No. 22-35203

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAGENDRA KUMAR NAKKA, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,
Defendants-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON
CASE NO. 3:19-cv-2099 (Simon, J.)

BRIEF FOR DEFENDANTS-APPELLEES

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I. INTRODUCTION

The Immigration and Nationality Act ("INA") permits some nonimmigrant workers to work in the United States temporarily and apply for adjustment of status to lawful permanent residents based on employment-based immigrant visa petitions without affecting their nonimmigrant status. However, the INA also limits the annual number of employment-based immigrant visas available and caps the number per country. Information regarding visas available is published

monthly in the Visa Bulletin issued by the Department of State. As demand outstrips the statutory supply of visas for workers and their dependent family members from India, this results in long wait times for nationals from India, which can cause some of them to "age out" and no longer qualify as derivative beneficiaries of their parents' applications. In 2002, Congress passed the Child Status Protection Act ("CSPA"), which provides that a derivative beneficiary's age may be adjusted by subtracting the time it took USCIS to adjudicate the petition from the beneficiary's age at the time an immigrant visa becomes available to the principal beneficiary.

Appellants are Indian nationals who are the Principal Beneficiaries of immigrant visa petitions and their adult children who seek to qualify as Derivative Beneficiaries on their parent's applications.[1] They allege that Appellees' reliance on the Visa Bulletin violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. Appellants also contend that the USCIS Policy Manual and Department of State Foreign Affairs Manual ("FAM"), which explain how the agencies apply the age calculation provisions of the CSPA, are arbitrary and capricious because they should have gone through notice and comment.

[1] The "Principal Beneficiaries" are Nagendra Kumar Nakka, Srinivas Thodupunuri, Rajeshwar Addagatla, Venkata Satya Venu Battula, Siva Beddada, and Miriam Edwards-Budzadzija. The "Derivative Beneficiaries" are Nitheesha Nakka, Ravi Vathsal Thodupunuri, Vishal Addagatla, Sandeep Battula, Pavani Peddada, Venkata Peddada, and Abigail Edwards.

The Court should dismiss the case for lack of subject matter jurisdiction. The Supreme Court recently held in *Patel v. Garland*, 142 S. Ct. 1614 (2002), that any decision involving the agency's determination whether to grant adjustment of status under 8 U.S.C. § 1255(a) is not subject to review due to the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(i). The decision of whether Derivative Beneficiaries are eligible for adjustment of status under 8 U.S.C. § 1255(a) because they can reduce their age pursuant to the CSPA is a determination that can no longer be reviewed post-*Patel* due to the Supreme Court's interpretation of the jurisdictional bar.

But even if there was jurisdiction over Appellants' claims, they failed to state a claim upon which relief may be granted. Appellants have not been treated differently than similarly situated individuals. Even if they could show disparate treatment, the age calculation is consistent with the statutory scheme and is supported by a rational basis. Appellees' reliance on the Visa Bulletin is consistent with the statutory scheme that imposes limits on visas per category and per country. The statutory scheme is supported by rational government interests, including making visas available to nationals of all countries on equal footing, regulating the national labor market, and promoting diversity among immigrants. Furthermore, the USCIS Policy Manual and the Department of State's Foreign Affairs Manual ("FAM") are interpretive documents that describe the statutory

scheme and are not subject to notice and comment. The Court should therefore deny Appellants' appeal.

II. JURISDICTIONAL STATEMENT

This is an appeal of a district court order granting Appellees' motion to dismiss pursuant to Rule 12(b)(6). Excerpts of Record ("ER") 4-10. Following the recent Supreme Court decision in *Patel*, neither the district court nor this Court has jurisdiction to review Appellants' claims because they are precluded by 8 U.S.C. § 1252(a)(2)(B)(i). Notwithstanding this jurisdictional bar, this Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because this appeal was timely filed. 28 U.S.C. § 2107(b).

III. STATEMENT OF THE ISSUE

1) Does 8 U.S.C. § 1252(a)(2)(B)(i) permit review of Appellants' claims when their claims relate to the agency's judgment of whether to grant adjustment of status pursuant to 8 U.S.C. § 1255(a)?

2) Do the age calculation provisions of the CSPA as applied to Appellants violate the equal protection guarantees of the Due Process Clause?

3) Do the agency guidance manuals on the application of the CSPA violate the Administrative Procedure Act ("APA")?

IV. STATEMENT OF THE CASE

A. Statutory background governing adjustment of status

There are two main ways an individual may seek to obtain status as a lawful permanent resident. A beneficiary of an immigrant visa petition may either apply for admission to the United States after obtaining an immigrant visa through consular processing with the Department of State or apply for adjustment of status from within the United States with USCIS. For applicants in the United States, USCIS may, in its discretion, adjust the status of an alien to that of a lawful permanent resident if "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a).

1. Employment-based immigrant classifications and derivative beneficiaries

Employment-based immigrant classifications are divided into five preference categories based on factors such as education, skills, and qualifications required for the job. 8 U.S.C. § 1153(b). Relevant to this case are the EB-2 and EB-3 classifications because these are the categories under which the Plaintiff Beneficiaries seek lawful permanent residence.[2] To apply for lawful permanent

[2] An EB-2 visa refers to the visa available under 8 U.S.C. § 1153(b)(2) to

residency based on an EB-2 or EB-3 immigrant visa petition, the principal beneficiary generally must have a U.S. employer apply for a labor certification with the United States Department of Labor ("DOL") on behalf of the beneficiary.[3] 8 U.S.C. §§ 1153(b)(3)(C), 1182(a)(5)(A). Once DOL approves the labor certification, the employer applies for an immigrant visa petition with USCIS by filing Form I-140, Immigrant Petition for Alien Worker, accompanied by the labor certification. 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5(c). If the employer meets its burden of proof for an immigrant visa petition in the relevant employment-based preference category, USCIS approves the I-140 petition. *See Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 940 (S.D. Cal. 2015) (describing burden on employer); 8 C.F.R. § 204.5(g)-(*l*) (describing type of evidence that may support an employment-based visa petition).

Being the beneficiary of an approved Form I-140 petition does not necessarily mean that the beneficiary can be issued an immigrant visa immediately. Instead, the beneficiary is classified in the appropriate preference category

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"Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability." An EB-3 visa refers to the visa available under 8 U.S.C. § 1153(b)(3) to "Skilled Workers, Professionals, and Other Workers".

[3] An exception to the labor certification exists for some EB-2 beneficiaries who can obtain a national interest waiver. 8 U.S.C. § 1153(b)(2)(B)(i). None of the Principal Beneficiary Appellants alleges that they sought or obtained a national interest waiver. ER 75-80 ¶¶ 7, 9, 11, 15.

depending on the visa category and beneficiary's country. 8 C.F.R. § 204.5(d). This is because Congress imposes statutory limits on the number of employment-based visas available for issuance each year, as well as statutory limits on the number of individuals from any single country who can obtain visas.[4] 8 U.S.C. §§ 1151(a), (d), 1152(a)(2), 1153(b). For most EB-2 and EB-3 immigrant visa petitions (those requiring labor certifications certified by DOL), the priority date is the date DOL accepted a labor certification application for processing. 8 C.F.R. § 204.5(d). The beneficiary cannot become a lawful permanent resident until an immigrant visa may be issued in the appropriate preference category based on the priority date. 8 U.S.C. §§ 1181(a), 1255(b); 8 C.F.R. § 245.2(a)(5)(ii). Upon the approval of the adjustment application, the Department of State "shall reduce by one the number of the preference visas authorized to be issued under sections 1152 and 1153 within the class to which the alien is chargeable." 8 U.S.C. § 1255(b).

