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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FAYEZ MANSOR, et al.,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES,
et al.,

Defendants.

CASE NO. C23-0347JLR

ORDER

I. INTRODUCTION

Before the court is Plaintiffs Fayez Mansor, Cabdi Ibrahim Xareed, and Shukria Zafari’s (collectively, “Plaintiffs”) motion for class certification. (Mot. (Dkt. # 2); Reply (Dkt. # 38).) Defendants United States Citizenship and Immigration Services (“USCIS”), Secretary of the Department of Homeland Security Alejandro Mayorkas, and USCIS Director Ur Jaddou’s (collectively, “Defendants”) oppose the motion. (Resp. (Dkt.

1 # 36.) The court has reviewed the parties’ submissions, the balance of the record, and
2 applicable law. Being fully advised,¹ the court GRANTS in part Plaintiffs’ motion.

3 II. BACKGROUND

4 Below, the court reviews the statutory and regulatory as well as factual and
5 procedural backgrounds relevant to Plaintiffs’ motion for class certification.

6 A. Statutory and Regulatory Background

7 The Immigration and Nationality Act (the “INA”) authorizes the Secretary of
8 Homeland Security to award Temporary Protected Status (“TPS”) to noncitizens² from
9 countries with certain emergent conditions. *See* 8 U.S.C. § 1254a(b)(1) (allowing the
10 Secretary to designate for TPS countries where there is an ongoing armed conflict, an
11 environmental disaster, or epidemic). A noncitizen from a designated country is eligible
12 for TPS if they: (1) have been “continually present in the United States since the
13 effective date of the most recent designation” of their country of origin; (2) have
14 “continuously resided in the United States” since the designation date; and (3) are
15 “admissible as an immigrant.” *Id.* § 1254a(c)(1)(A)(i)-(iii). USCIS must deny TPS to
16 certain classes of noncitizens, such as those involved in terrorist activities, convicted of a
17 felony or at least two misdemeanors in the United States, or “if there are reasonable

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20 ¹ Plaintiffs request oral argument. (*See* Mot.) However, the court has determined oral
argument would not be helpful to its disposition of the motion. *See* Local Rules W.D. Wash.
LCR 7(b)(4).

21 ² The TPS statute and its implementing regulations refer to “aliens,” *see generally*
22 8 U.S.C. § 1254a, but the parties generally use the word “noncitizens” to refer to foreign
nationals who apply for TPS (*see generally* Mot.; Resp.). The court adopts the parties’ phrasing.

1 grounds for regarding the [noncitizen] as a danger to [U.S.] security.” *Id.*

2 §§ 1254a(c)(2)(B), 1158(b)(2)(A).

3 TPS temporarily protects noncitizens from deportation or removal from the United
4 States and grants them work authorization. *Id.* § 1254a(a)(1). Specifically, the statute
5 provides that the government “shall authorize the [noncitizen] to engage in employment
6 in the United States and provide the [noncitizen] with an ‘employment authorized’
7 endorsement or other appropriate work permit.” *Id.* § 1254a(a)(1)(B). The statute further
8 provides that, “[i]n the case of [a noncitizen] who establishes a prima facie case of
9 eligibility for [TPS] benefits . . . until a final determination with respect to the
10 [noncitizen’s] eligibility for such benefits . . . has been made, the [noncitizen] shall be
11 provided such benefits.” *Id.* § 1254a(a)(4)(B); *see also* 8 C.F.R. § 244.5(b) (“Upon the
12 filing of an application for [TPS], the [noncitizen] shall be afforded temporary treatment
13 benefits, if the application establishes the [noncitizen’s] prima facie eligibility for
14 [TPS].”). The statute’s implementing regulations define “prima facie” as “eligibility
15 established with the filing of a completed application for [TPS] containing factual
16 information that if un rebutted will establish a claim for eligibility” under the statute.
17 8 C.F.R. § 244.1. The temporary treatment benefits are protection from deportation and
18 employment authorization. *See* 8 U.S.C. § 1254a(a)(1); 8 C.F.R. § 244.10(e)(1). The
19 regulation further provides that “[t]emporary treatment benefits shall be evidenced by the
20 issuance of an employment authorization document” (“EAD”) and that “temporary
21 treatment benefits shall remain in effect until a final decision has been made on the
22 application for [TPS].” 8 C.F.R. § 244.10(e)(1), (2).

1 To apply for TPS, a noncitizen from a country designated for TPS must submit a
2 completed Form I-821 (“TPS application”) during the designated registration period. *See*
3 *generally Instructions for Application for Temporary Protected Status*, USCIS,
4 <https://www.uscis.gov/sites/default/files/document/forms/i-821instr.pdf> (last visited Aug.
5 1, 2023)). According to USCIS, an electronically filed TPS application is reviewed
6 through an automated “logic system” to ensure the fields are completed. (Orise Decl.
7 (Dkt. # 37-1) ¶ 6.) TPS applications submitted by mail are reviewed for completeness by
8 a contractor-operated “USCIS Lockbox.” (*Id.* ¶¶ 7-9.) According to USCIS, no
9 eligibility determination is made in either of these “completeness” review processes. (*Id.*
10 ¶¶ 6, 8.³) If the TPS application is “complete” and the applicant has either submitted the
11 application fee or a fee waiver, USCIS then sends a receipt notice acknowledging the
12 completed application. *See* 8 C.F.R. § 103.2(a)(7)(i); (*see* Compl. (Dkt. # 1) ¶ 52;
13 Maltese Decl. (Dkt. # 4) ¶ 3, Ex. A at 2 (“Mansor Receipt”), *id.* ¶ 4, Ex. B at 2 (“Zafari
14 Receipt”)).

15 Next, both mailed and electronically filed applications are, if complete, placed in
16 an electronic queue with other TPS applications from the same country for review in the
17 order they were filed. (Orise Decl. ¶¶ 6-7, 13 & n.4.) USCIS then schedules a biometric
18 appointment for the applicant. (*Id.* ¶ 11.) Finally, after the biometric data is collected
19 and processed, an Immigration Service Officer (“ISO”) begins the “initial review” to
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21 ³ Regulations governing USCIS provide that an application for an immigration benefit is
22 “complete” if it “establish[es] that [the noncitizen] is eligible for the requested benefit at the time
of filing the benefit request” and is “properly completed and filed with all initial evidence
required” by law and agency instructions. 8 C.F.R. § 103.2(b)(1).

1 determine whether the applicant is eligible. (*Id.* ¶ 13.) USCIS acknowledges that “is
2 required to assess TPS eligibility factors in both the prima facie determination and the
3 final adjudication processes.” (*Id.* ¶ 14 (emphasis removed).) According to USCIS, “to
4 be more efficient, USCIS simultaneously assesses the prima facie determination and
5 approvability during the ISO’s initial review of the file.” (*Id.* (describing this as
6 “processing and completing adjudication in one touch”).) USCIS states that if the
7 applicant is prima facie eligible, but the ISO cannot approve the TPS application, the ISO
8 will issue a prima facie eligibility determination and either request additional evidence or
9 issue a Notice of Intent to Deny the TPS application. (*Id.* ¶¶ 14-15.) If, on the other
10 hand, the ISO can approve the TPS application at this stage, it will do so without having
11 ever issued temporary treatment benefits. (*Id.* ¶ 14.)

12 Under USCIS’s current processes, the TPS application receipt does not contain an
13 “employment authorized” endorsement, and TPS applicants must separately apply for an
14 EAD using Form I-765. (Compl. ¶ 28); *see also A.A. v. U.S. Citizenship & Immigr.*
15 *Servs.*, Case No. C15-0813JLR, 2018 WL 1811352, at *1 (W.D. Wash. April 17, 2018)
16 (discussing the Form I-765 application).⁴

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20 ⁴ The parties dispute whether TPS applicants—as opposed to those whose TPS
21 applications have been granted—may file a Form I-765. (*See, e.g.*, Compl. ¶¶ 48-50; Corral
22 Decl. (Dkt. # 12) ¶ 5 (Form I-765 applicants “are not permitted to select . . . the category for TPS
applicants”); *but see* Orise Decl. ¶¶ 18-22 & n.10, Ex. A (screenshot of application for Form
I-765 indicating a TPS holder or a TPS applicant may submit the form).) The court need not
resolve this dispute on the instant motion.

1 **B. Factual Background**

2 Plaintiffs are noncitizens from countries designated for TPS. (*See* Compl.
3 ¶¶ 15-18.) Each of the Plaintiffs has applied for TPS and employment authorization and,
4 with one exception, received receipt notices from USCIS confirming their submission of
5 complete applications. (*See id.* ¶¶ 15-18, 72-73, 75, 78-79, 81, 83, 85, 87, 91-92, 94.)
6 Plaintiffs assert that they meet the prima facie eligibility criteria for TPS but, as of the
7 filing of the complaint,⁵ had yet to receive temporary employment authorization incident
8 to their TPS applications. (*See id.* ¶¶ 74, 80, 86, 93.)

9 Afghanistan is currently designated for TPS. (*Id.* ¶¶ 59-60.) Plaintiff Fayez
10 Mansor is a noncitizen from Afghanistan who applied for TPS on February 21, 2023. (*Id.*
11 ¶¶ 72-73; Mansor Receipt.) Mr. Mansor has resided in the United States since he first
12 entered the country with parole and applied for TPS and employment authorization on
13 February 21, 2023. (*Id.* ¶¶ 73-74.) Mr. Mansor has temporary employment authorization
14 through his parole status, which is not associated with his TPS application and is set to
15 expire on October 3, 2023. (*Id.* ¶ 76.) Mr. Mansor alleges that losing his work
16 authorization will cause him “significant harm” because he will lose his job and be
17 unable to pay for basic expenses. (*Id.* ¶ 77.) Plaintiff Shukria Zafari is a noncitizen from
18 Afghanistan who has resided in the United States since she first entered the country on
19 parole on September 8, 2021, after being evacuated from Afghanistan. (*Id.* ¶¶ 91, 93.)
20 Ms. Zafari applied for TPS and employment authorization on January 3, 2023. (*Id.*

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22 ⁵ For the reasons articulated below (*see infra* § III.A), the court reviews the facts as they
were at the time the complaint was filed.

1 ¶¶ 91-92; Zafari Receipt.) Ms. Zafari also has temporary employment authorization
2 through her parole status, which is not associated with her TPS application and will
3 expire in September 2023. (*Id.* ¶ 95.) Ms. Zafari also alleges she will endure “significant
4 harm” if she loses her employment authorization and will be unable to support herself
5 and two of her three children who live with her in the United States. (*Id.* ¶ 96.)

6 Somalia is currently designated for TPS. (*Id.* ¶¶ 59, 65.) Plaintiff Cabdi Ibrahim
7 Xareed is a noncitizen from Somalia who has resided in the United States since he first
8 entered the country without authorization on September 23, 2022, seeking asylum. (*Id.*
9 ¶ 83.) Mr. Xareed is in removal proceedings. (*Id.* ¶ 84.) Mr. Xareed applied for TPS
10 and employment authorization on February 23, 2023. (*Id.* ¶ 85.) Mr. Xareed has not
11 received receipt notices from USCIS for his applications or temporary employment
12 authorization. (*Id.* ¶¶ 86-87.) Mr. Xareed alleges that “[e]mployment authorization is
13 critical” for him because he does not have family in the United States to support him and
14 he needs financial resources to find his wife and daughter in Somalia. (*Id.* ¶¶ 88-89.)

15 **C. Procedural Background**

16 Plaintiffs filed this proposed class action, asserting claims under the Declaratory
17 Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act, 5 U.S.C. § 701, *et*
18 *seq.*, and the Fifth Amendment’s Due Process Clause, U.S. Const. amend. V. (*See*
19 Compl. ¶¶ 105-25.) On August 2, 2023, the court denied Defendants’ motion to dismiss,
20 except with respect to its motion to dismiss Plaintiff Ecclesiaste Coissy, whose claim had
21 become moot. (*See* MTD (Dkt. # 42); 8/2/23 Order (Dkt. # 51).) In relevant part, the
22 court rejected Defendants’ arguments that TPS applicants who receive EADs via other

1 avenues lack standing to challenge Defendants' alleged failure to issue EADs incident to
2 their prima facie eligibility for TPS. (*See id.* at 11-12.) On August 14, 2023, Defendants
3 notified the court that Plaintiffs had each received EADs incident to their applications for
4 TPS. (Not. (Dkt. # 54).) The court ordered briefing from the parties on the impact of this
5 development, if any, on the instant motion and this litigation in general. (8/14/23 OSC
6 (Dkt. # 56).) Both parties timely responded to the order. (*See* Pls' OSC Resp. (Dkt.
7 # 57); Defs' OSC Resp. (Dkt. # 58); *see also infra* § III.A (addressing possible
8 mootness).)

9 Plaintiffs now ask the court to certify the following class:

10 All individuals who have submitted or will submit an initial application for
11 Temporary Protected Status (TPS), who have received or will receive a
12 notice of receipt for such an application, who have not received a final
13 decision on the TPS application, and who have not been issued employment
14 authorization documentation incident to their pending TPS application.

15 (Mot. at 2.) In the alternative, Plaintiffs propose modifying the class definition as
16 follows:

17 All individuals who have submitted or will submit an initial application
18 establishing prima facie eligibility for Temporary Protected Status (TPS),
19 who have not received a final decision on the TPS application, and who have
20 not been issued employment authorization documentation incident to their
21 pending TPS application.

22 (Reply at 7.) Plaintiffs' modified class definition is very similar to the class definition
that Defendants argue the court would have to adopt to narrow an otherwise
impermissibly broad class definition. (*Compare id.*, with Resp. at 10.) The court
evaluates Plaintiffs' motion using this second, modified class definition. *See* 7A Charles
Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1759 (4th ed. 2023)

1 (noting the court’s authority to “construe the complaint or redefine the class to bring it
2 within the scope of Rule 23”); *see also Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 483
3 (N.D. Cal. 2011) (narrowing overbroad class definition).

4 III. ANALYSIS

5 The court begins by discussing the impact of Plaintiffs’ receipt of temporary
6 employment authorization on the instant motion, before reviewing the standard for
7 granting a motion for class certification, and finally turning to Plaintiffs’ motion and
8 Defendants’ arguments in opposition.

9 A. Whether the Class Certification Motion is Moot

10 A named plaintiff with a mooted claim generally cannot represent a class unless
11 they were a “member of the class at the time the class was certified.” *Kuahulu v. Emps.*
12 *Ins. of Wausau*, 557 F.2d 1334, 1336 (9th Cir. 1977); *see also Rosemere Neighborhood*
13 *Ass’n v. U.S. Env’t Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (“In general, when
14 an administrative agency has performed the action sought by a plaintiff in litigation, a
15 federal court lacks the ability to grant effective relief, and the claim is moot.” (internal
16 quotation marks omitted)). However, when a proposed class asserts “inherently
17 transitory” claims, “mooting the putative class representative’s claims will not
18 necessarily moot the class action,” even prior to class certification. *Pitts v. Terrible*
19 *Herbst, Inc.*, 653 F.3d 1080, 1090 (9th Cir. 2011); *see also Cnty. of Riverside v.*
20 *McLaughlin*, 500 U.S. 44, 52 (1991) (“That the class was not certified until after the
21 named plaintiffs’ claims had become moot does not deprive us of jurisdiction.”).

