Brent W. Renison, OSB No. 96475
E-mail: brent@entrylaw.com
Parrilli Renison LLC
610 SW Broadway Suite 505
Portland, OR 97205
Tel: (503) 780-2223
Attorneys for Plaintiffs

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

OBJECTIONS TO FINDINGS AND RECOMMENDATIONS

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby object to portions of the Findings and Recommendations (ECF No. 45, hereafter F&R).

I. Standing and Ripeness.

Plaintiffs do not object to the Court's recommendation that plaintiffs have established standing and that their claims are ripe.

II. Plaintiffs state a claim that defendants use of the national origin-based visa bulletin violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment

Plaintiffs object to the Court's recommendation that plaintiffs' equal protection claim be dismissed.

The Court finds plaintiffs, who are born in an oversubscribed country, are not similarly

situated to other derivative beneficiaries whose countries are not oversubscribed. This single difference, the place of birth, does not render plaintiffs not similarly situated to other derivative beneficiaries whose parents are born on the other side of a border. If the difference in the statute were a person's color of skin rather than place of birth, that distinction would not render them no longer similarly situated. Rather, they are similar but for the one distinction which is challenged here as depriving these derivative beneficiaries who have grown up in the United States from others – the place of birth.

Further, despite the Court finding otherwise, plaintiffs are favored immigrants provided special protection by special legislation, the American Competitiveness in the Twenty First Century Act of 2000, AC21, § 104(c), which reads,

> "Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)), any alien who –
> (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
> (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,
> may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon."

Plaintiffs were brought to the United States at an early age and have lived here for most of their lives. Despite the special AC21 legislation cited above, and plaintiffs favored status under its Congressionally sanctioned protections which permits them to stay for many years and decades in the United States, plaintiffs have been treated less favorably based only upon their parents' national origin, than other derivative child immigrants from other countries. Defendants have denied them the ability to use the Worldwide Visa Bulletin dates to lock in their CSPA age. This has harmed them because they would each and all still be considered under 21 derivatives if their age had been calculated using the visa bulletin afforded other countries.

In *Tista v. Holder*, 772 F.3d 1122, 1126-27 (9th Cir. 2013) the Ninth Circuit held that it

was not irrational for Congress to extend CSPA protections to family members of asylum seekers but not to NACARA beneficiaries. ECF No. 18, p. 21. But in *Tista*, the Court found that those who had received a grant of asylum had already shown well founded fear of persecution whereas those receiving NACARA benefits only had to show they were from certain countries. The Court in *Tista* found that the group of asylum grantees was a "much more limited group" and therefore found it rational that Congress would have given *them* special CSPA benefits. *Id*. at 1127.[1] In other words, giving a much more limited group special benefits is rational.

In the case at bar, however, plaintiffs are the "much more limited group" of beneficiaries of immigrant petitions in that they enjoy special protections of the AC21 legislation which permits them indefinite extensions of H-4 status while they await immigrant visa availability. The broader group of similarly situated immigrants are also in H-4 status and are also immigrating in the same employment-based ("EB") categories. Yet defendants permit these similarly situated EB immigrants to lock their age using the more favorable Worldwide Visa Bulletin. Whereas the Court in *Tista* found it reasonable that a much more limited group would enjoy greater protections, here we have the opposite – a much more limited group receives less protection versus immigrants otherwise similarly situated but for their national origin.

It makes no sense for Congress to have permitted these children to remain in the United States for years and years beyond the normal 6 year maximum allowed others in H-4 status "until the alien's application for adjustment of status has been processed and a decision made thereon" (*see* language of § 104(c)(2)) but then deny them equal protection others enjoy by use of the Worldwide Visa Bulletin dates to lock in their CSPA age. They are a special and "much more limited group" of immigrants, but defendants have afforded them a much less advantageous CSPA calculation due to the use of the national origin-based Visa Bulletin for locking CSPA

[1] The Tenth Circuit in *Ramirez v. Holder*, 590 F. App'x 780, 785 (10th Cir. 2014) held similarly on the same issue involving NACARA. The Fourth Circuit in *Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009) involved the HRIFA statute and concluded without analysis that the plenary power doctrine permitted different criteria based on national origin.

age.

