BRIAN 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

PORTLAND DIVISION

Nagendra Kumar NAKKA et al.,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES et al.,

Defendants.

Case No.: 3:19-cv-02099-YY

DEFENDANTS' SECOND MOTION TO DISMISS

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I. CERTIFICATION PURSUANT TO LR 7-1

In compliance with LR 7-1, undersigned counsel for the United States certifies that he conferred with Plaintiffs' counsel in good faith regarding this motion, and Plaintiffs' counsel stated that he intends to oppose it.

II. MOTION

Defendants move to dismiss Plaintiffs claims for lack of subject matter jurisdiction because the case is not yet ripe, and because Plaintiffs failed to state a claim upon which relief may be granted. Defendants also move to dismiss all of Plaintiffs' claims for failure to state a claim. Defendants seek an order dismissing all claims with prejudice and entering judgment in Defendants' favor.

III. INTRODUCTION

The Immigration and Nationality Act ("INA") balances various policy goals. It allows some nonimmigrant workers to work in the United States temporarily and apply for adjustment of status to permanent residence based on employment-based immigrant visa petitions without affecting their nonimmigrant status. It also allows these workers' spouses and minor children under 21 years of age to immigrate as derivative beneficiaries. Even if these children turn 21 years of age while waiting to immigrate, the amendments made to the INA by the Child Status Protection Act ("CSPA") permit *some* of these derivative beneficiaries to still immigrate as derivative beneficiaries.

However, the INA also imposes limits on the number of immigrant visas available for employment-based preference categories, as well as the number of aliens from any single country who obtain immigrant visas in these preference categories in a given year. Only seven percent of immigrant visas available per category can be allocated to nationals of a single

country, and two percent of visas to nationals of a dependent area of another country. If the demand from a particular country exceeds that limit, then the INA provides rules for how to allocate immigrant visas to those aliens. Employment-based immigrant visas from India is oversubscribed by intending immigrants. Therefore, the Department of State's Visa Bulletin chart for Final Action Dates for Employment-Based Preference Cases contains a separate column for visa availability for Indian nationals pursuant to 8 U.S.C. § 1153(b).

In addition, there are significant limits to the relief provided by the CSPA to those children who turn 21 years of age while waiting to immigrate as a derivative beneficiary. The CSPA statutory scheme contemplates that some of these applicants will continue to age out. Under the CSPA, a derivative beneficiary's age may be adjusted by determining the age of the beneficiary at the time an immigrant visa becomes available to the principal beneficiary and subtracting the time it took USCIS to adjudicate the petition. If the derivative beneficiary's age is still over 21 years old even after being adjusted under this calculation, they would no longer qualify as a derivative beneficiary. The government consults the Final Action Dates chart of the Visa Bulletin to determine the date an immigrant visa becomes available for purposes of the CSPA.

Plaintiffs are six Indian nationals who are the beneficiaries of employment-based immigrant visa petitions ("Plaintiff Principal Beneficiaries")[1] and their adult children who allege to be derivative beneficiaries of their parents' immigrant visa petitions ("Plaintiff Derivative Beneficiaries").[2] Plaintiffs allege that Defendants' reliance on the Indian nationals chart violates

[1] The Plaintiff Principal Beneficiaries are Nagendra Kumar Nakka, Srinivas Thodupunuri, Rajeshwar Addagatla, Venkata Satya Venu Battula, Siva Beddada, and Miriam Edwards-Budzadzija.

[2] The Plaintiff Derivative Beneficiaries are Nitheesha Nakka, Ravi Vathsal Thodupunuri, Vishal Addagatla, Sandeep Battula, Pavani Peddada, Venkata Peddada, and Abigail Edwards.

the equal protection guarantees of the Due Process of the Fifth Amendment. They request that the government calculate the age of Plaintiff Derivative Beneficiaries using the worldwide chart of the Visa Bulletin as opposed to the chart applicable to Indian nationals. Plaintiffs also contend that the USCIS Policy Manual, which explains the use of the Final Action Dates chart in calculating age, was required to go through notice and comment and is also arbitrary and capricious. Plaintiffs reason that USCIS should not use the Final Action Dates chart of the Visa Bulletin, which reflects when the visa actually may be issued, and instead it must consult the Dates for Filing chart, which does not reflect actual availability but instead provides the earliest dates when applicants may be able to begin the application process.

This Court should dismiss the lawsuit because Plaintiffs' claims are not ripe because they are not seeking review of a final agency decision denying their applications for adjustment of status and they cannot firmly predict that any applications would be denied by virtue of the challenged rule. The Court should also dismiss this lawsuit because Plaintiffs fail to state a claim that a relief can be granted. Defendants' age calculation is consistent with the statutory scheme and is supported by a rational basis. Defendants' reliance on the Indian nationals chart of 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 the rational government interests of making visas available to nationals of all countries on equal footing, regulating the national labor market, promoting diversity among migrants, and promoting foreign relations. Furthermore, the Court should reject Plaintiffs' challenge to the USCIS Policy Manual and Department of State's Foreign Affairs Manual ("FAM") reliance on the Final Action Dates chart for two reasons. First, no Plaintiff alleges that they will apply through the Department and therefore that agency's FAM is not implicated. Furthermore, these agency manuals are not final

agency action under the Administrative Procedure Act ("APA"). And lastly, even if the agency manuals were subject to review, they explanation of how to calculate age under the CSPA and the role of the Final Action Dates chart in that calculation is interpretive and is consistent with the statutory and regulatory requirements. The Court should therefore dismiss Plaintiffs' complaint.

