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INTRODUCTION

The government has refused to abide by its legal obligations to provide work authorization to Plaintiff XXXXXXXXX, a cooperating crime victim with a pending, bona fide U-visa application. This agency failure, in violation of federal statute and regulation, has placed XXXXXXXXX and his family in a state of legal and financial jeopardy, when the U-visa statutory and regulatory scheme is designed to do just the opposite. A longtime New York resident, XXXXXXXXX was the victim of XXXXXXXXX. XXXXXXXXX subsequently provided critical assistance to both the New York Police Department and Queens District Attorney's Office that led to his assailant's arrest and conviction—precisely the kind of assistance contemplated by the U-visa program. And yet, despite having filed a bona fide petition for a U-visa, United States Citizenship and Immigration Services (“USCIS” or “the Agency”) has refused to take any action whatsoever on his petition for 800 days. XXXXXXXXX brings this action to compel USCIS to follow federal statutes and its own binding regulations.

Congress created the U-visa to protect immigrant victims of crime. Since the 10,000 per-year statutory cap creates significant wait times that leave U-visa petitioners vulnerable while their petitions are pending, federal law also ensures that they are eligible for interim benefits and protections during the wait. Two principal forms of protection are available: First, Congress made such petitioners eligible to apply for employment authorization based on the threshold determination that their U-visa petition is bona fide. *See* 8 U.S.C. § 1184(p)(6). For petitioners who applied before January 17, 2017, like XXXXXXXXX, a regulation required USCIS to adjudicate applications for an Employment Authorization Document (“EAD”) within 90 days, or, failing that, to grant an interim EAD. *See* 8 C.F.R. § 274a.13(d). Second, under binding agency regulations, USCIS must evaluate U-visa petitioners for placement on an official

“waitlist.” *See* 8 C.F.R. § 214.14(d)(2). Once added to that list, petitioners automatically receive deferred action, an interim form of protection from deportation, and are eligible for work authorization. Yet, in this case, USCIS has categorically refused to ever provide the first benefit, and has unreasonably delayed the second for a period that the government admits will last more than three years. This constitutes agency action unlawfully withheld or unreasonably delayed and arbitrary and capricious agency action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), 706(2)(A).

USCIS’s failure to comply with its clear statutory and regulatory obligations is causing ongoing harm to XXXXXXXX. The Agency’s failure to grant him an EAD has hindered his ability to support himself and provide for XXXXXXXX. Now, XXXXXXXX. Had he been timely placed on the waitlist, XXXXXXXX would not face the ongoing imminent risk of deportation and XXXXXXXX. Instead, this decision has been unreasonably delayed.

Since no dispute of material fact exists, XXXXXXXX is entitled to judgment as a matter of law, and this Court should order USCIS to (1) timely adjudicate his application for an EAD, (2) grant XXXXXXXX an interim EAD, and (3) determine whether to add him to the U-visa waiting list. In the alternative, XXXXXXXX here opposes the government’s motion for summary judgment and requests discovery related to the Agency’s delays.

STATEMENT OF FACTS

On August 11, 2015, XXXXXXXX submitted a Form I-918 petition for U-visa status to USCIS. Local Rule 56.1 Statement of Undisputed Facts (annexed hereto, hereinafter “SOUF”) ¶ 13. XXXXXXXX, had been the victim of XXXXXXXX. *Id.* ¶¶ 1–4. Following the XXXXXXXX, XXXXXXXX assisted the New York Police Department and the Queens District Attorney’s Office by reporting the crime, identifying the assailant and his weapon, and agreeing

to testify as required. *Id.* ¶¶ 5–11. Based on XXXXXXXXX’s assistance, XXXXXXXXX was convicted of XXXXXXXXX. *Id.* ¶¶ 8–9.

As part of XXXXXXXXX’s U-visa petition, XXXXXXXXX, completed and signed a Form I-918 Supplement B, U Nonimmigrant Status Certification, in support of his U-visa petition. *Id.* ¶¶ 10–11. XXXXXXXXX submitted all other necessary components of the U-visa petition to USCIS. *Id.* ¶ 13. To apply for employment authorization, XXXXXXXXX marked a checkbox on his Form I-918 indicating that he wanted an EAD. *Id.* ¶ 15. On August 14, 2015, XXXXXXXXX received from USCIS’s Vermont Service Center an acknowledgment of its receipt of his Form I-918 Petition for U Nonimmigrant Status. *Id.* ¶ 20.

XXXXXXX has now waited 800 days for USCIS to adjudicate his U-visa and employment authorization application and provide him with an interim EAD. *Id.* ¶ 21. This has diminished his earnings and his ability to provide for his family. *Id.* ¶¶ 33–35. Although Congress authorized the granting of employment authorization for individuals with pending, bona fide petitions, *see* 8 U.S.C. § 1184(p)(6), the Agency admits that it does not and will not adjudicate EAD applications under this provision. *Id.* ¶ 24.

XXXXXXX is also still waiting for USCIS to place him on its official waitlist for a U-visa. *Id.* ¶ 27. Currently, USCIS is processing U-visa petitions submitted on or before September 25, 2014. *Id.* ¶ 22. USCIS claims it has begun to address its delays by distributing U-visa petition adjudication between its Nebraska and Vermont Service Centers and simultaneously processing waitlist and final U-visa adjudications, but these steps have not significantly accelerated the placement of U-visa petitioners on the waitlist. *Id.* ¶ 32. Rather, USCIS has continued to place only a small percentage of petitioners on the waitlist. *Id.* ¶ 26. U-visa petitioners, such as XXXXXXXXX, therefore receive limited access to interim benefits, as USCIS refuses to provide

threshold determinations of employment eligibility under 8 U.S.C. § 1184(p)(6) and the wait time for the waitlist increases. *Id.* ¶ 32. Under the government’s own prediction, XXXXXXXX will probably not receive an EAD for more than three years after he applied for one, *id.* ¶ 32, and he will never receive, or even have a chance to receive, a 90-day adjudication of his EAD or an interim EAD.

Not only has USCIS refused to grant XXXXXXXX. As a result, XXXXXXXX may be deported before he is ever processed for inclusion on the waitlist. And, once deported, he may face difficulty returning to the United States, *even if* he is placed on the official waitlist. SOUF ¶ 37.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is granted in favor of a moving party “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).¹ The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is considered material “if it might affect the outcome of the suit under the governing law,” and an issue of fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001) (citation omitted). A court must “draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

¹ The government’s motion should be considered as a motion for summary judgment rather than a motion to dismiss. *See* Fed. R. Civ. P. 12(d); *Sira v. Morton*, 380 F.3d 57, 66 (2d Cir. 2004) (motions for judgment on the pleadings must be converted to one for summary judgment if the motion includes material “outside the pleadings” not excluded by the court).

ARGUMENT

I. USCIS'S CATEGORICAL REFUSAL TO ADJUDICATE EAD APPLICATIONS UNLAWFULLY DENIES XXXXXXXX HIS STATUTORY RIGHT TO A RULING

USCIS has categorically refused to adjudicate XXXXXXXX's EAD application, in violation of its statutory duty. Under the plain text of 8 U.S.C. § 1184(p)(6), XXXXXXXX was legally entitled to a ruling on his application. It is undisputed that Defendants have failed to rule on his application for over two years because they categorically refuse to adjudicate EAD applications authorized by this statute. SOUF ¶ 24. This failure has left XXXXXXXX and XXXXXXXX in a continued position of vulnerability. As a matter of law, USCIS's refusal to comply with its nondiscretionary duty to provide XXXXXXXX with a ruling constitutes "agency action unlawfully withheld or unreasonably delayed" under the APA. 5 U.S.C. § 706(1). This Court should therefore compel USCIS to adjudicate XXXXXXXX's application under § 1184(p)(6).²

A. By Virtue of His Pending, Bona Fide U-Visa Petition, XXXXXXXX Is Eligible for an EAD under 8 U.S.C. § 1184(p)(6)

Under the plain text of § 1184(p)(6), U-visa petitioners like XXXXXXXX who have pending, bona fide U-visa petitions are eligible for employment authorization. The analysis of a statute "necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." *In re Lehman Bros. Inc.*, 808 F.3d 942, 946 (2d Cir. 2015). This statute

²The government frivolously argues that this Court does not have jurisdiction under 8 U.S.C. § 1252(g). Defs.' Mot. at 20. But §1252 (g) applies "only to three discrete actions that the Attorney General may take" within the *deportation* process, none of which applies here. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-83 (1999). Further, its reference to 5 U.S.C. § 701(a)(2) is similarly misguided, as that "narrow exception" to the presumption of judicial review is only pertinent where there is "no law to apply." *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016). Of course, there is "law to apply" here, which the government does not dispute.

provides in pertinent part: “The Secretary [of Homeland Security] may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U) of this title.” 8 U.S.C. § 1184(p)(6). Despite this clear language, added by Congress to provide access to interim relief for cooperating crime victims like XXXXXXXX who face lengthy U-visa delays, USCIS has refused to consider XXXXXXXX’s application.

The language of § 1184(p)(6) shows that EADs adjudications should be widely available, based on an initial, threshold determination of bona fide validity. The use of the word “any” makes clear that the statute’s scope covers *all* individuals with pending, bona fide U-visa petitions. *Massachusetts v. E.P.A.*, 549 U.S. 497, 529 n.25 (2007) (“[A]ny’ . . . has an expansive meaning, that is, one or some indiscriminately of whatever kind.”). “Pending” means “[r]emaining undecided; awaiting decision.” Pending, *Black’s Law Dictionary* (10th ed. 2014). Any petitioner whose eligibility for a U-visa has not yet been decided therefore has a *pending* petition. Similarly, “bona fide” denotes an initial threshold determination, particularly since such determinations of “bona fide” validity are familiar in the EAD application context, and consist of a limited, initial review. For example, in the asylum context, a bona fide application is “a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous.” Donald Neufeld, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act 29* (USCIS May 6, 2009), perma.cc/K8XZ-P8Y8. In the related context of T-visas, which are granted to certain victims of trafficking, applications are found to be “bona fide” after an “initial review” confirms that the application is complete, properly filed, contains required documents, and does not appear

fraudulent. *See* 8 C.F.R. § 214.11(a). Therefore, by the text of § 1184(p)(6), a U-visa petitioner is eligible for an EAD based on a threshold determination that the petition is bona fide.³

The legislative history of § 1184(p)(6) confirms that its purpose was to ensure that a wide class of bona fide petitioners would receive prompt access to interim work authorization while awaiting their U-visa adjudications. When the pertinent provision was enacted in 2008 as part of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), it was only the latest congressional action to push USCIS to provide timely access to benefits for immigrant victims of crimes. Pub L. No. 110-457, § 201(b), 122 Stat. 5044, 5053. Evidence of this intent stretches back to 2000, when Congress first created the U-visa program. Violence Against Women Act (“VAWA 2000”), Pub. L. 106-386, § 1513, 114 Stat. 1464, 1533-34 (2000). Later, when USCIS failed to promulgate regulations for the U-visa program for several years, Congress required the Agency to implement VAWA 2000 protections for victims within 180 days after the law’s enactment. Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, § 828, 119 Stat. 1960, 3066 (2006). The legislative history of TVPRA confirms Congress’s mandate that U-visa petitioners receive prompt access to EADs: “Immigrant victims of . . . violent crimes should not have to wait for up to a year before they can support themselves and their families.” 154 Cong. Rec. H10,888, 10,905 (daily ed. Dec. 10, 2008) (statement of cosponsors).⁴ The text and context of § 1184(p)(6) speak with one voice:

³ It is unnecessary for the Court here to determine what precisely constitutes a *bona fide* petition, as Defendants do not dispute that XXXXXXXX’s petition is bona fide, and, in any case, XXXXXXXX’s petition plainly meets any reasonable initial threshold.

⁴ Subsequent legislation indicates Congress’s ongoing concern that employment authorization be available widely prior to adjudication. In 2013, Congress required DHS to submit reports that included “[t]he mean amount of time and median amount of time between the receipt of an application for [U] nonimmigrant status and *the issuance of work authorization to an eligible applicant* during the preceding fiscal year.” Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 802, 127 Stat. 54, 110-11 (2013) (emphasis added).

Congress intended for all individuals with pending, bona fide U-visa petitions to be eligible for work authorization in a timely manner.

The government argues that § 1184(p)(6) is satisfied by the regulatory waitlist system that existed prior to the statute's enactment. Yet, it has foreclosed the argument that the waitlist satisfies § 1184(p)(6), since it admits that the waitlist is an *alternative* to complying with the statute, even conceding that it has never implemented the statute. Defs.' Mot. at 19. Additionally, unlike § 1184(p)(6), the waitlist regulation requires a U-visa adjudication on the merits, as the waitlist is for those who would receive U-visas *but for* the cap. Defs.' Mot. at 3. This full adjudication on the merits is substantially more demanding than the threshold bona fide determination contemplated by section 1184(p)(6).