1 A claim is inherently transitory and therefore subject to the “capable of repetition
2 yet evading review” exception to mootness if: (1) “the duration of the challenged action
3 is ‘too short’ to allow full litigation before it ceases,” *Johnson v. Rancho Santiago Cmty.*
4 *Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010); and (2) “it is certain that other persons
5 similarly situated will have the same complaint,” *Pitts*, 653 F.3d at 1089-90 (internal
6 quotation marks omitted). A challenged action that lasts up to three years may be “too
7 short” and therefore inherently transitory, *Johnson*, 623 F.3d at 1019, and the
8 “evading-review doctrine” applies “where the duration of the controversy is solely within
9 the control of the defendant,” *Anderson v. Evans*, 371 F.3d 475, 479 (9th Cir. 2004). If a
10 proposed class’s claims are inherently transitory, the court may invoke the “relation
11 back” doctrine upon class certification and review the facts as they were at the time the
12 complaint was filed, “to preserve the merits of the case for judicial resolution.”
13 *McLaughlin*, 500 U.S. at 52.

14 Here, each of the Plaintiffs have received temporary employment authorization
15 incident to their TPS applications, which is the relief they ultimately request. (8/2/23
16 Order at 10-11; Not. at 2; *see, e.g.*, Compl. at 22); *see Rosemere*, 581 F.3d at 1173. But
17 Plaintiffs’ claim that USCIS violates the law by not issuing temporary employment
18 authorization immediately upon receipt of a completed TPS application is inherently
19 transitory. *See Pitts*, 653 F.3d at 1089-90. First, the duration of the challenged action is
20 “too short” because processing times for TPS applications are measured in months, and
21 because “the duration of the controversy is solely within the control of the defendant.”
22 *Anderson*, 371 F.3d at 479; (*see Orise Decl.* ¶ 16 (listing current processing times for

1 TPS applications, ranging between 3.5 and 21.5 months)). Second, other TPS applicants
2 will certainly have the same complaint, because Defendants will continue their practice
3 of not issuing temporary employment authorization immediately upon receipt of TPS
4 applications. *See Pitts*, 653 F.3d at 1089-90; *Casa Libre/Freedom House v. Mayorkas*,
5 Case No. 2:22-cv-01510-ODW (JPRx) 2023 WL 3649589, at *7 (C.D. Cal. May 25,
6 2023) (concluding claims of Special Immigrant Juvenile petitioners who challenged
7 USCIS’s delay in processing their applications were inherently transitory); (*see generally*
8 *Orise Decl.* (describing how USCIS processes TPS applications)). Thus, Plaintiffs’
9 claims relate back to the filing of the complaint. *See McLaughlin*, 500 U.S. at 52.

10 **B. Legal Standard for Class Certification**

11 Class certification is governed by Federal Rule of Civil Procedure 23. *Wal-Mart*
12 *Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Under Rule 23(a), the party seeking
13 certification must first demonstrate that “(1) the class is so numerous that joinder of all
14 members is impracticable; (2) there are questions of law or fact common to the class;
15 (3) the claims or defenses of the representative parties are typical of the claims or
16 defenses of the class; and (4) the representative parties will fairly and adequately protect
17 the interests of the class. Fed. R. Civ. P. 23(a). “Second, the proposed class must satisfy
18 at least one of the three requirements listed in Rule 23(b).” *Dukes*, 564 U.S. at 345;
19 *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013). Here, Plaintiffs seek to
20 certify a class under Rule 23(b)(2), which requires that “the party opposing the class has
21 acted or refused to act on grounds that apply generally to the class, so that final injunctive
22 relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

1 Fed. R. Civ. P. 23(b)(2); (*see* Mot. at 2). “Rule 23(b)(2) applies only when a single
2 injunction or declaratory judgment would provide relief to each member of the class.”
3 *Dukes*, 564 U.S. at 360.

4 Rule 23 “does not set forth a mere pleading standard.” *Id.* at 350. Rather,
5 “certification is proper only if the trial court is satisfied, after a rigorous analysis, that the
6 prerequisites of Rule 23(a) have been satisfied.” *Id.* at 350-51 (internal quotation marks
7 omitted). “[I]t may be necessary for the court to probe behind the pleadings before
8 coming to rest on the certification question.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S.
9 147, 160 (1982). This is because “the class determination generally involves
10 considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s
11 cause of action.” *Id.* (internal quotation marks omitted). Nonetheless, a decision on the
12 merits is improper at the class certification stage. *Moore v. Hughes Helicopters, Inc.*, 708
13 F.2d 475, 480 (9th Cir. 1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78
14 (1974). The decision regarding class certification “involve[s] a significant element of
15 discretion.” *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir.
16 2010).

17 **C. Plaintiffs’ Motion for Class Certification**

18 The court reviews Plaintiffs’ motion with respect to each of the relevant Rule 23
19 factors before turning to Defendants’ arguments in opposition. Defendants do not
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1 challenge Plaintiffs’ proposed class under any of the 23(a) or 23(b) factors, but instead
 2 argue that the proposed class is an impermissible fail-safe class. (Resp. at 10-12.⁶)

3 1. Numerosity

4 “The prerequisite of numerosity is discharged if ‘the class is so large that joinder
 5 of all members is impracticable.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
 6 Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(1)). Defendants do not contest Plaintiffs’
 7 numerosity allegations. (*See Resp.*) Here, the court concludes that Plaintiffs have
 8 established their proposed class is so numerous that joinder is impracticable, in
 9 satisfaction of Rule 23(a)(1)’s requirement. (*See Mot.* at 11 (estimating more than
 10 100,000 proposed class members).)