The statute here which places Plaintiffs in a discrete minority of immigrants is also more than just tangentially related to their claim that they should be permitted to use the Worldwide Visa Bulletin charts for locking in their CSPA age. The provisions of AC21 § 104(c) allow them to stay here in the country legally for a very lengthy period of residence through the point that their adjustment of status application (which grants them permanent resident status) is decided upon. In other words, the favored status they enjoy isn't just some special procedure they are permitted to gain a benefit, unrelated to the issue they complain about. It is at the heart of their complaint because Congress passed legislation permitting and explicitly encouraging extensive residence in the United States while they wait for a visa number to become available. Others who do not enjoy this special minority status are nonetheless allowed to lock in their CSPA age much earlier using the Worldwide Visa Bulletin dates, an irrational result.

There is no case directly on point in this circuit. The Ninth Circuit sustained an equal protection challenge to a statute which afforded discretionary relief from removal to permanent residents who have committed worse crimes than similarly situated permanent residents. See *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005) (vacated for lack of jurisdiction *Cordes v. Mukasey*, 517 F.3d 1094 (9th Cir. 2008) (*Cordes* also relied on the *Tapia-Acuna* case below, which has been overruled). The Ninth Circuit sustained an equal protection challenge in a case involving a law granting relief from removal to permanent residents in exclusion proceedings who left the United States temporarily and sought return, but not to those permanent residents in deportation proceedings who had never left the United States. See *Tapia-Acuna v. INS*, 640 F2d 223, 225 (9th Cir. 1981). The Court in *Tapia-Acuna* stated, "no purpose would be served by giving less consideration to the alien 'whose ties with this country are so strong that he has never departed after his initial entry' than to the alien 'who may leave and return from time to time.'" *Id*. at 225. The holding in *Tapia-Acuna*, however, was later overruled in *Abebe v. Mukasey*, 554 F.3d 1203, 1205-06 (9th Cir. 2009) (*en banc*).

The Court in *Abebe* found a rational basis in limiting 212(c) relief to those seeking to enter the country from abroad by incentivizing deportable aliens to leave the country. *Id*. at 1206. Judge Clifton (joined by Silverman and Gould) wrote a concurrence, noting that the majority unnecessarily overruled more than sixty years of precedent and created a circuit split, but also clarified that "[t]he majority doesn't quarrel with the legal rule of *Tapia-Acuna*, that the Equal Protection Clause prohibits irrational disparities in treatment. It simply disagrees with the application of that long-settled rule to a statutory provision that was repealed a dozen years ago. It disagrees that the disparate treatment our court previously concluded was irrational is, in fact, irrational." *Id*. at 1209.

Of the bounty of benefits the federal government grants to those within this country Justice Stevens in *Mathews v. Diaz*, 426 U.S. 67 (1976) stated, "[t]he decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence…it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and duration of his residence." *Id*. at 80, 82-83. See *Korab v. Fink*, 797 F.3d 572 (9th Cir. 2014) (citing the latter sentence from *Matthews*). Congress has specifically passed legislation, AC21 § 104(c), which sanctions and encourages plaintiffs' ties to grow stronger, and which permits and welcomes the character and duration of plaintiffs' residence to exceed normal limitations. Plaintiff children are culturally American, having grown up here. It is not rational that Congress would have had in mind when passing CSPA two years after AC21 § 104(c) that defendants would force these long term H-4 status holders to use a much less favorable national origin-based Visa Bulletin to lock CSPA age, to lose eligibility to immigrate together with their parents, and to lose utterly their place in line as well. This isn't at all reasonable. It is more reasonable to expect that Congress would treat this smaller minority of long-term legal residents at least as well as the newly arrived, particularly when the only difference between the two is their national origin.

Congress determined that the character and duration of plaintiffs' residence and ties to this country were to be extended. It is not reasonable to expect that they be treated far less favorably in an age calculation than recent arrivals, based only upon their national origin.

III. Plaintiffs have shown the USCIS Policy Manual and FAM constitute final agency action and violate the APA

Plaintiffs object to the Court's recommendation that plaintiffs' APA claim should be dismissed due to lack of final agency action.

The Court found that the USCIS Policy Manual (PM) and Department of State Foreign Affairs Manual (FAM) do not "direct adjudicators to decide individual applications in a certain way" and "'do not tell adjudicators to decide their individual applications in a specific manner.'" F&R, ECF No. 45, p. 30. The PM and FAM do, however, tell adjudicators to decide applications in a specific manner.

