defendants' Notice and Review Policy and Practice, according to which Defendants fail to provide adequate notice of or a meaningful opportunity to review Defendants' decisions to stop or not start or restart the asylum EAD clock; Defendants' Hearing Policy and Practice, which allows an asylum EAD clock to be started only at a hearing before an immigration judge even when an asylum applicant has filed a complete asylum application with the immigration court; and Defendants' Remand Policy and Practice, which prohibits the asylum EAD clock from being started or restarted after a previously denied asylum claim has been remanded by a court of appeals or the BIA. These policies and

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practices violate the Immigration and Nationality Act (INA) and binding federal regulations, the Administrative Procedure Act (APA), and the Fifth Amendment to the United States Constitution.

The core issues are pure questions of law well suited for resolution on a class wide basis. *See e.g., Unthaksinkun v. Porter,* No. 11-0588, __ F. Supp. 2d __, 2011 U.S. Dist. LEXIS 111099, *38 (W.D. Wash. Sept. 28, 2011) (finding that, because all class members were subject to the same process, the court's ruling as to the legal sufficiency of the process would apply to all). On behalf of themselves and others similarly situated, Plaintiffs seek class certification to obtain declaratory and injunctive relief requiring USCIS and EOIR to conform their policies and practices to the applicable statute and regulations, consistent with applicable due process requirements, so that applicants for asylum are not unlawfully prevented from obtaining employment authorization. Plaintiffs do not ask this Court to grant them employment authorization. Instead, they ask only that the Court determine whether Defendants' policies and procedures are unlawful, and order Defendants to apply legally proper procedures to all asylum applicants.

A recent USCIS Ombudsman's report acknowledged that there are nationwide systemic problems related to employment authorization for asylum applicants, specifically citing the lack of sufficient notice about the status of their asylum EAD clocks and the lack of an adequate process for reviewing clock decisions. *See* U.S. Citizenship and Immigration Services Ombudsman, *Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication,* at 3, 6 (Aug. 26, 2011), *available at* http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf [hereinafter USCIS Ombudsman Report]. As such, these problems should not be left to individualized local or piecemeal resolution, but rather should be resolved through class litigation.

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EOIR recently issued guidance clarifying how it administers the asylum EAD clock. Memorandum from Chief Immigration Judge, Brian O'Leary, Operating Policies and Procedures Memorandum 11-02: The Asylum Clock (Nov, 15, 2011) 5-6, *available at* http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf [hereinafter OPPM 11-02]. Because this guidance does not significantly alter EOIR's previous guidance, however, the core systemic problems remain.

III. CLASS CERTIFICATION

Upon a showing that the requirement of Rule 23(a) and (b)(2) were met, numerous district courts within the Ninth Circuit have certified classes of noncitizens who challenge immigration policies and practices. *See, e.g., Santillan v. Ashcroft*, No. 04-2686, 2004 U.S. Dist. LEXIS 20824, at *40 (N.D. Cal. 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Ali v. Ashcroft,* 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd,* 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds,* 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Walters v. Reno*, 1996 WL 897662, No. 94-1204 (W.D. Wash. 1996), *aff'd* 145 F.3d 1032 (9th Cir. 1998), *cert. denied, Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998) *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Gonzales v. U.S. Dept. of Homeland Sec.*, 239 F.R.D. 620, 628 (W.D. Wash. 2006) (certifying Ninth Circuit wide class challenging USCIS policy contradicting binding precedent), *preliminary injunction vacated*, 508 F.3d 1227 (9th Cir. 2007) (establishing new rule and vacating preliminary injunction but no challenge made to class certification); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding district

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court had jurisdiction to grant injunctive relief in certified class action challenging unlawful immigration directives issued by EOIR); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district court's denial of class certification in case challenging inadequate notice and standards in INS vehicle forfeiture procedure).

Like the above cases, the instant action satisfies the requirements for class certification under Rule 23(a) and (b)(2). Each of these requirements is discussed below. Where the class certification determination is intertwined with the merits of the action, Plaintiffs address both. While Plaintiffs demonstrate that they meet the class certification requirements under the required "rigorous analysis," *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2551 (2011) (internal quotations and citations omitted), such analysis does not "equate with an in-depth examination of the underlying merits" of the case. *Ellis v. Costco*, 657 F.3d 970, 983 n.8 (9th Cir. 2011) (explaining that a court need only examine the merits to determine whether common questions exist and not to determine whether class members can actually prevail on the merits).

