No. 25-1201

United States Court of Appeals for the First Circuit

SANJAY KRISHNA; MAKSIM PISKUNOV; DANIYAL AHMED FAHEEM; SABITHA KAJULURI; CHANIKYA SAI RAM GOPISETTY; ELENA KOKUEVA; IDRIS SYED; AND NATNAEL BEKELE,

Plaintiffs - Appellants,

v.

LORI CHAVEZ-DEREMER, Secretary, U.S Department of Labor,

Defendant - Appellee.

On Appeals from the District of Massachusetts
(C/A No.: 1:24-cv-10241-MJJ)

OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, Plaintiffs - Appellants make the following disclosure:

1. Are the Plaintiffs - Appellants a publicly held corporation or other publicly held entity? No.

2. Do the Plaintiffs - Appellants have any parent corporations? No.

3. Is 10% or more of the stock of the Petitioners owned by a publicly held corporation or other publicly held entity? No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? No.

5. Is party a trade association? No.

6. Does this case arise out of a bankruptcy proceeding? No.

May 13, 2025

Respectfully submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This Court should schedule this case for oral argument because the decision has serious consequences for hundreds of thousands of nonimmigrants stuck in the Appellee's ever-increasing delays for labor certification.

JURISDICTIONAL STATEMENT

The lower court had jurisdiction under 28 U.S.C. § 1331 to hear Plaintiffs-Appellants' challenge under the Administrative Procedure Act. This Court has jurisdiction to review the lower court's final decision under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Appellee demonstrated sufficient excusable neglect for its untimely request for an extension when it did not cite Rule 6(b) or argue its conduct qualified as "excusable neglect."

II. Whether the DOL's 499-day adjudication delay for PERM certification decision that each take 8 minutes is reasonable.

STATEMENT OF THE CASE

Appellee ("DOL") plays a crucial role in the employment-based immigration system. 8 U.S.C. §§ 1154(b), 1182(a)(5); 20 C.F.R. § 556, *et seq*. Congress only permits the U.S. Department of Homeland Security and the U.S. Department of State to issue a majority of employment-based immigrant visas to noncitizens "after consultation with the Secretary of Labor." 8 U.S.C. § 1154(b). During this

consultation process, DOL must certify that the permanent employment of a noncitizen will not negatively impact the United States labor force:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—
>
> > **(I)** there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > **(II)** the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A). DOL's Office of Foreign Labor Certification ("OFLC") administers the permanent labor certification program at its Atlanta Service Center. *See generally* https://flag.dol.gov/programs/perm (last visited May 13, 2025); 20 C.F.R. § 656.10.

The permanent labor certification program is a three-part process. First, an employer must get a prevailing wage from DOL. *See generally* 20 C.F.R. § 656.40. This stage is called the Prevailing Wage Determination. *Id.* At the conclusion of this process, DOL tells the employer the wage level that it must offer and pay a noncitizen employee. Currently, this process takes more than a year. *See* https://flag.dol.gov/processingtimes (last visited May 13, 2025).

Second, an employer must test the labor market to determine if there are any able and willing American workers who can and will fill the position at the prevailing wage. *See generally* 8 C.F.R. § 656.17(e). This stage is called the Labor Market Test. To test the labor market, the employer must place a job advertisement with the relevant state workforce agency, the local newspaper of general circulation, and for professional positions—those requiring at least a bachelor's for entry into the profession—additional locations (online, job fairs, etc.). *See id.* The timing of this process is controlled by the employer, and it can vary from 3 to 6 months.

Finally, if the labor market test identifies no able and willing workers, the employer seeks permanent labor certification from DOL by filing online a Form ETA 9089 within the Permanent Electronic Record Management ("PERM")[1] system. 20 C.F.R. § 656.17(a)(1). This is the third step. If DOL certifies the position, the employer can then petition for an immigrant visa with United States Citizenship and Immigration Services ("USCIS") on behalf of their future permanent employee, and USCIS approves or denies the immigrant visa petition. 8

[1] Companies submit their requests for permanent labor certification through an electronic system called the "Program Electronic Record Management" or PERM system. PERM is the technological platform where employers file an ETA Form 9089, Application for Permanent Employment Certification. But stakeholders and bureaucrats alike use the term PERM as a catchall for this entire process.

U.S.C. § 1154(b). This case relates exclusively to this third step in the process—the PERM process.

PERM started in 2002. In May of 2002, DOL noticed a proposed rule to implement an electronic labor certification application. DOL, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 67 Fed. Reg. 30466-01, 30467 (May 6, 2002). DOL sought to use computer automation to simplify, streamline, and speed up the PERM process:

> The process for obtaining a permanent labor certification has been criticized as being complicated, time consuming and requiring the expenditure of considerable resources by employers, SWA's and the Federal Government. *It can take up to two years or more to complete the process for applications* . . . The redesigned system we envision would require employers to conduct recruitment before filing their applications. . . . Employers would be required to submit their applications on forms designed for automated processing to minimize manual intervention to an ETA application processing center for automated screening and processing. After an application has been determined to be acceptable for filing, an automated system would review it based upon various selection criteria that would allow applications to be identified for potential audits before determinations could be made. In addition, some applications would be randomly selected as a quality control measure for an audit without regard to the results of the computer analysis.

Id. at 30466 (emphasis added). The 2002 proposal sought to decide routine, non-audited Forms 9089 in 21 days:

> Computers would do an initial analysis of the information provided on the "machine readable" application form. Applications that could not be accepted for processing because certain information that was requested by the application form was not provided will be returned to

> the employer. Applications accepted for processing would be screened and would be certified, denied or selected for audit.
>
> Information on the form may trigger a denial of the application or a request for an audit by Federal regional office staff. The application may also be selected for audit on a random basis as a quality control measure. If an application is not denied or selected for audit we anticipate that the application will be certified and returned to the employer within 21 days.
>
> If the application is selected for audit, we will send the employer a letter with instructions to furnish required documentation supporting the information provided on the application form within 21 calendar days of the date of the request. If the requested information is not received in a timely fashion, the application will be denied.

Id. The proposed rule expected employers "to file approximately 121,300 applications for alien employment certification." *Id.* at 30482 (second column). Thus, in 2002, DOL expected to complete at least 120,000 per fiscal year in an average time of 21 days.

The final rule—implemented two and a half years later—codified this process, though DOL tempered its expectation of processing times to 45-60 days:

> The combination of pre-filing recruitment, providing employers with the option to complete applications in a web-based environment, automated processing of applications including those submitted by mail, and elimination of the SWA's required role in the recruitment process will yield a large reduction in the average time needed to process labor certification applications. . . . If an application has not been selected for audit, and satisfies all other reviews, the application will be certified and returned to the employer. The employer must immediately sign the application and then submit the certified application to DHS in support of an employment-based I-140 petition. We anticipate an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the

date the application was initially filed. DOL, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326-01, 77328 (Dec. 27, 2004).

The final rule—again two and half years later—projected employers would file 100,000 PERM applications per fiscal year. *Id.* at 77376. DOL's Final Rule also declared it would process PERM applications on a first in, first out basis: "We will process applications, including properly refiled applications, in the order in which they were filed under this final rule." *Id.* at 77343 (middle column). Thus, under its final rule in 2004—and the technology available in 2004—DOL intended to decide approximately 100,000 routine, non-audited PERM applications on a first in first out basis within 60 days of their filings.

Today, DOL reports it takes 499 days to decide a routine PERM. *See* https://flag.dol.gov/processingtimes (last visited May 13, 2025). All PERM certifications take place at DOL's Office of Foreign Labor Certification ("OFLC"). The OFLC has 12 employees that decide routine, unaudited PERM applications full time. J.A. at 192. In addition, it has 6 "flex" employees that spend at least 6 months out of the year deciding routine, unaudited PERM applications full time. *Id.*

Under a collective bargaining agreement, these analysts have daily performance goals of 35 to 42 PERM applications a day. J.A. at 198. Analysts meeting their daily performance goals decide a single PERM application in 11-13 minutes. J.A. at 199. These are the minimum production standards for PERM processing. DOL OFLC analysts, therefore, decide on average 175 to 210 applications per week. Assuming four weeks in a month, DOL OFLC Analysts on average decide between 700 and 840 applications per week. Assuming 48 weeks in a year, each analyst decides between 8,400 and 10,080. But these completions represent the bare minimum an employee completes.

Most DOL OFLC Analysts decide an average of 50 PERM applications per day, deciding 250 per week, 1000 per month, and 12,000 per year. J.A. at 199-200. Including the additional 6 analysts who assist with PERM full time for 6 months out of the year—and assuming 48 work weeks per year—DOL OFLC Analysts can decide between 126,000 to 180,000 per fiscal year. In fact, from October to December 2023—a period of 38 workdays—DOL OFLC analysts decided 55 PERM applications per day. J.A. at 284. DOL incentivizes these higher averages with bonuses, overtime, and promotions. J.A. at 200. DOL also offers maximum workplace flexibility for its OFLC employees. *Id.* Further, DOL OFLC is looking to hire three additional analysts to supplement its workforce. *Id.* at 275.

The analysts can make decisions in 8 minutes (J.A. at 199) because they are only reviewing the PERM application for completeness and accuracy. J.A. at 210. Analysts are not permitted or able to do outside research to test the accuracy. *Id.* They do not look for fraud; in fact, no PERMs are denied for fraud. *Id.* Despite the rulemaking declaring a first in, first out-processing logic, DOL assigns these cases in a 5-step process.

Step Zero: Before the employer or its representative can even submit an ETA Form 9089, the PERM system tests each submission for completeness, basic compliance with the Form's timelines, and incompatible answers These digital submission checks ensure no incomplete applications are submitted.

Step One: Upon e-submission of a complete PERM application, first, the PERM system automatically sends an email to the employer submitting the PERM to confirm the employer intended on submitting an application. The employer has 30-days to respond, but employers typically respond immediately. This step is wholly automated.

Step Two: Next, the PERM system pulls out between 10 and 15% of all applications because they are being held for OIG investigations, their substance triggered pre-determined audit parameters, or they are subject to random audit. DOL constantly changes its predetermined audit parameters, but the percentage of PERM applications immediately separated for audit stay constant around 10 to

15%. The applications that are selected for holds or audits are sent to DOL contractors for resolution. The applications on hold or delayed for audit are not passed on to the 12-18 DOL employees who adjudicate only non-audited PERM applications. These "flagged" cases do not slow down adjudication on the non-flagged, non-audited PERM applications. The remaining 85 to 90% of the applications that are not selected for audit are then placed on a digital "shelf." They are then organized and segregated by the calendar month which they were submitted. So, all cases filed in January 2023 sit together, those filed in February 2023 are separated and sit together, and so on. They currently sit there for approximately 13-14 months. Nothing happens to them during this time.