For the first time ever, the agencies in 2015 created two distinct visa bulletins; one labeled Final Action Dates ("FAD") and the other labeled Dates for Filing ("DFF"). On May 23, 2018, USCIS issued an update to its Policy Manual, Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act (7 USCIS-PM A.7). On July 29, 2019, Department of State revised its Foreign Affairs Manual, at 9 FAM 502.1-1(D)(4) Calculation of CSPA Age for Preference Categories and Derivative Petitions. The PM states,

> "While an adjustment applicant may choose to file an adjustment application based on the Dates for Filing chart, USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes. Age at time of visa availability is the applicant's age on the first day of the month of the DOS Visa Bulletin that indicates availability according to the Final Action Dates chart. An applicant who chooses to file an adjustment application based on the Dates for Filing chart may ultimately be ineligible for CSPA if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action Dates chart."[2]

[2] The FAM also proclaims DOS uses the Final Action Dates chart.

The PM makes a clear mandate to adjudicators: "USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes". This is unequivocal. It does not say that examiners are also free to use the Dates for Filing chart to determine the applicant's age. They are instructed in the PM that **USCIS uses the Final Action Dates chart** to determine the age. It is important to note that this was the first time in immigration history that USCIS issued this instruction. Prior to 2015 there was only one chart to apply (simply called the "Visa Bulletin"), and between 2015 and 2018 the public was left to guess which chart USCIS and DOS decided to use for CSPA age determination purposes. Further, the 2018 USCIS PM provides two examples:

> Example 1: Application Filed Based on Dates for Filing Chart
>
> **The applicant files an adjustment application in March based on the Dates for Filing chart. However, it is not until May 1 that the Final Action Dates chart indicates availability for the applicant's immigrant preference category and priority date (based on the Final Action Dates chart).** In July, the visa retrogresses.
>
> In this case, USCIS calculates the applicant's CSPA age using May 1 as the visa availability date. If the applicant's calculated CSPA age was under 21, his or her CSPA age is locked in through final adjudication and USCIS holds the application until the visa becomes available again (based on the Final Action Dates chart).
>
> Example 2: Application Filed Based on Final Action Dates Chart
>
> In May, the Final Action Dates chart indicates availability for the applicant's immigrant preference category and priority date. The applicant files an adjustment application in June, and then the visa retrogresses in July (based on the Final Action Dates chart). In this case, USCIS calculates the applicant's CSPA age using May 1 as the visa availability date (based on the Final Action Dates chart). If the applicant's calculated CSPA age was under 21, his or her CSPA age is locked in through final adjudication and USCIS holds the application until the visa becomes available again.
>
> **For both examples, if the applicant's calculated CSPA age was 21 or older using the May 1 visa availability date, the applicant has already aged out and will not be eligible when the visa becomes available again. In these cases, USCIS denies the application.**" (emphasis supplied)

Example 1 describes the cases of plaintiffs Edwards and Peddada, involving an application filed based on Dates for Filing Chart, including the instruction at the bottom of both examples which states that if the calculated CSPA age was 21 or older using the Final Action Chart visa availability date, the "applicant has already aged out and will not be eligible when the visa becomes available again. In these cases, USCIS denies the application." *Id*. (emphasis supplied) Not only are examiners told to follow this rule, but the use of Final Action Dates was actually applied to plaintiff Peddada and defendants denied her application for adjustment of status in July of this year, after defendants had filed their motion to dismiss.

The PM does not merely describe what the law says, because the statutes do not include a provision for two separate visa bulletin charts, but rather use the same language describing when a visa is "available". The PM proclaims that USCIS uses the Final Action Date chart (newly created) to determine CSPA age even though USCIS uses the Dates for Filing chart to allow the filing of an adjustment of status application based on the same availability described in the statute. The proclamation that "USCIS uses" the FAD chart, and not the DFF chart marks the consummation of the agency decisionmaking process, and the proclamation that "In these cases, USCIS denies the application" is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennet v. Spear*, 520 U.S. 154, 177-78 (1997). As seen with plaintiff Peddada's denial, her rights have been determined (denied), and legal consequences flow from that decision (USCIS commanded her to leave the country).