A. THIS ACTION SATISFIES THE CLASS CERTIFICATION REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(a)

1. The Proposed Class Members Are So Numerous That Joinder Is Impracticable.

a. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder is impracticable." "[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). No fixed number of class members is required for numerosity. *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) ("There is no magic number for determining when too many parties make

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joinder impracticable. Courts have certified classes with as few as thirteen members, and have denied certification of classes with over three hundred members.") (citations omitted).

Determining whether plaintiffs meet the numerosity requirement "requires examination of the specific facts of each case and imposes no absolute limitations." *Troy v. Kehe Food Distributors, Inc.*, No. 09-0785,___ F.R.D. ___, 2011 U.S. Dist. LEXIS 110012, at *25-26 (W.D. Wash. Sept. 26, 2011) (citing *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Thus, courts have found numerosity when relatively few class members are involved. *See Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763, 765-66 (9th Cir. 1971) (finding 17 class members sufficient); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1381 (5th Cir. 1974) (assuming class membership of 28 was sufficient); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (41-46 members).

Moreover, in certifying classes of noncitizens, courts have taken notice of circumstances in which "INS [now DHS] is uniquely positioned to ascertain class membership." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). Where DHS has control of the information proving the practicability of joinder and does not make such information available, it would be improper to allow the agency to defeat class certification on numerosity grounds. In this case, Defendants are knowledgeable as to the size of the proposed class as they are uniquely positioned to know the number of asylum cases pending in immigration court in which asylum EAD clocks have stopped as a result of the challenged asylum EAD clock-related policies and practices. Defendants also know the number of EAD applications from asylum applicants they have received and how many of these have been denied based on their challenged policies and practices.

Publicly available data and information obtained through a FOIA request demonstrates the large numbers of asylum applicants that potentially fall into the proposed class each subclass. The

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EOIR FY 2010 Statistical Report on asylum applications shows that, during 2010, EOIR received over 32,000 asylum applications and granted almost 10,000 after individual hearings. *See* U.S. Department of Justice, Executive Office for Immigration Review, Figure 13 at I1, *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf [hereinafter FY 2010 Statistical Yearbook]. Presumably, if proceedings extended beyond 180 days, most of the 32,000 applicants sought, or would have sought if not deterred by Defendants' policies and practices, work authorization. EOIR also has stated, in a response to a May 23, 2011 FOIA request, that 285,101 asylum cases were pending before EOIR between 2007 and May 2011, *see* Exh. 1 at 2, and that the vast majority of those applicants appearing in immigration courts across the country had "stopped clocks" at some point during the pendency of their asylum case. *Id*. at 3.[1] For example, the New York immigration court, with 61,752 asylum cases pending between 2007 and May 2011, had one of the largest asylum dockets of any immigration court. Of these cases, 51,224 (approximately 82%) had "stopped" asylum EAD clocks at some point in the proceedings. *Id* at 3.

Moreover, recurring clock issues are so widespread that the USCIS Ombudsman recently issued recommendations to USCIS on improving administration of the asylum EAD clock. *See* USCIS Ombudsman Report, at 4. The report verifies the core problems that Plaintiffs challenge with regard to Defendants' Notice and Review Policies and Practices, including the absence of adequate notice to asylum seekers of the status of their asylum EAD clocks and the lack of a meaningful process for reviewing contested asylum EAD clock decisions. *Id.* at 2 (". . . when a delay that was caused by or requested by the applicant comes to an end, there is no easy way for the

[1] While this EOIR reference to "stopped clocks" is to the 180-day period during which an immigration judge must adjudicate an asylum application and not the 180-day asylum EAD clock, delays for the two clocks, as prescribed by regulation, are the same, *see* 8 C.F.R. §§ 208.7(a)(2) and 1208.7(a)(2), and Defendants rely on the adjudications clock to measure both periods.