Step Three: A supervisory employee assigns the cases for the next submission month to the 12-18 analysts. There is no set time for when it assigns these cases. Rather, it is based on current workload. For example, when the OFLC has only 1000 or so cases pending certification from February 2023, the supervisor will go ahead and assign the cases from March 2023. There is no rule, policy, or limitation on how long the analysts can take to decide a single month of Forms 9089. Part of the assignment policy is to group Forms 9089 submitted by the same employer and assign them to the same analyst.

Step Four: Each analyst decides their cases. Again, it takes between 8 and 13 minutes for an analyst to decide a single PERM. They do not look for fraud.

Rather, they look for completeness, internal consistency, and facial red flags. At the end of the process, the analyst either certifies, denies, or flags the case for an audit.

Step Five: The final action is recorded in the system and the system automatically sends out an e-notice to the employer. This is the end of the process. This process is not recorded in any regulation, policy manual, or public information.

The OFLC has consistently gotten additional resources for this process. The OFLC's budget has increased by more than $20,000,000 over the last decade:

Fiscal Year	Budget for OFLC
2014	$61,973,000
2015	$62,310,000
2016	$62,310,000
2017	$62,310,000
2018	$62,310,000
2019	$62,310,000
2020	$68,810,000
2021	$77,810,000
2022	$79,810,000
2023	$83,810,000

And there has been no drastic increase in the number of applications submitted, though its productivity varies substantially:

Fiscal Year	ETA 9089s Received	ETA 9089s Decided
2017	105,034	97,603
2018	104,360	119,776
2019	113,014	102,655
2020	115,133	94,019
2021	120,660	108,264
2022	141,951	104,600
2023	158,987	116,427

Submission volume and resources do not justify the 499-day wait time to do an 8-minute adjudication.

DOL publishes historic and quarterly performance data.[2] When the audited cases, denied cases, expired cases, and outliers are removed from DOL's data set, the data reveals highly variable adjudication times with unusually long delays:

Decision Length Statistics (Certified, Non-Audited Cases, 2014-2022)										
	2014	2015	2016	2017	2018	2019	2020	2021	2022	All
Sample	14,985	24,802	43,379	51,821	52,012	61,254	62,229	52,651	17,293	380,426
Mean	191	182	97	100	94	83	167	186	285	154
Median	187	190	96	88	92	68	174	182	271	150
SD	37	72	32	47	30	44	44	63	61	48
Skewness	26.9	18.5	26.4	12.9	6.6	8.0	3.3	6.8	1.9	12.4
Kurtosis	1,094.3	480.1	1,315.2	437.5	282.4	221.1	67.6	61.5	3.0	440.3
Outliers	116	271	566	194	326	365	314	613	1,915	4,680

J.A. at 327. It is telling that since the end of FY 2022, the processing times have grown by another 200 days. Similarly, DOL consistently decides later-filed PERM applications before earlier-filed PERM applications.

Line Jumping Per Year				
Year Submitted	Mean Skipped	Median Skipped	Mean Skip Rate	Median Skip Rate
2014	1,010	565	36%	30%

[2] DOL discloses quarterly performance data at https://www.dol.gov/agencies/eta/foreign-labor/performance (last visited May 13, 2025).

2015	1,387	716	39%	37%
2016	1,540	1,030	40%	38%
2017	1,697	865	39%	34%
2018	1,586	557	34%	28%
2019	743	189	26%	12%
2020	991	211	25%	11%
2021	1,340	610	34%	27%
2022	1,112	372	36%	26%
2014 - 2022	1,272	504	33%	25%

J.A. at 333. DOL does not decide these applications in the order received. At all. There is no "line" therefore for PERM applications. And DOL engages in rampant "line jumping."

Further, even when the "Month Processing Method" is taken into account, there remains wild variability between decision times among applications submitted in the same month and line-jumping remains rampant. Nearly 25% of cases submitted in the same month are decided more than a month before or after the mode month—the decision month for most PERM applications submitted in the same month. J.A. at 334. This means thousands of applications that are submitted in the same month are decided at least a month before or after their "decision month." This indicates that, to the extent DOL has a month processing method, it does not follow it.

Similarly, even taking into account the month processing method, each routine PERM case can expect to be skipped 114 times by PERM applications filed in the following month. Despite claiming to have a processing logic, such high variability indicates that DOL does not decide non-flagged, non-audited cases in compliance with any rule. It further reveals DOL has no guardrails, limits, or controls governing the actual time it takes to decide a single PERM application. The lack of any consistent processing mechanism is further reflected by looking at how long it took DOL to decide PERM applications that were submitted to the OFLC on the same day. J.A. at 334-336.

DOL's PERM delays harm the beneficiaries of PERM applications in various ways. First, DOL's data reflects that a significant portion of PERM beneficiaries are specialty occupation workers ("H-1B"). This visa can only last 6 years. However, H-1B workers can get one-year extensions if their employer gets a PERM approval before the beginning of their fifth year in H-1B status. Because PERM now takes nearly a year, these delays often prevent H-1B applicants from getting this extension. Second, H-1B workers who have an approved I-140 Immigrant Visa Petition can get indefinite extensions of their H-1B while they await an immediately available immigrant visa number. But a vast majority of H-1B workers can only apply for an immigrant visa *after* DOL issues them a PERM. The nearly one year wait harms these workers. Third, these delays prevent

beneficiaries from applying for adjustment of status when visas are immediately available. This prevents them from acquiring lawful permanent residency and delays their residency periods for naturalization. Fourth, the PERM delays prevent career advancement because employers often do not promote employees while the PERM is pending because the job duties may change and put at risk the PERM process and related immigrant visa application. Finally, these delays harm the employers because they are deprived of the consistent labor force for highly skilled workers in a tight labor market.[3]

Appellants are the beneficiaries of ETA Forms 9089, Application for Permanent Labor Certification ("Forms 9089"). At the time of filing the first amended complaint, they had been waiting the following time periods:

Name (First)	Name (Last)	PERM Receipt Number	Days Pending
Sanjay	Krishna	G-100-23195-190138	276
Maksim	Piskunov	G-100-23321-510403	150
Daniyal Ahmed	Faheem	G-100-23250-327361	221
Sabitha	Kajuluri	P-100-22144-204252	263
Chanikya Sai Ram	Gopisetty	G-100-24022-656855	84
Elena	Kokueva	G-100-23227-263994	245
Idris	Syed	G-100-23307-478851	164
Natnael	Bekele	G-100-23256-344232	215

[3] In April of 2023, DOL announced it would start accepting Forms 9089 through its updated website called the Foreign Labor Application Gateway ("FLAG"). OFLC began accepting the New ETA Form 9089 in July of 2023 through the FLAG system.

Appellants sought an order declaring all delays beyond 60 days as unreasonable. J.A. at 049.

Appellants filed for summary judgment on April 15, 2024. J.A. at 006-007. DOL's response was due May 6, 2024, under Local Rule 7.1(b)(2) in the District of Massachusetts. J.A. at 007. Appellees did not respond to it timely, and Appellants filed a notice of failure to file a response on May 8, 2024. J.A. at 007. Nearly a week later, on May 14, 2024, DOL moved for an extension of time to respond to the motion for summary judgment. J.A. at 348. DOL's motion did not identify the rule that it was moving under, and it did not use the phrase "excusable neglect." J.A. at 348-350. Despite moving for an out of time extension that requires a showing—or at least a claim—to excusable neglect, the lower court granted the motion through a minute order on the docket:

05/16/2024	25	Judge Myong J. Joun: ELECTRONIC ORDER entered **GRANTING** 23 Motion for Extension of Time to File Answer re 15 Motion for Summary Judgment, 18 Amended Complaint. Defendant shall file a response to the Amended Complaint, Doc. No. 18 , on or before 5/31/24 and a response to the Motion for Summary Judgement, Doc. No. 15 , on or before 6/21/24. (York, Steve) (Entered: 05/16/2024)

J.A. at 008. The parties then filed their cross motions, and on February 5, 2025, the lower court granted DOL's motion for summary judgment and denied Appellants' motion. J.A. at 353. This appeal followed. J.A. at 377.

SUMMARY OF THE ARGUMENT

This Court should vacate the lower court's opinion and remand with instructions to enter an order declaring all delays in the amended complaint as unreasonable. The lower court abused its discretion by granting DOL's motion for an out-of-time extension for its response to the Appellants' motion for summary judgment because DOL moved under the wrong rule and did not argue that its failure to timely respond was due to excusable neglect. To the extent this Court finds the lower court did not abuse its discretion by granting an extension, the lower court erred in granting DOL summary judgment.

ARGUMENT

This Court should vacate the lower court's opinion and remand with instructions to enter an order declaring all delays in the amended complaint as unreasonable. This Court should review the lower court's decision to grant DOL's out of time extension for an abuse of discretion. *Dimmitt v. Ockenfels*, 407 F.3d 21, 23 (1st Cir. 2005). And this Court should review the lower court's grant of summary judgment to DOL *de novo*. *Stephanie C. v. Blue Cross Blue Shield of Massachusetts HMO Blue, Inc.*, 852 F.3d 105, 110 (1st Cir. 2017).

I. DOL failed to show excusable neglect.

The lower court abused its discretion by granting DOL's out of time extension because DOL did not even claim excusable neglect existed for an out-of-

time extension. J.A. at 348-350. Under Rule 6, courts may extend the time to respond for (1) *good cause* if the request is made before the original due date; or (2) *excusable neglect* if the request is made after the original due date. Fed. R. Civ. P. 6(b)(1)-(2). To demonstrate excusable neglect, courts must consider "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Nnodim v. U.S. Bank Tr. Ass'n as Tr. for LB-Igloo Series IV Tr.*, No. 22-CV-11125-DLC, 2024 WL 1675688, at *1 (D. Mass. Mar. 29, 2024) (quoting *Tubens v. Doe*, 976 F.3d 101, 105 (1st Cir. 2020)). The "most important" factor for excusable neglect is the reason for the oversight. *Tubens*, 976 F.3d at 105.