Finally, the argument that the Agency's waitlist scheme satisfies the statute's work authorization eligibility requirement is untenable in light of the timing of the statute's enactment. The pertinent portion of § 1184(p)(6) was enacted on December 23, 2008, over a year after USCIS rendered the official waitlist policy effective in October 2007. *See* TVPRA, Pub L. No. 110-457, 122 Stat. 5044, 5044; New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status ("New Classification"), 72 Fed. Reg. 53,014, 53,014 (Sept. 17, 2007). Courts presume "that Congress is aware of existing law when it passes legislation." *Hall v. United States*, 566 U.S. 506, 516 (2012). Accepting the government's reading of § 1184(p)(6) as duplicative of the already existing process, rather than a statutory directive to provide greater access to interim benefits, would impermissibly render the section inoperative. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (citing the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"). Additionally, the lack of timely access to interim benefits that Congress sought to address in

enacting the work authorization provision of § 1184(p)(6) has only worsened since 2008. SOUF ¶ 32. The government’s reading of the statute is thus in conflict with its own argument, as well as the text and background of the law itself.

B. XXXXXXXXX has a Clear Right to a Ruling on His EAD Application

Statutes that set out specific criteria of eligibility, such as § 1184(p)(6), grant petitioners a right to a ruling. Therefore, XXXXXXXXX is clearly entitled to a ruling on his EAD application under this section. Contrary to the government’s assertions, the fact that USCIS has until now categorically refused to provide such a ruling does not alter its duties under the plain language of § 1184(p)(6). Defs.’ Mot. at 19. Rather, its admission that it has “never implemented” the statute, *id.*, is a telling concession that USCIS has ignored the law, allowing victims like XXXXXXXXX to languish for years in positions of economic and personal vulnerability.

The Supreme Court has repeatedly held that when a statute provides specific standards of eligibility for a benefit or relief, an individual applying for that relief has a “right to a ruling,” even if the *outcome* of that ruling is discretionary. *I.N.S. v. St. Cyr*, 533 U.S. 289, 307–08 (2001) (“Eligibility that was governed by specific statutory standards provided a right to a ruling on an applicant’s eligibility, even though the actual granting of relief was not a matter of right under any circumstances, but rather is in all cases a matter of grace.” (internal quotation marks omitted)). *St. Cyr* forecloses the government’s claim that the use of “may” in § 1184(p)(6) renders the statute *entirely* discretionary such that no ruling on eligibility is required.⁵ Defs.’ Mot. at 18–19. Indeed, the statutory provision at issue in *St. Cyr*, governing cancellation of removal, was analogous to § 1184(p)(6): It provided that “[t]he Attorney General *may* cancel

⁵ The sole case the government cites, *Rastelli v. Warden Metro Correctional Center*, 782 F.2d 17 (2d Cir. 1986), is not to the contrary. Defs.’ Mot. at 18–19. *Rastelli* simply stands for the general proposition that “may” simply “suggests” discretion. 782 F.2d at 23.

removal in the case of an alien who is inadmissible or deportable from the United States if the alien” meets a list of statutory standards. 8 U.S.C. § 1229b(a) (emphasis added). The Court held that while the use of “may” indicated that the *outcome* was discretionary, the individual’s entitlement to a ruling was not. *St. Cyr*, 533 U.S. at 307 (recognizing “a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand”). The Second Circuit has consistently applied this principle. *See, e.g., Levine v. Apker*, 455 F.3d 71, 81 (2d Cir. 2006) (finding it impermissible for an agency to “allow the discretion granted by the word ‘may’ to eclipse the seemingly mandatory Congressional parameters for the exercise of that discretion, and render them purely hortatory”). Because the plain language establishes specific criteria for eligibility, XXXXXXXXX is entitled to a ruling.

C. USCIS’s Categorical Refusal to Adjudicate EAD Applications Is Agency Action Unlawfully Withheld or Unreasonably Delayed

The government’s acknowledged refusal to adjudicate employment applications under § 1184(p)(6) constitutes agency action “unlawfully withheld or unreasonably delayed” under the APA, 5 U.S.C. § 706(1), and this Court should compel the Agency to adjudicate XXXXXXXXX’s application. Section 1184(p)(6) entitles XXXXXXXXX to a ruling. Where a statute requires a ruling, an agency’s categorical refusal to decide violates the APA.⁶ *McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000) (“When an administrative agency simply refuses to act upon an application, the proper remedy—if any—is an order compelling agency action.”); *Villa v. U.S. Dep’t of Homeland Sec.*, 607 F. Supp. 2d 359, 363 (N.D.N.Y. 2009) (“While it is within the Attorney

⁶ Contrary to the government’s argument, Defs.’ Mot. at 19, the lack of an explicit timeframe for EAD issuance does not excuse USCIS’s *categorical* refusal to comply with its statutory duty to decide. No such timeframe exists in the statute authorizing cancellation of removal at issue in *St. Cyr*, 533 U.S. at 307. Further, Congress wanted threshold determinations of eligibility made quickly. *See supra* Part I.A. Regardless, when XXXXXXXXX applied, the adjudication timeline was governed by specific regulatory standards. § 274a.13(d). *See infra* Part II.B.

General’s discretion to grant or deny an application for adjustment of status, it is not within his discretion to not adjudicate at all.”). XXXXXXXXX is entitled to an adjudication, and the Agency has categorically refused to act on that plainly defined duty. This has caused ongoing harm to XXXXXXXXX and XXXXXXXXX. For all these reasons, this Court should grant summary judgment to XXXXXXXXX and compel Defendants to adjudicate his EAD application or should declare Defendants’ refusal to do so unlawful.

II. USCIS’S REFUSAL TO FOLLOW ITS OWN REGULATORY TIMELINE FOR ADJUDICATING XXXXXXXXX’S EAD APPLICATION VIOLATES THE APA

USCIS’s failure to abide by its own binding regulatory timeline for adjudicating XXXXXXXXX’s application for an EAD constitutes unlawful agency action under the APA. On August 12, 2015, XXXXXXXXX applied for an EAD in the same way as other U-visa petitioners, by submitting a Form I-918. SOUF ¶¶ 14–19. USCIS regulations then operative imposed a mandatory timeline on the adjudication of EAD applications: once an individual applied, “USCIS will adjudicate the application within 90 days from the date of receipt of the application Failure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days.” 8 C.F.R. § 274a.13(d). However, USCIS neither adjudicated XXXXXXXXX’s application within 90 days nor provided him an interim EAD. The agency’s failure to follow its own binding regulations was unlawful agency action. *See* 5 U.S.C. § 706(1) (courts shall “compel agency action unlawfully withheld or unreasonably delayed”); § 706(2)(A) (courts shall “hold unlawful and set aside agency action . . . otherwise not in accordance with law”). Because there is no material dispute over these facts, this Court should grant summary judgment to XXXXXXXXX as a matter of law, ordering USCIS to timely adjudicate his application and grant him an interim EAD pending that adjudication.

