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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NAGENDRA KUMAR NAKKA, et al., Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES and U.S. DEPARTMENT OF STATE, Defendants.	Case No.: 3:19-cv-02099 DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO NOVEMBER 30, 2021 FINDINGS AND RECOMMENDATION

Defendants oppose Plaintiffs' objections to the November 30, 2021 Findings and Recommendation ("F&R"). Plaintiffs failed to establish that the Court should have considered the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21"), Pub. L. No. 106-313, 114 Stat. 1251 (2000) because that statute does not affect the Court's analysis of their equal protection claim under the Due Process Clause of the Fifth Amendment. In fact, AC21

bears no relation to the Child Status Protection Act ("CSPA"). Second, Plaintiffs fail to establish that the United States Citizenship and Immigration Services ("USCIS") Policy Manual or the Department of State ("DOS") Foreign Affairs Manual ("FAM") discussion of the use of the Visa Bulletin in calculating age under the CSPA violates the Administrative Procedure Act ("APA"). The Court should therefore reject Plaintiffs' recommendation and adopt the F&R to the extent that it recommends dismissal of Plaintiffs' claims.

I. Plaintiffs erroneously rely on AC21 in their equal protection claim

In their objections to the F&R, Plaintiffs contend that the magistrate judge failed to consider the effect of AC21 on their equal protection claim. F&R Obj., ECF No. 47 at 2. However, AC21 is irrelevant to Plaintiffs' equal protection claim. AC21 is a separate law that primarily addresses extensions of certain nonimmigrant visas and has no relation whatsoever with the CSPA. Plaintiffs attempt to conflate two separate laws that address different problems in order to redraft the statutory scheme in a manner not contemplated by Congress and not compelled by the equal protection guarantees of the Due Process Clause.

As explained in Defendants' motion to dismiss, Congress enacted AC21 to, among other things, address issues pertaining to H-1B nonimmigrant visas which affect certain H-1B nonimmigrant workers and their relatives. Mot. to Dismiss, ECF No. 35 at 10-12. AC21 provides certain exemptions from the general 6-year period of H-1B admission in 8 U.S.C. §1184(g)(4). For example, AC21 permits H-1B nonimmigrant workers who are the beneficiaries of approved EB-1, EB-2, and EB-3 immigrant visa petitions but are unable to adjust their status to permanent residence because of the per country limitations, as well as their spouses and qualifying minor children under 21 years of age in H-4 nonimmigrant status, to extend their nonimmigrant status beyond the standard six years. AC21 § 104(c); 8 C.F.R.

§ 214.2(h)(13)(iii)(E).

Plaintiffs assert that AC21 is relevant to the equal protection analysis, but their reliance on that statute is unavailing. First, Plaintiffs allege that they are "favored immigrants provided special protection." F&R Obj. at 2. But Plaintiffs cannot point to any provision of AC21 that explicitly creates any such special status or grants the derivatives indefinite residency in the United States. In fact, neither the CSPA nor AC21 make any special provisions relating to derivatives who cease to qualify for H-4 nonimmigrant status after turning 21 years. To the contrary, the CSPA was not intended to protect nonimmigrants and only sought to address agency processing delays, not wait times in visa availability. 8 U.S.C. § 1153(h); *see Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 53 (2014). And AC21 did not make any additional benefits available to children who are no longer eligible for H-4 nonimmigrant status because of aging out. *See* AC21 § 104(c); 8 U.S.C. § 1101(a)(15)(H) (limiting H-4 visas to minor children of H-1B workers); 8 U.S.C. § 1101(b)(1) (defining "child" as an unmarried person under 21 years).

In arguing that the F&R failed to consider the effect of AC21 on their equal protection claim, Plaintiffs criticize the magistrate judge's reliance on *Tista v. Holder*, 772 F.3d 1122 (9th Cir. 2013), arguing that *Tista* stands for the proposition that "giving a much more limited group [a] special benefit is rational." F&R Obj. at 2-3. This misconstrues both the holding of *Tista* and how the rational basis test is applied. Under the rational basis test, a distinction that differentiates based on nationality must be upheld if it is rationally related to a legitimate government purpose, and Plaintiffs bear the burden of negating every conceivable basis that may support the distinction. *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008). 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, 06 (9th Cir. 2009) (*en banc*). The Ninth Circuit added that, where, as here, 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.*; *see also Alvarez v. Dist. Dir. of the United States INS*, 539 F.2d 1220, 1224 (9th Cir. 1976) ("it is clear that classifications made under the immigration laws need only be supported by some rational basis to fulfill equal protection guarantees."). Thus, even if (as Plaintiffs contend) Plaintiffs enjoy so-called favored status arising out of AC21, Plaintiffs must still negate every single basis that supports use of the per country charts when determining visa availability for the age calculation provisions under the CSPA.[1]