Here, DOL did not argue, claim, or even suggest that its need for an out-of-time extension was due to excusable neglect. J.A. at 348-350. Accordingly, the lower court provided no written explanation for its grant of such motion. Between the two filings, there is no way for this Court to determine whether excusable neglect existed because DOL made no such claim and the lower court provided no rationale for its grant for an out-of-time extension. This is a clear abuse of discretion, and this Court should not condone such conduct on the part of the U.S. Department of Justice. As such, this Court should vacate the lower court's decision

and remand this case with instructions to declare all PERM delays beyond 60 days as unreasonable.

II. DOL's PERM delays beyond 60 days are unreasonable.

To the extent this Court finds the lower court did not abuse its discretion, this Court should vacate the lower court's order on summary judgment and declare that all PERM delays beyond 60 days are unreasonable. To determine whether a delay is reasonable, courts often consider the factors set out in *Telecomms. Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"):

> (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.'"

Id. at 80 (internal citations omitted); *see also Towns of Wellesley, Concord & Norwood, Mass. v. F.E.R.C.*, 829 F.2d 275, 277 (1st Cir. 1987) (applying *TRAC*). This is not an exclusive list of factors. But courts often consider the "rule of reason" and "competing priorities" factors as dispositive. *See V.U.C. v. United States Citizenship & Immigr. Servs.*, 557 F. Supp. 3d 218, 223 (D. Mass. 2021).

A. DOL has no rule of reason or follows no rule of reason.

A "rule of reason" is an agency policy, rule, or process that governs, regulates, or controls the time agencies take to make a particular decision. *TRAC*, 750 F.2d at 80. A rule of reason requires more than a description of how a benefits application goes through the agency from filing to decision because, in hindsight, an agency can always describe the path an application took through an agency. *Id.* Rather, a rule of reason requires statutory, regulatory, or policy guardrails to regulate or "govern" the *length* of time an agency takes to make a decision. *Id.*

Here, DOL's "month processing method" has no term, policy, or practice that governs, limits, or regulates the time it takes to decide a FLAG-based PERM application. DOL's internal guidance to its employees that decide PERMs provides no term, policy, or practice to govern, limit, or regulate the time it takes to make a decision on a PERM application. As such, the month processing method is not a rule of reason because it is merely a description of the path a PERM application takes within DOL. It has no provision, term, or practice that "governs," regulates, oversees, or limits the "time" DOL takes to decide a PERM. *TRAC*, 750 F.2d at 80. Further, the month processing method is only an *assignment* policy and not an adjudication policy. To the extent DOL believes this to be a rule of reason, DOL has admitted it is nothing more than an assignment policy, dealing only when it

"start[s] opening up all the cases," and nothing to do with adjudication.". DOL has no rule of reason.

To the extent this Court finds DOL's "month processing method" is a rule of reason, it is unlawful because it violates the rule of reason DOL announced in its rulemaking. In 2004, DOL finalized the regulations implementing the PERM process. DOL, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326-01, 77343 (middle column) (Dec. 27, 2004). Responding to a comment about processing Forms 9089, DOL unequivocally announced it would use a first in, first out rule of reason: "We will process applications, including properly refiled applications, in the order in which they were filed under this final rule." *Id.* There have been no regulations that have changed this rule of reason. But DOL does not process applications on a first in, first out basis:

> Q Does Department of Labor follow a first-in, first-out rule for [PERM] adjudications?
>
> A No.

DOL admits it violates the rule of reason it mandated in its rulemaking, and no later rulemaking modified this declaration. DOL announced to the regulated community it would decide PERMs on a first in, first out basis, but without any public notice, DOL changed course. To the extent DOL need not promulgate its processing method in a rulemaking, it voluntarily chose to do so in 2004 and,

therefore, at a minimum, it must now "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). DOL has no explanation.

To the extent DOL can lawfully use its month processing method to process FLAG-based PERMs, DOL does not follow its own purported rule of reason. DOL claims its "month processing method" is a five-step process.

Steps	Time Frame
Employer Verification: Automated Email upon submission to petitioning employer.	1 to 30 days
Case Prep for Assignment: Automated process that identifies and removes applications that are subject to automatic audits or investigatory holds.	7 days
Assignment: When approximately 1000 previously assigned PERMs are outstanding, OFLC electronically assigns routine PERM applications that were submitted during the same calendar month to federal employees.	1 day
Review: A federal employee reviews the PERM for completeness and internal consistency and takes action to audit, approve, or deny.	8-13 minutes
Email Decision: A federal employee prints a decision to PDF and emails it to the petitioning employer and their attorney.	1 day

Under this "rule," routine PERM applications submitted within the same month ("Submission Month") should be decided within the same month ("Decision Month"). But 22.4% of routine PERM cases from the same Submission Month are decided at least a month before or after the announced/mode Decision Month. J.A. at 342. And "the average applicant can expect 114 cases submitted in a subsequent month to jump ahead of them in the queue order and receive a quicker decision."

J.A. at 344. It should be noted that Dr. Ragusa's analysis gave DOL's publicly available data every benefit of the doubt; Dr. Ragusa removed any outliers, audits, denials, or expirations when conducting these analyses because those non-routine actions may lengthen the processing times. *Id.* In short, the data Dr. Ragusa used is the strongest data for DOL. The raw data would reveal more extreme variability. *Id.* Regardless, DOL's own data reveals DOL does not follow its month processing method. Rather, DOL's own data reveals the PERM adjudication process follows no consistent processing logic or rule.

Further, DOL did nothing to rebut Dr. Ragusa's expert report and the lower court erred by giving DOL's statements of counsel the weight of evidence. Appellants averred Dr. Ragusa's analysis demonstrated that DOL does not follow a month processing rule in support of its motion for summary judgment and DOL responded to these properly supported, undisputed facts by stating:

> 13. Disputed. This is the opinion of Plaintiffs' expert, not DOL. At this early stage in the case, the Plaintiffs' expert has not been deposed, nor has DOL had an opportunity to have the results analyzed by their own analysts. It is not clear what a "routine" PERM case is.
>
> 14. Disputed. This is the opinion of Plaintiffs' expert, not DOL. At this early stage in the case, the Plaintiffs' expert has not been deposed, nor has DOL had an opportunity to have the results analyzed by their own analysts.

These claims of litigation counsel are not evidence. First, DOL has deposed Dr. Ragusa. Second, if DOL believed it needed to depose Dr. Ragusa again for this case, it could have filed a Rule 56(d) motion, but it "simply elected not to do so," thereby waiving any claim that it now needs discovery. *Jain v. Jaddou*, No. 21-CV-03115-VKD, 2023 WL 2769094, at *5 (N.D. Cal. Mar. 31, 2023) (vacated for mootness after appeal). A mechanism was available to DOL to seek additional time to depose Dr. Ragusa, but it did not use it. Because DOL fails to rebut Dr. Ragusa's opinion that DOL's own data reveal it does not follow a month-processing rule, the lower court erred by disregarding Dr. Ragusa's opinion and Appellants properly supported, undisputed facts.

B. Compelling action will not harm DOL priorities.

Compelling DOL to make PERM decisions will have no impact on agency activities of a higher or competing priority because it has excess resources to decide the volume of PERM applications it receives. *TRAC*, 750 F.2d at 80. DOL has 12 full time federal employees who decide PERMs; it further has 6 "flex" employees that decide PERM applications. Under the collective bargaining agreement with the federal employees, each federal employee has daily quotas from 35-42 routine PERMS per day, but they are able to do up to 55 per day. Taking into account federal holidays and two weeks of leave, federal employees can reach the following productivity:

PERMS per day	35 PERMs per day x 239 workdays per year	42 PERMS per day x 239 workdays per year	55 PERMS per day x 239 workdays per year
1 employee	8,365	10,038	13,145
12 employees	100,380	120,456	157,740
12 employee + 6 flex employees	125,475	150,570	197,175

These projections do not consider overtime that DOL offers to its federal employees. When compared with the PERM submissions and actual decisions numbers over the past seven fiscal years, compelling DOL to decide 9 PERM applications would not harm them because OFLC has excess resources—comprising the difference between potential adjudications and actual adjudications—to decide 9 PERM applications without reallocating resources:

Fiscal Year	ETA 9089s Received	ETA 9089s Decided
2017	105,034	97,603
2018	104,360	119,776
2019	113,014	102,655
2020	115,133	94,019
2021	120,660	108,264
2022	141,951	104,600
2023	158,987	116,427

Because DOL's resources are sufficient to handle the incoming submissions and decide thousands of additional PERMS per year, compelling action on 9 PERM applications would not harm OFLC. This should be no surprise given the 8-minute average adjudication time that OFLC recorded in the first quarter of FY 2024. Further, the OFLC comprises several "teams" that are charged with different types of adjudications. So, compelling DOL to decide the Plaintiffs' PERMS would not

require DOL to move members of other teams because the resources identified above are exclusively for routine PERM adjudications.[4]

Finally, DOL *admits* it can comply with an order compelling adjudication of specific PERM applications:

> Q . . . if a judge said this is unreasonable, make ten decisions, would that impact the office's foreign labor certification? Let me ask, how would that impact?
>
> A Operationally?
>
> Q Yeah.
>
> A To -- to move the ten cases?
>
> Q Correct.
>
> A Yes. I would have -- I would basically tell I would basically tell a staff person the judges order these same cases be adjudicated. You are to go search for them in the PERM system, which would be in the waiting queue, and they would have to be assigned to an analyst and they would be worked immediately.

DOL can decide Appellants' PERMS without any interruption in its processes, which is more than Appellants sought here. To adjudicate the Plaintiffs in this case, one adjudicator would only take a maximum of 2 hours, a hardly burdensome amount on the agency.

---

[4] It is worth noting that while DOL's Office of Foreign Labor Certification also handles the H-2A and H-2B labor certification program, those programs would not be harmed an order to adjudicate these PERMs because H-2 program adjudicators are separate from the PERM adjudicators outside of the flex team.

Further, the line of cases expressing concern about compelling action where it would comprise "line jumping" do not apply here because line jumping is endemic to DOL's motion processing method:

> How common is line jumping in the PERM adjudication process? According to the data, the mean of the line jumping variable is 1,272. In other words, the typical PERM applicant can expect over 1,200 other applicants to skip ahead of them in queue and receive a faster decision. Admittedly, the mean is inflated by several very large values in the line jumping variable. For example, there are 16,242 applicants in the dataset who were skipped over 5,000 times! If we compute the median instead, the typical applicant can expect to be skipped 504 times.

Even when the outliers, audits, denials, and expirations are removed and the skipper analysis is modified to only count later-filed applications filed in a subsequent Submission Month, the average PERM still gets skipped more than 100 times. Simply said, because line jumping is part of the PERM process, an order compelling action would comport with the PERM process rather than undermine it. Thus, compelling DOL to make final decisions on Plaintiffs' PERM applications will have no negative effect on any competing priority (assuming it has a competing interest).

