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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Maria Robien Nadhar, et al.,

10 Plaintiffs,

11 v.

12 Tracy Renaud,

13 Defendant.

No. CV-21-00275-PHX-DLR

**ORDER**

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16 Pending before the Court is Defendant Tracy Renaud's<sup>1</sup> motion to dismiss and  
17 Plaintiffs'<sup>2</sup> motion for sanctions, both of which are fully briefed. (Docs. 15, 18, 19, 29.)  
18 For the following reasons, the Court denies both motions.

19 **I. Background**

20 **A. EB-5 Program**

21 The EB-5 program allots visas to immigrants who have "invested . . . capital" in a  
22 new commercial enterprise ("NCE") that will "create full-time employment for not fewer  
23 than 10 United States citizens" or foreign nationals authorized to work in the United States,  
24 excluding the applicant's spouse or children. 8 U.S.C. § 1153(b)(5). At the times relevant  
25 to the petitions at issue in this case, applicants for the EB-5 program were required to invest

26 <sup>1</sup> Renaud was the Senior Official Performing the Duties of the Director, U.S.  
27 Citizenship and Immigration Services ("USCIS"). As of August 3, 2021, the current  
28 director of USCIS is Ur M. Jaddou.

<sup>2</sup> Plaintiffs are Maria Robien Nadhar, Srennadh Kartei, Vijay Keerthi Seetharam,  
Atul Radhakrishana, Hendrik Lund, Nazanin Naikan, Kautilya Vemulapalli, Karien  
Wilson, Uma Saimani, and Ali Al Sharifi.

1 at least \$1,000,000 in a qualifying enterprise unless the project was in a “targeted  
2 employment area,”<sup>3</sup> in which case the investment threshold was \$500,000.<sup>4</sup> 8 U.S.C. §  
3 1153(b)(5)(B)(ii), (C)(ii); 8 C.F.R. § 204.6(f)(1)-(2).

4 Applicants can satisfy the EB-5 “job creation” requirement by showing that their  
5 investment will directly create full-time positions for at least 10 employees. 8 C.F.R. §  
6 204.6(j)(4)(i). Alternatively, applicants who participate in the EB-5 Immigrant Investor  
7 Program (or “Regional Center Program”) can demonstrate that their investment is within  
8 an approved regional center and that the investment will “create jobs indirectly through  
9 revenues generated from increased exports resulting from the new commercial enterprise.”  
10 8 C.F.R. § 204.6(j)(4)(iii), (m)(7). Participants in the Regional Center Program may show  
11 indirect job creation through “reasonable methodologies,” including “multiplier tables,  
12 feasibility studies, analyses of foreign and domestic markets for the goods or services to be  
13 exported, and other economically or statistically valid forecasting devices which indicate  
14 the likelihood that the business will result in increased employment.” 8 C.F.R. §  
15 204.6(m)(7)(ii). Multiple investors may aggregate their investments, and one NCE can  
16 serve as the basis for multiple EB-5 petitions so long as each investor individually meets  
17 the monetary and job creation requirements. *See* 8 C.F.R. § 204.6(g).

18 Foreign nationals apply for the EB-5 Program using Form I-526, Immigrant Petition  
19 by Alien Investor. *See* 8 C.F.R. §§ 204.6(a), (c). Applicants must show by a preponderance  
20 of evidence that they are eligible to receive an EB-5 visa. 8 U.S.C. § 1361. An approved  
21 visa petition is “merely a preliminary step in the visa application process. It does not  
22 guarantee that a visa will be issued, nor does it grant [the applicant] any right to remain in  
23 the United States.” *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1308  
24 (9th Cir. 1984). Once U.S. Citizenship and Immigration Services (“USCIS”) has approved

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26 <sup>3</sup> A “targeted employment area” is defined as “a rural area or an area which has  
27 experienced high unemployment (of at least 150 percent of the national average rate).” 8  
28 U.S.C. § 1153(b)(5)(B)(ii).