The Court found the PM and FAM similar to the DHS manual described in *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021) ("*Whitewater II*"). The Manual in *Whitewater II*, however, only "facilitates the *beginning* of the NEPA review process for proposed DHS actions." Id. at 1008. (emphasis in original). Here the PM does not facilitate the beginning of the adjustment of status process, which starts with the filing of the adjustment of status application (Form I-485), but rather the final decision of the adjustment of status process, including the CSPA analysis and determination (which the government says has

to be done at the conclusion of the process), which USCIS proclaims ends in denial in exactly the situation plaintiff Peddada has found herself in. In *Oregon Natural Desert Ass'n. v. U.S. Forest Service, 465 F.3d 997 (9th Cir. 2006),* the Court held the agency rule marked the culmination of the decisionmaking process regarding grazing (not the beginning of a process of evaluation like *Whitewater II*), and in the instant case the PM marked the culmination of the agencies' decisionmaking process with respect to the determinative question as to which of the two Visa Bulletin charts would be used to determine a visa was "available" under CSPA. This 2018 decision, contained within the PM and FAM as a pronouncement to use the Final Action Date chart as opposed to the Dates for Filing chart had profound implications for plaintiffs Edwards and Peddada (and class members), and has ultimately resulted in Peddada's application being denied. But her application was predestined to be denied, due to the clear pronouncement of the PM that states USCIS uses the FAD chart, and based on the example like her case where the PM pronounces such cases are denied. The PM describes no mere preliminary or beginning review process, but the end. It is final agency action because of this.

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99 (1977), the Supreme Court held that finality is to be interpreted "in a pragmatic way". Id. at 149. From a practical point of view, then, plaintiff Peddada's denial flowed from the PM because USCIS has pronounced it uses the FAD date for CSPA age calculation instead of the DFF date, and the PM is therefore not some kind of preliminary or intermediate agency guide. Practically speaking it is the end for her, as we all saw it become. Also, the government here has never stated anywhere that somehow Edwards irregular approval was a result of an examiner exercising their own discretion to use the DFF date instead of the FAD, in the face of the pronouncement in the PM that "USCIS uses the Final Action Dates chart" for CSPA determination. Rather, it has always, in the course of this litigation, been seen and referred to as an error and against the PM.

Contrasted with *Whitewater II*, which involved a Manual facilitating the beginning of

agency review, this case involves agency rules which prescribe action. The PM pronounces that "[w]hile an adjustment applicant may choose to file an adjustment application based on the Dates for Filing chart, **USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA**" and "[i]n these cases, **USCIS denies the application**." (emphasis supplied) There is nothing preliminary or interlocutory about this pronouncement describing what USCIS does with cases like Edwards and Peddada's. In *Whitehall II*, the court said of the manual there, "This is not the stuff of final agency decisionmaking. The Manual contains very general instructions and has not bound DHS to any particular decision." *Id*. at 1009. *Whitehall II* is distinguishable from the case at bar because here we have a pronouncement that USCIS uses the Final Action Date chart, and that it denies applications in cases where the CSPA age is over 21 when the Final Action Date chart is consulted. The case at bar is distinguishable from *Whitehall II*.

There has also been direct and immediate effect, seen here with Peddada's denial. The 2018 PM and 2019 FAM significantly altered the adjustment of status landscape. Whereas before these rules were published there was not ever a case of an adjustment of status applicant filing an I-485 application based on the visa dates being available not being considered eligible under CSPA, there was now for the first time in history, a situation where an I-485 applicant could file an application based on an immediately available visa, but then denied under CSPA because the date did not become available due to the two chart phenomenon. The government cannot contend otherwise, since before this new policy pronouncement there was never such a consequence.