C. DOL's delays undermine Congressional intent.

DOL's PERM delays beyond 60 days defeat the purpose of labor certification. Congress charged DOL with ensuring that "there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available *at the time of application for a visa* and

admission to the United States and at the place where the alien is to perform such skilled or unskilled labor." 8 U.S.C. § 1182(a)(5)(A) (emphasis added). DOL does this through the labor recruitment process. *See generally* 20 C.F.R. § 656.17. After getting a prevailing wage, the petitioning employer must test the labor market through a series of job advertisements with private and public entities for a minimum of 30 days; then the employer must wait an additional 30 days to see if anyone responds. 8 C.F.R. §§ 656.17(e), (e)(1)(i). At the end of this labor market test, an employer may file their PERM application. *Id.*

Because an immigrant visa application cannot be filed until DOL certifies the PERM, PERM certification cannot be so temporally disconnected from the labor market test such that the results of the labor market test are stale. If that were the case, DOL would be subverting the intent of Congress because certification would not ensure that "at the time" of the visa application there were insufficient lawful workers for the position offered. For example, if an employer engaged in a labor market test during February 2020, which revealed no available workers, and DOL took 397 days to certify the PERM, the labor market in March 2021 was very, very different than February 2020 due to the COVID 19 pandemic. Thus, if the PERM processing takes so long it renders the recruitment efforts stale, the delay would violate congressional intent.

DOL's Bureau of Labor Statistics maintains and reports a quarterly census of employment and wages. *See* https://www.bls.gov/cew/ (last visited May 13, 2025). It does these reports quarterly because wages and employment can change drastically over a period of three months. *See* https://www.bls.gov/cew/overview.htm (last visited May 13, 2025). Thus, DOL seems to agree that wage an employment information may be stale after 3 months. This comports with their undisputed goal of deciding PERM applications in 45-60 days because it would ensure its certification would be within 90 days of the end of the employer's recruitment—recall the employer must run ads for 30 days and then wait an additional 30 days before filing the PERM. Thus, the cool down period of 30 days plus 60 days of PERM adjudication would ensure the results of the labor recruitment reflect the actual wages and employment at the time of the visa application as Congress requires. 8 U.S.C. § 1182(a)(5)(A). Even if the labor market does not change within 90 days, it certainly changes within 14 months. Thus, DOL's current delays undermine Congressional intent.

To the extent DOL argues there is no congressional timetable for PERM adjudications and, so, this factor favors it, the second *TRAC* factor is broader than a timeline; rather, *TRAC* urges courts to consider "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." *TRAC*, 750 F.2d at 80 (emphasis added). DOL does not engage Appellants' legislative intent argument because it can't. It has no argument that Congress intended PERM adjudications to take more than year.

D. These delays harm Plaintiffs health and welfare.

DOL's delays harm PERM beneficiaries, a group Congress and DOL intend to protect through the PERM process. As a threshold issue, Congress intended to protect foreign national employees, including PERM beneficiaries.[5] *See Matushkina v. Nielsen*, 877 F.3d 289, 293 (7th Cir 2017); *Mantena v. Johnson*, 809 F.3d 721, 732 (2nd Cir. 2015); *Kurapati v. United States Bureau of Citizenship & Immigration Servs.*, 775 F.3d 1255, 1261 (11th Cir. 2014); *Patel v. United States Citizenship & Immigration Servs.*, 732 F.3d 633, 638 (6th Cir. 2013). First, Congress sought to protect persons "named" in agency proceedings from unreasonable delays under § 555(b) and, more broadly, entitled any "interested party" to final agency action under § 555(e). Appellants are a party to the PERM application because they are "named" throughout the ETA 9089. An ETA 9089 cannot be submitted without including the beneficiary's information. Even if they

[5] For these same interests, Plaintiffs here are well within the "zone of interests" Congress sought to protect and, therefore, Plaintiffs have standing to bring this case. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) ("The zone-of-interests test is therefore an appropriate tool for determining who may invoke the cause of action[.]"); *Texas v. Mayorkas*, No. 2:22-CV-094-Z, 2024 WL 455337, at *4 (N.D. Tex. Feb. 6, 2024).

are not a "party," they are certainly an "interested party" and, therefore, entitled to a final decision. *Id.* Second, Congress sought to protect the interests of PERM beneficiaries in various ways. *See id.* § 1182(n)(1)(A)(i) (requiring labor conditions for nonimmigrant workers); 20 C.F.R. § 655.731; 8 U.S.C. § 1182(n)(2)(A) (creating enforcement mechanisms for aggrieved nonimmigrant workers); 8 U.S.C. § 1182(d)(2)(C)(vii)(I) (outlawing "benching" nonimmigrant workers); *See also* The American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Public Law 105-277, div. C, tit. IV, 112 Stat. 2681 (1998); American Competitiveness in the Twenty-First Century Act of 2000 ("AC21"), Public Law 1-6-131, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 (2002); Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82408 (Nov. 16, 2016) ("ACWIA also included several measures intended to improve protections for U.S. and H–1B nonimmigrant workers."); 8 U.S.C. § 1324b (outlawing unfair immigration related employment practices).

Finally, DOL confirmed that Form 9089 is intended protect PERM beneficiaries:

> Q Okay. As the representative of the Department of Labor, are the attestations of the regulations designed to protect foreign national employees who are the beneficiaries of a PERM application?
>
> A So I -- I believe that – that most of them are.

J.A. at 220. The PERM process is intended to protect the beneficiaries, and therefore, it is no surprise that PERM delays harm the beneficiaries.

PERM delays impact the Appellants' health and welfare; PERM is not an economic regulation. PERM certification, as described in detail below, gives its beneficiaries extensions of their existing nonimmigrant status, the ability to apply for an immigrant visa—and depending on the visa bulletin adjustment of status—and permits job portability. *See infra* § D. These benefits provide the beneficiaries the "certifications" necessary to remain in the United States lawfully with work authorization. It also impacts the Plaintiffs immediate families—spouses and unmarried children under 21. To this end, PERM delays can cause family separation where one spouse has independent immigration status, but the spouse awaiting a PERM certification to qualify for extensions must leave the United States to continue to work. *See, e.g., Samiappan v. Su*, No. 3:24-CV-0148-B, 2024 WL 990065, at *2 (N.D. Tex. Feb. 16, 2024). These interests are properly categorized as health and welfare interests. *See Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 452 (6th Cir. 2022).

Here, the delays harm the PERM beneficiaries because they delay applications and decisions for subsequent immigration benefits petitions while any existing nonimmigrant benefits expire. For PERM beneficiaries chargeable to countries that have an immigrant visa backlog, PERM beneficiaries without timely

PERM certifications lose their lawful nonimmigrant status in the United States when they hit the particular visa's caps. *See, e.g.,* 8 U.S.C. § 1184(g)(4). For example, Appellant Sanjay Krishna—an individual whose immigrant visa is chargeable to India and, therefore, likely not available for decades—hit his 6-year H1B cap on February 13, 2024. He lost his right to work and live in the United States on his H-1B visa throughout the duration of the lower court case. 8 U.S.C. § 1184(g)(4). However, if DOL had certified his PERM timely, he would be entitled to indefinite extensions of his H-1B status upon filing of the certified PERM alongside the immigrant visa application:

> (c) ONE-TIME PROTECTION UNDER PER COUNTRY CEILING.— Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
>
> > (1) *is the beneficiary of a petition filed under* section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and
> >
> > (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,
> >
> > may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

American Competitiveness in the Twenty First Century, P.L. 106-313, § 104(a) (Oct. 17, 2000) (codified at the notes to 8 U.S.C. § 1184(g) (emphasis added). Considering Mr. Krishna—and other Appellants—would qualify for indefinite extensions upon

merely filing an immigrant visa which requires a certified PERM, PERM delays harmed Mr. Krishna by preventing him from getting such an extension.

Similarly, if DOL timely certifies a PERM application, a nonimmigrant with an immigrant visa immediately available—that is an immigrant from a country with no immigrant visa backlog—can apply for the immigrant visa and adjustment of status at the same time. This immediately provides the beneficiary the right to apply for independent work authorization and advance parole (or travel authorization). Then, when the adjustment of status has been pending for 180 days, the beneficiary may change employers. 8 U.S.C. § 1154(j). This opportunity arises the moment DOL certifies the PERM. These harms are, therefore, directly attributable to DOL's PERM delays.

In addition to these harms to immigration status and work authorization, these delays cause the Plaintiffs and their families' significant mental anguish and stress. Not knowing whether they will have work authorization or lawful status in the United States precludes them from planning their lives. Further, to the extent DOL's delays cause a loss of work authorization or loss of immigration status, these harms are irreparable. They hurt the Plaintiffs' careers and lives in the United States. These harms are very real. But as noted below, DOL gives no concern to them at all.

E. DOL knowingly ignores the regulated parties' interests.

The APA requires agencies to consider the impact of delays on the parties to the application: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). But DOL refuses to take into account the interests of the employer or employee who are the interested parties in a PERM application. The OFLC Administrator admitted it gives no regard to the employer or employee's convenience or necessity:

> Q Does DOL have the ability to adjudicate these in a way that gives due regard for the convenience and necessity of the petitioning companies?
>
> A The convenience or necessity of a - - No.
>
> Q Does the Department of Labor give due regard . . . for the convenience and necessity of the beneficiary employees, when it's looking at how to adjudicate these?
>
> A No.

J.A. at 245. The OFLC Administrator testified his employees did not have the capacity to consider the interests of individuals for expedite requests or any other individual specific issue. *Id.* But the OFLC Administrator then admitted the OFLC could identify and decide individual applications if a Court ordered it to without interfering with OFLC's overall operations.

CONCLUSION

For these reasons, this Court should vacate the lower court's decisions and remand this case with instructions to declare all PERM delays beyond 60 days as unreasonable.

May 13, 2025

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit, typeface requirements and type-style requirements because it contains 8985 words, including those exempted by some rules, and this document has been prepared in a proportionally spaced typeface using 14-point, Times New Roman in Microsoft Word 2018.

May 13, 2025

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CERTIFICATE OF SERVICE

I hereby certify that May 13, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Lori Chavez-DeRemer

May 13, 2025

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Nos. 25-1201

United States Court of Appeals for the First Circuit

SANJAY KRISHNA; MAKSIM PISKUNOV; DANIYAL AHMED FAHEEM; SABITHA KAJULURI; CHANIKYA SAI RAM GOPISETTY; ELENA KOKUEVA; IDRIS SYED; AND NATNAEL BEKELE,

Plaintiffs - Appellants,

v.