The statute imposes annual limits on visas available per employment-based immigrant visa category at 140,000 plus the number of unused family-sponsored visas from the immediately preceding fiscal year as calculated by a formula set at 8 U.S.C. § 1151(d)(2). *See* 8 U.S.C. § 1151(d). Each employment category in turn

[4] Congress also imposed statutory limits on the number of visas available for some family-based categories. *See* 8 U.S.C. § 1151(c).

is allocated a specific percentage of the annual limit.[5] 8 U.S.C. § 1153(b)(1), (2)(A), (3)(A)-(B), (4), (5)(A), (5)(B)(i); *Mehta v. United States Dep't of State*, 186 F. Supp. 3d 1146, 1149 (W.D. Wash. 2016). There is also a 7 percent annual per-country limit that applies to all of the family-sponsored and employment-based preference categories combined. *See* 8 U.S.C. § 1152(a)(2). And if the number of available visas within a particular employment-based category exceeds the demand for those visas within a calendar quarter, then the remaining visa numbers in that particular category may be used without regard to the per-country limit in 8 U.S.C. 1152(a)(2). *See id.*

As a result of the congressionally imposed limits on visas, demand for some employment-based immigrant visas exceeds the number of available visas. *Mehta*, 186 F. Supp. 3d at 1149-50. When that happens, the Department of State considers a category "oversubscribed" and imposes a cutoff date to keep the allocation of visas within the statutory limits for each fiscal year or quarter. *Id.* at 1150; *see also* 8 U.S.C. § 1153(g) (authorizing the Department of State to make "reasonable estimates" regarding the anticipated number of visas to be issued and to rely upon such estimates in authorizing the issuance of visas). If the beneficiary's priority date is earlier than the cutoff date, then a visa may be available to the beneficiary.

[5] The family-sponsored preference categories have a similar annual limit and a similar distribution of the annual limit between the categories. 8 U.S.C. § 1151(c); 8 U.S.C. § 1153(a).

Scialabba v. Cuellar de Osorio, 573 U.S. 41, 48 (2014); *Mehta*, 186, F. Supp. 3d at 1150; *Li v. Renaud*, 654 F.3d 376, 378 (2d Cir. 2011). The Department of State determines the cutoff date based on, among other things, reports from consular officers abroad and the Department of Homeland Security about applications for immigrant visas and for adjustment of status. 22 C.F.R. § 42.51; *Mehta*, 186 F. Supp. 3d at 1149. The amount of time the beneficiary must wait for a visa to become available based on the cutoff date depends on supply and demand for visas within a given category, and some beneficiaries may wait years before a visa in a given preference category becomes available. *Scialabba*, 573 U.S. at 50; *Li*, 654 F.3d at 378.

The Department of State publishes a "Visa Bulletin" every month that reports the priority dates that are current within each preference category and per country of chargeability.[6] *See* 8 C.F.R. § 245.1(g)(1); 22 C.F.R. § 42.51(b). The Visa Bulletin's "Final Action Dates" chart shows if a visa in a category is "current," i.e. available regardless of priority date, and if not current, it shows the cutoff date indicating for which priority dates a visa is available. *Mehta*, 186 F. Supp. 3d at 1150. The Department of State only authorizes issuance of a visa in accordance with the statutory limits described above when it is available under the

[6] The current and historical visa bulletins can be found at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.

Final Action Dates chart. *Lin Liu v. Smith*, 515 F. Supp. 3d 193, 197 (S.D.N.Y. 2021).

In addition to the Final Action Dates chart, the Visa Bulletin publishes a "Dates for Filing" chart reflecting the earliest dates when an applicant may begin filing paperwork with the Department of State in support of their visa application. *Lin Liu*, 515 F. Supp. 3d at 195; *Mehta*, 186 F. Supp. 3d at 1150-51. The Dates for Filing chart was added to the Visa Bulletin in 2015 in order to modernize the bulletin, better estimate immigrant visa availability, and provide a degree of predictability to those seeking permanent residency. *Mehta*, 186 F. Supp. 3d at 1150; *Lin Liu*¸ 515 F. Supp. 3d at 195. In general, applicants for adjustment of status must use the Final Action Dates chart to determine if a visa is available for purposes of filing the adjustment application. 7 USCIS Policy Manual A.7.F.4[7]; *see also* 8 C.F.R. 245.1(g)(1) ("A preference immigrant visa is considered available for accepting and processing if the applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin"). If USCIS determines that the number of known applicants is lower than the number of available visas remaining in the fiscal year, USCIS will allow applicants to file based on the Dates for Filing chart in accordance with Department of State

[7] The USCIS Policy Manual is available at https://www.uscis.gov/policy-manual.

estimates of those applicants who will likely have visas authorized for issuance in the foreseeable future. *Id*. USCIS advises the public each month whether they can consult the Final Action Dates chart or Dates for Filing chart to file for adjustment of status with USCIS that month. *Id*. While the Dates for Filing chart provides guidance as to when an applicant may begin the application process, the Final Action Dates chart is consistent with the cutoff dates in the prior version of the Visa Bulletin. *See Mehta*, 186 F. Supp. 3d at 1151; *Lin Liu*, 515 F. Supp. 3d at 195.

2. Derivative Beneficiaries and the Child Status Protection Act ("CSPA").

The principal beneficiary's spouse and children under the age of 21 are derivative beneficiaries who are given "the same status, and the same order of consideration" as the principal beneficiary. *See* 8 U.S.C. §§ 1101(b)(1), 1153(d). This means that these beneficiaries may accompany or follow to join in the same visa category, and with the same priority date as the principal beneficiary. *Id*. Generally, derivative beneficiaries do not have an independent basis to receive an immigrant visa apart from their relationship to the principal beneficiary. Therefore, an immigrant visa becomes available to the derivative beneficiary child only when an immigrant visa becomes available to the parent as the principal beneficiary based on their visa category and country of origin. *Scialabba*, 573 U.S. at 48. Prior to 2002, if the derivative beneficiary child turned 21 years old while

waiting for an employment-based visa to become available to the principal beneficiary, the child would age out and no longer be considered a derivative beneficiary. *See id.* at 45.

In 2002, Congress passed the CSPA to protect certain beneficiaries who were under 21 when the petitions were filed but aged out because of administrative processing delays (i.e., the time it took USCIS to adjudicate the immigrant petition). *See* H.R. Rep. 107-45. For derivative beneficiaries, the CSPA provided a rule found at 8 U.S.C. § 1153(h)(1), captioned "Rules for determining whether certain aliens are children." Under Section 1153(h)(1), the statutory age of a derivative beneficiary is calculated by reducing "the age of the alien on . . . the date on which an immigrant visa number became available for the alien's parent" by "the number of days in the period during which the applicable [immigrant] petition was pending [adjudication with USCIS]." *Id.* § 1153(h)(1). Section 1153(h)(1) also requires that the derivative beneficiary seek to acquire lawful permanent resident ("LPR") status "within one year of such [visa] availability" in order to benefit from the "statutory age" calculation. *Id.* The Visa Bulletin fulfills the role of determining when the visa becomes available for an approved petition. *Mehta*, 186 F. Supp. 3d at 1150. In applying the age calculation provision at Section 1153(h), the agencies look at the cutoff dates in the Visa Bulletin to see if a visa is available. *See Scialabba*, 573 U.S. at 48-49. If a visa is available for the principal

beneficiary, then the agencies will determine the age of the derivative beneficiary using the date that visa became available. *Id.* While the applicant needs to seek to acquire within one year of the visa becoming available under the Final Action Dates chart, 8 U.S.C. § 1153(h), USCIS will still consider the applicant to have met that requirement if the applicant files using the Dates for Filing chart. 7 USCIS Policy Manual A.7.G.2.

3. American Competitiveness in the Twenty-First Century Act of 2000

The wait for an employment-based visa affects some United States employers and their employees who are already living and working in the United States. This includes workers and their family members present in the United States in H-1B nonimmigrant status normally admitted for up to six years who are also waiting for an employment-based visa to become available.[8] 8 U.S.C. § 1184(g)(4). On October 17, 2000, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") to address

[8] The INA provides for the classification of qualified temporary worker ("nonimmigrant") aliens who are coming to the United States to perform services for a sponsoring employer in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see Caremax, Inc. v. Holder*, 40 F. Supp. 3d 1182, 1185-86 (N.D. Cal. 2014) (discussing requirements for an H-1B visa). These individuals are classified as "H-1B" nonimmigrants. The "H-1B" designation derives from the section of the INA providing for this category of temporary workers, namely, 8 U.S.C. § 1101(a)(15)(H)(i)(b). (emphasis added). "Nonimmigrants" are noncitizens who are admitted to the United States for a temporary period of time for a specific purpose, *e.g.*, to visit, study or work. *See* 8 U.S.C. § 1101(a)(15).

issues pertaining to H-1B nonimmigrant visas. Pub. L. No. 106-313, 114 Stat. 1251 (2000). Under Section 104(c) of AC21, Congress provided an exemption to the general rule that the period of authorized admission on H-1B status cannot exceed six years. AC21 § 104(c). Congress allowed for extensions of H-1B nonimmigrant visas beyond the six-year limitation for H-1B nonimmigrant workers who are beneficiaries of EB-1, EB-2, and EB-3 visa petitions but are unable to adjust their status to permanent residence because of the per country limitations. *Id*.

The spouses and children of H-1B nonimmigrant workers who are eligible for H-4 nonimmigrant status, 8 U.S.C. § 1101(a)(15)(H) (stating that visa is available to "the alien spouse and minor children of [an H-1B worker] if accompanying him or following to join him."), may also have their derivative status extended in accordance with AC21. 8 C.F.R. § 214.2(h)(9)(iv). The children, however, lose H-4 derivative status once they turn 21 years because they are no longer be considered a "child." *See* 8 U.S.C. § 1101(b)(1) (defining "child" as an unmarried person under 21 years of age). Neither the CSPA nor AC21 make any special provisions relating to derivatives who cease to be H-4 derivatives after turning 21 years old.[9]

[9] The CSPA was not intended to apply to nonimmigrants. *See, e.g.*, H.R. Rep. 107-45 (describing the need for CSPA in order to protect children who aged out while waiting for immigrant visas).

B. Appellants' claims and procedural history

Appellants are six Indian national Principal Beneficiaries of employment-based immigrant visa petitions present in the United States on H-1B non-immigrant visas, and their children, who are Derivative Beneficiaries who are or were present in the United States as H-4 derivative beneficiaries of their parents' H-1B visas and who have applied or intend to apply to adjust status to lawful permanent resident status as derivative beneficiaries of their parent's visa petitions. ER 75-83 ¶¶ 7-19. On December 27, 2019, Appellants filed their Complaint. ER 227; *see generally* Compl. Appellants filed their First Amended Complaint on March 19, 2020. *See generally* ER 194-220. On May 1, 2020, Appellees filed their Motion to Dismiss. ER 228. The magistrate judge issued a Findings and Recommendation ("F&R") on November 2, 2020. ER 110-135. On May 12, 2021, after the parties had filed timely objections to the F&R, the district judge permitted Appellants to file a second amended complaint. ER 109, 229. The district judge declined to adopt the magistrate judge's F&R as moot and denied Appellees' motion to dismiss without prejudice. ER 109.

Appellants filed their Second Amended Complaint on May 20, 2021. ER 73-104. Of all Appellants who are Derivative Beneficiaries, only Appellants Pavani Peddada ("Peddada") and Abigail Edwards ("Edwards") have alleged that they applied for adjustment of status as derivative beneficiaries of their parents'

visa petitions. ER 80-83 ¶¶ 16, 19. Appellant Edwards alleged that she was granted permanent resident status but that her status was granted in error. ER 82-83 ¶ 19. Appellant Edwards alleged that she fears that USCIS will initiate rescission proceedings against her. *Id.*, *see* 8 U.S.C. § 1256(a). Appellant Peddada's application for adjustment of status was denied on July 26, 2021, after Appellants filed their Second Amended Complaint, because she was not under 21 years of age as calculated under the CSPA. ER 70-72. The remaining Derivative Beneficiaries have not alleged that they have applied for, or been denied, adjustment of status. ER 76-82 ¶¶ 8, 10, 12, 14, 17.

Appellees moved to dismiss on June 10, 2021. ER 230. The magistrate judge issued her F&R on November 30, 2021. ER 11-44. The magistrate judge recommended that Appellees' motion to dismiss be granted in part. ER 12, 44. The magistrate judge recommended that the district judge deny Appellees' motion to the extent it argued that Appellants' claims were not ripe. ER 19-27. The magistrate judge, however, found that Appellants failed to state a claim that the age calculation provisions of the CSPA as applied to them violated the equal protection guarantees under the Due Process Clause of the Fifth Amendment. ER 27-36. The magistrate judge further determined that Appellants failed to state a claim that the USCIS Policy Manual or Department of State FAM violated the APA. ER 36-43. On January 27, 2022, the district judge adopted the F&R in part and granted

Defendants' motion to dismiss.[10] ER 5-10. The district judge entered the judgment on February 11, 2022, dismissing the case without prejudice. ER 4.

V. SUMMARY OF THE ARGUMENT

The district court lacked jurisdiction over Appellants' complaint because 8 U.S.C. § 1252(a)(2)(B)(i) precludes review of any judgment regarding the granting of adjustment of status pursuant to 8 U.S.C. § 1255(a). The Supreme Court in *Patel v. Garland* interpreted this jurisdictional bar to include not only the decision of whether to ultimately grant adjustment of status under 8 U.S.C. § 1255(a), but also any judgment relating to the grant of adjustment of status. Appellants' challenge to the age calculation on the CSPA fails in this jurisdictional bar because the decision of whether Derivative Beneficiaries can reduce their age under the CSPA, and consequently whether they are eligible for adjustment of status under 8 U.S.C. § 1255(a), is a judgment related to the grant of a benefit not subject to review in this lawsuit. The Court should therefore dismiss Appellants' appeal for lack of jurisdiction.