Plaintiffs' objections contend that their ties to the United States, developed after living in the country pursuant to the provisions of AC21, entitle them to greater constitutional protections. F&R Obj. at 5-6. However, while it may be true that Plaintiffs have connections to the country, this one fact is insufficient to compel, under the rational basis standard, the conclusion that the statutory scheme violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. The F&R points to various policy rationales supporting the CSPA's age calculation provisions: Congress' plenary authority over immigration policy, the limit on worldwide limits on employment-based immigrant visas, and the need to allocate those visas subject to per-country limitations. F&R at 26. These all provide a rational basis for Congress' decision to limit CSPA relief under 8 U.S.C. § 1153(h) only to those children who age out due to

[1] Plaintiffs rely on *Tapia Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), and *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005). F&R Obj. at 4-5. These cases were later overruled by *Abebe v. Mukasey*, 554 F.3d 1203, 1205-06 (9th Cir. 2009) (*en banc*). While Plaintiffs note that a concurrence took issue with the overruling of *Tapia-Acuna* and *Cordes*, F&R Obj. at 4, the majority still overruled these cases. *Abebe*, 554 F.3d at 1207.

bureaucratic delays and use of the per-country chart of the Visa Bulletin to calculate age under the CSPA. *Id.* Plaintiffs' argument that it would be rational to provide additional benefits to Derivative Beneficiaries due to their ties to the United States does not show that the Court should impose its judgment for that of Congress and find that the decision made by Congress lacks any rational basis. *Tista*, 722 F.3d at 1122. The Court should reject Plaintiffs' objections to the dismissal of Count I of the Amended Complaint.

II. Plaintiffs fail to establish that the agency manuals are subject to APA review.

Plaintiffs' second objection to the F&R challenges the magistrate judge's conclusion that the USCIS Policy Manual and the DOS FAM do not violate the APA. The USCIS Policy Manual and DOS FAM guidance advising adjudicators to consult the Final Action Dates chart of the Visa Bulletin when calculating age under 8 U.S.C. § 1153(h) is not subject to APA review because, as the magistrate judge concluded, the agency guidance are not final agency actions. As the magistrate judge determined, the USCIS Policy Manual and the DOS FAM "do not impose new legal requirements or alter the regime to which [the government] is subject." F&R at 31 (citations and quotations omitted). Indeed, the agency manuals are decision-making reference tools for adjudicators to use to decide applications based on applicable statutes, regulations, and other sources. F&R at 30. None of Plaintiffs' arguments require a contrary finding. Plaintiffs' objections are unpersuasive, as their arguments fail to demonstrate that the manuals are final agency actions subject to review.

Plaintiffs asserts that the USCIS Policy Manual does not "describe what the law say[s], because the statues do not include a provision for two separate [V]isa [B]ulletin charts." F&R Obj. at 8. But contrary to Plaintiffs' argument, the use of the Visa Bulletin is consistent with the immigration statue. DOS is tasked with determining visa availability and cutoffs when a

category is oversubscribed. *Mehta v. United States Dep't of State*, 186 F. Supp. 3d 1146, 1149-50 (W.D. Wash. 2016); 8 U.S.C. § 1153(g). The Visa Bulletin is the DOS tool that illustrates the availability of visa numbers and cutoffs by priority dates to adjudicators and the public. *See* 8 C.F.R. § 245.1(g)(1); 22 C.F.R. § 42.51(b). Thus, whether the statue provides for specific language related to the types of charts listed in the Visa Bulletin is immaterial; the Visa Bulletin itself is consistent with the statutory scheme and its use by adjudicators in making determinations on individual applications is reasonable.