11 2. Commonality

12 The requirement of “commonality” is met through the existence of a “common
 13 contention” that is of “such a nature that it is capable of classwide resolution.” *Dukes*,
 14 564 U.S. at 350. A contention is capable of classwide resolution if “the determination of

15 _____
 16 ⁶ Defendants also argue that the Plaintiffs’ original class definition is overbroad because
 17 it includes TPS applicants who have suffered no harm because they either already received
 18 EADs through another avenue, or are not *prima facie* eligible for TPS. (*See Resp.* at 7-10.) The
 court need not address Defendants’ first argument, having rejected a similar argument in denying
 Defendants motion to dismiss. (*See 8/2/23 Order* at 10-11.) Defendants argue that, “[t]o resolve
 the overbreadth issues . . . the [c]ourt would need to narrow the proposed class to:

19 All individuals who have submitted or will submit an initial application for [TPS]
 20 *who are prima facie eligible for TPS*, who have not received a final decision on the
 TPS application and who have not been issued employment authorization
 documentation.”

21 (Resp. at 10 (emphasis in original); *see supra* § II.C (discussing narrower class definition in light
 22 of Defendants’ arguments and Plaintiffs’ reply).) Defendants argue that this narrowed definition
 creates a fail-safe class. (Resp. at 10-12; *see also infra* § III.C.6 (addressing this argument).)

1 its truth or falsity will resolve an issue that is central to the validity of each one of the
2 claims in one stroke.” *Id.* Accordingly, “what matters to class certification . . . is not the
3 raising of common questions—even in droves—but, rather the capacity of a classwide
4 proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.*
5 This requirement is “construed permissively.” *Hanlon*, 150 F.3d at 1019. Accordingly,
6 “[a]ll questions of fact and law need not be common to satisfy the rule.” *Id.*; *Evon v. Law*
7 *Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (“Where the
8 circumstances of each particular class member vary but retain a common core of factual
9 or legal issues with the rest of the class, commonality exists.”). This standard is “readily
10 met” where plaintiffs seek prospective relief “challeng[ing] a system-wide practice or
11 policy that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849,
12 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499,
13 504-05 (2005); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (“What makes the
14 plaintiffs’ claims suitable for a class action is the common allegation that the [agency’s]
15 procedures [are] insufficient.”).

16 Here, Plaintiffs’ proposed class meets the Ninth Circuit’s permissive commonality
17 standard because the class poses a common contention: namely, that USCIS’s practice of
18 not issuing temporary employment authorization upon receipt of a complete TPS
19 application that establishes prima facie eligibility violates the TPS statute. *See Dukes*,
20 564 U.S. at 350; (Reply at 7). Thus, the class’s common contention is capable of
21 classwide resolution because Plaintiffs challenge “a system-wide practice or policy that
22 affects all of the putative class members.” *Armstrong*, 275 F.3d at 868; *see also Nw.*

1 *Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs.*, 325 F.R.D. 671, 693
2 (W.D. Wash. 2016) (finding sufficient commonality where the litigation would be
3 resolved by answering whether USCIS is legally obligated to adjudicate EAD
4 applications within a certain timeframe). If Plaintiffs are correct on the merits, USCIS
5 can address all proposed class members' injuries by changing its practice "in one stroke."
6 *Dukes*, 564 U.S. at 350.

7 Defendants' argument to the contrary is unpersuasive. Defendants assert that the
8 proposed class cannot satisfy the commonality requirement because resolution of the
9 common legal question depends on an individualized assessment of a person's prima
10 facie eligibility for TPS. (*See Resp.* at 11.) Defendants' argument appears to conflate
11 Rule 23(a)(2)'s requirement that the class suffered a common injury capable of classwide
12 resolution, *see Dukes*, 564 U.S. at 350, with Rule 23's implied "ascertainability"
13 requirement that class members can be readily identified using clear and objective, rather
14 than subjective criteria, *see Xavier v. Phillip Morris USA, Inc.*, 787 F. Supp. 2d 1075,
15 1089 (N.D. Cal. 2011).⁷ But courts within the Ninth Circuit have concluded that the
16 implied ascertainability requirement does not apply to Rule 23(b)(2) classes. *See, e.g., In*
17 *re Yahoo Mail Litig.*, 308 F.R.D. 577, 596-98 (N.D. Cal. 2015); *Campbell v. Facebook,*
18 *Inc.*, 315 F.R.D. 250, 259 (C.D. Cal. 2016); *Al Otro Lado, Inc. v. McAleenan*, 423 F.

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21 ⁷ To the extent Defendants conflate the commonality requirement with Rule 23(b)(3)'s
22 more burdensome requirement that common questions predominate over individualized issues,
this too fails because, "[a]lthough common issues must predominate for class certification under
Rule 23(b)(3), no such requirement exists under 23(b)(2)." *Walters*, 145 F.3d at 1047.