But even assuming jurisdiction, the district court did not err in holding that Appellants failed to state a claim for which relief should be granted. Appellants failed to state a valid claim that the age calculation provision of the CSPA as

[10] The district court did not adopt the part of the magistrate judge's F&R that recommended dismissal with prejudice without leave to amend the complaint and dismissed the case without prejudice. ER 4, 10.

applied to them violates the equal protection guarantees of the Due Process Clause because they have not been treated differently than similarly situated individuals and, even if they could show disparate treatment, rational basis supports the statutory scheme. Appellants' attempts to argue that intermediate scrutiny should apply runs contrary to longstanding precedent holding that challenges to immigration statutes that distinguish based on nationality are reviewed for rational basis. And under this standard, Appellants cannot overcome the fact that many policies, such as a desire to promote immigrant diversity, grant limited relief under the CSPA, and protect the labor market, support the age calculation provision of the CSPA.

Lastly, Appellants cannot establish that either the USCIS Policy Manual or the Department of State FAM violate the APA. The agency manuals are not final agency action because they merely provide guidance to the agency on how to adjudicate applications. They do not make a final determination on Appellants' applications. Furthermore, both manuals are not subject to notice and comment because they are interpretive documents that accurately describe how the CSPA and the process to obtain permanent resident status operate in a manner consistent with the statute. The Court should therefore affirm the district court's decision.

VI. ARGUMENT

A. Standard and Scope of Review

The Court reviews a decision denying a motion to dismiss for lack of subject matter jurisdiction *de novo*. *Kingman Reef Atoll Investments, LLC v. United States*, 541 F.3d 1189, 1195 (2008). The party asserting jurisdiction bears the burden of establishing that it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000). Factual determinations made in deciding a motion to dismiss are reviewed for clear error. *Kingman Reef*, 541 F.3d at 1195. Because federal courts are courts of limited jurisdiction, a challenge to subject matter jurisdiction may be raised at any point, including for the first time on appeal. *Herklotz v. Parkinson*¸848 F.2d 894, 897 (9th Cir. 2017). This Court has an obligation to ensure that both it and the lower court had jurisdiction. *Id.*

This Court reviews the grant of a motion to dismiss for failure to state a claim *de novo*. *Applied Underwriters, Inc. v. Lichtenegger*¸ 913 F.3d 884, 890 (9th Cir. 2019). While a court "must accept as true all of the allegations contained in a complaint," it is not required to apply the same deference to legal conclusions made in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. The Court lacks jurisdiction over Appellants' complaint because, under the reasoning of *Patel*, federal courts cannot review any decision related to the denial of adjustment of status.

Following the Supreme Court's decision in *Patel*, neither the district court nor this Court has jurisdiction over any claim brought by Appellants pursuant to the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(i). Appellants challenge purported denials of adjustment of status applications due to the application of the age calculation provision of the CSPA.[11] Appellants' claims are thus barred by 8 U.S.C. § 1252(a)(2)(B)(i) and can only be brought on a petition for review of a final order of removal. Such conclusion is derived from the statute's plain language, the *Patel* Court's expansive interpretation of such provision, and decisions from courts across the country concluding that district court judicial review of adjustment of status challenges is barred.

Federal courts generally lack jurisdiction to review discretionary decisions made by the Attorney General or the Secretary of Homeland Security. Title 8 U.S.C. § 1252(a)(2)(B) is entitled "Denials of discretionary relief." It directs that "[n]otwithstanding any other provision of law (statutory or nonstatutory), . . . and except as provided in subparagraph (D), *and regardless of whether the judgement, decision, or action is made in removal proceedings, no court shall have*

[11] No Appellant argues that they have sought or will seek lawful permanent resident status from abroad through consular processing. ER 75-83 at ¶¶ 7-19.

jurisdiction to review any judgment regarding the granting of relief under section . . . 1255 of this title." 8 U.S.C. § 1252(a)(2)(B)(i) (emphasis added). Section 1255 provides the statutory basis for adjustment of status applications as it provides that the "status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence . . . ." 8 U.S.C. § 1255(a). Therefore, by the jurisdiction stripping statute's plain language, the district court lacked jurisdiction over this case. There is no dispute that Appellants brought this action to challenge USCIS' denial of their adjustment of status applications pursuant to Section 1255(a) on the basis that they are found to be ineligible due to the interpretation and application of the provisions of the CSPA. ER 92-102 ¶¶ 55-95 (discussing claims).

This Court's lack of subject matter jurisdiction over review of an adjustment of status denial is even more evident after the Supreme Court's *Patel* holding. The *Patel* court construed Section 1252(a)(2)(B)(i)'s jurisdiction-stripping bar broadly. In *Patel*, a noncitizen filed a petition for review with the Eleventh Circuit seeking judicial review of the Board of Immigration Appeals' ("BIA") affirmance of an immigration judge's denial of an adjustment of status application. 142 S. Ct. at 1620. At the panel level and on rehearing *en banc*, the circuit court held that it lacked jurisdiction to consider Patel's claim because federal law prohibits judicial

review of "any judgment regarding the granting of relief" under 8 U.S.C. § 1252(a)(2)(B)(i), and that "all factual determinations made as part of considering a request for discretionary relief fall within § 1252(a)(2)(B)(i)'s prohibition on judicial review." *Id* at 1621. The Supreme Court granted certiorari to resolve a circuit split and considered the INA's jurisdiction stripping provision found at 8 U.S.C. § 1252(a)(2)(B)(i). *Id.* In analyzing the statutory provision, the Supreme Court held that that federal courts lack jurisdiction over all judgments related to the denial of adjustment of status and accepted the amicus' interpretation that 8 U.S.C. § 1252(a)(2)(B)(i)'s jurisdictional bar "does not restrict itself to certain kinds of decisions." *Id.* at 1622. "Rather, it prohibits review of *any* judgment *regarding* the granting of relief under § 1255 and other enumerated provisions." *Id.* (emphasis in original). As such, Section 1252(a)(2)(B)(i)'s jurisdiction stripping effect was not restricted to "just discretionary judgments or the last-in-time judgment." *Id.* Therefore, Section 1252(a)(2)(B)(i) "encompasses not just the 'granting of relief' but also any judgment *relating to* the granting of relief." *Id.* (emphasis in original).

In reaching this conclusion, the Court rejected the argument that the provision's use of "judgment" referred exclusively to a "discretionary" decision. *Id.* at 1623-24 (explaining that "[h]ad Congress intended to limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language—as it did

elsewhere in the immigration code."). The Court also rejected the argument that Section 1252(a)(2)(B)(i) only applies to the actual decision of whether to deny or grant relief, and therefore determinations as to the eligibility for the application for relief remained subject to judicial review, finding that such an interpretation would read "regarding" out of the statute entirely. *Id.* at 1625-26.