Plaintiffs rely on *Whitewater Draw Natural Res. Conserv. Dist. v. Mayorkas*, 5 F. 4th 997 (9th Cir. 2021) to challenge the magistrate judge's finding that the agency manuals do not mark the conclusion of the agency's decision making process by contending that the manuals in *Whitewater* facilitated the beginning of the agency's decision. That distinction is irrelevant because neither the USCIS Policy Manual nor the DOS FAM reflect the conclusion of the adjudication of any application. As in *Whitewater*, any guidance attributable to the USCIS Policy Manual or the DOS FAM "would be subsumed" in any final decision issued by an adjudicator to the extent an adjudicator consult the manuals in making a final adjudication.[2] *Whitewater*, 5 F. 4th at 1008. The USCIS Policy Manual and DOS FAM, standing alone, do not amount to final agency action.

Plaintiffs contend that the court in *Lin Liu v. Smith*, 515 F. Supp. 3d 193 (S.D.N.Y. 2021) and the magistrate judge both failed to consider that visa availability is just an estimate and that

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[2] The Court specifically instructed Plaintiffs in its May 12, 2021 order to clarify "and be explicit" in their Second Amended Complaint as to what exactly they were challenging. Order, ECF No. 29, at 3. Plaintiffs stated in their Second Amended Complaint that they were challenging Defendant's interpretation of the CSPA as they "operate through a 2018 change to the USCIS Policy Manual and a 2019 change to the Department of State's Foreign Affairs Manual." Am. Compl. ¶ 76.

actual availability is when an applicant has been "invited" to apply. F&R Obj. at 11-13. This argument is unavailing. The statute provides the government the ability to make reasonable estimates as to visa availability and to *rely* on these estimates to authorize visa issuance. 8 U.S.C. § 1153(g). Thus, to the extent that the Final Action Dates chart of the Visa Bulletin are reasonable estimates consistent with 8 U.S.C. § 1153(g), Defendants can still rely on these estimates to determine if a visa is available and therefore can be issued to an applicant.[3] Furthermore, *Lin Liu* correctly explained the statutory scheme in finding that the USCIS Policy Manual reasonably explained the statutory scheme. *Lin Liu*, 515 F. Supp. 3d at 197-98. Contrary to Plaintiffs' argument, F&R Obj. at 12, there is no "error" in the *Lin Liu* or magistrate judge's reliance in that decision to find that the agency manuals described applicable law.

Plaintiffs also misconstrue the role of the Final Action Dates chart and the Dates for Filing chart in the Visa Bulletin by arguing that the government determined that the Dates for Filing chart demonstrates when "visas would be 'immediately available'" but the government erroneously construes the Final Action Dates chart to be visa availability for CSPA purposes. F&R Obj. 13-14. The government, however, has consistently argued that the Final Action Dates chart, and not the Dates for Filing chart, represents actual visa availability because that is consistent with the statutory scheme. Mot. to Dismiss, ECF No. 36, at 31 (citing 8 U.S.C. §§ 1151(d), 1153(e); 8 C.F.R. § 204.5(d)). This interpretation has been adopted by courts. *Lin Liu*, 515 F. Supp. 3d at 197; *Metha*, 186 F. Supp. 3d at 1150. Plaintiffs' attempt to turn the Dates for Filing chart into the chart documenting visa availability is simply inconsistent with the

[3] Furthermore, Plaintiffs' later argument that visa availability must "mean something different" because issuing agencies must contact DOS and receive authorization prior to issuance, F&R Obj. 12, actually cuts against Plaintiffs. If, as Plaintiffs argue, issuing agencies must contact DOS for authorization, then the Dates for Filing Chart could not represent when a visa is immediately available for purposes of age calculation under 8 U.S.C. § 1153(h).

statutory scheme. F&R at 33 (stating that "defendants were correct to tether availability to the Final Action Date chart and the defendants' interpretations were consistent with the ordinary meaning of the text of the CSPA and with the text and history of the statute" (internal quotations omitted)).

Plaintiffs simply fail to establish that they may challenge the USCIS Policy Manual or DOS FAM because those manuals do not represent final agency action and they accurately summarize the statutory scheme. The Court should therefore reject Plaintiffs' objections to the F&R recommendation that Count II be dismissed.

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III. Conclusion

For the foregoing reasons, the Court should reject Plaintiffs' objections to the F&R and adopt the F&R's recommendation that the case be dismissed.

RESPECTFULLY SUBMITTED THIS January 11, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2022, 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.

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