1 Supp. 3d 848, 872-73 (S.D. Cal. 2019) (collecting cases).⁸ Defendants cite no authority
2 that subsumes this inquiry into the commonality analysis. (*See Resp.*) Regardless, the
3 Ninth Circuit has concluded that Rule 23 does not require an “administratively feasible”
4 way to identify class members. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133
5 (9th Cir. 2017). And courts often certify classes whose membership requires some
6 inquiry—and even a legal determination—to ascertain. *See, e.g., Vizcaino v. U.S. Dist.*
7 *Court*, 173 F.3d 713, 721-22 (9th Cir. 1999) (upholding certification of class of “common
8 law employees” where plaintiffs’ legal claims required determination of whether they
9 were common law employees); *Vaszlavik v. Storage Tech. Corp.*, 183 F.R.D. 264, 271
10 (D. Colo. 1998) (finding commonality and typicality requirements satisfied in proposed
11 class of employees whom defendant allegedly perceived to have over-used benefits);
12 *Johnson v. Jessup*, 381 F. Supp. 3d 619, 634-35 (M.D. N.C. 2019) (proposed class of
13 drivers licensees alleging state’s revocation of their licenses due to failure to pay court
14 fines without first assessing inability to pay violated due process rights satisfied
15 commonality and typicality requirements; common question was whether state provided
16 adequate procedures, not whether given class member could show inability to pay).

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19 ⁸ Even if Plaintiffs must establish the class’s ascertainability, the court concludes that
20 class members can be identified using the clear, objective criteria for prima facie eligibility
21 defined by the TPS statute and implementing regulations. *See Xavier*, 787 F. Supp. 2d at 1089;
22 (*supra* § II.A (describing criteria)); *compare Civ. Rights Educ. & Enf’t Ctr. v. Hosp. Props. Tr.*,
317 F.R.D. 91, 104-05 (N.D. Cal. 2016) (finding proposed class of wheelchair users denied full
enjoyment of facilities sufficiently ascertainable), *with C.F. v. Lashway*, Case No.
C16-1205RSM, 2017 WL 2574010, at *4 (W.D. Wash. June 14, 2017) (proposed class of
Medicaid recipients with disabilities who needed institutional care and desired community-based
services was not ascertainable because it relied on subjective criteria).

1 Here, the common legal question is whether Defendants’ practice violates the TPS
2 statute and its implementing regulations. If Plaintiffs ultimately obtain a judgment,⁹
3 Defendants need only change their uniform procedures for reviewing TPS applications
4 and assessing prima facie eligibility. *See Dukes*, 564 U.S. at 350 (noting that
5 commonality is satisfied where the class’s claims can all be resolved “in one stroke”). In
6 this Rule 23(b)(2) class, no “individualized” inquiries into proposed class members’
7 eligibility for relief would be necessary. (*See Resp.*; *infra* § III.C.5 (discussing Rule
8 23(b)(2)).) Therefore, because Plaintiffs challenge “a system-wide practice or policy that
9 affects all of the putative class members,” *Armstrong*, 275 F.3d at 868, the proposed class
10 meets Rule 23(a)(2)’s commonality requirement.

11 3. Typicality

12 “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with
13 those of absent class members; they need not be substantially identical.” *Hanlon*, 150
14 F.3d at 1020. “Typicality refers to the nature of the claim or defense of the class
15 representative, and not to the specific facts from which it arose or the relief sought.”
16 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Nonetheless, the
17 “commonality and typicality requirements of Rule 23(a) tend to merge.” *Falcon*, 457
18 U.S. at 157 n.13. “Both serve as guideposts for determining whether under the particular
19 circumstances maintenance of a class action is economical and whether the named
20 plaintiff’s claim and the class claims are so interrelated that the interests of the class

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22 ⁹ Importantly, the court takes no position on the merits of Plaintiffs’ claims at this time.
See Moore, 708 F.2d at 480; *Eisen*, 417 U.S. at 177-78.

1 members will be fairly and adequately protected in their absence.” *Id.* In determining
2 typicality, courts consider “whether other members have the same or similar injury,
3 whether the action is based on conduct which is not unique to the named plaintiffs, and
4 whether other class members have been injured by the same course of conduct.” *Hanon*,
5 976 F.2d at 508. Typicality is a “permissive standard,” *Staton v. Boeing Co.*, 327 F.3d
6 938, 957 (9th Cir. 2003) (cleaned up), but class certification is inappropriate “if there is a
7 danger that absent class members will suffer if their representative is preoccupied with
8 defenses unique to it,” *Hanon*, 976 F.2d at 508 (internal quotation marks omitted).

9 Here, as of the filing of the complaint, each of the Plaintiffs plausibly alleged that
10 they had suffered the same injury as that suffered by the proposed class; namely, they had
11 submitted complete TPS applications allegedly establishing their prima facie eligibility
12 but had not yet received temporary employment authorization incident to their TPS
13 applications. (*See* Compl. ¶¶ 72-77; 83-96); *Hanon*, 976 F.2d at 508; *see also*
14 *McLaughlin*, 500 U.S. at 52 (discussing inherently transitory claims). The proposed class
15 has allegedly suffered, or will suffer, the same harm as a result of Defendants’ common
16 practice. (*See* Reply at 7); *Hanon*, 976 F.2d at 508. Defendants’ argument that the class
17 fails to satisfy typicality is the same as their argument regarding commonality; that class
18 membership is predicated on individualized inquires into each member’s prima facie
19 eligibility. (*See* Resp. at 11.) Defendants again miss the mark for the reasons articulated
20 above. (*See supra* § III.C.2 (rejecting Defendants’ argument)); *see Falcon*, 457 U.S. at
21 157 n.13 (noting that the commonality and typicality requirements tend to merge).
22 Defendants’ argument also fails because whether Plaintiffs have established prima facie

1 eligibility—and are therefore members of the proposed class—refers to the facts from
2 which their alleged injury arose, which is irrelevant to the typicality analysis. *Hanon*,
3 976 F.2d at 508 (“Typicality refers to the nature of the claim or defense of the class
4 representative, and not to the specific facts from which it arose.”). Defendants do not
5 argue that Plaintiffs’ claims are vulnerable to unique defenses, *see id.*, or challenge
6 typicality on any other recognized grounds. (*See Resp.*) Accordingly, because Plaintiffs
7 allege claims that are co-extensive with those of the absent class members, they satisfy
8 Rule 23(a)(3)’s typicality requirement. *See Hanlon*, 150 F.3d at 1020.