IV. STATEMENT OF THE CASE

A. Statutory background governing adjustment of status

To understand Plaintiffs' allegations, it is important to understand the process by which the beneficiary of an employment-based immigrant visa petition may become a lawful permanent resident, and how that beneficiary's minor children may also obtain lawful permanent resident status as derivative beneficiaries of the principal beneficiary. A beneficiary 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). 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).

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:

Category	Definition	Citation
EB-1	Priority Workers	8 U.S.C. § 1153(b)(1)
EB-2	Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability	8 U.S.C. § 1153(b)(2)
EB-3	Skilled Workers, Professionals, and Other Workers	8 U.S.C. § 1153(b)(3)
EB-4	Certain Special Immigrants	8 U.S.C. § 1153(b)(4)
EB-5	Employment Creation	8 U.S.C. § 1153(b)(5)

Relevant to this case are EB-2 and EB-3 classifications because these are the categories under which Plaintiff Beneficiaries seek permanent residence.[3] To apply for permanent residence based on an EB-2 or EB-3 immigrant visa petition, the beneficiary generally must have a U.S. employer apply for a labor certification with the United States Department of Labor ("DOL") on behalf of an alien beneficiary.[4] 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

[3] Plaintiffs allege in their complaint that they represent a class of applicants seeking adjustment of status as either EB-1, EB-2, and EB-3. Second Am. Compl. ("SAC") ¶ 46. However, none of the Plaintiff Principal Beneficiaries are EB-1 applicants. *See* SAC ¶¶ 7, 9, 11, 15 (EB-2 beneficiaries), ¶¶ 13, 18 (EB-3 beneficiaries).

[4] 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). No Plaintiff alleges that they sought or obtained a national interest waiver. SAC ¶¶ 7, 9, 11, 15.

(S.D. Cal. 2015) (describing burden on employer); 8 C.F.R. § 204.5(g)-(m) (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 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.[5] *See* 8 U.S.C. § 1151(a), (d) (listing annual limit in employment-based immigrant visas); 8 U.S.C. § 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).

The statute imposes annual limits on visas available per employment-based immigrant visa category at 140,000 plus the number of unused visas 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 is allocated a specific percentage of the annual limit. 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). Only seven percent of visa available per category can be allocated to nationals of a single country and two percent of visas to nationals of a dependent area of another country. 8 U.S.C. § 1152(a)(2); 22 C.F.R. § 40.1(f); *Mehta*, 186 F. Supp. 3d at 1149.

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

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. *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. *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 to 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. *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 Final Action

Dates chart. *See Lin Liu v. Smith*, --- F. Supp. 3d ---, 2021 WL 232890 (S.D.N.Y. Jan. 25, 2021). The Visa Bulletin for May 2021[6] (when the second amended complaint was filed) had the following information regarding employment-based visa availability in the EB-2 and EB-3 visa categories:

Employment-based	**All Chargeability Areas Except Those Listed**	**China (mainland born)**	**El Salvador Guatemala Honduras**	**India**	**Mexico**	**Philippines**	**Vietnam**
EB-2	Current	01DEC16	Current	01AUG10	Current	Current	Current
EB-3 Skilled Workers and Professionals	Current	15MAY18	Current	01FEB11	Current	Current	Current
EB-3 Other Workers	Current	01AUG09	Current	01FEB11	Current	Current	Current

This Visa Bulletin indicates that demand for employment-based immigrant visas from certain categories by nationals from mainland China and India exceeds the statutory limits on visas available per country of nationality.[7]

In addition to the Final Action Date chart, the Visa Bulletin publishes a "Dates for Filing" chart reflecting the earliest dates when an applicant may be able to apply for permanent residence. Department of State Visa Bulletin (May 2021); *see also Lin Liu*, 2021 WL 232890 at *1. 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

[6] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-may-2021.html.

[7] Indeed, supply and demand for visas in the various categories affect the availability for visas. At the time Plaintiffs filed their First Amended Complaint, the Visa Bulletin indicated that demand for employment-based immigrant visas from certain categories by nationals from mainland China, El Salvador, Guatemala, Honduras, India, Mexico, the Philippines, and Vietnam exceeded the statutory limits on visas available per country of nationality for the EB-2 and EB-3 categories. Mot. to Dismiss, ECF No. 13, at 8.