<sup>4</sup> As of November 21, 2019, these thresholds have increased to \$1,800,000 and  
\$900,000, respectively. 8 C.F.R. § 204.6(f)(1)-(2) (eff. Nov. 2019). Since each Plaintiff  
filed an application prior to that date, they may qualify for an EB-5 visa under the lower  
thresholds. (*See* Doc. 7 ¶¶ 88, 98, 108, 118, 127, 136, 145, 154, 164, 173.)

1 an I-526 petition, the applicant may apply for two-year conditional lawful permanent  
2 resident (“LPR”) status. 8 U.S.C. § 1186b(a). The investor can eventually qualify for full,  
3 nonconditional LPR status by submitting a petition that demonstrates the investor has  
4 “maintained his or her capital investment” for over two years and “created or can be  
5 expected to create within a reasonable time ten full-time jobs for qualifying employees.”  
6 8 C.F.R. § 216.6(a)(4)(iii)-(iv).

### 7 **B. USCIS's Processing Procedures for I-526 Petitions**

8 The Immigration and Nationality Act (“INA”) limits the total number of visas  
9 available to foreign nationals each year, as well as the number of visas available for  
10 nationals of any single country. *See* 8 U.S.C. §§ 1151, 1152. Most visa applications,  
11 including the ones at issue here, are considered in the order they are filed. 8 U.S.C. §  
12 1153(e). USCIS formerly processed Form I-526 petitions on a “first-in, first-out” basis.  
13 *See* Press Release, U.S. Citizenship and Immigration Servs., USCIS Adjusts Process for  
14 Managing EB-5 Visa Petition Inventory (Jan. 29, 2020),  
15 [https://www.uscis.gov/news/news-releases/uscis-adjusts-process-for-managing-eb-5-visa-](https://www.uscis.gov/news/news-releases/uscis-adjusts-process-for-managing-eb-5-visa-petition-inventory)  
16 [petition-inventory](https://www.uscis.gov/news/news-releases/uscis-adjusts-process-for-managing-eb-5-visa-petition-inventory) [hereinafter Press Release]. However, in January 2020, USCIS  
17 announced that it would “give[ ] priority to petitions where visas are immediately available,  
18 or soon available.” *Id.* Under the new approach, USCIS evaluates the visa availability for  
19 a petitioner’s country of birth and uses that information, “along with other factors, to  
20 determine which Form I-526 petitions should be processed first.” U.S. Citizenship and  
21 Immigration Services, *Questions and Answers: EB-5 Immigrant Investor Program Visa*  
22 *Availability Approach* (April 2, 2021), [https://www.uscis.gov/working-in-the-united-](https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/questions-and-answers-eb-5-immigrant-investor-program-visa-availability-approach)  
23 [states/permanent-workers/employment-based-immigration-fifth-preference-eb-](https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/questions-and-answers-eb-5-immigrant-investor-program-visa-availability-approach)  
24 [5/questions-and-answers-eb-5-immigrant-investor-program-visa-availability-approach](https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/questions-and-answers-eb-5-immigrant-investor-program-visa-availability-approach).  
25 The agency stated that the “new operational approach aligns with other visa-availability  
26 agency adjudications processes, is more consistent with congressional intent for the EB-5  
27 Immigrant Investor Program, and increases fairness in the administration of the program.”  
28 Press Release.