The F&R cites to *Lin Liu v. Smith*, 515 F. Supp. 3d 193 (S.D.N.Y. 2021) in finding plaintiffs have failed to establish the PM or FAM constitute a legislative rule subject to notice and comment under the APA. The Court in *Liu*, however, made this determination based on a presumption that the Final Action Dates chart was the only chart which implicates visa availability. In determining the meaning of the meaning of "available" visas the Court in *Liu* confined its analysis of the statute to 8 U.S.C. § 1153(h) without review of the statute as a whole,

stating only that, "Even without the rule, the defendants still would be able to interpret the statute in accordance with their conclusion in this case." *Liu*, supra, at 199. But the Court in *Liu* did not consider the meaning of "available" under CSPA in light of the adjustment of status statute, 8 U.S.C. § 1255(a)(3) which uses the language "immediately available", or 8 U.S.C. § 1153(g) which describes estimates of visa availability. *See* Response to Motion to Dismiss, ECF No. 14, pp. 17-19 ; Objections, ECF No. 21, pp. 8-10. The Court in *Liu* did not consider the impact of the agency inviting applicants to file adjustment of status applications based on the Dates for Filing charts where the adjustment of status statute, 8 U.S.C. § 1255(a)(3), permits this when visas are "immediately available". This is an admission of visa availability at the point of the I-485 being filed, and not later. The Court in *Liu* did not consider the impact of 8 U.S.C. § 1153(g) which recognizes that issuance of visas is based on estimates of availability within the entire fiscal year and broken down by quarterly estimates during the fiscal year and "availability" is a wholly different concept from "issuance" of a visa.

Plaintiffs here argued that the entire statutory scheme, including 8 U.S.C. § 1255(a)(3), 8 U.S.C. § 1153(g), and 8 U.S.C. § 1153(h), was clear: "visa availability is just an 'estimate' of anticipated 'availability' and pursuant to 8 U.S.C. § 1153(h)(1)(A) which references 'availability' for issuance and 'such availability' for filing applications to seek permanent resident status (whether through an immigrant visa application with DOS or an adjustment of status application with USCIS) and that 'availability' means when a child has been invited to apply for an immigrant visa or an adjustment of status (because a visa number must be 'immediately available' pursuant to statute) based on the published chart which applies for those applications." ECF No. 14, p. 19. A new batch of at least 140,000[3] employment-based visas come available on the first day of the Fiscal Year (starting October 1) each year and are available in quarterly percentages. Availability is thus not equal to issuance.

[3] Plus any unused Family Based numbers from the previous Fiscal Year. 8 U.S.C. § 1151(d)(1).

Given that the Visa Bulletin represents estimates of visas to be issued, the term "available" means something different than a visa actually issued, contrary to what the Court in *Liu* supposed. It may interest the Court to know that when a visa is "actually issued" (resulting in a green card approval) USCIS and Consular Officers abroad must contact Department of State and receive authorization for the issuance of a specific visa number to actually approve the case (and thus issue the visa), even if the Final Action Date chart is current, because "issuance" is totally different from the statutory term "availability". The Court in *Liu* presumed "available" just means "issued" and did not review the statute as a whole and did not consider all parts of the whole.

The F&R proposes to repeat the errors of the *Liu* Court when it states, "The PM and FAM are also consistent with the CSPA statutory scheme because, 'pursuant to the ordinary meaning of the term 'available,' a visa number cannot be considered available until it is issued legally.'" F&R, p. 32, citing *Liu*, supra at 197. *Liu* is in error here because the word "available" is used in the adjustment of status statute, 8 U.S.C. § 1255(a)(3), to mean something much less than a visa number being "issued". As repeated throughout this litigation, the Dates for Filing chart indicates a person may *file* an adjustment of status application based on a visa being "immediately available" and therefore it does not mean that in order to be available, a visa has to actually be issued. The *Liu* Court committed clear error in confusing the two.

The Court in *Liu* found that the agency's use of the Final Action Dates chart for determining age pursuant to CSPA was an interpretive rule because the agency had previously used one chart and was still using that same chart to determine CSPA age. *Liu*, supra, at 197. This ignores the fact that prior to permitting applicants to file for adjustment of status based on the separate, second Dates for Filing chart there were no applicants who filed adjustment of status and then faced denial later after paying all fees and following all prerequisites for filing adjustment of status, including showing a visa was "immediately available" under the adjustment of status statute. With but one chart (pre-2015), the analysis was always the same – if you were

given the formal go ahead to file an adjustment of status based on an immediately available visa by consulting the one and only Visa Bulletin chart, your age would be frozen, period. The Court in *Liu* stated, "[t]he newly added Dates for Filing chart reflects useful information for when applicants can begin submitting materials to the NVC, but it does not reflect when visa numbers are legally available." *Id*. at 197. This is not so. The *Liu* Court's conclusion that the Dates for Filing chart does not reflect when visa numbers are "legally available" is incorrect and in conflict with the adjustment of status statute. Without considering the "immediately available" language of 8 U.S.C. § 1255(a)(3) the Court's determination about what "legally available" means was incomplete as it did not consider the whole statutory scheme. The adjustment of status statute, 8 U.S.C. § 1255(a)(3), has been in existence since before CSPA was enacted and the drafters of the CSPA legislation knew what it meant when they fixed eligibility on visa availability (not issuance) and also knew that one could only file an adjustment of status application until the visa was immediately available.[4]