Manual A.7.F.4.[8]; *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 than 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 estimates of those applicants who will likely have visas authorized for issuance in the foreseeable future. *Id*. USCIS advises the public each month if they can rely on the Final Action Dates chart or Dates for Filing chart to file for adjustment of status with USCIS that month. *Id*. The Dates for Filing chart was added to the Visa Bulletin on October 2015, while the Final Action Dates chart is the consistent with the cutoff dates in the prior version of the Visa Bulletin. *See Mehta*, 186 F. Supp. 3d at 1151; *Lin Liu v. Smith*, 2021 WL 232890 *5.

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

The beneficiary's spouse and minor children under the age of 21 are given "the same status, and the same order of consideration" as the principal beneficiary. *See* 8 U.S.C. §§ 1153(d). A "child" is defined as an unmarried person under 21 years of age. *See* 8 U.S.C. § 1101(b)(1). 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 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. However, if the derivative beneficiary child turned 21 years while waiting for an

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

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 the agency to adjudicate the 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. 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 child 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 affected some United States employers and their

employees who were already living and working in the United States. This included workers present in the United States on H-1B nonimmigrant visas who were also waiting for an employment-based visa to become available.[9] The period of authorized admission into the United States for H-1B workers is generally limited to six years. 8 U.S.C. § 1184(g)(4). H-1B workers can be sponsored for employment-based immigrant visas but may have to wait more than six years before a visa becomes available if subject to longer wait times due to the per country limit on immigrant visas.

On October 17, 2000, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") to address 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 exception to the general rule that the period of authorized admission under an H-1B visa 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 spouse and children of H-1B nonimmigrant workers are eligible for H-4 nonimmigrant status. 8 U.S.C. § 1101(a)(15)(H) (stating that visa is available to "the alien

[9] 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 aliens 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 aliens 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).

spouse and minor children of [an H-1B worker] if accompanying him or following to join him."). The H-4 status of derivatives may also be extended in accordance with AC21. 8 C.F.R. § 214.2(h)(9)(iv). The children, however, would lose H-4 derivative status once they turn 21 years because they would 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.[10]

B. Plaintiffs' Claims[11]

Plaintiffs are six Indian national principal beneficiaries of employment-based immigrant visa petitions who are present in the United States on H-1B non-immigrant visas, and their derivative children beneficiaries who are or were present in the United States as H-4 derivative beneficiaries of their parents' H-1B visas and who expect to seek immigrant visas as derivative beneficiaries of their parent's visa petitions. SAC ¶¶ 7-19.

Plaintiff Narendra Kumar Nakka is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition with a priority date of February 1, 2011. SAC ¶ 7. On October 29, 2020, he filed an application for adjustment of status with USCIS. *Id.* His daughter, Plaintiff Nithessha Nakka, was admitted to the United States at age 4 as an H-4 derivative of her father's H-1B non-immigrant visa. SAC ¶ 8. Plaintiff Nithessha Nakka did not allege that she filed an application for adjustment of status as a derivative beneficiary of her father's application and instead claims that USCIS would prospectively "reject" her application if one were to be filed. *Id.*

[10] The CSPA was not intended to apply to non-immigrants. *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).

[11] Unless stated otherwise, the factual statement is based on Plaintiffs' allegations.

Plaintiff Shrinivas Thodupunuri is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition. SAC ¶ 9. On December 20, 2020, he filed an application for adjustment of status with USCIS. *Id.* His son, Ravi Thodupunuri, was admitted as an H-4 derivative of his father's H-1B visa.[12] SAC ¶¶ 10. Plaintiff Ravi Thodupunuri did not allege that he filed an application for adjustment of status as a derivative beneficiary of his father's application and instead claims that USCIS would "reject" his application if one were to be filed. *Id.*

Plaintiff Rajeswar Addagatla is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition with a priority date of December 16, 2011. SAC ¶ 11. His son, Vishal Addagatla, was admitted to the United States as an H-4 derivative beneficiary but is now in the United States as a student on an F-1 student visa. SAC ¶ 12. Neither Rajeswar nor Vishal Addagatla allege that they have filed applications for adjustment of status with USCIS.

Plaintiff Venkata Satya Venu Battula was present in the United States on an H-1B visa and was the principal beneficiary of an EB-3 visa petition with a priority date of May 9, 2008. SAC ¶ 13. His son, Sandeep Battula, was admitted to the United States as an H-4 derivative beneficiary. SAC ¶ 14. On February 2019, Plaintiff Venkata Battula adjusted his status to that of a lawful permanent resident. SAC ¶ 13. Following adjustment of status, Plaintiff Venkata Battula filed a Form I-130 Petition for Alien Relative on behalf of his son Sandeep Battula as the adult son of a permanent resident. SAC ¶ 13. Plaintiff Sandeep Battula does not allege that he

[12] In Plaintiffs' First Amended Complaint, Plaintiff Srinivas Thodupunuri had a second son, Girijesh Thodupunuri, who also alleged that he would have been considered to have "aged out" under the CSPA. First Am. Compl. ¶ 10. He is not listed as a party in the Second Amended Complaint, but has not filed a notice of voluntary dismissal of his claim. However, it appears that Girijesh Thodupunuri is no longer a party to this case.

filed an application for adjustment of status with USCIS.