1           **C. Allegations and Claims**

2           All Plaintiffs filed Form I-526 petitions as part of the EB-5 visa program process.  
3           (*Id.* ¶¶ 88, 98, 108, 118, 127, 136, 145, 154, 164, 173.) Plaintiffs are nationals of several  
4           countries, including India, South Africa, Iran, and Iraq. (Doc. 7 ¶¶ 1-10.) Four Plaintiffs  
5           reside in the United States, and of those, one, Nadhar, lives in Arizona. (*Id.* ¶¶ 1-10.) The  
6           remaining Plaintiffs reside in five other countries. (*Id.*) Except for Al Sharifi, whose lost  
7           petition will be recreated and assigned for review after resubmission (Doc. 11 ¶ 5), and  
8           Niakan, whose petition has already been assigned for review (Doc. 7 ¶ 154), Plaintiffs, as  
9           of the date Defendant’s motion to dismiss was filed, have been waiting an average of 17.5  
10          months (*Id.* ¶¶ 88, 98, 108, 118, 127, 136, 145, 164). Upon approval of their petitions,  
11          Plaintiffs are eligible to immediately apply for lawful permanent resident status. (*Id.* ¶¶  
12          94, 104, 114, 123, 132, 141, 150, 160, 169, 177.)

13          Plaintiffs allege that the processing times for Form I-526 petitions have increased  
14          dramatically in recent years. (Doc. 7 ¶¶ 52-71.) Specifically, they state that 15,122  
15          petitions were adjudicated in Fiscal Year (“FY”) 2018 while only 4,673 were adjudicated  
16          in FY 2019. (*Id.* ¶ 53.) In the first quarter of FY 2020, USCIS only adjudicated 455  
17          petitions. *Id.* The slowdown is also reflected in the estimated processing times published  
18          by USCIS. In April 2019, the agency reported that processing times for Form I-526  
19          petitions were 20.5 to 27 months. (Doc. 7 ¶ 54.) In May 2019, the estimate was at 29 to  
20          45.5 months. (*Id.*) At the beginning of July 2020, USCIS claimed that Form I-526 petitions  
21          are adjudicated within 29.5 to 61 months. (*Id.* ¶ 57.) By the end of that same month, the  
22          agency estimated the wait to be between 46 and 74.5 months. (*Id.*)

23          Plaintiffs allege that the slowdown in processing times is deliberate and that  
24          Defendant “has taken affirmative actions, unknown to the public, to purposefully delay  
25          adjudications of EB-5 petitions and applications.” (Doc. 7 ¶ 198.) They assert that  
26          USCIS’s published processing times are inconsistent with its historical average processing  
27          times, which may indicate that “the Form I-526 processing times are artificially inflated to  
28          create a potential defense against lawsuits and also end” Congressional and public inquiry

1 into the length of time it takes to adjudicate those petitions. (*Id.* ¶ 198.) Plaintiffs also  
2 contend that the decrease in number of petitions processed per year and the increase in  
3 published processing times “did not correspond with any decrease in resources or  
4 significant increase in demand.” (*Id.*) For example, the Immigrant Investor Program  
5 Office (“IPO”), which handles all EB-5 related filings is “authorized by statute to charge  
6 fees to cover the cost of adjudicating EB-5 petitions in a reasonable amount of time.” (*Id.*  
7 ¶ 38.) In 2016, the filing fee was raised from \$1,500 to \$3,675, and USCIS sought to raise  
8 it to \$4,015 in October 2020. (*Id.* ¶¶ 38, 41.) During that same time period, USCIS  
9 received fewer applications than in previous years, but it still adjudicated fewer petitions  
10 than it did before. (*Id.* ¶ 52.) In addition, USCIS has allegedly expedited some petitions  
11 for NCEs but not others and has reassigned staff away from processing applications. (*Id.*  
12 ¶ 188.) According to Plaintiffs, these allegations evince a “common policy and practice to  
13 withhold and delay adjudication” of Form I-526 petitions. (*Id.* ¶ 20.)

14 Plaintiffs allege a single claim for unreasonable delay under the APA. *See* 5 U.S.C.  
15 § 706(1).

## 16 **II. Permissive Joinder**

17 Defendant argues that Plaintiffs are not properly joined under Federal Rule of Civil  
18 Procedure 20. That rule allows permissive joinder of plaintiffs if

19 (A) they assert any right to relief jointly, severally, or in the  
20 alternative with respect to or arising out of the same  
21 transaction, occurrence, or series of transactions or  
22 occurrences; and

23 (B) any question of law or fact common to all plaintiffs will  
24 arise in the action.