By creating two charts then issuing policy guidance determining that only one of the two charts could be used for CSPA age locking purposes, the agency brought the adjustment of status statute into the equation and set up an irreconcilable conflict between the terms "immediately available" and "becomes available." This had the result of causing applicants to file (and pay for) adjustment of status with their families, receiving work and travel permits, only to find themselves denied and out of status and forced to leave their family and home of many years. Prior to 2015, the agency could not have accepted adjustment of status applications based on the single chart, then denied that application under CSPA. Why? Because 8 U.S.C. § 1255(a)(3)

[4] The Court noted that CSPA was aimed at preventing aging out because of bureaucratic delays, and also noted that the CSPA statutory and regulatory scheme provides for a derivative beneficiary child's age to be "locked in" on the date a visa becomes available. F&R at 6. This age "locking" is as central to CSPA as the credit for bureaucratic delays and by changing what it means for a visa to be "available" the government has created a novel rule. This 2018 PM was bound to have negative legal impact on children when we filed suit in 2019 and as the denials roll in it is having continued legal effect.

requires a visa be "immediately available" to file an adjustment application, and with a single chart (and thus one date) eligibility for adjustment filing and eligibility for CSPA age locking were the same. When there was but one chart (pre-2015), a visa is "immediately available" (see adjustment statute, § 1255(a)(3)) and "becomes available" (see CSPA statute § 1153(h)(1)(A)) **on the same day** (the first day of the month in which the Visa Bulletin indicates the cut-off date is later than the priority date). With the newly created two Visa Bulletin chart system, however, the agencies determined in 2018 that visas would be "immediately available" when the Dates for Filing chart cutoff indicated, but that the Final Action Date chart would determine when the visa "becomes available" for CSPA purposes, **which is never the same day**, and often separated by months or even years. This novel rule set up the children of backlogged families for thousands upon thousands of denials that would never have been possible prior to 2015 and the 2018 challenged PM.[5] This rule determined plaintiffs' rights and obligations (the filing of the adjustment of status applications), carried legal consequences (denial), and had legal effects (permanent ineligibility as a child derivative of the parent's petition). Peddada's I-485 was denied based on the PM. These novel changes impacting CSPA age calculation were legislative and not just explanatory.

By issuing two charts in 2015, the agency signaled it was viewing visa availability in a broader sense. But then in 2018 the agency pronounced it would only use the least favorable of the two newly created charts to lock CSPA age thereby prejudicing those who filed for adjustment of status under the 2015 expansive definition of visa availability. Why such an abrupt

[5] For example, during oral argument undersigned counsel mentioned the case of putative class member Niranjan Barathimohan whose adjustment of status application had just been denied on November 9, 2021. He came to the U.S. in 2006 in the first grade. His father's priority date ("PD") is Sept. 9, 2011 in the EB-3 category and the Oct. 1, 2020 DFF chart showed a visa immediately available to all PDs earlier than Jan. 1, 2015 and FAD date of Jan. 15, 2010. He filed for adjustment October 20, 2020, and his biological age exceeded 21 as of March 2021, when the March 1, 2021 FAD date was Jul. 1, 2010 and FAD date was Jan. 1, 2014. If there were one date of availability he would either have CSPA age locked or would not have been eligible to file adjustment of status, but under the new PM he is deemed eligible to file adjustment because a visa is available and deemed ineligible for approval because a visa is not available.

change? The 2015 dual Visa Bulletin system seemed to signal a way to utilize more of the Congressionally authorized visas than in previous years when numbers would go unused and permanently wasted. The 2018 PM seemed to signal a way to deny cases even where a child had filed an adjustment of status application based on an immediately available visa number. