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IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

GUAM CONTRACTORS ASS'N, *et al.* Plaintiff, v. LORETTA E. LYNCH, Attorney General of the United States, *et al.* Defendants	Civ. No. 16-00075 **DEFENDANTS' RULE 7(B) MOTION TO HOLD IN ABEYANCE PLAINTIFFS' MOTION TO CERTIFY A CLASS AND MEMORANDUM OF POINTS AND AUTHORITIES**

I. INTRODUCTION

Defendants Loretta E. Lynch, *et al.* ("Defendants") respectfully move this Court to hold in abeyance the motion to certify a class filed by Plaintiffs Guam Contractors Association, *et al.* ("Plaintiffs").[1] Plaintiffs moved for class certification before Defendants had the chance to answer or otherwise respond to Plaintiffs' Complaint, and Defendants intend to file a motion to dismiss all of Plaintiffs' claims in the Complaint in their entirety. Given the potential for this case to resolve itself at the motion to dismiss stage, the Court need not undertake the merits-heavy analysis of Plaintiffs' class certification motion until (1) the Court disposes of Defendants' motion to dismiss, thereby potentially narrowing the claims and issues upon which Plaintiffs seek class relief, and, if necessary, (2) Defendants can compile and file the voluminous certified administrative record[2] upon which the Court may properly decide whether class certification is appropriate. Moreover, neither party is prejudiced by staying Plaintiffs' class certification motion at this early stage in the litigation. Therefore, in the interest of judicial economy, and because good cause exists, Defendants' motion to hold Plaintiffs' motion to certify a class in abeyance should be granted.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs are a disparate group of Guam businesses whose most recent petitions for H-2B temporary guest workers were apparently denied by, or still pending before, Defendant United States Citizenship and Immigration Services ("USCIS").[3] *See* Compl. ¶ 13, ECF No. 1. On or

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[1] Defendants bring this motion in accordance with Rule 7(b) of the Federal Rules of Civil Procedure.

[2] Defendants use the term "certified administrative record" in this motion out of convenience and do not concede that the pertinent administrative materials relating to all of Plaintiffs' H-2B petitions at issue should be consolidated into a single administrative record.

[3] For the purposes of this motion, Defendants accept Plaintiffs' allegations in their Complaint as true.

about October 10, 2016, Defendants were served Plaintiffs' Complaint. On October 13, 2016, Plaintiffs filed a motion to certify a class, along with a motion for a preliminary injunction. Mot. to Certify Class, ECF Nos. 7, 8. Plaintiffs seek to certify the following class:

> Petitioners who have filed or will file an I-129 application for H[-]2B workers for Guam under one of the following two categories:
>
> 1. Peakload need (the "Peakload Subclass"); or
> 2. One-Time Occurrence (the "One-Time Occurrence Subclass")
>
> And who have received or will receive a denial of such I-129 application based on a finding that the Petitioner is unable to demonstrate "temporary need."

Mot. to Certify Class, ECF No. 7, at 6. Plaintiffs seek class-wide declaratory and injunctive relief by asking this Court to (1) declare unlawful and set aside USCIS actions, findings, and conclusions regarding Plaintiffs' current H-2B petitions, (2) remand Plaintiffs' petitions back to USCIS for findings in accordance with this Court's decision, (3) order USCIS to reopen and grant Plaintiffs' H-2B petitions, (4) extend any labor certifications for the entire validity period as well as any additional time necessary to provide meaningful relief to each Plaintiff, (5) clarify the appropriate legal definitions for "peakload" need and "one time occurrence" need, and (6) other associated relief. Compl., ECF No. 1, at 35–36.

III. LEGAL BACKGROUND

A. *Class Certification*

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). The burden of a party seeking certification of a proposed class includes demonstration of the existence of the required elements set forth in Rule 23(a) of the Federal Rules of Civil Procedure: (1) the class is so numerous that joinder of all members is impractical ("numerosity"); there are questions of law or fact common to the class ("commonality"); (2) the claims or defenses of the named plaintiffs are

typical of claims or defenses of the class ("typicality"); and (3) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation"). *See* Fed. R. Civ. P. 23(a). The purported class must also satisfy one of Rule 23(b)'s requirements. Fed. R. Civ. P. 23(b). Here, Plaintiffs seek certification under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.*

"Courts must perform a 'rigorous analysis' of these prerequisites before concluding that Rule 23(a) is satisfied." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015) (quoting *Wal–Mart v. Dukes*, 131 S.Ct. 2541, 2551 (2011)). The analysis may "entail some overlap with the merits of the plaintiff's underlying claim . . . ." *Id.* (quoting *Wal–Mart*, 131 S.Ct. at 2551). "As the party seeking to certify a class, [P]laintiffs bear the burden of demonstrating that they satisfy the elements of Rule 23." *McPhail v. First Command Fin. Planning, Inc.*, 247 F.R.D. 598, 608 (S.D. Cal. 2007) (citing *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977)). "The party may not rest on mere allegations, but must provide facts to satisfy these requirements." *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 529 (C.D. Cal. 2011) (citing *Doninger*, 564 F.2d at 1309).

B. *Motions to Stay or Hold in Abeyance*

The Court's authority "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This power encompasses holding in abeyance or staying the merits phase of a case. *Id.* at 253–54. The Supreme Court has explained that this power grants the Court "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). The

court may stay all proceedings in a case or hold in abeyance parts thereof, including the briefing of motions or discovery. *See, e.g., Horowitz v. Sulla*, 2014 WL 1048798, at *10 (D. Haw. Mar. 14, 2014) (granting motion to dismiss for lack of jurisdiction and noting how, before deciding upon a motion for summary judgment, the court had "ordered that all other motions be held in abeyance until the issue of federal jurisdiction was resolved").

IV. ARGUMENT

The parties should not brief, and the Court should not decide, Plaintiffs' class certification motion at this early stage in the litigation. Rule 23 states that a class determination should be made "as soon as practicable." Fed. R. Civ. P. 23(c)(1). The Ninth Circuit has recognized "that, in some cases, it may be appropriate in the interest of judicial economy to resolve a motion for summary judgment or motion to dismiss prior to ruling on class certification." *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (quoting *Wright v. Schock*, 742 F.2d 541, 545–46 (9th Cir. 1984)); *see also Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974).

Here, the interests of judicial economy weigh against the practicability of deciding Plaintiffs' class certification motion before deciding the threshold legal questions Defendants intend to timely raise regarding Plaintiffs' Complaint, including (1) whether joinder of the putative named Plaintiffs is permissible given the unique facts and circumstances forming the basis for each petition's denial and (2) whether Plaintiffs fail to state a claim upon which relief may be granted. *E.g., Cornilles v. Regal Cinemas, Inc.*, No. 00-173-AS, 2000 WL 1364236, at *1 (D. Or. Sept. 12, 2000) (staying "the determination of class certification issues until after it assesses the viability of plaintiffs' claims on dispositive motions to dismiss or motions for summary judgment" because "[b]efore transforming this case into a class action, a determination of the alleged merits of the action would benefit the court, the parties, and the potential parties"); *In re Beer Distribution Antitrust Litig.*, 188 F.R.D. 557, 564 (N.D. Cal. 1999). Such questions should be decided before

the Court embarks on the fact-intensive analysis of determining whether Plaintiffs have met their burden to show that their proposed class satisfies Rule 23's numerous requirements.