Plaintiff Siva Peddada is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition with a priority date of December 7, 2010. SAC ¶ 15. On October 6, 2020, he filed an application for adjustment of status with USCIS. *Id.* His two children, Pavani and Venkata Peddada, were admitted to the United States as H-4 derivative beneficiaries. SAC ¶¶ 16-17. Pavani Peddada alleges that she filed for adjustment of status with USCIS on October 6, 2020 which is still pending. SAC ¶ 16. However, Venkata Peddada has not alleged that he filed an application for adjustment of status with USCIS.

Plaintiff Miriam Edwards-Buzadzija is present in the United States on an H-1B visa and is the principal beneficiary of an EB-3 visa petition with a priority date of October 6, 2009. SAC ¶ 18. Her daughter, Abigail Edwards, was admitted to the United States as an H-4 derivative beneficiary. SAC ¶ 19. Miriam Edwards-Buzadzjia applied for adjustment of status in January 2019. *Id.* Her daughter, Abigail Edwards, also filed for adjustment of status as the derivative beneficiary of her mother's application. *Id.* On October 20, 2020, both Miriam Edwards-Buzadzjia and Abigail Edwards were granted permanent resident status. SAC ¶ 18-19. Plaintiff Abigail Edwards alleges that she fears that USCIS would consider that her grant of permanent resident status was in error because under USCIS' interpretation of the CSPA, she would have been aged out as a derivative beneficiary. *Id.* Abigail Edwards has not alleged that the government has taken steps to rescind her permanent resident status.

On December 27, 2019, Plaintiffs filed their Complaint. *See generally* Compl. Plaintiffs filed their First Amended Complaint on March 19, 2020. *See generally* First Am. Compl. On May 1, 2020, Defendants filed their Motion to Dismiss. Mot. to Dismiss, ECF No. 13. The Magistrate Judge issued a Findings and Recommendation ("F&R") on November 2, 2020,

recommending that Defendants' motion be granted in part on the basis that Plaintiffs failed to state a claim upon which relief may be granted but denied in part to the extent Defendants' motion was based on lack of subject matter jurisdiction. F&R at 25, ECF No. 18. On May 12, 2021, after the parties filed timely objections to the F&R, the District Judge permitted Plaintiffs to file a second amended complaint without the need to seek leave to amend in light of new facts that developed after the filing of the First Amended Complaint. Order, ECF No. 29 at 3, 5. The District Judge declined to adopt the Magistrate Judge's F&R as moot and denied Defendants' motion to dismiss without prejudice. *Id.* Plaintiffs filed their Second Amended Complaint on May 20, 2021.

V. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1) Standard

Federal district courts are courts of limited jurisdiction. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005). Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move to dismiss claims for lack of subject matter jurisdiction. A facial challenge asserts that the complaint, on its face, fails to allege facts that would invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). 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). A court may dismiss a complaint under Rule 12(b)(1) on an APA claim if the complaint does not challenge final agency action. *See Rattlesnake Corp. v. EPA*, 509 F.3d 1095, (9th Cir. 2007) (upholding dismissal of APA lawsuit under Rule 12(b)(1) for lack of final agency action).

B. Federal Rule of Civil Procedure 12(b)(6) Standard

A defendant may move a court to dismiss a complaint for "failure to state a claim upon

which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Naffe v. Frey*, 789 F.3d 1030, 1035 (9th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the plaintiff is liable for the alleged misconduct." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). While a court "must accept as true all of the allegations contained in a complaint," this tenet is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Courts have granted motions to dismiss of Equal Protection claims and of claims seeking review under the APA under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *Herguan Univ. v. ICE*, 258 F. Supp. 3d 1050, 1064-74 (N.D. Cal. 2017).

VI. ARGUMENT

A. Plaintiffs' claims are not ripe for judicial review because the determination of whether Plaintiff Derivative Beneficiaries are eligible for a visa as minor child derivative beneficiaries is contingent on many future events that may or may not occur.

Plaintiffs' claims are also unripe for review. To determine if a case is ripe for judicial review, courts consider the fitness of the issue for judicial decision and the hardship on the parties if judgment is withheld. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Addington v. U.S. Airlines Pilots Ass'n*, 606 F.3d 1174, 1179 (2010). Ripeness is a question about the proper timing of a claim. *Amer.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Plaintiffs' claims are not ripe for judicial review because they all depend on a series of future events occurring. Before the CSPA age calculation would even come into play, several things must happen. First if seeking adjustment of status, the Plaintiff Principal Beneficiaries must apply for adjustment of status and must demonstrate that they are eligible, which includes establishing that they are not inadmissible and that they merit the agency's exercise of discretion. 8 U.S.C. § 1255(a). This is critical since a derivative beneficiary cannot be eligible for lawful permanent residence if the principal beneficiary is ineligible. 8 U.S.C. § 1153(d). The derivative beneficiaries also must apply for adjustment of status and independently demonstrate that they are eligible under 8 U.S.C. § 1255(a). Furthermore, the derivative beneficiaries must continue to qualify as children, which requires that they remain unmarried in addition to being under 21 years old. Before the age calculation can even be applied to determine if they can still meet the age requirement, 8 U.S.C. § 1153(h) requires that the derivative beneficiary had to apply for adjustment of status, or otherwise sought to acquire permanent resident status, within one year of the visa becoming available. 8 U.S.C. § 1153(h). As a result, in order to reach the question of whether Plaintiff Derivative Beneficiaries may still qualify as under 21 years old under this age calculation, there are many contingent future events that may or may not happen. Plaintiffs' claims are not ripe. *See Reno v. Catholic Soc. Svcs.*, 509 U.S. 43, 58-59 (1993) (explaining that challenge to regulation involving legacy INS program was not ripe because applicants were required to take steps before denial became judicially reviewable).

Furthermore, the "firm prediction rule" does not compel the conclusion that the matter is ripe for review because it ignores the multiple events that must happen between now and any final decision from USCIS reaching this issue—as well as Plaintiffs' potential to obtain permanent resident status through other means. Under the firm prediction rule, a case may be

ripe even when lacking a final agency decision only if the Court "can make a firm prediction that the plaintiff will apply for the benefit, and 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)). Applying this rule, the Court cannot firmly predict that Plaintiff Derivative Beneficiaries will apply for adjustment of status as derivative beneficiaries of their parents' applications and that USCIS will deny their applications by virtue of the agency's application of the CSPA. *See Montana Environmental Information Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190-91 (9th Cir. 2014) (citing previous case law that made firm predictions when the plaintiff's injury was "nearly certain"). As explained above, there are multiple decision points in the process where Plaintiffs could become ineligible for an immigrant visa on grounds *other* than the CSPA age calculation. *See supra* at 16. It is also possible that Plaintiff Principal Beneficiaries simply become ineligible for an employment-based visa, either because they lose their jobs or their employers withdraw their petitions.

The case *Immigrant Assistance Project of Los Angeles Cnty. Fed. Of Labor (AFL-CIO) v. INS*, 306 F.3d 842 (9th Cir. 2002) ("*IAP*") is distinguishable. In *IAP*, two of the plaintiffs who applied for legalization were challenging the alleged likely denial of their applications on the basis that the government would deem them as not having unlawful status known to the government, a requirement for the legalization program. *IAP*, 306 F.3d at 860. The court found that it could firmly predict that the plaintiffs were going to apply for the legalization program—as they did apply—and that the agency was going to deny their applications by virtue of the challenged policy. *IAP*, 306 F.3d at 862-63. *IAP* is distinguishable from Plaintiffs' case. The plaintiffs in *IAP* were applying—and did file applications—for legalization, a program where eligibility did not depend on a third party applying for a visa petition on their behalf. *See IAP*,

306 F.3d at 848-49 (discussing legalization eligibility). In contrast, the age calculation provisions of the CSPA do not come into play unless the Plaintiff Principal Beneficiaries are eligible for and are granted lawful permanent residency, a fact that further depends on the Plaintiff Principal Beneficiaries' continued employment and sponsorship by their petitioning employer. *See* 8 C.F.R. § 103.2(b)(6) (stating that petitioner may withdraw petition); *Elgamal v. Bernacke*, 2016 WL 3976466, at *1 (D. Ariz. July 25, 2016) (explaining that petitioning employer may withdraw I-140 petition at any time and beneficiary would not be eligible for adjustment of status). And the age calculation provision would not be dispositive of eligibility if, even after finding Plaintiff Principal Beneficiaries are eligible for permanent resident status, Plaintiff Derivative Beneficiaries are ineligible on independent grounds, such as marriage or inadmissibility, or fail to meet the requirements for the age calculation to apply. *See* 8 U.S.C. § 1182 (listing basis for inadmissibility); 8 U.S.C. § 1255(a)(2) (stating applicant for adjustment of status must be eligible for an immigrant visa and admissible); 8 U.S.C. § 1153(h) (requiring the applicant to have sought to acquire LPR status within one year of visa availability in order for the age calculation to apply). Unlike the Plaintiffs in *IAP* who alleged that they were otherwise eligible for legalization but-for challenged agency policy, the Court cannot firmly predict that Plaintiff Derivative Beneficiaries will be eligible to adjust status as derivative beneficiaries except for the age calculation provision.

Lastly, to the extent that Plaintiff Abigail Edwards claims her claims are ripe in spite of her having permanent resident status, her argument fails. Plaintiff Edwards was granted permanent resident status. SAC ¶ 19. In other words, Plaintiff Edwards was granted the immigration benefit she sought. While Plaintiff alleges that grant was made in error, Plaintiff Edwards has not alleged, nor can this court firmly predict, that USCIS *will* initiate rescission

proceedings in order to rescind her permanent resident status. *See id.* And even if the government sought to rescind her status through rescission proceedings, Plaintiff Edwards would have administrative remedies available to her to challenge those rescission proceedings before an immigration judge. *See, e.g.*, 8 U.S.C. § 1256(a) (providing for rescission of permanent resident status); 8 C.F.R. § 246.3. Besides, the decision to initiate rescission proceedings is a matter of prosecutorial discretion and Plaintiff Edwards cannot firmly predict how USCIS may exercise its prosecutorial discretion. *See Asika v. Ashcroft*, 362 F.3d 264, 268 (4th Cir. 2004) (citing *Matter of Quan*, 12 I&N Dec. 487 (BIA 1987)). Ultimately, Plaintiff Edwards, who is currently in permanent resident status, cannot establish that the government *will* initiate rescission proceedings, and if those proceedings are initiated, Plaintiff Edwards can, if necessary, seek judicial review before an immigration judge, the Board of Immigration Appeals, and the district court. 8 C.F.R. §§ 246.3, 246.7.

None of the Plaintiffs have alleged that they were *denied* adjustment of status on the basis of the government's interpretation and application of the age calculation provisions of the CSPA, nor can they firmly predict that their applications will be denied by virtue of the challenged interpretation. Plaintiffs' claims are therefore not ripe and the Court should dismiss their claims.

B. Plaintiffs failed to state a claim that the statutory scheme violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment.

Plaintiffs challenge the government's reliance on the India chart in order to calculate Plaintiff Derivative Beneficiaries' adjusted age under the CSPA. SAC ¶ 57. Plaintiffs allege that this practice violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. *See generally* SAC ¶¶ 55-73. However, Plaintiffs failed to state a claim for an equal protection violation because the statutory scheme on its face does not distinguish or single out Indians based on their nationality, but instead is a neutral statute that is applied equally to all

aliens regardless of national origin. Plaintiffs recognize that all countries are equally subject to annual per county limits on the number of visas available to nationals of that country. SAC ¶¶ 59-60. Plaintiffs concede that 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." SAC ¶ 62. It is therefore beyond reasonable dispute that limits on immigrant visas based on national origin is consistent with the Constitution. *See, e.g.*, *Pedroza-Sandoval v. INS*, 498 F.2d 899, 900 (7th. Cir. 1974) (finding that under prior statutory scheme that allocated visas differently based on country of origin, courts consistently held that Congress may set different immigration legislation that treats nationals of western hemispheric countries differently from other nationals, based on their country of origin).

Plaintiffs contend that reliance on the India chart of the Visa Bulletin—as opposed to the general worldwide chart—when calculating age under 8 U.S.C. § 1153(h) is an equal protection violation. SAC ¶¶ 55-73. However, for derivative beneficiaries, section 1153(h) requires that age under the CSPA be calculated depending on when "a visa became available for the alien's parent." 8 U.S.C. §1153(h)(1). A visa becomes available to the Plaintiff Derivative Beneficiaries only when a visa becomes available to the Plaintiff Principal Beneficiaries. *Scialabba*, 573 U.S. at 48. Plaintiffs have a longer wait for an immigrant visa in the EB-2 and EB-3 categories than nationals from most countries because India is oversubscribed, a fact that is reflected on the India chart of Visa Bulletin.

But even if the statutory scheme distinguished based on nationality, Plaintiffs' argument fails because rational basis supports the reliance on the India chart. Congress may limit the number of visas available to nationals of certain countries in order to make visas available to nationals of every country. The Visa Bulletin reflects that policy and applies the limits as

Congress intended. Indeed, Congress may limit and regulate migration based on nationality in order to encourage diversity in immigration from all nations, promote racial and ethnic diversity, promote foreign relations, serve diplomatic goals, or many other purposes. *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009). Congress' choice to subject visa availability to per country limits is rationally related to these purposes. Plaintiffs therefore cannot establish that Defendants violated the equal protection guarantees of the Due Process Clause of the Fifth Amendment.

1. Courts review equal protection challenges to immigration statutes and regulations that distinguish on nationality under the rational basis standard of review.

While the Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, the Due Process Clause of the Fifth Amendment contains an equivalent equal protection guarantee that require 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*, 566 F.3d at 137 ("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); *Masnauskas v. Gonzales*, 432 F.3d 1067, 1070-71 (9th Cir. 2005) (applying rational basis to a Lithuanian alien's equal protection challenge to NACARA based on national origin); *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."); *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. at 81.[13]

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*). 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

[13] 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. 67, 79-80 (1976)).

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."). A distinction must be "wholly irrational to violate equal protection" and Plaintiffs 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. Courts can dismiss equal protection claims under Rule 12(b)(6) if the plaintiff failed to state an equal protection violation. *See HSH, Inc. v. City of El Cajon*, 44 F. Supp. 3d 996, 1006-09 (S.D. Cal. 2014).

2. Rational basis supports Defendant's reliance on the India country chart in calculating Plaintiff Derivative Beneficiaries' age under the CSPA.

To the extent that Plaintiffs contend that the application of the CSPA causes a distinction based on their Indian nationality, those distinctions survive rational basis review. 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.[14] *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.").

[14] Similarly, the Supreme Court has stated that the Executive has the authority to suspend entry of aliens based on nationality. *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018).