25 Fed. R. Civ. P. 20. “[A] district court must examine whether permissive joinder would  
26 ‘comport with the principles of fundamental fairness’ or would result in prejudice to either  
27 side.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000) (quoting *Desert  
28 Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980)).

First, Defendant argues that Plaintiffs’ claims do not arise out of the same  
transaction or occurrence because the I-526 petitions

1 (1) turn on different factual evidence specific to their  
2 circumstances, (2) are at a different stage of the adjudication  
3 process or at a different place in the inventory management  
4 process, (3) relates to (primarily) distinct EB-5 new  
commercial enterprises—all of which are outside of this  
district—and (4) are being processed on its own merits.

5 (Doc. 15 at 7-8.) To be sure, the merits of the petitions all raise distinct factual questions.  
6 But Plaintiffs’ claims do not concern the merits of the petitions, rather their claims turn on  
7 whether an agency policy, applicable to all I-526 petitions, caused an unreasonable delay  
8 in adjudicating Plaintiffs’ I-526 petitions. As such, all the claims concern a policy  
9 applicable to all plaintiffs, which amounts to the same transaction or occurrence. *Gutta v.*  
10 *Renaud*, No. 20-CV-06579-DMR, 2021 WL 533757, at \*5 (N.D. Cal. Feb. 12, 2021)  
11 (holding that I-526 plaintiffs alleging an unreasonable delay as a result of an unlawful  
12 policy could join under Rule 20); *F.L.B. v. Lynch*, 180 F. Supp. 3d 811, 816 n.5 (W.D.  
13 Wash. 2016) (finding the same transaction or occurrence test satisfied by claims  
14 challenging the application of an unlawful policy related to the same benefit); *cf. Coughlin*  
15 *v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997) (concluding that immigration plaintiffs  
16 needed to allege a pattern or policy that caused unreasonable delay to satisfy the same  
17 transaction or occurrence test).

18 Second, Defendant argues that Plaintiffs’ claims do not raise common questions of  
19 fact or law. Defendant’s argument as to common facts rehashes the same argument as  
20 above and fails for the same reason. (Doc. 15 at 8-9.) Plaintiffs have alleged a pattern or  
21 policy of delaying adjudication of I-526 forms. And, as noted below, there is a common  
22 question of law as to whether Defendant’s adjudication process for Form I-526 petitions is  
23 governed by a rule of reason.

24 As to prejudice, Defendant makes no compelling case as to why defending in a  
25 single venue is more arduous than in multiple ones. Indeed, although Defendant complains  
26 that she will have to “litigate wholly different claims and factual circumstances with  
27 petitions at different stages of processing and review in the same action,” she would have  
28 to litigate these claims even if they were severed. (Doc. 15 at 9.) The Court is not presented

1 with a reason for why Defendant is prejudiced by consolidating these similar claims in one  
2 venue.

### 3 **III. Failure to State a Claim**

4 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil  
5 Procedure 12(b)(6), a complaint must contain factual allegations sufficient to “raise a right  
6 to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
7 (2007). The task when ruling on a motion to dismiss “is to evaluate whether the claims  
8 alleged [plausibly] can be asserted as a matter of law.” *See Adams v. Johnson*, 355 F.3d  
9 1179, 1183 (9th Cir. 2004); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When  
10 analyzing the sufficiency of a complaint, the well-pled factual allegations are taken as true  
11 and construed in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d  
12 1063, 1067 (9th Cir. 2009).