Moreover, delaying a decision on Plaintiffs' class certification motion until this Court has disposed of the threshold legal issues Defendants intend to raise would not work a "significant prejudice" to Plaintiffs. *See Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984). Plaintiffs' claims do not have the potential to be inherently transitory, such as those claims in cases involving short-term prison inmates, which necessitate an immediate ruling on class certification to potentially preserve claims for adjudication.[4] *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997). Rather, Plaintiffs' claims relate to the denial of employers' nonimmigrant visa petitions for H-2B temporary workers; thus, the merits of certifying a class of those employers whose petitions were denied can be safely reviewed after a ruling on issues raised under Rule 12. *E.g., Cornilles*, 2000 WL 1364236, at *1.

Finally, Defendants note that no certified administrative record has yet been compiled or filed in this case and that such a record may be necessary for the Court to consider ruling on

[4] Plaintiffs' citation in their class certification motion to case law regarding the viability of transitory class claims is inapposite here. ECF No. 7, at 18–19 (citing *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Los Angeles Unified School District v. Garcia*, 669 F.3d 956, 958 n.1 (9th Cir. 2012); *United States v. Howard*, 480 F.3d 1005, 1009–1010 (9th Cir. 2007); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1118 (9th Cir. 2003)). Plaintiffs appear to cite this line of case law for the proposition that this Court may order relief for the named Plaintiffs without mooting out the class claims. *Id.* However, this proposition is irrelevant to Plaintiffs' class certification motion, which seeks no ultimate relief, and is not supported by the case law cited. Rather, the cited cases discuss the circumstance where a claim is inherently transitory, and, thus, inherently susceptible to otherwise evading review because of Defendants' conduct or other third-party conduct. *See Cnty. of Riverside*, 500 U.S. at 52; *Gerstein*, 420 U.S. 103, 110 n.11 (1975); *Los Angeles Unified School District*, 669 F.3d at 958 n.1; *Howard*, 480 F.3d at 1009–1010; *Oregon Advocacy Ctr.*, 322 F.3d at 1118. Such a circumstance materially differs from the possibility that the Court will moot Plaintiffs' class claims by granting relief to the named Plaintiffs before deciding class certification.

Rather, Plaintiffs' concerns are more generally allayed by Rule 23, which dictates that class certification issues be decided as soon as practicable; presumably, the possibility of mooting out Plaintiffs' class claims by granting relief to the named Plaintiffs before deciding class certification would factor in to the Court's practicability analysis. *See Wright*, 742 F.2d at 543–44 (9th Cir. 1984).

Plaintiffs' class certification motion. Specifically, information in the administrative record bears on whether Plaintiffs' claims, which seek to lump together hundreds[5] of individualized administrative proceedings of visa petitions submitted by a varied group of businesses, for various occupations and job positions, are typical of the claims of the class and raise a common question of law or fact. Fed. R. Civ. P. 23(a). The administrative record materials regarding the final agency actions that are the subject of Plaintiffs' Complaint—all of the recently denied H-2B petitions for each of the ten individual employer Plaintiffs—are voluminous and will take at minimum several weeks to prepare and file. Therefore, additional time is needed for Defendants to compile the record and brief their opposition to Plaintiffs' class certification motion in light of the information in the record, so that the Court may make a fully-informed determination. However, a ruling favorable to Defendants on their forthcoming motion to dismiss would obviate the need for the Court to even consider Plaintiffs' class certification motion and Defendants' opposition, rendering Plaintiffs' motion premature.

Alternatively, if the Court denies Defendants' instant request to stay Plaintiffs' motion for class certification, Defendants respectfully request an extension of time until December 9, 2016, to file their opposition.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to hold Plaintiffs' motion to certify a class in abeyance pending a ruling on Defendants' forthcoming motion to dismiss should be granted. If the Court denies this request, Defendants request an extension to respond to Plaintiffs' motion for class certification until December 9, 2016.

RESPECTFULY SUBMITTED this 27th day of October.

[5] *See* Comp. Ex. 2, ECF No. 1-3.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2016, the foregoing document was served electronically by the Court's CM/ECF system on all counsel of record.

Dated: October 27, 2016

/s/ *Vinita B. Andrapalliyal*
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