While the *Patel* court noted that the "reviewability of [USCIS] decisions is not before us, and we do not decide it," it nonetheless observed that "it is possible that Congress did, in fact, intend to close th[e] door" to judicial review of USCIS decisions. *Id.* at 1626. The Court reasoned that Congress had amended the relevant statutory provisions to "extend[] the jurisdictional bar to judgments made outside of removal proceedings [while] at the same time that they preserved review of legal and constitutional questions made within removal proceedings" and that "foreclosing judicial review unless and until removal proceedings are initiated would be consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." *Id.* at 1626-27.

Pursuant to *Patel's* reasoning, this Court lacks subject matter jurisdiction over Appellants' claims which plainly seek federal court review of the agency's adjustment of status decision. Age calculation under the CSPA is a decision related to the agency's judgment regarding the grant of a benefit, specifically Section 1255(a) adjustment of status. Because the determination of whether

Derivative Beneficiaries are under 21 years of age pertains to the eligibility of Derivative Beneficiaries for adjustment of status, review of that determination is barred under 8 U.S.C. § 1252(a)(2)(B)(i).

Numerous other courts reached this conclusion pre-*Patel* based upon the plain language of the statute. *See Perez v. U.S. Bureau of Citizenship & Immigr. Servs.*, 774 F.3d 960, 967 (11th Cir. 2014) ("If [the Cuban Adjustment Act] is part of § 1255, then any judicial review of the USCIS CAA-eligibility determination is precluded by § 1252(a)(2)(B)(i)."); *J.M.O. v. United States*, 3 F.4th 1061, 1063 (8th Cir. 2021) (applying § 1252(a)(2)(B)(i) to bar review of USCIS' decision because "[t]he introductory part of § 1252(a)(2)(B) makes clear the statute applies 'whether the judgment, decision, or action is made in removal proceedings.'"); *Lee v. U.S. Citizenship & Immig. Servs.*, 592 F.3d 612, 621 (4th Cir. 2010) (explaining that "[l]ike a number of our sister circuits, we therefore conclude that the district court did not have jurisdiction to entertain Lee's challenge to the [USCIS] District Director's eligibility determination and subsequent denial of adjustment of status."); *Bultasa Buddhist Temple of Chicago v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017) (explaining that Section 1252 "strips the courts of jurisdiction to review a [USCIS] decision made on an [adjustment of status] application under [Section 1255]."); *Hassan v. Chertoff*, 593 F.3d 785, 788-89 (9th Cir. 2010) (per curiam) (same); *Ayanbadejo v. Chertoff*, 517 F.3d 273, 277 (5th Cir. 2008) (per curiam)

(same); *Jimenez Verastegui v. Wolf*, 468 F. Supp. 3d 94, (D.D.C. 2020), *appeal dismissed sub nom. Verastegui v. Wolf*, No. 20-5215, 2020 WL 8184637 (D.C. Cir. Dec. 11, 2020) (explaining that the district court lacked jurisdiction over USCIS' decision denying adjustment of status because the "statutory text does not support" the argument that the court retained jurisdiction because the denial was based on a pure question of law and not the exercise of discretion).

Section 1252(a)(2)(B)(i) strips this Court of subject-matter jurisdiction to review Appellants' Complaint even though Appellants are not in removal proceedings and are not challenging a final order of removal as the provision applies "regardless of whether the judgement, decision, or action is made in removal proceedings." The Supreme Court explained in *Patel* that Section 1252(a)(2)(B)(i) applies to "any judgment regarding" the granting of adjustment of status, and not simply to "discretionary" decisions made during such process. Therefore, this Court should apply this interpretation and dismiss Appellants' appeal for lack of subject matter jurisdiction.

C. Assuming the Court has jurisdiction, the District Court correctly concluded that the age calculation provisions of the CSPA do not violate the equal protection guarantees of the Due Process Clause.

Appellants challenge the age calculation provisions of the CSPA as applied to them because they contend that it discriminates against nationals from India. ER 92-96. As a preliminary matter, Appellants cannot establish that the statutory

scheme violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment because, simply stated, the statutory scheme does not distinguish or single out Indians based on their nationality. The visa allocation provisions impose limits on visas available to nationals from all countries and do not single out nationals of any country for disparate treatment. *See* 8 U.S.C. §§ 1151(a), (d), 1152(a)(2), 1153(b). Instead, it is a result of supply and demand for visas in the preference-based categories. *Scialabba*, 573 U.S. at 50; *Li*, 654 F.3d at 378. Furthermore, nationality is not a factor used when calculating age under the CSPA. 8 U.S.C. § 1153(h). And as Appellants recognize, all countries are equally subject to annual per county limits on the number of visas available to nationals of that country and these limits are permissible to serve the government interest "to apportion immigrant visas in a fashion that ensures immigrant visa availability in a given fiscal year to all nationalities." ER 91-92 ¶¶ 59-60, 62. As the F&R concluded, Appellants have failed to establish that Indian nationals are being treated differently than individuals from other countries with high demand for immigrant visas, and the alleged inability to reduce their age under the CSPA is a result of supply and demand for immigrant visas. ER 30-31.

But even assuming that the statutory scheme were to distinguish based on nationality, which it does not, Appellants cannot establish that it is an equal

protection violation. Various rational bases support the statutory scheme and Appellants cannot negate every single justification for the statutory scheme.

1. The District Court correctly applied rational basis review.

Regarding the standard by which to review Appellants' constitutional claim, the district court did not err in applying rational basis review. The Due Process Clause of the Fifth Amendment contains an equal protection guarantee that requires federal laws to treat all persons similarly situated alike unless there is adequate justification for treating them differently. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). It is well established that where, as here, a party challenges an immigration rule that distinguishes based on nationality, that challenge is subject to rational basis. *Tista v. Holder*, 722 F.3d 1122, 1126-27 (9th Cir. 2013); *see also Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009) ("Although courts usually subject national-origin classifications to strict scrutiny, when such classifications involve unadmitted aliens in the immigration context, we subject them only to rational basis review. This is so because Congress has plenary power over immigration and naturalization, and may permissibly set immigration criteria based on an alien's nationality even though such distinctions would be suspect if applied to American citizens") (internal citations and quotations omitted); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) ("Federal classifications distinguishing among groups of aliens are thus valid unless wholly irrational.");

Masnauskas v. Gonzales, 432 F.3d 1067, 1070-71 (9th Cir. 2005) (applying rational basis to a Lithuanian national's equal protection challenge to NACARA based on national origin); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (reviewing an immigration-related regulation under the rational basis test). In immigration and naturalization, federal authority is plenary. *Sandoval-Luna*, 526 F.3d at 1247; *see Fiallo*, 430 U.S. at 792 ("[T]he power to expel or exclude aliens . . . [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). Similarly, the Supreme Court has held that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the *political branches* of the Federal Government." *Mathews*, 426 U.S. 67, 81 (1976).[12]

Appellants, while aware that the applicable standard is rational basis, ask the Court to review their equal protection claims using intermediate scrutiny. Br. 8-10, 12-13. However, Appellants rely on *Tapia Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), which was overruled in *Abebe v. Mukasey*, 554 F.3d 1203, 1205-06 (9th Cir. 2009) (*en banc*). Br. 10. *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005), also cited by Appellants, relied on *Tapia-Acuna*, making its rationale unavailing.