The government seeks to shield USCIS’s disregard of its regulatory obligations by arguing that a subsequent amendment to § 274a.13(d) retroactively stripped XXXXXXXX of his right to a timely adjudication of his EAD application and to an interim EAD. However, under the Supreme Court’s recent decision in *Vartelas v. Holder*—which the government fails to mention—the Agency’s subsequent amendment should *not* be interpreted to apply retroactively. 566 U.S. 257, 266–67 (2012). This attempt here by USCIS to evade its obligations is especially concerning since both the Agency and the government have conceded that USCIS was not following the regulation even *prior* to its amendment. Defs.’ Mot. at 6.

A. XXXXXXXX’s U-Visa Petition Constituted an EAD Application

XXXXXXX applied for employment authorization in the standard manner for U-visa principals: by checking “yes” on his Form I-918 to the statement “I want an Employment Authorization Document.” SOUF ¶¶ 14–19. When he submitted his Form I-918, USCIS policy treated it as an EAD application. *See* New Classification, 72 Fed. Reg. at 53,029 (Sept. 17, 2007) (“USCIS has designed the Form I-918 so that it serves the dual purpose of requesting U nonimmigrant status and employment authorization to streamline the application process.”); *see also* SOUF ¶¶ 14–19. Indeed, agency practice had been to provide a receipt for a Form I-918 application *and* a receipt for an EAD application to applicants who had submitted a Form I-918 with the checkbox marked. SOUF ¶ 19. XXXXXXXX therefore applied for an EAD in the manner permitted by the Agency’s own form and recognized by its own practices.

The government’s arguments to the contrary are unavailing, as nothing in the I-918 instructions in effect when XXXXXXXX submitted his petition indicated that he was required to

submit an I-765 to apply for an EAD.⁷ Rather, the Agency's prior policies and his eligibility under § 1184(p)(6) confirm that XXXXXXXX applied for an EAD.

B. 8 C.F.R. § 274a.13(d) Required USCIS to Adjudicate XXXXXXXX's EAD Application in 90 Days or Grant Him an Interim EAD

USCIS was required to follow the mandatory timeline set forth in former 8 C.F.R. § 274a.13(d) in processing XXXXXXXX's EAD application. The text of the regulation is nondiscretionary and general in scope: Once the Agency receives an EAD application, "USCIS will adjudicate the application within 90 days from the date of receipt of the application, except as described [in three exceptions that do not apply here]." 8 C.F.R. § 274a.13(d). In addition, "[f]ailure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days." *Id.* USCIS was therefore required to adjudicate XXXXXXXX's EAD application within 90 days of his application, and grant him an interim EAD if it failed to do so.

The language of § 274a.13(d) is mandatory, given its use of the phrases "will adjudicate" and "will result in the grant." In other contexts, courts have confirmed that the plain language of § 274a.13(d) imposes a nondiscretionary duty. *See, e.g., Ramos v. Thornburgh*, 732 F. Supp. 696, 701 (E.D. Tex. 1989) (holding that the plaintiff's application for employment authorization had a substantial likelihood of success on the merits given "the nondiscretionary nature of [the agency's] obligations" under § 274a.13(d)); *John Doe I v. Meese*, 690 F. Supp. 1572, 1577 (S.D.

⁷The government also argues that the checkbox was only applicable to individuals who have been granted a U-visa, claiming that the I-918 instructions then indicated that an EAD would "only be issued '[i]f your petition is approved,'" Defs.' Mot. at 25 n.6. But the word "only" is newly introduced by the government in its brief and does not appear anywhere in the text of the instructions. Nothing in the text of the instructions even suggests such a limitation.

Tex. 1988) (§ 274a.13(d) imposes “a mandatory duty to grant interim employment authorization”). Section 274a.13(d)’s imposed timeline is thus nondiscretionary.

The text and purpose of § 274a.13(d) also make clear that it applies generally to employment applications. The text carves out only three specific exceptions to “the application[s]” it applies to—none of which pertain to XXXXXXXX.⁸ 8 C.F.R. § 274a.13(d). Under the longstanding textual canon of *expressio unius*, the inclusion of these express exemptions indicates the absence of implied exceptions. *See Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996) (“The ancient maxim *expressio unius est exclusio alterius* (mention of one impliedly excludes others) cautions us against engrafting an additional exception to what is an already complex [statute].”). Thus, while the government asserts that the text of § 274a.13(d) applies *only* to “certain enumerated provisions”, Defs.’ Mot. at 24, in fact the opposite is true: the text of the provision applies generally *except* for the three express exceptions.

The history of § 274a.13(d) reinforces this plain reading of its text: Absent the explicitly enumerated exceptions, it applies to EADs generally. The Agency’s official statements during notice-and-comment rulemaking confirm that § 274a.13(d) was intended to apply broadly across “a *comprehensive* listing of employment authorization classifications.” Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,219 (May 1, 1987) (emphasis added). They also referred broadly to the importance of promptly processing EADs *generally*. *Id.* at 16,220 (“In promulgating this rule, [the Agency] recognizes the importance of expeditious processing of employment authorization applications.”).

⁸ Section 274a.13(d) contains only three exceptions: “USCIS will adjudicate the application within 90 days . . . except as described in 8 CFR 214.2(h)(9)(iv) [spouse and children of an H nonimmigrant], . . . 8 CFR 274a.12(c)(8) [nonimmigrants pursuant to Compact of Free Association] . . . and 8 CFR 274a.12(c)(9) [nonimmigrant spouses and their children] in so far as it is governed by 8 CFR 245.13(j) and 245.15(n).”