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applicant to work with the Federal Government to restart the clock"). The USCIS Ombudsman also found that the lack of a mechanism for asylum seekers to accurately learn how much time had accrued on their asylum EAD clocks creates confusion about employment eligibility. *Id.* at 1, 5-6. Attached declarations from thirteen immigration attorneys who represent asylum applicants in immigration courts across the country support the Ombudsman's determination that systemic problems exist with respect to Defendants' Notice and Review Policies and Practices. *See* Exh. 2-14. The recently issued guidance from EOIR does not remedy these systemic problems.

The Notice and Review class challenges these systemic problems. Plaintiffs assert that, under Defendants' Notice and Review Policies and Practices, no asylum applicant whose EAD application has been or will be denied receives legally sufficient notice of asylum EAD clock determinations or a meaningful opportunity to correct errors on the asylum EAD clock. Consequently, the Notice and Review class consists of all asylum applicants in removal proceedings (including defensive cases and those that were initially filed as affirmative cases) whose EAD applications have been or will be denied. Of the over 33,000 new asylum cases filed in 2010, the last year for which statistics are available, it is reasonable to assume that at least several hundred – if not thousands – of the applicants whose applications remain pending at this time have filed EAD applications and had such applications denied. *Ali v. Ashcroft*, 213 F.R.D. at 408 (" . . . the Court does not need to know the exact size of the putative class, 'so long as general knowledge and common sense indicate that it is large'") (citing *Perez-Funez*, 611 F. Supp. at 995). This reasonable inference is supported by the attached attorney declarations reflecting the prevalence of such cases throughout the country. Exh. 2-14. The sampling of attorneys represented by these declarations, which emphasize the high rate of improper denials, verifies the existence of at least several hundred class members in the Notice and Review class.

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All members of the two subclasses are also members of the Notice and Review class. Declarations from individuals and organizations that provide legal services to asylum applicants demonstrate that the number of asylum applicants who would fall within the two subclasses are too numerous for joinder to be practicable. In particular, the declarations of attorneys Ashley Huebner, Natalie Hansen, Paula Enguidanos, Sherizaan Minwalla, and Vanessa Allyn provide evidence of 45 asylum applicants who have been adversely impacted by Defendants' Hearing Policy and Practice over the past year. *See* Exh. 3, 9, 10, 11, and 13. Because these declarations represent only a small sample of attorneys in the United States who represent asylum applicants, it is reasonable to assume that these numbers do not represent all asylum applicants who fall within this subclass because they have been harmed by this policy and practice.

Similarly, the 24 asylum applicants discussed in the Declarations from Ashley Huebner, Jonathan Kaufman, Judy London, Megan Kludt, Sherizaan Minwalla, Stacy Tolchin and Yeimi G. Martinez Michael is a low estimate of the number of asylum applicants who are or will be harmed by Defendant's Remand Policy and Practice. *See* Exh. 3, 6, 7, 8, 11, 12, and 14. The Remand subclass includes all asylum applicants whose asylum cases have been remanded following an appeal to the BIA and in some cases, a federal court of appeals. More than 800 cases were remanded by courts of appeals to the BIA in FY 2010. *See* FY 2010 Statistical Yearbook, Table 16, at T2. If only five percent – or 40 – of these remanded cases fit within the subclass definition, numerosity would be met. Moreover, this number would still not include all the asylum cases remanded to the immigration courts by the BIA without a further appeal to the court of appeals. *See id*. (indicating that over 15,000 cases were taken up to the BIA from immigration courts).

Thus, although Plaintiffs currently cannot determine the precise number of potential class members, Plaintiffs assert that numerosity is met with respect to the class and both subclasses.

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While Defendants are in possession of the precise number of applicants currently in question, Plaintiffs have demonstrated that the number of potential class members makes class certification appropriate as the class is "so numerous that joinder is impracticable."

b. Impracticability

In addition to class size, factors that inform impracticability include: (1) geographical diversity of class members; (2) the ability of individual claimants to institute separate suits; and (3) the type of review sought. *Jordan v. Co. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). *See also Gonzales*, 239 F.R.D. at 628 (geographic diversity over several states, inability of some claimants to bring individual claims, and the fact that class will grow with future claims all support circuit-wide class certification)

Application of these factors shows impracticability of joinder in the present case. First, joinder is impracticable where, as here, the geographic location of proposed class members spans the entire country. *See Levya v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (joinder of 50 individual migrant workers with limited English skills and limited knowledge of the American legal system dispersed throughout Washington, California, New York and Mexico would be "extremely burdensome"). As the USCIS Ombudsman's report acknowledges, and as the attached declarations reflect, harmful asylum clock policies and practices are a nationwide problem. The declarations demonstrate that the challenged policies and practices are implemented by Defendants in immigration courts in Washington, New York, Illinois, Wisconsin, Indiana, California, Washington D.C., Maryland, Virginia, Massachusetts and Texas. *See* Exh. 2-14.