[12] Thus, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Eldridge*, 426 U.S. at 79-80).

Cordes, 421 F.3d at 898-99 (citing *Tapia-Acuna*, 640 F.2d at 225). And as Appellants themselves concede, *Cordes* was subsequently vacated for lack of jurisdiction. *Cordes v. Mukasey*, 517 F.3d 1094 (9th Cir. 2008); Br. 9. Appellants then note several equities centered around their ties to the United States that should support the application of intermediate scrutiny. Br. 13 n.4. However, rational basis review applies in the immigration context because of the longstanding plenary power Congress possesses over immigration. *Tista*, 722 F.3d at 1126-27. The Court should reject Appellants' unsupported invitation to apply intermediate scrutiny and apply rational basis review as previously held by this Court.

2. Appellants' claim fails under rational basis review.

In the immigration context, a distinction that differentiates based on nationality must be upheld under the rational basis standard if it is rationally related to a legitimate government purpose. *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008). Under this standard, "line-drawing decisions made by Congress or the President in the context of immigration and naturalization must be upheld if they are rationally related to a legitimate government purpose." *Jimenez-Angeles v. Ashcroft,* 291 F.3d 594, 603 (9th Cir. 2002) (internal quotations omitted). The Ninth Circuit noted that "Congress has particularly broad and sweeping powers when it comes to immigration and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion,

removal, naturalization or other matters pertaining to aliens." *Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (*en banc*). Where the immigration scheme does not discriminate against a "discrete and insular minority" or on a fundamental right, the court applies "a standard of bare rationality." *Id.* A distinction must be "wholly irrational to violate equal protection" and Appellants bear the burden "to negate every conceivable basis which might support a legislative classification *whether or not the basis has a foundation in the record.*" *Tista*, 722 F.3d at 1126-27 (citing *Aguilera-Montero*, 548 F.3d at 1252) (emphasis added). Under rational basis review, the Court's task is "to determine . . . whether [the Court] can conceive of a rational reason Congress may have in adopting" the rule at issue. *Abebe*, 554 F.3d at 1206. Even a hypothetical rationale would be sufficient to support the immigration rule under rational basis. *Id.* at 1206 n.4. The application of the CSPA to Derivative Beneficiaries survives rational basis review because it is well established that, in the immigration context, Congress has the power and authority to create and remove distinctions among immigrants based on national origin. *See, e.g.*, *De Avila v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981) (deferring to agency interpretation of caps in visas for Mexican nationals after Congress removed preferential treatment of western hemisphere countries in visa allocation); *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) ("Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the

Executive."). Assuming without conceding that the CSPA distinguishes based on nationality, *see supra* 25-26, reliance on the India column in the Visa Bulletin when determining when a visa is available in order to calculate age under 8 U.S.C. § 1153(h) is not an equal protection violation because Congress can grant, deny, or limit immigration benefits based on nationality to advance various policy goals. *See Midi*, 566 F.3d at 137 ("Congress grants or denies many immigration benefits based on nationality, presumably to advance security, foreign relations, humanitarian, or diplomatic goals. We cannot say that Congress's decision to deny CSPA protection to HRIFA applicants lacks any rational basis.").

a. Various rationales support the age calculation provisions of the CSPA.

First, there is no equal protection violation because Congress designed the CSPA to provide limited relief on account of delays caused by the time it took the agency to process the immigrant visa petition. Section 1153(h) is also a statute of limited applicability that only provides some relief against aging out "because of—but only because of—bureaucratic delays." *Scialabba*, 573 U.S. at 53. The CSPA does not provide relief against aging out involving statutes that provide immigration benefits available to nationals of certain countries, such as the Cuban Adjustment Act ("CAA," available to certain Cuban nationals and relatives), the Nicaraguan and Central American Relief Act ("NACARA," available to certain nationals of Central America), and the Haitian Refugee Immigrant Fairness Act

("HRIFA," available to certain Haitian nationals). *See Tista*, 722 F.3d at 1126-28 (holding that failure of Congress to apply the CAA to NACARA beneficiaries does not violate equal protection); *Midi*, 566 F.3d at 137 (4th Cir. 2009) (finding that CSPA does not apply to HRIFA); *Schloser v. Dir. Miami Field Office, USCIS*, Case No. 19-23346-CIV, 2019 WL 7371815, at *8-9 (S.D. Fla. 2019) (holding that CSPA does not apply to CAA).

The limited protection against aging out at 8 U.S.C. § 1153(h) reflects Congressional balance of providing some relief against aging out due to processing delays and the understanding that the new statutory scheme would not displace or affect other people who have been waiting in line in their respective visa category. *Matter of Wang*, 25 I. & N. Dec. at 37-38 (citing 148 Cong. Rec. H4989 at *H4992 (statement of Rep. Jackson-Lee)). Even if Derivative Beneficiaries could rely on the worldwide column of the Visa Bulletin to determine visa availability for the age calculation *before* a visa becomes available to their parent under the India column, Derivative Beneficiaries would in essence run around the statutory scheme, claim an age, and retain a spot in a category based on an age calculation that was not intended by Congress. By calculating age based on the India column, the government advances the interest in making visas available to aliens in their respective category and country of chargeability without displacing others. *See Matter of Wang*, 25 I. & N. Dec. at 37-38. The government's use of the India chart

in the Visa Bulletin is rationally related to this interest to provide limited relief in the respective category without displacing others.

Second, the CSPA reliance on the numerical limits to visa allocation per country as reflected in the Visa Bulletin supports the INA's overall goal of promoting immigration diversity. The government consults the Visa Bulletin to calculate age under 8 U.S.C. § 1153(h) because that chart reflects when a visa is available to an Indian national and their derivatives. *See Mehta*, 186 F. Supp. 3d at 1151. The district court noted that the Visa Bulletin reflected a longer wait for visas for Indian nationals. ER 14, 30-31. However, Indian nationals and nationals of other countries are equally treated in that they are all subject to a per country limit on visas. 8 U.S.C. § 1152(a)(2). Congress intended to promote diversity by imposing per country limits on visas by placing all countries at the same footing for visas. *See De Avila*, 643 F.2d at 475-76 (explaining that imposition of limit on visas at 20,000 per country in 1976 and remove separate treatment to Mexican and Canadian nationals served to provide uniform treatment to all countries). Therefore, consulting the India column of the Visa Bulletin as part of the CSPA age calculation process to determine if an applicant is eligible for an immigrant visa is rationally related to the overall goals of the INA of promoting immigration diversity, making visas available to all countries in an equal footing, and avoiding a situation where visas in one category are mainly granted to nationals of a

particular country. *See* ER 32 ("it is rational for USCIS to calculate the CSPA age of a beneficiary when the beneficiary reaches the front of the 'queue' to ensure uniform treatment of all applicants and to ensure conformity with the statutory provisions that establish annual limitations on immigration visas, per-country allocation of visas, and the publication of monthly visa bulletins.").

