

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division
WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
SAMUEL P. GO
Assistant Director
VICTOR M. MERCADO-SANTANA
Trial Attorney
United States Department of Justice
Civil Division, Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7001
Facsimile: (202) 616 -8962
victor.m.mercado-santana@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NAGENDRA KUMAR NAKKA, et al.

Case No.: 3:19-cv-02099

Plaintiffs,

v.

DEFENDANTS' OBJECTIONS TO
NOVEMBER 30, 2021 FINDINGS AND
RECOMMENDATION

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES and U.S. DEPARTMENT OF
STATE,

Defendants.

Defendants oppose in part the Findings and Recommendation ("F&R") entered by Magistrate Judge Youlee Yim You on November 30, 2021. Defendants disagree with the F&R's conclusions regarding ripeness. Defendants also object to the F&R analysis to the extent that the F&R failed to address Defendants' argument that Plaintiffs Pavani Peddada and Abigail Edwards have no valid challenge to the Department of State's Foreign Affairs Manual ("FAM").

Page 1

DEFENDANTS' OBJECTIONS TO NOVEMBER 30, 2021 FINDINGS AND
RECOMMENDATION

First, Defendants object to the conclusion that Ms. Edwards' claims are ripe. F&R 12-13. In concluding that she can firmly predict that USCIS will initiate rescission proceedings against Edwards, the F&R relied on Edwards' conclusory and unsupported allegation that the government "cannot be presumed to overlook their error forever." F&R 12-13. But neither the F&R nor Edwards point to any policy or history of agency action that demonstrate rescission proceedings against Edwards are "inevitable." Rescission proceedings are not instituted automatically against an individual. To the contrary, the decision to initiate rescission proceedings is a matter of USCIS prosecutorial discretion. *Asika v. Ashcroft*, 362 F.3d 264, 268 (4th Cir. 2004) (citing *Matter of Quan*, 12 I. & N. Dec. 487 (BIA 1987)). Both Edwards and the F&R prejudge USCIS' exercise of its discretion to initiate rescission proceedings and conclude, without any support other than Edwards' speculation, that there is only one inevitable result of USCIS' exercise of its prosecutorial discretion: the initiation of rescission proceedings. But presupposing that USCIS will inevitably exercise its discretion against Edwards is inconsistent with the agency's discretionary authority to *not* initiate rescission proceedings against Edwards.¹ The Court should reject this finding and conclusion and find that Edwards has no ripe claim against Defendants.

Defendants further object to footnote 2 as unnecessary dicta. F&R 13 n.2. While Defendants did not assert mootness in their motion, the F&R conducted a cursory mootness analysis without the benefit of briefing on the issue by the parties. Since mootness was not an issue argued by the parties in their briefs, the Court should decline to adopt the analysis on footnote 2 as dicta unnecessary to the resolution of this case. But if the Court believes it necessary to address mootness, Defendants request an opportunity to address the issue.

¹ And of note, Edwards has not alleged that any rescission proceedings have been initiated.

Third, Defendants object to the conclusion that the firm prediction rule permits those derivative beneficiaries without final agency decisions to file suit. F&R 13-17. Under the firm prediction rule, the Court must be satisfied that the agency “will deny the application by virtue of the rule.” *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1436 (9th Cir. 1996) (quoting *Catholic Soc. Svcs*, 509 U.S. at 69 (O’Connor, J., concurring)). But the F&R ignores that there are many other steps in the application process where Plaintiffs *could* be denied that bear no relation to the challenged rule. The derivative beneficiaries could be ineligible *ab initio* if their parents do not apply for—or are denied—adjustment of status. *See Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 48 (2014) (citing 8 U.S.C. § 1153(d)). Furthermore, the derivative beneficiaries could be denied adjustment of status if they are found otherwise ineligible for adjustment of status. 8 U.S.C. § 1255(a). All these other rules can still result in the denial of adjustment of status for the derivative beneficiaries, none of which are a consequence of how age is calculated under 8 U.S.C. § 1153(h). But the F&R ignores these remaining requirements and assumes that the application of 8 U.S.C. § 1153(h) is the only barrier to the derivative beneficiaries’ adjustment of status. The F&R failed to recognize that, given other adjustment of status requirements that must be met, the Court cannot firmly predict that the application of 8 U.S.C. § 1153(h) will be the basis of a denial of adjustment of status. The Court should decline to adopt the conclusion of the F&R that the derivative beneficiaries’ claims are ripe.

Lastly, the F&R failed to address Defendants’ argument that Plaintiffs Peddada and Edwards have no valid challenge to the Department of State’s FAM. Defendants’ motion specifically argued that the interpretation of the use of the Visa Bulletin in the calculation of the age under the CSPA articulated in the FAM is not implicated in this case because no party can meaningfully allege that they would be affected by the FAM. Mot. at 29. The F&R overlooks

that issue and analyzes the FAM as if it applied to Plaintiffs Peddada and Edwards. Indeed, neither Peddada (whose application was denied by USCIS and not DOS) nor Edwards (who alleges that USCIS and not DOS may rescind her permanent resident status) can reasonably contend that DOS will take any action against them and that the FAM will be used in such an action. The Court should therefore conclude that Plaintiffs have no valid challenge relating to the application of the FAM and dismiss Plaintiffs' APA challenge to the extent it challenges the FAM.²

The Court should therefore adopt the F&R in part, but sustain the aforementioned objections by Defendants.

RESPECTFULLY SUBMITTED THIS December 14, 2021.

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation

SAMUEL P. GO
Assistant Director

/s/ Victor M. Mercado-Santana
VICTOR M. MERCADO-SANTANA
Trial Attorney
United States Department of Justice
Civil Division, Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7001
Facsimile: (202) 616 -8962
victor.m.mercado-santana@usdoj.gov

Attorneys for Defendants

² Should the Court overrule this objection, Defendants have no objection to the analysis in the F&R as it relates to the FAM.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I certify that all participants are CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Victor M. Mercado-Santana

VICTOR M. MERCADO-SANTANA

Trial Attorney

U.S. Department of Justice

Civil Division

Office of Immigration Litigation

District Court Section