Second, joinder is impracticable when proposed class members, by reason of such factors as financial inability, fear of challenging the government, lack of understanding that a cause of action exists, lack of representation, and fear of persecution, are unable to pursue their claims individually.

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Morgan v. Sielaff, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals … who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf.") (internal citation omitted); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that poor, elderly plaintiffs dispersed over a wide geographic area could not bring multiple lawsuits without great hardship).

EOIR statistics demonstrate that 57% of all noncitizens appearing in immigration court in 2010 were unrepresented. *See* FY 2010 Statistical Yearbook, Figure 9, at G1**.** The proposed class members are, by definition, not authorized to work and accordingly many have limited financial resources to support themselves, let alone retain legal counsel, and free legal services are limited. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) ("…in … deportation proceeding[s], … we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and … often do not even understand the tongue in which they are accused."). Equity favors certification where class members lack the financial ability to afford legal assistance. *Lynch v. Rank*, 604 F. Supp. 30, 38 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984) (certifying class of poor and disabled plaintiffs represented by public interest law groups).

Third, where, as here, injunctive or declaratory relief is sought, the requirements of Rule 23 are more flexible. *See Goodnight v. Shalala*, 837 F. Supp. 1564, 1582 (D. Utah 1993). In particular, smaller classes are less objectionable and the plaintiffs' burden to identify class members is substantially reduced. *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984) (citing *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975)); *Doe v. Charleston Area Medical Ctr*., 529 F.2d 638, 645 (4th Cir.

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1975) ("Where 'the only relief sought for the class is injunctive and declaratory in nature . . .,' even 'speculative and conclusory representations' as to the size of the class suffice as to the requirement of many.") (citation omitted). Plaintiffs here challenge DHS' unlawful policies and practices and are seeking declaratory and injunctive relief. Because Plaintiffs satisfy the stricter numerosity requirement of Rule 23(a)(1), *a fortiori*, they meet the requirements of the rule when liberally construed.

Finally, "'where the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met,' regardless of class size." *Ali*, 213 F.R.D. at 408-09 (citations omitted); *see also Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) ("…the fact that the class includes unknown, unnamed future members also weighs in favor of certification").

2. The Class Presents Common Questions of Law and Fact

Rule 23(a)(2) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, "[a]ll questions of fact and law need not be common." *Ellis v. Costco Wholesale Corp.*, 657 F.3d at 981 (quoting *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the contrary, one shared legal issue can be sufficient. *See, e.g., Walters*, 145 F.3d at 1046 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement asks us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551. In determining that a common question of law exists, the putative class members' claims "must depend upon a common contention" that is "of such a

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nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Thus, "[w]hat matters to class certification is not the raising of common 'questions' . . . but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal citation and quotation marks omitted).

Here, Plaintiffs and the proposed class and subclasses challenge as unlawful specific nationwide policies and practices of Defendants. As discussed in detail below, the class and the subclasses each limit membership to asylum applicants who have been or will be harmed by the application of one of these challenged policies and practices to their cases. Consequently, the common question of law for each is whether the policy and practice violates the law. Should Plaintiffs prevail, all who fall within the class and subclasses will benefit. Thus, a common answer as to the legality of each challenged policy and practice "will drive the resolution of the litigation." *Ellis*, 657 F.3d at 981 (citing *Wal-Mart*, 131 S. Ct. at 2551).

Although factual variations in individual cases may exist, these are insufficient to defeat proof of commonality. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."); *Walters*, 145 F.3d at 1046 ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification"). Rather, the legal policies and practices challenged here apply equally to all class members regardless of any other factual differences. For this reason, questions of law such as whether Defendants' policies and practices provide adequate notice and review are particularly well-suited to resolution on a class-wide basis because "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy*, 2011

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U.S. Dist. LEXIS 110012, at *31; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact). As such, resolution on a class-wide basis also serves a purpose behind the commonality doctrine: practical and efficient case management. *Rodriguez v. Hayes*, 591 F.3d at 1122.

The following legal and factual questions are common to the class and to each subclass.

a. Notice and Review Class

The Notice and Review class consists of asylum applicants who are or will be placed in removal proceedings and whose asylum EAD clock determinations and EAD application decisions have been or will be made based upon notice and review procedures that they contend are not legally sufficient. Neither Defendant USCIS nor Defendant EOIR requires asylum applicants to be informed when or why their asylum clocks are stopped, not started, or not restarted. *See, e.g.*, OPPM 11-02 at 8 (stating that an immigration judge "*may* inform the parties how many days are on the clock and whether the clock is running or stopped") (emphasis added); Exh. 5 (attaching USCIS letters denying EAD applications but not explaining *why* the EAD clock was stopped).

Instead, the only two mandatory notices related to the asylum EAD clock do not provide information to the asylum applicant about the status of the clock, what actions have been taken to stop or start the clock, or the reason for any such action. First, an immigration judge only is required to state on the record the reason for a case adjournment. OPPM 11-02 at 8. While the immigration judge "may" also inform the asylum applicant of the number of days on the clock and whether it is running, this additional notice is entirely optional. *Id.* Further, when an immigration judge adjourns a case at a time other than a hearing, there is no requirement of notice to the applicant at all. *Id.* at 12-13. Similarly, court administrators make decisions about the asylum EAD clock, as EOIR has determined that they are "responsible for ensuring that … the asylum clock is accurate"

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and for taking "corrective measures" when necessary. OPPM 11-02 at 15. Like immigration judges, when a court administrator makes a decision about the asylum EAD clock, there exists no policy requiring notice to the applicant.

Second, USCIS is required by regulation to issue decisions when it denies EAD applications. While these decisions sometimes (although not always) reference the number of days on the asylum EAD clock, they do not explain when or why the asylum EAD clock was stopped or not started or restarted. Importantly, they also do not provide any information about how an applicant can resolve or contest miscalculations on the asylum EAD clock. To the contrary, many times the decisions inform the applicant that USCIS has no authority over the asylum EAD clock and thus no ability to change it. *See* Exh. 5 (attaching decision letters stating that USCIS relies on electronic records entered and/or changed by the Immigration Court in determining the number of days elapsed when processing applications for employment authorization).

Additionally, there is no meaningful opportunity for Plaintiffs to challenge or remedy improper asylum EAD clock determinations. As the declarations of thirteen attorneys from around the United States demonstrate, the limited administrative review that may be available to an asylum applicant is arbitrary, inconsistent, and ineffective. *See, e.g.*, Exh. 2-14.

The common question of law that all Notice and Review class members seek to have resolved in this litigation is: Whether Defendants' Notice and Review Policies and Practices violate the U.S. Constitution, the INA, the governing regulations, and the APA. Should Plaintiffs and class members prevail on this legal question, Defendants will be required to provide legally sufficient notice and review procedures regarding asylum EAD eligibility determinations, including erroneous asylum EAD clock determinations.

b. Hearing Subclass

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The Hearing subclass includes only those asylum applicants whose asylum EAD clocks have not started or will not start on the date that a complete asylum application was or will be filed with the immigration court. Plaintiffs A.B.T. and K.M.-W. and the members of this subclass have been or will be adversely impacted by the Defendants' Hearing Policy and Practice. This nationwide policy and practice mandates that, with respect to asylum applications to be decided during removal hearings, an asylum application is not considered "filed" until the next hearing before an immigration judge. *See* OPPM 11-02 at 5-6 ("A defensive asylum application is 'filed' for asylum clock purposes when it is accepted by the judge at a hearing."); Department of Justice, Immigration Court Practice Manual (2009) § 3.1(b)(iii)(A) ("Defensive asylum applications are filed in open court at a master calendar hearing.").

As a direct result of this policy and practice, the asylum applications of Plaintiffs and subclass members that are filed with the immigration court at a time other than a hearing are not considered "filed" until the next hearing. Plaintiffs contend that this policy violates the regulations and that an asylum application is "filed" for purposes of the asylum EAD clock when an asylum applicant submits a complete asylum application to an immigration court, whether or not at a hearing before an immigration judge. Because an asylum applicant's asylum EAD clock only begins when a complete application is filed, the asylum EAD clocks of Plaintiffs and subclass members are not started on the date that a complete asylum application was or will be filed at the immigration court, but instead are delayed – sometimes by months or even a year – until the next hearing date before an immigration judge. In Plaintiff K.M.-W."s case, for example, the delay between the filing of his complete asylum application and his next scheduled hearing was just two weeks short of a year. In Plaintiff A.B.T.'s case, the delay between the two dates is nine months.

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The common question of law that all members of the Hearing subclass seek to resolve in this litigation is: Whether Defendants' Hearing Policy and Practice violates the INA, the regulations, and/or the APA. Should Plaintiffs K.M.-W. and A.B.T. and subclass members prevail on these legal questions, Defendants will be required to start their asylum EAD clocks as of the date that their complete asylum application was or will be filed with the immigration court.

c. Remand Subclass

The Remand subclass includes only those asylum applicants whose asylum EAD clocks have not started or restarted, or will not start or restart, following a remand of their asylum cases by the BIA or a court of appeals for further adjudication of their asylum application. As such, every member of this subclass shares a common procedural history:

- Their asylum cases were all denied by an immigration judge;
- Their asylum EAD clocks were stopped (or, if never previously started for some other reason, remained stopped at zero days) as a result of this denial of the asylum application;
- Following an appeal, their asylum cases were remanded by either the BIA or a federal court of appeals for further adjudication of the asylum application; and
- Their asylum EAD clocks did not start or restart following the remand decision due solely to Defendants' Remand Policy and Practice.

The central shared fact is that all have been adversely affected by Defendants' Remand Policy and Practice. This policy and practice mandates that the asylum clock remains permanently stopped when an asylum application is denied and does not restart following a remand for further adjudication of the asylum application. *See* EOIR's OPPM 11-02 at 16; Exh. 15 at 29 (USCIS PowerPoint presentation released in response to a Dec. 14, 2010 FOIA request submitted by the Massachusetts Law Reform Institute).

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The common question of law that all members of the Remand subclass seek to have resolved in this litigation is: Whether the Remand Policy and Practice violates the INA, the immigration regulations, and/or the APA. Should Plaintiffs G.K., L.K.G., and D.W. and subclass members prevail on these legal questions, Defendants will be required to restart their asylum EAD clocks as of the date of the remand.

3. The Claims of the Named Plaintiffs are Typical of the Claims of the Members of the Proposed Class.

Rule 23(a)(3) specifies that the claims of the representatives must be "typical of the claims … of the class." Meeting this requirement usually follows from the presence of common questions of law. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). To establish typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 154. As with commonality, factual differences among class members do not defeat typicality provided there are legal questions common to all class members. *La Duke*, 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Smith v. U. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented ... typicality ... is usually satisfied, irrespective of varying fact patterns which underlie individual claims.") (citation omitted).

The claims of the named Plaintiffs are typical of the claims of the proposed classes. All Plaintiffs represent the Notice and Review class challenging Defendants' policy and practice of failing to provide notice to asylum applicants when EOIR unilaterally takes action to stop or not start or restart their asylum EAD clocks. Plaintiffs K.M.-W. and A.B.T., like all members of the Hearing subclass, have been unable to get their asylum clocks started upon their filing a complete asylum

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application because of the Defendants' Hearing Policy and Practice. Plaintiffs G.K., L.K.G. and D.W., like all members of the Remand subclass, have not been able to get their asylum EAD clocks started or restarted following a remand of their cases by the BIA or a federal court of appeals for further action on the asylum application due to Defendants' Remand Policy and Practice.

Because the named Plaintiffs and the proposed classes are united in their interest and injury and raise common legal claims, the element of typicality is met.

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class and Counsel are Qualified to Litigate this Action.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citation omitted).

a. *Named Plaintiffs*

The named Plaintiffs will fairly and adequately protect the interests of the proposed class and subclasses because they seek relief on behalf of the classes as a whole and have no interest antagonistic to other members of the classes. Their mutual goal is to declare Defendants' challenged policies and practices unlawful and to enjoin further violations. *Cf. Hanberry v. Lee*, 311 U.S. 32, 41 (1940). The interest of the class representatives are not antagonistic to those of the proposed class members, but in fact coincide.

All of the Plaintiffs are asylum applicants seeking employment authorization pursuant to 8 U.S.C. § 1158(d)(2), as implemented by 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a) and 1208.7. All Plaintiffs contend that Defendants' policies and practices controlling the asylum EAD clock violate

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the Constitution, the statute and implementing regulations. Thus, in each case their respective goals are the same.

b. *Counsel*

The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984), *amended on rehearing*, 763 F.2d 1098 (9th Cir. 1985); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979), *aff'd without opinion*, 609 F.2d 505 (4th Cir. 1979).

Plaintiffs' are represented by Northwest Immigrant Rights Project, American Immigration Council, Massachusetts Law Reform Institute and a private law firm that specializes in immigration litigation. Counsel are able and experienced in protecting the interests of noncitizens and, among them, have considerable experience in handling complex and class action litigation. *See* Exh. 16-23 (Declarations of Matt Adams, Chris Strawn, Melissa Crow, Mary Kenney, Emily Creighton, Robert Pauw, Robert Gibbs and Iris Gomez). Thus, Counsel are able to demonstrate that they are counsel of record in numerous cases focusing on immigration law that successfully obtained class certification and class relief. In sum, Plaintiffs' counsel will vigorously represent both the named and absent class members.

B. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the requirements of Rule 23(b) for a class action to be certified. This action meets the requirements of Rule 23(b)(2), namely "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding

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declaratory relief with respect to the class as a whole." Plaintiffs challenge—and seek declaratory and injunctive relief from—systemic policies and practices that create tremendous hardship for asylum applicants who are forced to wait for prolonged time periods without employment authorization before final adjudication of their asylum claims. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (finding certification under Rule 23(b)(2) appropriate "where the primary relief sought is declaratory or injunctive.").

In this case, Defendants have created and applied policies and practices that affect all asylum applicants. The class and subclasses describe nationwide groups of applicants for asylum who have been or will be subjected to Defendants' unlawful policies and practices denying them their statutory and regulatory right to apply for and obtain employment authorization, for which they would otherwise be eligible. 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7(a); 8 C.F.R. § 274a.12(c)(8).

As noted, the Government itself has already acknowledged that there is a systemic problem, which led to the USCIS Ombudsman's Report. The policies and practices have been further delineated in OPPM 11-02 at 8 (absence of any notice required when a decision is made to stop or not (re)start the asylum EAD clock); the Immigration Court Practice Manual and Operating Policies and Procedures Memorandum (ICPM), in particular with reference to ICPM rule 3.1(b)(iii)(A) and OPPM 11-02 at 5-6 (requiring defensive asylum applications to be filed at a master calendar hearing); and OPPM 11-02 at 16 (requiring that the asylum EAD clock remain stopped upon a denial by an immigration judge even if, subsequently, the case is remanded to the immigration judge for a new asylum decision).

These policies and practices and the government's own reports demonstrate that Defendants have acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Defendants' actions

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therefore are more than "generally applicable" to Plaintiffs and unnamed class members alike. Hence, the first requirement of subsection (b)(2) is met.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion and enter the attached order certifying this proceeding as a class action and defining the class and sub-Classes as set forth in Section I of this Motion.

Dated this 20th day of December, 2011.

Respectfully submitted,

s/ Matt Adams
s/ Christopher P. Strawn

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CERTIFICATE OF SERVICE

RE: *A.B.T., et al. v. U.S. Citizenship and Immigration Services, et al.*
Case No. 2:11-cv-02108

I, Matt Adams, am an employee of Northwest Immigrant Rights Project. My business address is 615 Second Ave., Ste. 400, Seattle, Washington, 98104. I hereby certify that on December 20, 2011, I electronically filed the foregoing motion and proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered partiers. In addition I sent two copies by U.S. certified mail postage prepaid, to:

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Executed in Seattle, Washington, on December 20, 2011.

s/ Matt Adams

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