Third, reliance on the Visa Bulletin also serves the government's interest in protecting the United States labor market. Limits on the number of visas allocated—including employment-based visas—rationally serve the interest in controlling and protecting the domestic labor market from an influx of foreign labor. *United States v. Baca*, 368 F. Supp. 398, 401 (S.D. Cal. 1973) (citing *Karnuth v. United States*, 279 U.S. 231 (1929)). The Visa Bulletin, based on relevant provisions of the Immigration and Nationality Act regarding immigrant visa allocation, is the tool the government uses to determine how employment-based visas are allocated so as to remain within the statutory limits imposed by Congress. The Visa Bulletin serves the purpose of protecting the labor market. This provides the government with an additional rational basis to rely on the India chart of the Visa Bulletin.

b. Appellants cannot overcome every real or conceivable rational bases provided by the government.

Appellants contend that their connections to the country and their presence in the United States pursuant to AC21 provisions demonstrate that there is no

rational basis. Br. 11-13. Under rational basis review, the Court's task is "to determine . . . whether [the Court] can conceive of a rational reason Congress may have in adopting" the rule at issue. *Abebe*, 554 F.3d at 1206. Even a hypothetical rationale would be sufficient under this standard. *Id.* at 1206 n.4. Thus, while Appellants do have equities and connections to this country, these equities do not defeat every rationale enumerated above supporting rational basis. *See Tista*, 722 F.3d at 1126-27 (explaining that party must negate every conceivable basis supporting rational basis).

And to the extent Appellants rely on AC21, that statute does not defeat the government's rational basis because Section 104(c) of AC21 does not provide Appellants with "special status" or any other special immigration preferential treatment. Instead, Congress intended for AC21 to provide some relief from lengthy adjudications by allowing H-1B nonimmigrants to remain in the United States while a decision on their cases is made. S. Rep. 106-260, at *10. In fact, a lot of the relief provided under AC21 relates to issues involving H-1B visas and not EB-2 or EB-3 visas. *See, e.g.*, AC21 § 102 (temporary increase in H-1B availability); AC21 § 105 (allowing increased portability of H-1B status). And while Congress knew that worldwide limits affected employment-based visas availability, S. Rep. 106-260, at *10 (stating that AC21 modified per country limits to "eliminate discriminatory impact" of visa limits), AC21 did not eliminate the per

country limits but instead eliminated the caps in a category if demand exceeded supply for a visa. AC21 §104(a) (codified at 8 U.S.C. § 1152(a)(5)). Furthermore, Congress intended that the provisions of AC21 extending the presence of employees in the United States would minimize disruptions on employers, not to provide special status to the applicants. S. Rep. 106-260, at *23 (explaining need to allow for extensions of H-1B status because delays in visa processing have caused disruptions on ongoing work projects). In sum, Appellants' equities and AC21 "fail under rational basis review to "negate every conceivable basis" behind the CSPA age calculation rules." ER 36. The district court's dismissal of Appellants' equal protection claims should be affirmed.

D. The District Court correctly dismissed Appellants' challenges to the agencies' manuals.

In its decision, the district court adopted the F&R's conclusion that the USCIS Policy Manual and the DOS FAM were not final agency action and, in the alternative, that they were not a legislative rule subject to notice and comment.[13]

[13] The district court did not address Appellees' argument that the Court should have dismissed Appellants' claims against the Department of State FAM because no plaintiff in this action would have been subject to any decision by the Department of State. Indeed, Appellants Peddada and Edwards did not allege that the Department of State would have made an adverse decision against them based on the application of the guidance of the Department of State FAM. *See* ER 80-83 ¶¶ 16, 19. Since they were both in the United States, both Appellants instead sought adjustment of status 8 U.S.C. § 1255(a) with USCIS, not with the Department of State. The Court should therefore dismiss Appellants' claim to the extent they challenge the Department of State FAM.

ER 36-43. The district court did not err in this conclusion and Appellants' arguments are unavailing.

1. Neither the USCIS Policy Manual nor the DOS FAM were final agency action.

The USCIS Policy Manual and Department of State FAM are not final agency action reviewable under the APA. Under the APA, only final agency action is subject to review. 5 U.S.C. § 704. To be considered final, the agency action must meet the following requirements: (1) it "marks the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature" and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotations omitted). The key question for this inquiry is whether the agency completed its decision-making process and whether the result of that process will directly affect the parties. *Indus. Customers of N.W. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (quoting *Franklin v. Mass.*, 505 U.S. 788, 797 (1992)). Courts consider "whether the [action] amounts to a definitive statement of the agency's position, whether the [action] has a direct and immediate effect on the day-to-day operations of the party seeking review, and whether immediate compliance [with the terms] is expected" provide "an indicia of finality." *Id.* (quoting *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 909 (9th Cir. 2003)). The Ninth Circuit

focuses on the "practical and legal effects of the agency action and interpret finality in a pragmatic and flexible manner." *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179 (9th Cir. 2019) (quotations omitted). The finality requirement under the APA is jurisdictional. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

The USCIS Policy Manual and the Department of State FAM are not final agency action. The USCIS Policy Manual informs staff of the most recent interpretation of the INA and applicable regulation. USCIS, About the Policy Manual, https://www.uscis.gov/policy-manual (last visited August 11, 2022)[14] ("The USCIS Policy Manual provides transparency, including outlining policies that are easy to understand, while also furthering consistency, quality, and efficiency."). An adjudicator must review Appellants' submissions and, after consulting the USCIS Policy Manual and any relevant authority, the adjudicator

[14] Appellants cite to a version in the Excerpts of Record of the USCIS Policy Manual as it was issued in 2018. ER 149. Appellants' brief also notes a difference between the 2018 version and the current version posted on the USCIS website. Br. 16 n.6. The version submitted by Appellants in the Excerpts of Record is not the most current version. The USCIS Policy Manual's discussion of the CSPA underwent a "technical update" on January 23, 2019 that clarified the Policy Manual's discussion of the CSPA. USCIS Policy Manual, Updates, https://www.uscis.gov/policy-manual/updates (last visited August 11, 2022). Specifically, the update "clarifie[d] that certain child beneficiaries of family-sponsored immigrant visa petitions who are ineligible for the [CSPA] may continue their adjustment of status application if the petition is automatically converted to an eligible category." *Id.* Appellants filed their lawsuit on December 27, 2019, nearly 11 months after the technical corrections were made.

must exercise their discretion (when appropriate) and issue a final decision on the application presented. *Id.* (stating that the USCIS Policy Manual "assists immigration officers in rendering decisions" and that while it must be followed by adjudicators, it "does not remove their discretion in making adjudicatory decisions."). The FAM provides "consular officers with the guidance needed to make informed decisions based on U.S. immigration law and regulations." 9 FAM 101.1-1. The USCIS Policy Manual and the Department of State FAM are not a final agency decision, but a decision-making reference tool for the use of adjudicators and does not direct adjudicators to decide individual applications a certain way. *See Whitewater Draw Natural Res. Conservation Dist. v. Nielsen*, No. 3:16-cv-02583, 2018 WL 4700494, at *3-4 (S.D. Cal. Sept. 30, 2018) (holding that agency manual used by government officials to determine agency compliance with environmental statute is not final agency action). The manuals are not the final consummation in the agency's decision-making process relating to Appellants' applications for permanent residency—applications that have not even been filed for most Appellants.