The government relies on the India chart of 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 supra* Part IV.A.1-2. Reliance on the per-country limits established by Congress as reflected in the Visa Bulletin to determine visa availability serves the legitimate purpose of promoting diversity among immigrants. The difference between the India chart and the worldwide chart is that the India chart reflects a longer wait for visas. 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, the reliance on the India chart of the Visa Bulletin is rationally related to the purpose of promoting immigration diversity, making visas available to all countries in an equal footing, and avoiding having nationals of a handful of countries monopolize visas in one category.

Section 1153(h) is also a statute of limited applicability that only provide 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*, 2019 WL 7371815, at *8-9 (S.D. Fla. 2019) (holding that CSPA does not apply to CAA).

Reliance on the India chart when calculating age under 8 U.S.C. § 1153(h) is not an equal protection violation because Congress can grant, deny, or limit relief under the CSPA 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."). The limited protection against age 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 Plaintiff Derivative Beneficiaries could rely on the worldwide chart to determine visa availability for the age calculation *before* a visa becomes available to their parent under the India chart, Plaintiff 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 chart, 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.

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 additional rational basis to rely on the India chart of the Visa Bulletin.

Plaintiffs contend that the government's reliance on the India chart is irrational because Plaintiffs have "special status" due to the extension of their H-1B and H-4 status under section 104(c) of AC21. SAC ¶ 63. However, section 104(c) of AC21 does not provide "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 visa holders 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)). In sum, AC21 does not provide Plaintiffs with any special status nor does it modify the statutory scheme in such a way that

compels changing the way the government calculates Plaintiff Derivative Beneficiaries age.

Plaintiffs have failed to plead facts supporting the conclusion that reliance on the India chart of the visa bulletin in calculating age for purposes of the CSPA violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. Plaintiffs' Equal Protection claim should be dismissed for failure to state a claim upon which relief may be granted.

C. Plaintiffs failed to state a claim that the USCIS Policy Manual or Department of State FAM explanation of how age is calculated violates the APA.

Plaintiffs state in their complaint that they challenge "Defendants' interpretation and implementation of the CSPA" as it relates to determining age and that such "interpretation and implementations of CSPA challenged [in the Complaint] operate through a 2018 change to the USCIS Policy Manual and a 2019 change to the Department of State's FAM." SAC ¶ 76; *see also id.* ¶¶ 90-91. In other words, Plaintiffs challenge the interpretation of the age calculation process described in two agency interpretative manuals. However, Plaintiffs' challenge fails for three reasons. First, to the extent Plaintiffs' challenge encompasses the Department of State's FAM, their challenge fails because they cannot point to any Plaintiff who would be affected by a decision or interpretation of the Department of State, because Plaintiffs have not alleged that any of them would obtain their visa via consular processing abroad. Second, no plaintiff has had an adjustment application denied byUSCIS and there is no injury. Third, the USCIS Policy Manual and the FAM are not final agency action and therefore not subject to APA review. Lastly, even if subject to judicial review, the USCIS Policy Manual and the FAM are interpretive not subject to notice and comment that reasonably explain how the age provisions of the CSPA are applied on a case by case basis.

1. The Court should deny Plaintiffs' challenge to the Department of State's FAM because no Plaintiff would be subject to a decision of the Department of State.

Plaintiffs Peddada and Edwards state in their Complaint that they challenge both the USCIS Policy Manual as well as the Department of State's FAM. SAC ¶ 76.[15] However, neither Peddada nor Edwards allege or could reasonably be assumed to face an adverse decision from the Department of State arising from that agency's interpretation of the FAM. Plaintiff Peddada alleges that she applied for adjustment of status with USCIS. SAC ¶ 16. Plaintiff Edwards also alleges that she underwent adjustment of status with USCIS. SAC ¶ 19. None of these Plaintiffs allege that they have sought an immigrant visa through consular processing abroad with the Department of State. Instead, they can—and did—apply for adjustment of status with USCIS. *See* 8 U.S.C. § 1255(a). And in their complaint, no Plaintiff explains how they would be affected by the Department of State's FAM as it relates to that agency's interpretation of the use of the Visa Bulletin charts in calculating age for CSPA purposes. SAC ¶¶ 74-95. Therefore, Plaintiffs have no valid challenge to the interpretation articulated in the Department of State's FAM.

2. The USCIS Policy Manual is not subject to APA review because it is not final agency action.

As a preliminary matter, the USCIS Policy Manual is 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

[15] Count II is only brought by Plaintiffs Peddada and Edwards. SAC ¶¶ 74-95.

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 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 ("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 Plaintiffs' submissions and, after consulting the USCIS Policy Manual and any relevant authority, the adjudicator 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 is 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 USCIS Policy Manual is not the final consummation in the agency's decision-making process relating to Plaintiffs' applications for permanent residency—applications that have not even been filed for most Plaintiffs. The Court therefore lacks jurisdiction over Plaintiffs' challenge under the APA because the USCIS Policy Manual is not final agency action. Their claim should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction under the APA.