13 The Ninth Circuit considers six factors to determine whether agency action has been  
14 delayed:

15 (1) the time agencies take to make decisions must be governed  
16 by a “rule of reason”;

17 (2) where Congress has provided a timetable or other  
18 indication of the speed with which it expects the agency to  
19 proceed in the enabling statute, that statutory scheme may  
20 supply content for this rule of reason;

21 (3) delays that might be reasonable in the sphere of economic  
22 regulation are less tolerable when human health and welfare  
23 are at stake;

24 (4) the court should consider the effect of expediting delayed  
25 action on agency activities of a higher or competing priority;

26 (5) the court should also take into account the nature and extent  
27 of the interests prejudiced by delay; and

28 (6) the court need not “find any impropriety lurking behind  
agency lassitude in order to hold that agency action is  
‘unreasonably delayed.’”

29 *Telecommunications Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984)  
30 (“TRAC”) (cleaned up); *see also In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1138-  
31 39 (9th Cir. 2020) (adopting the TRAC test in the Ninth Circuit). Because this is a fact-

1 sensitive test, *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100  
2 (D.C. Cir. 2003), it is usually inappropriate to resolve it on a 12(b)(6) motion, *see, e.g.*  
3 *Gutta*, 2021 WL 533757, at \*7.

4 As a threshold argument, Defendant argues that Plaintiffs do not allege an  
5 unreasonable delay because the alleged delay is too short. “[A] reasonable time for agency  
6 action is typically counted in weeks or months, not years.” *Id.* (quoting *In re A Cmty.*  
7 *Voice*, 878 F.3d 779, 787 (9th Cir. 2017)). Here, Plaintiffs have tendered the application  
8 fee and waited about two years for USCIS to adjudicate their EB-5 applications, all the  
9 while watching average processing times increase. This is sufficient to state a claim.

10 The first *TRAC* factor carries the most weight. *In re Nat. Res. Def. Council, Inc.*,  
11 956 F.3d at 1139. It also exposes the questions of fact that remain live in this matter, which  
12 favor denying the motion to dismiss. Defendant argues that it employs a rule of reason—  
13 processing EB-5 applications based on visa availability, rather than first-in, first out. But  
14 Plaintiffs have pled that their visas are current and that USCIS has not adjudicated their  
15 petitions, a clear deviation from the stated processing rule. Taking these allegations as  
16 true—as the Court must at the 12(b)(6) stage—Plaintiffs have stated a claim.

17 As is evident from the above analysis, these factual scums will only be resolved as  
18 the evidentiary record develops. Further assessment of the *TRAC* factors would show the  
19 same. The Court will not shortchange Plaintiffs’ chance to develop the evidentiary record  
20 at the 12(b)(6) stage.

#### 21 **IV. Sanctions**

22 Plaintiffs ask the Court to sanction Defendant for failing to provide discovery  
23 needed to prosecute their motion for preliminary injunction. (Doc. 29-1.) In particular,  
24 Plaintiffs ask the Court to strike Defendant’s response in opposition to their preliminary  
25 injunction motion and to grant their preliminary injunction motion as unopposed. This  
26 issue is now moot. The Court already denied Plaintiffs’ motion for a preliminary injunction  
27 and, in so doing, explained why the specific sanctions Plaintiffs seek in their motion for  
28



1 sanctions are inappropriate. (Doc 33.) The motion for sanctions therefore is denied as  
2 moot.

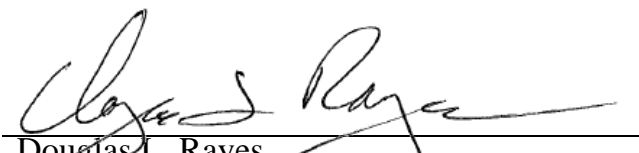
3 **V. Conclusion**

4 Plaintiffs satisfy the requirements for permissive joinder under Rule 20. They also  
5 plead sufficient facts to state a claim for unreasonable delay. Therefore,

6 **IT IS ORDERED** that Defendant's Motion to Dismiss (Doc. 15) and Plaintiffs'  
7 Motion for Sanctions (Doc. 29) are **DENIED**.

8 Dated this 8th day of March, 2022.

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Douglas L. Rayes  
United States District Judge