The government's argument that § 274a.13(d) does not apply to XXXXXXXX is unavailing. The government asserts that § 274a.13 as a whole applies only to certain types of EAD eligibility discussed in one of its paragraphs, § 274a.13(a). Defs.' Mot. at 24. Yet nothing in the text of the regulation supports this interpretation. Nor is it plausible, since paragraph (a) is a technical paragraph that lays out different procedures for applying for authorization under certain sub-sections of a separate regulation, 8 C.F.R. § 274a.12 (enumerating certain regulatory bases for EADs). Furthermore, these sub-sections of § 274a.12 do not define the entire universe of eligibility for employment authorization: XXXXXXXX's EAD eligibility is derived not from the regulations but directly from 8 U.S.C. § 1184(p)(6). *See supra* Part I.A. The absence of regulations cannot, of course, preclude a later statutory grant of eligibility. And USCIS itself has recognized its authority to grant EADs to individuals made eligible by statute in the absence of implementing regulations. Indeed, the Agency has pointed to paragraphs marked "reserved" in 8 C.F.R. § 274a.12(c)(27)-(30), which serve as placeholders for future grants of eligibility, in determining that victims of spousal abuse are eligible for EADs under a direct statutory grant of eligibility absent formal implementing regulations. USCIS, Policy Memorandum, PM-602-0130, "Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants" 5–6 (Mar. 8, 2016), perma.cc/WHF8-SC5K. Since XXXXXXXX was eligible under § 1184(p)(6), his application was governed by the general nondiscretionary timeline of § 274a.13(d).

C. USCIS's Failure to Comply With § 274a.13(d) Warrants Relief Under the APA

USCIS had a clear duty to adjudicate his employment application within 90 days or grant him an interim EAD, and its failure to do so was unlawful agency action. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (an agency unlawfully withholds or unreasonably delays action if it "failed to take a discrete agency action that it is required to take" (emphasis omitted)).

It is well established that an agency may not disregard its own binding regulations, especially when the rights of individuals are at stake. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”); *Singh v. U.S. Dep’t of Justice*, 461 F.3d 290, 296 (2d Cir. 2006) (“[A]n administrative agency must adhere to its own regulations”). Section 274a.13(d) required USCIS to adjudicate XXXXXXXXX’s application in 90 days or grant him an interim EAD. The government has acknowledged that it has done neither. Defs.’ Mot. at 22. The Agency’s refusal to adjudicate XXXXXXXXX’s EAD application was agency action not in accordance with law under 5 U.S.C. § 706(2)(A), and its failure to follow the mandatory timeline established by its own binding regulations was unlawful withholding or unreasonable delay under 5 U.S.C. § 706(1).

Since there are no material disputes on this claim, this Court should order that USCIS adjudicate XXXXXXXXX’s EAD application and grant him an interim EAD pending that adjudication or should declare Defendants’ refusal to do so unlawful.

D. The Government’s Efforts to Retroactively Shield USCIS’s Failure to Comply With Its Regulatory Obligations Are Unavailing

The government has acknowledged that USCIS not only failed to apply 8 C.F.R. § 274a.13(d) to XXXXXXXXX, but that it had generally ceased to abide by its own binding regulations prior to their amendment. The government seeks to shield USCIS’s unlawful and dilatory action in two ways. First, the government invokes *Auer* deference, which is inapplicable here, and, furthermore, cannot change the plain text of the regulation. Second, the government argues that the amendment of 8 C.F.R. § 274a.13(d) applied retroactively to allow the Agency to escape its existing obligation to XXXXXXXXX—despite the fact that the Supreme Court has made clear that regulations may not retroactively disturb a vested right.

1. The Agency’s Interpretation of 8 C.F.R. § 274a.13(d) is Not Entitled to *Auer* Deference

The government misconstrues *Auer* deference in arguing that it applies to its interpretation of 8 C.F.R. § 274a.13(d). Defs.’ Mot. at 25 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). *Auer* deference does not apply here because it is inapplicable to questions of statutory interpretation and because the regulation is not ambiguous.⁹

First, *Auer* deference is not relevant, since the question of whether 8 U.S.C. § 1184(p)(6) triggered the 8 C.F.R. § 274a.13(d) timeline is primarily one of *statutory* interpretation, to which *Auer* is inapplicable. *See Gonzales v. Oregon*, 546 U.S. 243, 257–58 (2006) (finding *Auer* deference not applicable when a question of regulatory meaning turns on a question of statutory interpretation). Congress enacted § 1184(p)(6) more than seventeen years after the Agency promulgated former 8 C.F.R. § 274a.13(d). *See* TVPRA, 122 Stat. 5044; Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens, 56 Fed. Reg. 41,767, 41,782 (Aug. 23, 1991). Since USCIS could not have intended to preemptively foreclose § 1184(p)(6) when it promulgated § 274a.13(d), *Auer* deference is inapplicable to the Agency’s argument that its interpretation excludes EAD applicants under the statute. *See Gonzales*, 546 U.S. at 257–58 (holding that when an agency’s interpretation of a regulation relied on events that took place subsequent to its promulgation, agency interpretation “runs counter to the intent at the time of the regulation’s promulgation” and does not receive *Auer* deference).

⁹ The government misconstrues *Auer* deference as appropriate “even when [an agency interpretation] appears to be inconsistent with the plain language of the regulation at issue,” Defs.’ Mot. at 25, but *Auer* does not apply when an interpretation is “plainly erroneous or inconsistent with the regulation,” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quotation omitted).

Second, the regulation in question is not ambiguous, and therefore *Auer* deference does not apply. Regulatory ambiguity is a prerequisite under *Auer*. *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). Yet, the language of § 274a.13(d) plainly states: “USCIS will adjudicate the application within 90 days from the date of receipt of the application” Even if the text were unclear, examining it in light of the “broad context of the statute” can resolve ambiguity. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As noted above, *see supra* Part I.A, Congress intended § 1184(p)(6) to ensure that crime victims who had helped law enforcement, like XXXXXXXX, could access an EAD. This context confirms the clear meaning of § 274a.13(d).

2. The Amendment of § 274a.13(d) Did Not Strip XXXXXXXX of His Vested Right to an Adjudication and an Interim EAD

XXXXXXX retains his right to timely adjudication or an interim EAD despite the amendment of § 274a.13(d) over 17 months after he applied. *See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant*, 81 Fed. Reg. 82,398, 82,398, 82,401 (Nov. 18, 2016) (amending the former regulation as of January 17, 2017). Stripping XXXXXXXX of that right would impermissibly give its amendment retroactive effect.