Appellants fail to explain why the guidance provided in the manuals to the adjudicator amount to the final consummation of the agency's decision-making process as it relates to the adjudication of Appellants' applications. The USCIS Policy Manual and the Department of State FAM guide the adjudicators as to how

to interpret the CSPA provisions—and statutory provisions in general—when reviewing applications; the manuals do not tell the adjudicators to decide their individual applications in a specific manner. *See Whitewater Draw Natural Res. Conservation Dist.*, 2018 WL 4700494, at **3-4. The Court therefore lacks jurisdiction over Appellants' challenge under the APA because the USCIS Policy Manual is not final agency action.

2. Alternatively, neither the USCIS Policy Manual nor the DOS FAM are interpretive rules subject to notice and comment.

Even if the USCIS Policy Manual or Department of State FAM were considered final agency action, Appellants' contention that they are subject to notice and comment under the APA is wrong because they are interpretive. *Lin Liu v. Smith*, 515 F. Supp. 3d 193 (S.D.N.Y. 2021). Notice and comment do not apply to interpretative rules. 5 U.S.C. § 553(b)(A). Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) (internal quotation marks omitted); *see also Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) ("[Interpretive] rules are essentially hortatory and instructional in that they go more to what the administrative officer thinks the statute or regulation means"). An agency need not pursue notice and comment when it issues an interpretive rule, nor when it amends or repeals such a rule. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015).

The USCIS Policy Manual's explanation of the application of the CSPA to derivative beneficiaries is an interpretive rule because it merely explains how the agency implements the age calculation at 8 U.S.C. § 1153(h). The Policy Manual explains that a visa becomes available for purposes of the age calculation when the petition is approved and when the visa is available for the preference category and priority date. 7 USCIS PM A.7.F.4. This is consistent with the statutory scheme and regulations requiring that a visa be available based on the visa priority date of the underlying petition. *See* 8 U.S.C. §§ 1151(d), 1153(e); 8 C.F.R. § 204.5(d).

The Policy Manual also explains that while USCIS may permit an applicant to file for adjustment of status using the Date for Filing chart in the Visa Bulletin in certain months, the Final Action Date chart should be used to determine when a visa becomes available for CSPA. 7 USCIS PM A.7.F.4. Calculating age using the Final Action Date chart is consistent with the statutory scheme because the Final Action Date chart reflects the cutoff dates for when a visa is *actually available* for issuance to an individual. *See* 22 C.F.R. § 42.51(b); *Mehta*, 186 F. Supp. 3d at 1150; *Lin Liu*, 515 F. Supp. 3d at 197. The USCIS Policy Manual provisions relating to the CSPA do not impose a new rule over Appellants, but merely interprets how the CSPA is applied in the context of the statutory scheme. The agency is thus permitted to make guidance available to without needing to process the agency manuals through notice and comment. *POET Biorefining, LLC*

v. EPA, 970 F.3d 392, 408 (D.C. Cir. 2020) ("Guidance offering 'convenient notice' of an agency's interpretation of a statute or regulation it administers is often preferable to leaving regulated parties and the public to piece together interpretive strands reflected in individual adjudications.").

At least one other court that has considered a similar challenge to the Department of State FAM interpreting the CSPA has found that the government's interpretation is consistent with the CSPA. In *Lin Liu v. Smith*, the Southern District of New York held that, when calculating age for purposes of 8 U.S.C. § 1153(h), the government was correct in using the age of the beneficiary when the visa becomes available in accordance with the Final Action Date chart of the Visa Bulletin and not when a beneficiary may begin the application process under the Dates for Filing chart. *Lin Liu*, 515 F. Supp. 3d at 197-98. The court cited to other parts of 8 U.S.C. § 1153, which provides for the "Allocation of Immigrant Visas," when referring to the congressional limits on the number of employment-based visas that can be issued. *Id*. at 197 (citing to 8 U.S.C. § 1153(a), (b)(5), (d), and (e)(1)); *see also* 8 U.S.C. § 1151(a) (referring to aliens who may be issued immigrant visas as employment-based immigrants under section 1153(b) in a number not to exceed that in subsection (d)). The court explained that the government "properly construe[s] the date on which the applicant's priority date becomes current on the Final Action Date chart to be the date on which the

applicant's visa becomes available because that is the chart that indicates when the defendants would be legally authorized to issue a visa." *Id.*

In addition to the agencies' interpretation regarding use of the Final Action Date chart being consistent with the text of the CSPA, it is also consistent with its history and purpose. *Lin Liu*, 515 F. Supp. 3d at 197-98. While CSPA was intended to prevent an applicant from aging out due to the bureaucratic delays, it was not designed to prevent an applicant from aging out due to delays resulting from these congressional limits on visas. *See Cuellar de Osorio*, 573 U.S. at 53; *see also Wang*, 25 I. & N. Dec. at 38.

Appellants contend that *Lin Liu* is inapplicable and wrongly decided because that court failed to consider the role of the adjustment of status provision at 8 U.S.C. § 1255(a)(3). Br. 20-21. Appellants also try to argue that the Dates for Filing chart should be used for calculating age under 8 U.S.C. § 1153(h) because applicants may submit required documents for immigrant visa applications or in certain months file adjustment applications by relying on the Dates for Filing chart, but the adjustment of status provision at 8 U.S.C. § 1255(a)(3) only allows filing for adjustment when a visa is immediately available. Br. 24-26. A problem with their argument is that based on its text, history, and purpose, the CSPA statute at 8 U.S.C. § 1153(h) evidences recognition of there being only a finite number of visas available in certain categories, given that the statutory "formula" effectively limits

how many applicants will be able to use the CSPA to be deemed "children" for immigration purposes despite being over the age of 21. The more applicants deemed children and permitted to use a visa number means less numbers available for the category, which will include children under the age of 21. In other words, every number used counts and the statutory scheme enacted by Congress in this regard appears to recognize that and that not every applicant will be able to benefit from CSPA. Accordingly, the government reasonably interprets the CSPA to use the age when the visa *becomes available* to the beneficiary for issuance. *Lin Liu*, 515 F. Supp. 3d at 197-98. ("it cannot be said that a visa is available until [the government is] legally authorized to issue it."). That is important because even if the agency allows applicants to submit documents pursuant to the Dates for Filing chart, the CSPA statute at 8 U.S.C. § 1153(h) relies on the age when the visa can legally be issued, not on a date prior to that date. *See id.* (holding that the government was "correct to tether availability to the Final Action Date chart."). The distinction being that the filing of the application does not immediately result in the issuance of a visa, while the CSPA calculation depends on when the adjudicator can issue a visa after determining if the beneficiary is eligible. The agency must apply the provision at 8 U.S.C. § 1153(h), and the policy manuals' interpretation are reasonably consistent with that statute. The district court

therefore did not err in dismissing Appellants' challenge to the USCIS Policy Manual or the Department of State FAM.

VII. CONCLUSION

For the foregoing reasons, this Court should dismiss Appellants' appeal for lack of subject matter jurisdiction or, in the alternate, affirm the district court's decision and deny Appellants' appeal.

DATED: August 11, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2022, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Appellees are unaware of any cases currently pending before this Court related to this appeal.

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