3. Alternatively the USCIS Policy Manual and the FAM are interpretive, not a new rule subject to notice and comment, that accurately explains how the CSPA age calculation provisions are applied.

Even if the USCIS Policy Manual or FAM were considered final agency action, Plaintiffs' contention that they are subject to notice and comment under the APA is wrong because they are interpretive. *Lin Liu v. Smith*, --- F. Supp. 3d ---, 2021 WL 232890 (S.D.N.Y. Jan. 25, 2021). Notice and comment does 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 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. The USCIS Policy Manual merely explains how the age calculation at 8 U.S.C. § 1153(h) is implemented by the agency. 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. *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 also 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*, 2021 WL 232890 at *5. The USCIS Policy Manual provisions relating to the CSPA do not impose a new rule over Plaintiffs, but merely interprets how the CSPA is applied in the context of the statutory scheme.

At least one other court that has considered a similar challenge to the FAM interpreting the CSPA has found that the government's use of the Visa Bulletin explained in the FAM 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*, 2021 WL 232890 at *3-6. 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 *3 (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.* at *3.

In addition to the use of the Final Action Date chart being consistent with the text of the CSPA, it is also consistent with its history and purpose. *Id.* at *3-5. The immigration process may take years or decades to complete, due in part to bureaucratic delays associated with reviewing documents and in part to long queues for the limited number of visas available each fiscal year. *See Cuellar de Osorio*, 573 U.S. at 45. While CSPA was intended to prevent an applicant from aging out due to the former, it was not designed to prevent an applicant from aging out due to delays resulting from these congressional limits on visas. *See id*. at 53; *see also Wang*, 25 I. & N. Dec. at 38. In *Lin Liu*, the court in *Lin Liu* thus rejected the plaintiff's contention that the Department of State's interpretation of how to determine age under the CSPA articulated in the FAM violated the APA because the interpretation, as explained in the FAM, is not a legislative rule requiring notice and comment under the APA and is consistent with the statute. *Id.* at *4-5.

Plaintiffs place heavy weight on the argument that an applicant may rely on the Dates for Filing chart because it allegedly invites an application for a child who aged out that would be subsequently denied. SAC ¶ 86. However, in general, an applicant must use the Final Action Dates rather than the Dates for Filing chart to determine when to file an adjustment application. 7 U.S.C. PM A.3.B.4. The USCIS Policy Manual also states that while an applicant *may* be able to apply based on the Dates for Filing chart, it does not *require* that an application be submitted using the Dates for Filing chart. 7 USCIS PM A.7.F.4 (explaining that applicants "may choose to file" for adjustment of status using the Dates for Filing chart). The applicant may choose to wait and apply at a moment when a visa is available under the Final Action Date chart in order to avoid filing an application that could be denied due to having aged out. The fact that an applicant may submit materials to the agency cannot compel the conclusion that a visa is available for purposes of 8 U.S.C. § 1153(h). *Lin Liu*, 2021 WL 232890 at *3. ("Whether or not an applicant may submit materials to the [agency] does not impact the question of whether the visa may be issued, and as such, the date on which an applicant can submit materials to the [agency] cannot be considered the date on which the visa number becomes available. . . . It cannot be said that a visa is available until the defendants are legally authorized to issue it.").

Plaintiffs do not adequately explain how the Dates for Filing chart, which was added to the Visa Bulletin in October 2015, would fit with the statutory scheme in 8 U.S.C. § 1153. Plaintiffs attempt to explain that by allowing applicants to file adjustment applications using the Dates for Filing chart, the Dates for Filing chart represents when a visa is "available". SAC ¶ 80. To the contrary, the USCIS Policy Manual does not reflect such an understanding as it specifically explains that the one-year sought to acquire period of 8 U.S.C. § 1153(h) commences when the visa becomes available under the Final Action Dates chart. 7 USCIS PM

A.7.G.2 ("While the Final Action Dates chart determines the date of visa availability for CSPA purposes and starts the 1-year clock, an applicant may choose to file an adjustment application based on the Dates for Filing chart. . . . If an applicant files based on the Dates for Filing chart prior to the date of visa availability according to the Final Action Dates chart, USCIS considers the applicant to have met the sought to acquire requirement. However, the applicant's CSPA age calculation is dependent on visa availability according to the Final Action Dates chart."). Indeed, no adjustment of status application can be approved and the applicant thereby acquire permanent resident status if the visa is not immediately available for issuance under the Final Action Date chart. 8 U.S.C. § 1255(b); 8 C.F.R. § 145.2(a)(5)(ii). Plaintiffs' interpretation could also cause the absurd result where an applicant may be allowed to lock in an age using the Dates for Filing chart and be required to pursue adjustment within a year but no visa be available during that year because the visa does not become immediately available under the Final Action Date chart. Plaintiffs cannot explain how the Dates for Filing chart represent visa availability under 8 U.S.C. § 1153(h) so as to justify calculating age under the CSPA using the Dates for Filing chart. Plaintiffs' complaint should therefore be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

VII. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' lawsuit.

RESPECTFULLY SUBMITTED THIS June 10, 2021.

BRIAN 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

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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