LORI CHAVEZ-DEREMER, Secretary, U.S Department of Labor,

Defendant - Appellee.

On Appeals from the District of Massachusetts
(C/A No.: 1:24-cv-10241-MJJ)

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Sanjay Krishna, Maksim Piskunov, Florian Adolf, Daniyal Ahmed Faheem, Sabitha Kajuluri, Chanikya Sai Ram Gopisetty, Elena Kokueva, Idris Syed, and Natnael Bekele, Plaintiffs, v. Julie Su, Acting Secretary, United States Department of Labor, Defendant.	Civil Action No. 24-10241-MJJ

MEMORANDUM OF DECISION

February 5, 2025

Plaintiffs are foreign nationals who are beneficiaries of pending "PERM" applications seeking required certifications from the Defendant, the Department of Labor ("DOL"), for their employers to sponsor them to become permanent U.S. residents based on their employment. The DOL has allegedly delayed its adjudication of these applications for so long that Plaintiffs argue they are entitled to an order under the Administrative Procedure Act ("APA") that the DOL complete Plaintiffs' applications within seven days. Before me are the following motions: Plaintiffs' Motion for Summary Judgment [Doc. No. 15], Defendant's Motion to Dismiss [Doc. No. 26], and Defendant's Cross-Motion for Summary Judgment [Doc. No. 29]. For the reasons set forth below, Defendant's Cross-Motion for Summary Judgment is GRANTED, Plaintiffs' Motion for Summary Judgment is DENIED, and Defendant's Motion to Dismiss is DENIED as moot.

I. BACKGROUND

A. Legal Context

1. The Employment-Based Immigration Visa Process

The DOL plays an important role in the United States' employment-based immigration system. [Doc. No. 18 at ¶ 46 (*citing* 8 U.S.C. §§ 1154(b), 1182(5); 20 C.F.R. § 556, *et seq.*)]. The DOL's Office of Foreign Labor Certification ("OFLC") administers the permanent labor certification program, [Doc. No. 18 at ¶ 49 (citing https://flag.dol.gov/programs/perm (last visited January 31, 2025); 20 C.F.R. § 656.10)], a process in which foreign national workers can apply for permanent residence in the United States based on their employment. [*See* Doc. No. 18 at ¶¶ 50, 56-57]. To obtain an employment-based immigrant visa, the employer must obtain labor certification from the DOL. [Doc. No. 18 at ¶ 56 (citing 20 C.F.R § 656.17(a)(1))]. Upon certification of the position, "the employer can then petition for an immigrant visa with the United States Citizenship and Immigration Services ("USCIS") on behalf of their future permanent employee, and USCIS approves or denies the immigrant visa petition." [Doc. No. 18 at ¶ 57 (citing 8 U.S.C. § 1154(b))]. The beneficiary can simultaneously apply to adjust their status to lawful permanent resident if visas are immediately available. [Doc. No. 18 at ¶ 289]; *see* 8 U.S.C.A. § 1255(a); *see also* 8 C.F.R. § 245.2(a)(2)(i)(C)(2).

2. The Labor Certification Process

The labor certification process, or "PERM," is a three-step process designed to ensure that the permanent employment of a noncitizen "will not negatively impact the United States labor force," [Doc. No. 18 at ¶¶ 48, 50], and "will not adversely affect the wages and working conditions of workers in the United States similarly employed." [Doc. No. 18 at ¶ 48 (quoting 8 U.S.C. § 1182(a)(5)(A)(i))]. The first stage is called the Prevailing Wage Determination, which

concludes by DOL telling the employer the wage level that it must offer and pay a noncitizen employee. [Doc. No. 18 at ¶ 51; 20 C.F.R § 656.40]. The next stage is the Labor Market Test, during which an employer "tests the labor market to determine if there are any able and willing American workers who can and will fill the position at the prevailing wage." [Doc. No. at ¶ 53 (citing 20 C.F.R. § 656.17(e))]. If this test identifies no willing and able domestic workers, then the employer can submit their request for permanent labor certification through an electronic system called the "Program Electronic Record Management" ("PERM")[1] system. [*Id.* at ¶ 58]. During this step, DOL must certify that the permanent employment of a noncitizen will not adversely affect the United States labor force. [*Id.* at ¶ 48]. Specifically, DOL must ensure:

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.
>
> [*Id.* at ¶ 48 (quoting 8 U.S.C. § 1182(a)(5)(A)(i))].

3. History Of PERM

To "simplify, streamline, and speed up the PERM process," DOL noticed a proposed rule to implement an electronic labor certification application in May of 2002. [Doc. No. 18 at ¶¶ 60-61 (citing DOL, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 67 Fed. Reg. 30466-01, 30467 (proposed May 6, 2002) (to be codified at 20 C.F.R. pts. 655, 656)]. This proposal aimed to decide routine, non-audited Forms 9089 in 21 days, [Doc. No. 18 at ¶ 62 (citing DOL, Labor Certification for

[1] "PERM is the technological platform where employers file an ETA Form 9089, Application for Permanent Employment Certification[,] [b]ut stakeholders and bureaucrats alike use the term PERM as a catchall for this entire process." [Doc. No. 18 at ¶ 58].

the Permanent Employment of Aliens in the United States; Implementation of New System, 67 Fed. Reg. 30466-01 at 30470 (third column))], and expected employers to "file approximately 121,300 applications for alien employment certification." [*Id.* at ¶ 63 (citing DOL, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 67 Fed. Reg. 30466-01 at 30482 (second column))]. Thus, in 2002, DOL anticipated completing a minimum of 120,000 applications per fiscal year in an average time of 21 days. [*Id.* at ¶ 64]. The final rule was implemented in 2004 with adjusted expected processing times of 45-60 days, [*Id.* at ¶ 65 (citing 69 Fed. Reg. 77326-01, 77328 (Dec. 27, 2004) (second column))], and a tempered projection of 100,000 PERM applications filed per fiscal year. [*Id.* at ¶ 66 (citing 69 Fed. Reg. at 77376) (first column))]. The final rule also declared that DOL would process PERM applications on a first in, first out basis: "We will process applications, including properly refiled applications, in the order in which they were filed under this final rule." [*Id.* at ¶ 67 (citing 69 Fed. Reg. at 77343) (second column))].

As of the filing of the Amended Complaint, DOL decides about 105,000 PERMS per year in an average of 397[2] days but does not follow the "first in, first out" rule. [Doc. No. 18 at ¶¶ 69, 263, 294]. Rather, DOL follows a "month processing" methodology, where DOL generally processes applications according to the month of their submission. [*Id.* at ¶ 69]. DOL posts the processing times for PERM applications on its public-facing website. [*See* PERM Processing Times, https://flag.dol.gov/processingtimes (last visited January 29, 2025)]. As of January 2025, DOL is reporting an average processing time of 462 calendar days for PERM applications filed in the most recent month (December 2024). [*Id.*] Applications not subject to audit are organized and segregated by the calendar month in which they were submitted. [Doc. No. 18 at ¶ 86].

[2] As of the time of the parties' summary judgment briefing, July 2024, Plaintiffs claim that this average processing time was 388 days. [Doc. No. 34-1 at ¶ 5].

These cases then sit on a "digital shelf" for approximately 13-14 months. [*Id.* at ¶¶ 86-87]. When the time comes, a supervisor assigns the cases for the next submission month to the OFLC Analysts. [*Id.* at ¶ 88]. This is based on current workload—for instance, when the OFLC has only 1000 or so cases awaiting certification from February 2023, the supervisor will then assign the cases from March 2023. [*Id.*]. The website instructs that if an "application was filed more than three months prior to the month posted, [a petitioner or beneficiary] may contact the OFLC PERM Helpdesk for a status on the application at plc.atlanta@dol.gov." [*See* PERM Processing Times, https://flag.dol.gov/processingtimes (last visited January 29, 2025)].

Twelve full-time OFLC Analysts decide routine, unaudited PERM applications together with six "flex employees" who also spend at least six months a year adjudicating routine, unaudited PERM applications full time. [Doc. No. 18 at ¶ 71]. Based on minimum production standards agreed upon under a collective bargaining agreement, DOL OFLC Analysts can decide between 126,000 to 180,000 applications per fiscal year. [*Id.* at ¶¶ 72, 75]. Analysts "are only reviewing the PERM application for completeness and accuracy" and are "not permitted to do outside research to test the accuracy." [*Id.* at ¶ 80]. No set rule, policy, or limitation governs how long the analysts may take to decide a single month of Forms 9089. [*Id.* at ¶ 88]. Even under the month processing method, there is a large variation between decision times among applications submitted in the same month. [*Id.* at ¶ 105]. Frequently, the DOL decides later-filed PERM applications prior to earlier-filed applications, and "nearly 25% of cases submitted in the same month are decided more than a month before or after the mode month," or the decision month for most PERM applications submitted in the same month. [*Id.* at ¶ 106]. Because of this month processing method for adjudicating PERM applications, Plaintiffs assert that the delays in application adjudication are unreasonable and harmful to PERM beneficiaries.

4. The FLAG System

In July of 2023, OFLC began accepting Forms 9089 through its updated website, the Foreign Labor Application Gateway ("FLAG"). [Doc. No. 18 at ¶¶ 119-20]. Plaintiffs claimed that as of February 26, 2024, DOL had not started processing cases submitted via FLAG. [*Id.* at ¶ 121]. Likewise, it had not "created any training materials, memorandums, internal guidance, power points, or other similar material related to adjudicating Forms 9089 in the FLAG system" nor taken "any steps at all to adjudicate any PERM applications filed on or after July 2023." [*Id.* at ¶¶ 122-23]. This is no longer true. Plaintiffs concede that after the filing of this lawsuit, the government started applying decisions in the FLAG system. Given that this is the basis of Plaintiffs' unlawful withholding claim, the Plaintiffs submit that this claim is moot. [Doc. No. 44 at 19:20-23 (Mot. H'rg Tr. 10/08/2024)].