9 4. Adequacy of Representation

10 “The final hurdle interposed by Rule 23(a) is that ‘the representative parties will
11 fairly and adequately protect the interests of the class.’” *Hanlon*, 150 F.3d at 1020
12 (quoting Fed. R. Civ. P. 23(a)(4)); *see also* Fed. R. Civ. P. 23(g) (setting forth factors for
13 appointing class counsel). “Resolution of two questions determines legal adequacy:
14 (1) do the named plaintiffs and their counsel have any conflicts of interest with other
15 class members and (2) will the named plaintiffs and their counsel prosecute the action
16 vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 1020 (citing *Lerwill v. Inflight*
17 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

18 Plaintiffs assert that they are adequate representatives of the class because they do
19 not seek money damages for themselves and, as of the filing of the complaint, share the
20 same interests as absent class members. (Mot. at 17); *see also Doe v. Wolf*, 424 F. Supp.
21 3d 1028, 1043-44 (S.D. Cal. 2020) (rejecting argument that named plaintiffs, whose
22 claims were moot, would not adequately represent the class where inherently transitory

1 exception too mootness applied); *Padilla v. U.S. Customs & Immigr. Enf't*,
2 C18-0928MJP, 2019 WL 1056466, at *4 (W.D. Wash. Mar. 6, 2019) (same). Counsel
3 for Plaintiffs demonstrate that they have experience litigating class actions on
4 immigration matters, including nationwide class actions. (See Mot. at 17; Adams Decl.
5 (Dkt. # 5) ¶¶ 3-4, 6-7; Kenney Decl. (Dkt. # 6) ¶¶ 4-6; Realmuto Decl. (Dkt. # 7) ¶¶ 4-5,
6 10.) The court finds nothing in the record that would indicate that either the Plaintiffs or
7 their attorneys have any conflicts of interest with other class members. Defendants do
8 not challenge Plaintiffs' or their counsel's abilities to protect the class's interests. (See
9 Resp.) Accordingly, the court concludes that Plaintiffs and their counsel meet Rule
10 23(a)(4)'s adequacy requirement. See *Hanlon*, 150 F.3d at 1020.

11 5. Common Grounds

12 Class certification under Rule 23(b)(2) is only appropriate where the plaintiffs
13 allege that the defendant has “acted or refused to act on grounds that apply generally to
14 the class, so that final injunctive relief or corresponding declaratory relief is appropriate
15 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). “Class certification under
16 Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or
17 injunctive.” *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001). In a
18 23(b)(2) class, the court treats “[p]redominance and superiority a[s] self-evident,” *Dukes*,
19 564 U.S. at 363, and requires “[o]nly a showing of cohesiveness of class claims,”
20 *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 481 (N.D. Cal. 2014) (citing *Fosmire v.*
21 *Progressive Max Ins. Co.*, 277 F.R.D. 625, 635 (W.D. Wash. 2011)). This inquiry “does
22 not require an examination of the viability or bases of the class members' claims for

1 relief, does not require that the issues common the class satisfy a Rule 23(b)(3)-like
2 predominance test, and does not require a finding that all members of the class have
3 suffered identical injuries.” *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014).

4 Here, the only relief Plaintiffs seek is declaratory and injunctive. (*See* Compl. at
5 18-22.) Plaintiffs seek a declaration that (1) the TPS statute requires Defendants to
6 provide employment authorization documentation while Plaintiffs’ TPS applications are
7 pending, and (2) Defendants’ alleged failure to implement a process to afford Plaintiffs
8 evidence of employment authorization while their TPS applications are pending violates
9 their due process rights. (*Id.* ¶¶ 106-110, 122-25.) Plaintiffs also seek an injunction
10 (1) setting aside Defendants’ allegedly unlawful practice and (2) compelling Defendants
11 to provide temporary employment authorization to the class. (*Id.* ¶¶ 112-16, 118-20.)
12 Without evaluating any of these claims on the merits, the court concludes the claims are
13 sufficiently cohesive for treatment in a Rule 23(b)(2) class. *See Fosmire*, 277 F.R.D. at
14 625; *see also Dukes*, 564 U.S. at 360 (stating that Rule 23(b)(2) authorizes class
15 certification “when a single injunction or declaratory judgment would provide relief to
16 each member of the class”).