The language of § 274a.13(d) does not explicitly compel retroactivity and may not be given retroactive effect, since doing so would “take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.” *Vartelas*, 566 U.S. at 266 (internal brackets omitted); *see also United States v. Gill*, 748 F.3d 491, 501 (2d Cir. 2014) (holding that the “essential inquiry” is “whether the new provision attaches new legal consequences to events completed before its enactment”). USCIS’s obligation to grant XXXXXXXX an interim EAD

vested 90 days after XXXXXXXXX filed his EAD application as part of his Form I-918, more than a year before the amendment of the governing regulation. The Agency’s amendment of § 274a.13(d), if given retroactive effect, would constitute a “taking away or impairing” of those vested rights, *Vartelas*, 566 U.S. at 266, and would absolve the Agency of its own admitted failure to follow its own binding regulations.

The government’s argument that the amendment is retroactive because XXXXXXXXX had no reliance or settled expectation on an interim EAD is foreclosed by controlling precedent. Both the Supreme Court and Second Circuit have held that the presumption against retroactivity “does not require a showing of detrimental reliance.” *Vartelas*, 566 U.S. at 273–74; *see Gill*, 748 F.3d at 501 (for retroactivity analysis, the “essential inquiry is *not* whether there is reliance”). This rule against retroactivity also applies to pending applications for administrative relief.¹⁰

III. USCIS’S DELAY IN ADDING XXXXXXXXX TO THE WAITLIST IS UNREASONABLE

Separate and apart from USCIS’s categorical refusal to comply with its obligations under 8 U.S.C. § 1184(p)(6) and 8 C.F.R. § 274a.13(d), USCIS has unreasonably delayed its determination of XXXXXXXXX’s eligibility for the U-visa waitlist, exposing him to the possibility of deportation and leaving him ineligible for legal employment in the United States.

By regulation, the government has a nondiscretionary duty to add XXXXXXXXX to the U-visa waitlist. 8 C.F.R. § 214.14(d)(2). Under the APA, USCIS was required to comply with its

¹⁰ The government incorrectly cites *Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014), for the proposition that new regulations should be applied to pending agency applications. *See* Defs.’ Mot. at 22-23. Instead, *Sierra Club* confirms that, absent clear congressional intent, a change in law should *not* apply retroactively. There, plain statutory language “clearly require[d] EPA to apply the regulations in effect at the time of the permitting decision.” *Sierra Club*, 762 F.3d at 979. In contrast, the Immigration and Naturalization Act lacks any provision indicating congressional intent to apply the repeal of the regulation retroactively to pending U-visa petitions.

duty to determine XXXXXXXX's eligibility within a reasonable period of time, 5 U.S.C. §§ 555, 706(1), which is informed by official agency and congressional statements that U-visa petitioners should promptly gain access to interim benefits and protections. The government argues that delays in placing petitioners on the waitlist are attributable to the 10,000 per year U-visa cap. Defs.' Mot. at 1, 5, 14, 20. Yet there is no statutory cap for the waitlist (nor any regulatory cap, for that matter). Nonetheless, USCIS has failed to make the required waitlist determination for over two years, and admits it is likely to delay it for at least another year. SOUF ¶ 32. Since the government does not contest any material fact regarding this extensive delay, the Court should grant summary judgment to XXXXXXXX as a matter of law and compel Defendants to promptly determine his eligibility for a U-visa or declare that Defendants' failure to do so was unlawful.

In the alternative, if this Court does not find the record sufficient to grant XXXXXXXX's motion for summary judgment, it should deny the government's motion for summary judgment and order discovery on this delay. *See Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006) (holding that the FDA must "justify its delay to the court's satisfaction" and ordering discovery on matters relating to the reasonableness of the delay).

A. USCIS Was Obligated to Determine XXXXXXXX's Eligibility for the Waitlist Within a Reasonable Time

The plain text of 8 C.F.R. § 214.14(d)(2) and the government's own statements regarding the purpose of the regulation show that USCIS had a clear duty to determine XXXXXXXX's eligibility for the waitlist. After a U-visa application is filed but before it receives a final adjudication, USCIS must place applicants on a waitlist: 8 C.F.R. § 214.14(d)(2) states that "[a]ll eligible petitioners who, due solely to the [statutory] cap, are not granted U-1 nonimmigrant status *must* be placed on a waiting list and receive written notice of such placement." (emphasis

added). This regulation was promulgated to ensure that crime victims would have a timely opportunity to receive employment authorization and protection from removal. *See* New Classification, 72 Fed. Reg. at 53,033–34 (Sept. 17, 2007) (noting that the Agency prioritized “the protection of [noncitizen] victims” by, *inter alia*, providing them with interim benefits). The government does not deny the mandatory nature of the requirement that USCIS determine XXXXXXXX’s eligibility petition for the official waitlist.

USCIS was also required to make this determination within a reasonable period of time. 5 U.S.C. § 555(b) imposes a statutory duty on USCIS to make decisions “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time.” *See, e.g., Kim v. Ashcroft*, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004) (finding even without statutory or regulatory deadlines CIS does not have “unfettered discretion to relegate noncitizens to a state of ‘limbo’”); *Villa*, 607 F. Supp. 2d at 365 (N.D.N.Y. 2009) (“Agencies must be responsive to the people who apply to them for assistance and cannot unreasonably delay their action.”); *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (“CIS’s duty [to adjudicate her application for adjustment of status] is subject to a requirement of reasonableness.”).

B. USCIS’s Delay in Determining XXXXXXXX’s Eligibility for the Waitlist Has Been Unreasonable

The current two-year delay—projected to reach three years—in determining XXXXXXXX’s eligibility for the waitlist is unreasonable. In assessing unreasonable delay claims, courts have noted that “a reasonable time for agency action is typically counted in weeks or months, not years.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Contrary to the government’s suggestion that delays of over three years cannot be unreasonable, Defs.’ Mot. at 17–18, courts have routinely found delays unreasonable that were

considerably shorter than the one experienced by XXXXXXXX. *See, e.g., Alkeylani v. Dep't of Homeland Sec.*, 514 F. Supp. 2d 258, 266 (D. Conn. 2007) (three-year delay unreasonable for adjustment of status application); *Paunescu v. I.N.S.*, 76 F. Supp. 2d 896, 902–03 (N.D. Ill. 1999) (two-year delay in processing adjustment of status application unreasonable); *Yu v. Brown*, 36 F. Supp. 2d 922, 935 (D.N.M. 1999) (one-year delay unreasonable in processing Special Immigrant Juvenile Status application); *Galvez v. Howerton*, 503 F. Supp. 35, 39 (C.D. Cal. 1980) (six-month delay unreasonable for processing of adjustment of status application). And the implication that a delay of over three years cannot be unreasonable is contrary to the fact that “there is no per se rule as to whether a given delay is reasonable[,] . . . and . . . courts must determine the reasonableness of delay based on the totality of the circumstances.” *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 541 (S.D.N.Y. 2009).

Telecommunications Research & Action Center v. FCC provides six widely-accepted “TRAC Factors” for determining the reasonableness of agency delays where, as here, there are no explicit statutory or regulatory deadlines for adjudication. 750 F.2d 70, 80 (D.C. Cir. 1984); *see also Tummino*, 427 F. Supp. 2d at 231 (E.D.N.Y. 2006) (employing the TRAC factors). These factors all weigh in favor of finding that USCIS’s delay has been unreasonable. The factors are:

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

Tummino, 427 F. Supp. at 231. USCIS carries the burden of “justify[ing] its delay to the court’s satisfaction.” *Id.* Under these factors, the government has failed to do so.

1. USCIS’s Delay is Not Governed by a Rule of Reason (TRAC Factor 1)

USCIS’s delay in deciding whether to add XXXXXXXX to the waitlist is not governed by a rule of reason and is contrary the Agency’s own stated purpose in promulgating its regulations. Under *TRAC* Factor 1, this strongly counsels in favor of finding the delay unreasonable. The government cites the “complexity and time-consuming nature” of the adjudication process it has chosen as a significant cause of the delay, Defs.’ Mot. at 14, but the Agency contemplated the complex nature of adjudication in promulgating the waitlist regulation and still sought to provide U-visa petitioners with timely access to interim relief. *See New Classification*, 72 Fed. Reg. at 53,033 (Sept. 17, 2007). The administrative costs implicit in the waitlist system were, according to the Agency, outweighed by the higher priorities of “allowing the alien victim to remain in the United States”; “giving them an opportunity to access victims services to which they may be entitled”; and “providing employment authorization to alien victims so they will have a lawful means through which to support themselves and their families.” *Id.* USCIS’s inaction now has reproduced exactly the problem that the waitlist was designed to prevent: a prolonged period of precariousness without access to interim relief.

The government repeatedly points to the statutory cap of 10,000 principal U-visas per year as a justification for delays in determinations of eligibility for the waitlist, Defs.’ Mot. at 1, 5, 14, 20, but this is not persuasive. A limit on the number of U-visas that may be granted each year places no limitation on the availability of interim relief—if anything, it makes the need for such relief more pressing. Since there is no limit on the official waitlist, the statutory cap on U-visas counts in favor of finding USCIS’s delay to be unreasonable, not against it.

2. USCIS’s Delay Is Contrary to Congressional Intent (TRAC Factor 2)

The legislative history of the statutes governing U-visas further contradicts the government's claim that its delay has been reasonable. Under *TRAC* Factor 2, indications of the timeline desired by Congress may provide the rule of reason by which a delay is to be measured. Congress enacted the relevant language of 8 U.S.C. § 1184(p)(6) to specifically ensure that *timely* interim relief would be available to U-visa petitioners, consistent with its history of lawmaking in protection of immigrant victims of crimes. *See supra* Part I.A. Though no timeline for placement on the waitlist appears in the statute, the legislative history of the statute shows that making immigrant crime victims wait over a year for interim relief was not acceptable to Congress. *See* 154 Cong. Rec. H10,888, 10,905 (daily ed. Dec. 10, 2008) (statement of co-sponsors) (stating that one-year delays in the provision of work authorization are not acceptable); *see also supra* Part I.A. Such “strong statement[s] by Congress that the [Agency] must act in a timely manner” are “important” to reaching determinations as to whether an agency delay has been unreasonable. *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir.) (finding “strong statement” by Congress that the Agency “must act in a timely manner” based in part on the relevant statute’s legislative history).

3. USCIS’s Delay Exposes XXXXXXXXX to Removal and Makes it Difficult for Him to Provide for XXXXXXXXX (*TRAC* Factors 3 and 5)

The possibility of XXXXXXXXX’s imminent removal and separation from XXXXXXXXX weighs against USCIS. Under *TRAC* Factors 3 and 5, the potential human impact of agency delays weigh heavily in favor of finding a delay to be unreasonable. *Tummino*, 427 F. Supp. at 231 (“[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.”); *see also Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (finding when “lives are at stake,” an agency must act “with energy and perseverance”); *see also Families for Freedom*, 628 F. Supp. 2d at 541

(S.D.N.Y. 2009) (emphasizing the fact that the plaintiffs' claim "clearly implicates concerns of human health and welfare" renders DHS's delay in responding to the petition "that much more egregious"). Here, the government's delay prejudices XXXXXXXX's welfare and that of XXXXXXXX as it has exposed him to imminent removal and prevented him from working lawfully to provide for himself and XXXXXXXX. SOUF ¶¶ 33–37; *Geneme v. Holder*, 935 F. Supp. 2d 184, 194 (D.D.C. 2013) (limitations on ability to work and uncertainty about status as implicating human welfare in *TRAC* analysis).

Not only has XXXXXXXX been left at risk of deportation by USCIS's unreasonable delay, but XXXXXXXX.

The effect of expediting delayed action on agency activities of a higher or competing priority does not weigh in favor of USCIS. The government argues that finding in favor of XXXXXXXX would allow him to move to the "front of the line," thereby "slow[ing] adjudication of other U-visa petitions." Defs.' Mot. at 15. But systematic neglect of a statutory command does not acquire the veneer of legitimacy simply because it is widespread. *Alkeylani*, 514 F. Supp. 2d at 266 ("While [lack of resources] may be a legitimate policy crisis, the Court will not excuse Defendants from their statutory duty and let the cost fall on immigrant plaintiffs.") (internal quotation marks omitted). The government's claim, taken to its logical conclusion, would prevent judicial review of any adjudicatory scheme, no matter how slow, so long as applications were considered in the order in which they were filed. But "[a] court's function extends beyond placing its imprimatur on the status quo." *Jefrey v. I.N.S.*, 710 F. Supp. 486, 488 (S.D.N.Y. 1989) (finding that the fact that an administrative delay was "not unusual" did not imply that it was therefore reasonable.); *see also Kashkool*, 553 F. Supp. 2d at 1145 (D. Ariz. 2008) ("Plaintiff is not 'cut[ting] in line,' he has been patiently waiting in line for nearly

six years This Court will not deny relief to Plaintiff whose application has been unreasonably delayed merely because there may be others . . . whose applications have perhaps also been unreasonably delayed.”). This Court also should not permit USCIS to abdicate its duty to determine XXXXXXXX’s eligibility for the waitlist by claiming others are similarly situated.

XXXXXXXX has been placed in an especially vulnerable position by the Defendants’ simultaneous failure to determine his eligibility for the waitlist and their attempt to use his U-visa petition against him. SOUF ¶ 38. In comparison, in none of the cases the government cites for its “line jumping” argument was there any indication that the plaintiff faced such significant risks. For example, the plaintiff in *Saleh v. Ridge*, 367 F. Supp. 2d 508, 512 (S.D.N.Y. 2005), already had refugee status and sought adjustment to permanent resident status, and the only harm alleged was difficulty travelling internationally for work. Indeed, in almost all of the cases the government cites in which agency inaction was not found unreasonable, the plaintiff sought to expedite adjudication of a petition for adjustment to lawful permanent residency.¹¹ In no relevant cases did plaintiffs allege the possibility of removal or the inability to legally provide for their families.¹²

Finally, the Agency’s systematic disregard of Congress’s desire to provide timely interim benefits to U-visa petitioners undercuts the government’s arguments about line jumping. The Agency may not pivot and invoke interests that it has systematically disregarded—the prompt access of U-visa petitioners to interim relief—as a justification for denying XXXXXXXX access

¹¹ See *Li v. Chertoff*, 2007 WL 4326784 (E.D.N.Y. Dec. 7, 2007); *Kobaivanova v. Hansen*, 2011 WL 4401687 (N.D. Ohio Sept. 16 2011); *Dmitrenko v. Chertoff*, No. 07-CV-82, 2007 WL 1303009, (E.D. Va. Apr. 30, 2007); *Espin v. Gantner*, 381 F. Supp. 2d 261 (S.D.N.Y. 2005).

¹² *Patel v. Rodriguez*, was an action to compel adjudication of a U-visa petition denied. 2015 WL 6083199 (N.D. Ill. Oct. 13, 2015). Yet in that case, the judge found especially significant that the plaintiff requested *all 80,000* pending U-visa petitions be granted *nunc pro tunc* and made no allegations explaining why their wait was unreasonable. *Patel*, 2015 WL 6083199, at *6.

to the determination to which he is entitled. The D.C. Circuit recognized this in *In re Barr Labs., Inc.*, holding that “[w]here the agency has manifested bad faith, as by singling someone out for bad treatment or *asserting utter indifference to a congressional deadline*, the agency will have a hard time claiming legitimacy for its priorities.” 930 F.2d 72, 76 (D.C. Cir. 1991) (emphasis added). In this instance, where USCIS has shown systematic disregard for Congress’s desire that U-visa petitioners have timely access to interim relief, it may not invoke other petitioners in an attempt to deny XXXXXXXX the determination to which he is entitled by law.

4. USCIS’s Has Shown Systematic Indifference to Congress’s Desired Timeline (TRAC Factor 6)

The government’s own admissions and evidence, as well as that submitted by XXXXXXXX, confirm that USCIS has shown systematic indifference to its obligation to place U-visa petitioners on the waitlist on a reasonable timeline. Such indifference constitutes impropriety under the TRAC factors. *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 510 (9th Cir. 1997) (finding impropriety where the agency has “assert[ed] utter indifference to a congressional deadline”). A showing of impropriety, while not necessary, weighs in favor of finding delay unreasonable and “serves as a basis for expanding the scope of review, and thereby the scope of discovery” when considering agency delay. *Tummino*, 427 F. Supp. 2d 212, 230 (E.D.N.Y. 2006).

Moreover, although USCIS asserts that it has redistributed U-visa adjudicative resources, it has offered no evidence that it has meaningfully decreased the amount of time XXXXXXXX will have to wait for a determination of his eligibility for the waitlist. SOUF ¶ 32. Indeed, it appears that delays for the waitlist have generally increased. *Id.* XXXXXXXX, will thus be delayed in accessing to the waitlist for around three years, despite congressional intent that “[i]mmigrant victims of . . . violent crimes should not have to wait for up to a year before they

can support themselves and their families.” 154 Cong. Rec. H10,888, 10,905 (daily ed. Dec. 10, 2008) (statement of cosponsors).

Here, where USCIS has created a system which by its own admission has left tens of thousands of individuals without access to the interim relief provided by the waitlist, the Court cannot be asked to blindly defer to the Agency’s own internal allocation of its adjudicative resources. *See In re Monroe Commc’ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) (“It is the suggestion the [agency] is purposely shirking its obligation under the [APA] to avoid unreasonable delay—that it seeks to evade the event it finds undesirable by refusing ever to reach the issue—that disconcerts us.”). USCIS’s indifference to Congress’s expressed desire for timely consideration of interim relief for U-visa applicants further evidences that USCIS delay has been unreasonable.

C. Because USCIS’s Delay Was Unreasonable, This Court Should Compel It to Act

Under the *TRAC* factors, USCIS’s two-year delay (and projected three-year delay) in determining XXXXXXXXX’s eligibility for the waitlist is clearly unreasonable. Because the APA required USCIS to make this determination within a reasonable time, its failure to do so constituted agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. §§ 555, 706(1). This Court should therefore compel USCIS to adjudicate XXXXXXXXX’s eligibility for the waitlist. In the alternative, if this Court does not find the existing record sufficient to judge the reasonableness of USCIS’s delay, it should deny the government’s motion for summary judgment and order discovery regarding this delay.

IV. XXXXXXXXX IS ENTITLED TO A WRIT OF MANDAMUS

A writ of mandamus is available to compel agency action when there is a clear right to relief, the agency has failed to act on a plainly defined duty, and there is no other available and

adequate remedy. *See Anderson v. Bowen*, 881 F.2d 1, 5 (2d Cir. 1989). As established above, USCIS failed to act on three plainly defined duties: (a) it refuses to comply with XXXXXXXX's right to a ruling under section 1184(p)(6); (b) it has not complied with its duties under 8 C.F.R. 274a.13(d) and (c) and it has not complied with its statutory duty to adjudicate XXXXXXXX's eligibility for the waitlist within a reasonable time. These failures are causing XXXXXXXX ongoing harm. This Court should therefore grant a writ of mandamus on all three counts.

CONCLUSION

For the above stated reasons, the Court should grant summary judgment to XXXXXXXX and deny the government's motion to dismiss, or in the alternative proceed to discovery.

Respectfully submitted,

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* Motion for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served by email on Joseph Marutollo, U.S. Attorney's Office, Eastern District of New York on October 20, 2017.

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