B. Relevant Facts

1. The Plaintiffs

Plaintiffs are all beneficiaries of pending PERM applications. [Doc. No. 18 at ¶ 45]. Since the Amended Complaint was filed, six out of nine Plaintiffs have received their PERM certifications.[3] As such, the unreasonable delay claims brought on behalf of those six Plaintiffs are now moot. *Matt v. HSBC Bank USA, N.A.*, 783 F.3d 368, 372 (1st Cir. 2015) ("Here, there is literally no controversy left for the court to decide—the case is no longer 'live'") (citation

[3] The following Plaintiffs have received PERM certifications: Florian Adolf [Doc. No. 43-1 (filed April 12, 2023 and certified on May 13, 2024, 397 days after filing)]; Sanjay Krishna [Doc. No. 43-2 (filed July 13, 2023 and certified on August 22, 2024, 406 days after filing)]; Sabitha Kajuluri [Doc. No. 43-3 (filed July 27, 2023 and certified on August 26, 2024, 396 days after filing)]; Elena Kokueva [Doc. No. 47-1 (filed August 14, 2023 and certified on December 4, 2024, 478 days after filing)]; Daniyal Ahmed Faheem [Doc. No. 47-2 (filed September 7, 2023 and certified December 5, 2024, 455 days after filing)]; Nathael Bekele [Doc. No. 47-3 (filed September 13, 2023 and certified December 5, 2024, 449 days after filing)]. *See generally* [Doc. No. 34-1 at ¶ 1 (listing filing dates)].

omitted). The remaining Plaintiffs who have yet to receive their PERM certifications are the following:

- Maksim Piskunov is a citizen and national of Russia whose six-year H-1B maximum will be hit on September 30, 2026. [Doc. No. 18 at ¶¶ 139, 141]. He is the beneficiary of a PERM application filed on November 17, 2023. [*Id.* at ¶142].

- Chanikya Sai Ram Gopisetty is a citizen and national of India who will hit his six-year maximum H-1B status on September 30, 2025. [*Id.* at ¶¶ 187, 189]. He is the beneficiary of a PERM application filed on January 22, 2024. [*Id.* at ¶ 190].

- Plaintiff Idris Syed[4] hit his six-year H-1B maximum on October 18, 2024. [*Id.* at ¶¶ 211, 213]. He is a beneficiary of a PERM application filed on November 3, 2023. [*Id.* at ¶ 214].

2. Effects Of Delayed PERM Applications

The DOL's data shows that a significant amount of PERM beneficiaries have H-1B visas. [Doc. No. 18 at ¶ 114]. These visas can only last six years. [*Id.*]. However, H-1B workers can get one-year extensions of their visas if their employer receives PERM approval before the beginning of their fifth year in H-1B status. [*Id.*]. Because the PERM process now takes approximately a year or more, these delays often prevent applicants with H-1B visas from receiving this extension. [*Id.*]. If an H-1B worker has an approved I-140 Immigrant Visa Petition,[5] they can get an indefinite extension of their H-1B while they wait for an immediately available immigrant visa. [*Id.* at ¶ 115]. However, a large majority of H-1B workers can only apply for an immigrant visa after DOL issues them a PERM. [*Id.*].

Additionally, the delays prevent beneficiaries from applying for adjustment of status when visas become immediately available. [*Id.* at ¶ 116]. This prevents beneficiaries from

[4] The Complaint states that Mr. Syed is a "citizen and national of United States." [Doc. No. 18 at ¶ 211]. This is likely an error.

[5] This form asks USCIS to classify a noncitizen as someone "who is eligible for an immigrant visa based on employment." USCIS, *Petition Filing and Processing Procedures for Form I-140*, Immigrant Petition for Alien Workers https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers.

acquiring lawful permanent residency and subsequently delays the required residency periods for naturalization. [*Id.*]. Without a PERM decision, beneficiaries may also have to leave the United States, causing potential family separation. [*Id.* at ¶ 282]. Delays can also negatively impact a beneficiary's potential for career advancement because employers are less likely to promote employees while their PERM is pending, since job requirements might change and "put at risk the PERM process and related immigrant visa application." [*Id.* at ¶ 117]. The culmination of these consequences may lead to substantial mental and emotional harm. [See *id.* at ¶¶ 162, 174, 186, 200, 223, 233]. Lastly, employers are also harmed by delays because they are "deprived of the consistent labor force for these highly skilled workers in a tight labor market." [*Id.* at ¶ 118].

II. PROCEDURAL HISTORY

Mr. Krishna filed an action on January 30, 2024, as a sole plaintiff bringing an APA claim for unreasonable delay. [Doc. No. 1]. On April 15, 2024, Mr. Krishna filed a Motion for Summary Judgment. [Doc. No. 15]. On May 3, 2024, an Amended Complaint was filed, adding eight additional plaintiffs and bringing an additional claim for unlawful withholding under the APA. [Doc. No. 18]. On May 31, 2024, DOL filed a Motion to Dismiss, [Doc. No. 26], and on June 21, 2024, DOL filed a Cross-Motion for Summary Judgment, [Doc. No. 29]. On October 8, 2024, a motion hearing on all the instant motions was held. At that hearing, Plaintiffs conceded that their unlawful withholding claim is moot. [Doc. No. 44 at 19:20-23]. As such, the only remaining claim here is for unreasonable delay under the APA.

I. LEGAL STANDARD

"Summary judgment is appropriate when the moving party shows that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Joseph v. Lincare, Inc.*, 989 F.3d 147, 157 (1st Cir. 2021) (quoting Fed. R. Civ. P. 56(a)).

"A dispute is 'genuine' if the evidence is such that a reasonable jury could resolve the point in the favor of the non-moving party, and a fact is 'material' if it has the potential of affecting the outcome of the case." *Taite v. Bridgewater State Univ., Bd. of Trustees*, 999 F.3d 86, 93 (1st Cir. 2021) (cleaned up). Once a party properly supports a motion for summary judgment, the opposing party "bears the burden of producing specific facts sufficient to deflect the swing of the summary judgment scythe." *Lincare*, 989 F.3d at 157 (cleaned up).

In assessing whether a genuine dispute of material fact exists, courts "look to all of the record materials on file, including the pleadings, depositions, and affidavits," while "neither evaluat[ing] the credibility of witnesses nor weigh[ing] the evidence." *Ahmed v. Johnson*, 752 F.3d 490, 495 (1st Cir. 2014). The record must be examined, however, "in the light most favorable to the nonmovant[,] . . . drawing all reasonable inferences in that party's favor." *Lopez-Hernandez v. Terumo Puerto Rico LLC*, 64 F.4th 22, 28 (1st Cir. 2023). And the Court "proceed[s] with caution and restraint when considering summary judgment motions where, as here, issues of pretext, motive, and intent are in play." *Taite*, 999 F.3d at 93.

II. ANALYSIS

A. *TRAC* Factors

The APA requires federal administrative agencies to address matters presented to them within a reasonable time, 5 U.S.C. § 555(b), and instructs federal courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). In evaluating an unreasonable delay claim, courts look to the six-factor test articulated by the D.C. Circuit in *Telecommunications Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*" or "TRAC"), which was adopted by the First Circuit in *Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987), for claims of agency delay:

> (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."

TRAC, 750 F.2d at 80 (cleaned up). Analysis of these factors involves a "fact intensive inquiry." *Novack v. Miller*, 727 F. Supp. 3d 70, 77 (D. Mass. 2024) (citing *V.U.C. v U.S. Citizenship & Immigr. Servs.*, 557 F. Supp. 3d 218, 223 (D. Mass. 2021)). While these factors are intended to provide "useful guidance in assessing claims of agency delay," they "are not ironclad." *Milligan v. Pompeo*, 502 F. Supp. 3d 302, 317 (D.D.C. 2020) (citations omitted). "[E]ach case must be analyzed according to its own unique circumstances, as each will present its own slightly different set of factors to consider." *Id.* (cleaned up). Thus, their application usually should not be decided at the motion to dismiss stage. *Novack*, 727 F. Supp. 3d at 77; *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) ("Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court").

The Plaintiffs argue that the majority of the TRAC factors weigh in their favor. [*See* Doc. No. 18 at ¶¶ 251-307]. The DOL argues the contrary. [Doc. No. 27 at 7-13]. I find that Plaintiffs have not put forth sufficient evidence that would allow me to rule, as a matter of law, that the TRAC factors weigh in Plaintiffs' favor. Further, I find that the TRAC factors weigh in favor of DOL. To summarize, and as explained in more detail below, I find that: Under TRAC Factor One, the DOL follows a rule of reason. Under TRAC Factor Two, Congress has not set forth a

clear timeline or indication regarding the speed at which PERM applications must be completed. Under TRAC Factors Three and Five, Plaintiffs have not demonstrated sufficient, non-economic harm distinct from other beneficiaries awaiting PERM certifications. Under TRAC Factor Four, compelling expedited review of the remaining PERM applications will conflict with DOL's competing priorities, and I defer to the agency's decision-making regarding its approach to processing these PERM applications.

1. *TRAC* Factor One

The first TRAC factor weighs in favor of Defendant. "The rule of reason is the first and most important TRAC factor." 727 F. Supp. 3d at 77 (quoting *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)). This factor considers whether an agency's response time is "governed by an identifiable rationale." *Id.* at 77-78 (quoting *Ctr. for Sci. in the Pub. Int. v. FDA*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014), *cited in Dastagir v. Blinken*, 557 F. Supp. 3d 160, 165 (D.D.C. 2021)). Whether or not an agency abides by a rule of reason "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Milligan*, 502 F. Supp. 3d at 317-318 (quoting *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1102) (alteration in original).

Plaintiffs argue that DOL does not follow its own proclaimed first-in, first-out processing method and does not have any policy that governs how long it takes to decide a PERM application. [Doc. No. 15-1 at ¶ 5; Doc. No. 15 at 5; *see* 69 Fed. Reg. at 77343 (explaining that DOL will process PERM applications "in the order in which they were filed")]. DOL concedes that it does not follow the first-in, first-out policy, [Doc. No. 31 at 2, ¶ 5], but objects to the

contention that it has no "rule of reason" by stating that it follows a "month processing method" whereby DOL posts the processing times for PERM applications on its public-facing website, which are updated monthly so the public is aware of the expected processing time. [Doc. No. 30 at 8-9].