17 Defendants’ arguments to the contrary are again unpersuasive. Defendants argue
18 that because “prima facie eligibility . . . cannot be assessed on a class-wide basis,” it is
19 “impossible for USCIS’s conduct to be ‘declared unlawful only as to all of the class
20 members or as to none.’” (Resp. at 12 (quoting *Dukes*, 564 U.S. at 360).) But, for the
21 reasons articulated above (*see supra* § III.C.2-.3), this is not so. The modified class
22 definition includes only those who “who have submitted or will submit an initial

1 application establishing prima facie eligibility for” TPS and have not received EADs
2 incident to their pending TPS applications. (*See supra* § II.C.) Plaintiffs contend—but
3 the court has not yet had occasion to rule—that USCIS’s failure to issue these EADs
4 violates the TPS statute. (*See, e.g.*, Mot. at 1-2.) Thus, when the court reaches the merits
5 of Plaintiffs’ case, its task will be to determine whether USCIS’s conduct is unlawful as
6 to all of the class members; no individualized assessment will be necessary. *See Dukes*,
7 564 U.S. at 360. Accordingly, the court concludes that class certification under Rule
8 23(b)(2) is appropriate.

9 6. Fail-Safe Class

10 Defendants’ primary argument against certifying this class is that it will create an
11 impermissible fail-safe class, or one “that is defined to include only those individuals
12 who were injured by the allegedly unlawful conduct.” *Olean Wholesale Grocery Coop.*,
13 *Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir.), *cert. denied sub nom.*
14 *StarKist Co. v. Olean Wholesale Grocery Coop., Inc., On Behalf of Itself & All Others*
15 *Similarly Situated*, --U.S.--, 143 S. Ct. 424 (2022); (Resp. at 10-12).¹⁰ A fail-safe class is
16 “defined in a way that precludes membership unless the liability of the defendant is
17 established.” *Kamar v. RadioShack Corp.*, 375 F. App’x 734, 736 (9th Cir. 2010);
18 *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (“Such a

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¹⁰ The court notes that in cautioning against fail-safe classes, the *Olean Wholesale* Court departed from, without expressly addressing, murky Ninth Circuit case law regarding the permissibility of such classes. *See Olean Wholesale*, 31 F.4th at 669 n.14; *see Melgar v. CSK Auto, Inc.*, 681 F. App’x 605, 607 (9th Cir. 2017) (noting “our circuit’s case law appears to disapprove of the premise that a class can be fail-safe” (citing *Vizcaino*, 173 F.3d at 721-22)).

1 class definition is improper because a class member either wins or, by virtue of losing, is
2 defined out of the class and is therefore not bound by the judgment.”).

3 Defendants argue that a class definition limited to prima facie eligible TPS
4 applicants is “the definition of a fail-safe class.” (Resp. at 11.) But Defendants again
5 conflate the merits of Plaintiffs’ eligibility for temporary treatment benefits with the
6 merits of Plaintiffs’ claims that Defendants’ procedures for issuing such benefits are
7 unlawful. (*See supra* § III.C.2-.3, .5.) Here, it is not the case that “a class member either
8 wins or, by virtue of losing, is defined out of the class” because the class will win or lose
9 on the basis of the court’s interpretation of Defendants’ obligations to TPS applicants
10 under the statutory and regulatory scheme—not on the basis of each applicant’s eligibility
11 for TPS. *See Messner*, 669 F.3d at 825. In other words, the court could (but does not
12 now) issue a judgment against Plaintiffs and conclude that the TPS statute and
13 regulations do not entitle prima facie eligible TPS applicants to EADs at any particular
14 time; such a judgment would bind all class members. *See id.* Therefore, Defendants do
15 not establish that the class is an impermissible fail-safe class.

16 **D. Class Certification**

17 For the reasons articulated above, the court concludes that Plaintiffs have satisfied
18 the requirements of Rule 23(a) and 23(b)(2). (*See supra* § III.C.) Plaintiffs have
19 demonstrated that (1) members of the proposed class are so numerous that joinder is
20 impracticable; (2) the class presents a common contention capable of classwide
21 resolution; (3) Plaintiffs’ claims are typical of the class; (4) Plaintiffs and their counsel
22 will fairly and adequately represent absent class members’ interests; and (5) Plaintiffs

1 allege that Defendants have acted or refused to act on grounds that apply generally to the
2 class. *See* Fed. Rule Civ. P. 23(a), (b)(2). The court therefore certifies the following
3 class pursuant to Rule 23(b)(2):

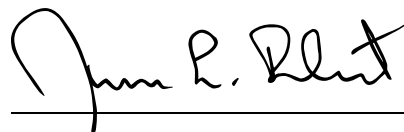
4 All individuals who have submitted or will submit an initial application
5 establishing prima facie eligibility for Temporary Protected Status (TPS),
6 who have not received a final decision on the TPS application, and who have
not been issued employment authorization documentation incident to their
pending TPS application.

7 The court appoints Plaintiffs Fayez Mansor, Cabdi Ibrahim Xareed, and Shukria Zafari as
8 class representatives, and attorneys Matt Adams, Aaron Korthius, and Glenda M. Aldana
9 Madrid of the Northwest Immigrant Rights Project, Marry Kenney, Trina Realmuto, and
10 Kristin Macleod-Ball of the National Immigration Litigation Alliance, and Ira J. Kurzban
11 and Edward F. Ramos of Kurzban Kurzban Tetzeli & Pratt, P.A., as class counsel.

12 IV. CONCLUSION

13 For the foregoing reasons, the court GRANTS in part Plaintiffs' motion (Dkt. # 2),
14 CERTIFIES the class as defined herein, and DIRECTS the Clerk to enter an order
15 regarding initial disclosures and a joint status report.

16 Dated this 25th day of August, 2023.

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19 JAMES L. ROBART
20 United States District Judge
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