Plaintiffs argue that "the month processing method is not a rule of reason because it is merely a description of the path a PERM application takes within DOL . . . the month processing method is only an *assignment* policy and not an adjudication policy." [Doc. No. 15 at 6]. Further, to the extent the month processing method is DOL's proclaimed rule of reason, Plaintiffs claim that DOL does not follow it. [*Id.* at 7]. In support of its summary judgment motion, Plaintiffs rely on, among other things, the deposition testimony of DOL's F.R.C.P. Rule 30(b)(6) designee David Pasternak (taken on March 4, 2024) and expert Dr. Jordan Ragusa, Associate Professor in the Department of Political Science at the College of Charleston (taken on April 5, 2024).[6]

Plaintiffs also rely on an expert report provided by Dr. Ragusa, which analyzes whether the DOL uses a "first in first out" adjudication pattern, and whether DOL "processes certain applications differently than others." [Doc. No. 15-2 at 267].[7] The report concludes that DOL does not follow a first in, first out rule, which DOL concedes, and finds that "22.4% of routine PERM cases from the same Submission Month are decided at least a month before or after the announced/mode Decision Month." [Doc. No. 15 at 7]. As such, "the average applicant can expect 114 cases submitted in a subsequent month to jump ahead of them in the queue order and

[6] Both depositions appear to have been taken in a different case before the U.S. District Court for the Northern District of Georgia (*Cardoso v. Su*, 23-cv-03629) and were taken before the filing of Plaintiffs' summary judgment motion in this matter on April 15, 2024. [*See* Doc. No. 34-2; Doc. No. 15-2 at 87].
[7] This report also appears to have been created for a different case, although there is no case caption provided with the report. [*See* Doc. No. 15-2 at 283 (describing that Dr. Ragusa had submitted an initial report on January 21, 2024, 5 days prior to the filing of the complaint in this matter)].

receive a quicker decision." [*Id.*]. Because, as Plaintiffs claim, DOL engages in this type of "line-jumping" and does not actually follow the month processing rule, DOL does not follow a rule of reason. Plaintiffs further claim that because DOL has not put forth their own expert or deposed Mr. Ragusa, that DOL has failed to put forth sufficient evidence to rebut Plaintiffs' evidence.[8]

I find that DOL's month processing method is a rule of reason. The OFLC has determined that month processing is "more efficient and creates more consistent results than a straight first-in/first-out processing method." [Doc. No. 30 at 9]. While processing times may vary, DOL cites to Mr. Pasternak's deposition to explain that the delays are "a combination of (1) rising caseload in the PERM program and (2) OFLC's responsibilities in administering other foreign labor certification programs in which the caseloads have increased even more and in which there are short statutory and regulatory deadlines for adjudication and funding constraints, OFLC's backlog of pending PERM applications—and the average processing times—generally continue to increase." [*Id.*]. DOL has also explained that while analysts work to reduce the applications of the current processing month, cases that were put on hold for audit review may be re-assigned once the contract analyst completes the audit review. [*Id.* at 9-10]. Once a federal analyst receives case assignments for the new month, they may continue working to close out the prior month's cases while beginning the new month. [*Id.* at 10]. In some instances, an analyst's assignment may include a group assignment consisting of all PERM applications filed by the same employer at any time during the processing month. [*Id.*]. Analysts are also responsible for "stragglers," which are applications "with a filing date earlier than the processing month, such as the approximately one thousand pending PERM applications still awaiting adjudication when a

[8] Plaintiffs' evidence from Dr. Ragusa appears to be from a different case. I am not persuaded that I should fault the DOL either for failing to depose Dr. Ragusa in *this* matter or for not providing a competing expert report.

new processing month is opened and assigned." [*Id.*]. Due to these changing circumstances, "[a] federal analyst may organize her assigned cases for the processing month in any way she wants to make processing easier and achieve daily production standards. Thus, all cases filed in the processing month are simultaneously assigned to analysts and are not necessarily processed in filing date order; 'anything that is in an active processing month can be issued at any time.'"[9] [*Id.* at 10]. DOL also has a long-standing policy to refrain from expediting the processing of PERM applications based on the circumstances of any individual employer or beneficiary, and does not have the authority or resources to verify the accuracy of a request to expedite. [*Id.* at 11]. DOL argues that its method of adjudicating PERM applications based on month of submission and without any preference to individual applications constitutes a rule of reason. [*Id.* at 12].

DOL also argues that at the time of its motion, each PERM application at issue had been pending for less than the published processing times. [*Id.* at 13]. As of this Court's decision, the DOL is processing PERM applications from September 2023. *See* https://flag.dol.gov/programs/perm (last visited January 31, 2025). It anticipates an average of 462 calendar days to process applications filed in December 2024. *Id.* Plaintiffs' applications have been pending since November 2023 and January 2024. *See, supra* Section I.B.1. As of this decision, Plaintiff Piskunov and Plaintiff Syed's applications have been pending for around 450-460 days, and Plaintiff Gopisetty's application has been pending for around 380 days. These applications appear to be within DOL's current processing times. *Id.*

[9] At the hearing, counsel for DOL explained that line jumping may be created when an officer decides to process, for example, two applications filed by the same employer on May 1 and May 30 respectively. An officer may decide to adjudicate both applications together to have consistent adjudication. Counsel explained that this could create the "line jumping" that Plaintiffs complain of. [Doc. No. 44 at 12:21-25, 13:1-9]. In any event, if, according to Dr. Ragusa, around 80% of PERM applications are decided within a month of the announced decision month, that seems to be a decent adherence to the month processing method. The method's imperfect implementation in practice does not make it unreasonable.

"The Court's determination that [month processing] is a rule of reason is, however, based on the policy's rationale, not on its efficacy." *Celebi v. Mayorkas*, 2024 WL 3744654, at *4 (D. Mass. Aug. 9, 2024); *see also Ctr. for Sci. in the Pub. Int. v. United States Food & Drug Admin.*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014) (requiring only that defendants provide a "rhyme or reason" for their policy and delay and holding that plaintiffs have not shown that time the agency took to respond approached an "egregious" standard). Plaintiffs have failed to put forth evidence that demonstrates that the DOL's processing times are *unreasonable* or egregious. *Anversa v. Partners Healthcare Sys., Inc.*, 835 F.3d 167, 178 (1st Cir. 2016) ("The duration of administrative proceedings, without more, cannot suffice to demonstrate that an agency's actions are unreasonable"). Given the nuances that impact the DOL's day to day tasks and projects, and the explanations provided by the DOL as to why processing times vary, it is prudent to defer to the agency's determination on how best to handle thousands of PERM applications in any given month. *Caswell v. Califano*, 583 F.2d 9, 15 (1st Cir. 1978) ("[C]ourts must normally defer to agency judgment to allow the evolution of procedures as need arise"); *Mashpee Wampanoag Tribal Council*, 336 F.3d at 1102 (whether delay is unreasonable "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part ... upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency"); *Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities") (listing illustrative cases).

Additionally, the fact that remaining Plaintiffs' applications are pending within the DOL's posted processing times demonstrates that the delay is not unreasonable. *Chuttani v. USCIS*,

2020 WL 7225995, at *4 (N.D. Tex. Dec. 8, 2020) ("The Court is reluctant to hold unreasonable any delay in adjudicating an immigration benefit application that's less than the upper limit of [the agency's] current estimated processing time for that particular application form and will not do so here"); *Skalka v. Kelly*, 246 F. Supp. 3d 147, 153-54 (D.D.C. 2017) (noting that a two-year delay "does not typically require judicial intervention"); *Ghadami v. U.S. Dep't of Homeland Sec.*, 2020 WL 1308376, at *8 (D.D.C. Mar. 19, 2020) ("Plaintiffs have summarily alleged that the twenty-five month delay is unreasonable, but many courts evaluating similar delays have declined to find a two-year period to be unreasonable as a matter of law." (cleaned up) (collecting cases)). For these reasons, TRAC Factor One leans in Defendant's favor.

2. *TRAC* Factor Two

The second TRAC factor likewise weighs in favor of Defendant. "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 th[e] rule of reason." *Am. Acad. of Pediatrics v. United States Food & Drug Admin.*, 330 F. Supp. 3d 657, 665 (D. Mass. 2018) (quoting *TRAC*, 750 F.2d at 80). "Absent a congressionally supplied yardstick, courts typically turn to case law as a guide." *Milligan*, 502 F. Supp. 3d at 318 (citing *Sarlak v. Pompeo*, 2020 WL 3082018, at *6 (D.D.C. June 10, 2020)).

In the present case, Congress has not set out an explicit timetable or processing goal. However, DOL's 2004 final rule regarding PERM certifications "anticipate[d] an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed." 69 Fed. Reg. at 77328 (second column). Plaintiffs argue that delaying PERM certification undermines Congress's intent to ensure that "there are not sufficient workers who are able, willing, qualified . . . at the time of application for

a visa." 8 U.S.C. § 1182(a)(5)(A)(i)(I). Prior to filing a PERM application, an employer must conduct a labor market test by advertising job postings for 30 days, and then waiting 30 days to see if anyone responds. *See generally* 20 C.F.R. § 656.17. The crux of Plaintiffs' argument is that if, for example, an employer conducted a labor market test in February 2020 certifying that there are no U.S. employees available, but DOL takes 397 days to certify PERM, then the labor market test results become stale. [Doc. No. 15 at 11]. This, Plaintiffs argue, defeats Congress's intent of "ensur[ing] DOL would protect the American labor force." [*Id.*; Doc. No. 18 at ¶ 267 (citing 8 U.S.C. § 1182(a)(5)(A)]. Plaintiffs argue that "at a minimum, Congress expected DOL to make a decision "in a timely enough fashion to ensure DOL would protect the American labor force." [Doc No. 18 at ¶ 267 (citing 8 U.S.C. § 1182(a)(5)(A)].

DOL responds by contending that the rule anticipating completion of applications within 45 to 60 days was an aspirational processing goal, and was merely DOL's interpretation of Congress's intent. [Doc. No. 30 at 13-14]; *Aziz v. Chadbourne*, 2007 WL 3024010, *2 n. 2 (D. Mass. 2007) (O'Toole, J.) (aspirational processing goal from Congress of six months did not create an enforceable standard "[b]ecause Congress stopped short of mandating a time limit"). Defendant argues that aspirational processing goals like the case at present are not binding requirements. *See, e.g.*, *Celebi v. Mayorkas*, 2024 WL 3744654 at *4 (D. Mass. Aug. 9, 2024); *Durrani v. Bitter*, 2024 WL 4228927 at *5 (D. Mass. Sept. 18, 2024). I agree. The preamble only noted that DOL "anticipate[d]" that computer-generated decisions would be complete within 45-60 days the application was initially filed. 69 Fed. Reg. at 77328 (second column). DOL has put forth evidence of the significant growth of PERM applications over the past few decades, the backlog this growth has created, and how the month processing method is intended to tackle this pace of adjudication. [*See* Doc. No. 30 at 14-15]. As circumstances, priorities, and resources

have changed over the past 20 years, it is unsurprising if 45 to 60 days is no longer an attainable goal. For these reasons, TRAC Factor Two leans in favor of Defendant.[10] *See Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) (cleaned up) ("[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable is entitled to considerable deference").

3. *TRAC* Factors Three & Five

The Third and Fifth TRAC Factors are often considered together in order to assess "the interests prejudiced by delay, including the delay's effect on human health and welfare." *Durrani*, 2024 WL 4228927 at *5 (cleaned up). Plaintiffs contend that the delays in their PERM adjudication harm them for two reasons.

First, Plaintiffs argue that because unapproved PERM certifications affect their immigration status in the United States, Plaintiffs' health and welfare is negatively impacted by the potential loss of employment, loss of Plaintiffs' ability to remain in the U.S. with work authorization, potential family separation, and the mental and emotional turmoil that can result from the delays. [Doc. No. 15 at 13-14]. Plaintiffs cite to Mr. Pasternak's deposition testimony that DOL does not consider the convenience or necessity of petitioning companies or beneficiary employees when adjudicating applications. [*Id.* at 16]. Plaintiffs also point to an internal email from Mr. Pasternak acknowledging that "[h]aving to uproot your life and move halfway across the world for an indefinite period of time is a harm to the worker." [Doc. No. 34 at 6]. DOL responds that Plaintiffs' harms are purely economic and insufficient to satisfy these TRAC Factors. [Doc. No. 30 at 16].

[10] Plaintiffs' argument regarding the staleness of the labor market test is a reach. If over 397 days, the labor market rebounds, a rational employer may presumably hire a domestic employee. Even if the employer does not hire a domestic employee, there is no harm to the statutory purpose caused by the delay because absent the delay, the employee's PERM application would have been adjudicated already.

I am hesitant to hold that Plaintiffs' harm is purely economic. There may very well be harm to an individual's health and welfare for several reasons. Delays in obtaining certification that will lead to important immigration benefits can cause uncertainty that prevents a beneficiary from planning their life and can cause extreme stress and mental anguish. Delays can lead to unemployment, stunt career advancement, cause family separation, and may prevent receipt of important health and educational benefits. While the court is sympathetic of these harms, Plaintiffs have not put forth sufficient evidence of harm they have experienced distinct from others in the PERM queue that warrant the relief they seek. *Pushkar v. Blinken*, 2021 WL 4318116, at *9 (D.D.C. Sept. 23, 2021) ("[I]t is not just [plaintiff's] 'health and welfare' that the Court must consider, but also that of others similarly-situated"). In their briefing, Plaintiffs only put forth particularized evidence as to Mr. Krishna. Plaintiffs argued that Mr. Krishna was harmed by the PERM processing delay because he hit his 6-year H-1B cap and lost his right to live and work in the United States. [Doc. No. 15 at 14]. Had his PERM certification been timely, he would have been entitled to indefinite extensions of his H-1B status. [*Id.*]. Fortunately, Mr. Krishna has received his PERM certification, and Plaintiffs have not provided any evidence of harm to the health and welfare of the remaining Plaintiffs.[11] *Celebi v. Mayorkas*, 2024 WL 3744654 at *5 (D. Mass Aug. 9, 2024) ("While the Court acknowledges the difficulties posed by plaintiff's pending status, he has failed to allege facts that set him apart from the hundreds of thousands of other asylum seekers"); *V.U.C. v. United States Citizenship & Immigr. Servs.*, 557 F. Supp. 3d 218, 223 (D. Mass. 2021) ("[W]hile plaintiffs' welfare interests are weighty (TRAC factors three and five), they are no more so than those of all U-visa petitioners awaiting waitlist adjudication").

[11] Indeed, the agency has already stated that it does not have the authority or resources to determine the accuracy of a request to expedite as to any individual employer or beneficiary. [Doc. No. 30 at 11].

Second, Plaintiffs argue that PERM certification delays impact their subsequent ability to apply for permanent residency or maintain their lawful nonimmigrant status. [Doc. No. 15 at 14-15]. Defendant responds that an employer may seek indefinite, one-year extensions beyond the statutory cap where a PERM application has been pending for at least 365 days. *See* 8 C.F.R. § 214.2(h)(13)(iii)(D); *see also* American Competitiveness in the Twenty-First Century Act of 2000, Pub. Law. 106-313, § 106, 114 Stat. 1251 (set out as note to 8 U.S.C. § 1184). DOL argues that it has no control over when employers choose to file PERM applications. I agree. DOL publishes its processing times on its website, which employers can use to anticipate how long a PERM application will take to be decided and may allow them to timely file a PERM application to avoid any delays and avoid expiration of a beneficiary's H-1B visa. For these reasons, TRAC Factors Three and Five weigh in Defendant's favor.

4. *TRAC* Factor Four

The fourth TRAC factor weighs heavily in favor of Defendant, as it considers the "importance of competing priorities in assessing the reasonableness of an administrative delay." *Durrani*, 2024 WL 4228927 at *5 (quoting *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100, *cited in Palakuru v. Renaud*, 521 F. Supp. 3d 46, 52 (D.D.C. 2021)). This fourth factor carries great weight "because courts have no basis for reordering agency priorities." *Durrani*, 2024 WL 4228927 at *5 (citation omitted). Indeed, courts have often "refus[ed] to grant relief to petitioners when all factors other than the fourth favored the petitioner[s]." *Id.* (citation omitted). As such, courts consistently decline to move plaintiffs to the front of the line, even when the rest of the factors favored the plaintiffs, if doing so would push all others back one space, thus producing "no net gain." *Id.* (citation omitted).

The remaining Plaintiffs insist that compelling DOL to make expedited PERM decisions on their behalf will have no impact on any higher or competing priorities of the DOL, given its resources. [Doc. No. 15 at 8]. Plaintiffs present the following evidence in support of this contention:

- A collective bargaining agreement for federal employes providing a daily quota of 35-42 PERM applications per day.
- Deposition testimony stating that employees can do up to 55 applications per day.
- A productivity projection chart compiled by Plaintiffs based on data provided in Mr. Pasternak's deposition testimony, listing the number of PERM applications that can be complete over 239 workdays in a year when 12 full time employees and 6 flex employees are working on those applications.
- Because PERM applications are decided by a team dedicated solely to PERM adjudications, additional work for that team would not impact other responsibilities that the OFLC has in administering the operations of other programs.

[Doc. No. 34 at 7; Doc. No. 15 at 8-9]. Plaintiffs further argue that because DOL already engages in "line jumping," moving them to the front of the line would not have any impact on DOL's processing methodology. [Doc. No. 15 at 10].

Defendant responds that PERM adjudication is indeed impacted by an "increasing volume of applications, competing priorities, and resource constraints." [Doc. No. 30 at 19]. While Defendant does not dispute the budget figures contained in Plaintiffs' Amended Complaint, [Doc. No. 18 at ¶ 96], DOL contends that Plaintiffs do not account for the OFLC's other responsibilities and how its allocation of its resources is spread across multiple programs. [Doc. No. 30 at 19]. DOL further contends that Plaintiffs cannot show that their applications have been processed differently than others. [*Id.*] Rather, Plaintiffs are seeking preferential treatment in having their applications moved to the front of the line, which would move all other applicants in that processing month back. [*Id.*]. I agree.

While DOL concededly does not follow any "line" or "first in, first out" method of processing, DOL has presented sufficient evidence to demonstrate that it follows a month processing method. In many instances, some applications may be decided one month earlier or one month after the current processing month. This occurs based on the individual adjudicator's decision as to how to decide certain applications. For instance, this may happen due to stragglers or because the adjudicator decided to adjudicate applications filed by the same employer and group them together. In any event, these decisions are made pursuant to DOL's "unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Laboratories, Inc.*, 930 F.2d at 76.

I decline to make individualized decisions regarding which litigants should be permitted to cut administrative lines, especially where DOL itself does not have the authority to do so. [*See* Doc. No. 30 at 20 ("Plaintiffs' demands are at odds with DOL's long-standing policy against expediting the processing of PERM applications based on an employer or its foreign beneficiary's particular circumstances")]; see *also Celebi*, 2024 WL 3744654, at *5 ("To allow plaintiff's request for a judicial remedy would be arbitrary and would incentivize and reward litigation"). Absent any evidence that Plaintiffs are in exceptional or unique circumstances as compared to the thousands of other applicants awaiting a decision, *V.U.C.*, 557 F. Supp. 3d at 224, I find that TRAC factor four weighs heavily in DOL's favor and I decline to extend Plaintiffs the relief they request. *See YER USA, Inc. v. Walsh*, 2022 WL 1715959, at *1 (N.D. Ga. Apr. 20, 2022) ("[Moving] YER USA, Inc.'s PERM application to the front of the line while pushing back the applications of other employers in the queue, ultimately creating an incentive to use litigation in order to secure expedited processing. Such an outcome would seriously interfere with the agency's processes. I find that DOL's modified first-in-first-out processing method for

PERM applications is not unreasonable considering the adjudicatory function the agency performs with respect to these applications"). For these reasons, TRAC Factor Four weighs in Defendant's favor.

5. *TRAC* Factor Six

Plaintiffs' Amended Complaint does not allege any impropriety on the part of DOL.[12] As such, I need not address this factor.

III. CONCLUSION

I understand Plaintiffs' frustration caused by the length of time it has taken for DOL to process their PERM certifications. The uncertainty caused by these delays can surely be stressful and my decision is not intended to diminish the harms Plaintiffs suffered by these delays. Nevertheless, Plaintiffs have not shown that these delays are unreasonable.[13] For the reasons above, Plaintiffs' Motion for Summary Judgment is DENIED, Defendants' Cross-Motion for Summary Judgment is GRANTED, and Defendant's Motion to Dismiss is DENIED as moot.

SO ORDERED.

/s/ Myong J. Joun
United States District Judge

[12] Plaintiffs do not allege impropriety in their Amended Complaint, and only address it briefly in their Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment. [Doc. No. 34 at 9]. Because the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," I decline to address this factor at this stage. *TRAC* 750 F.2d at 80.

[13] The Court acknowledges receipt of Plaintiffs' Notices of Supplemental Evidence, [Doc. Nos. 42, 46] and Defendant's Notices of Administrative Developments, [Doc. Nos. 43 and 47].

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Sanjay Krishna et al. Plaintiff, **v.** **Julie Su** Defendant	**1:24-cv-10241-MJJ**

JUDGMENT

February 5, 2025

Joun, D.J.

In accordance with the Court's Memorandum of Decision entered and dated February 5, 2025, it is hereby **ORDERED** that this action is dismissed.

/s/ Myong J. Joun
Myong J. Joun
United States District Judge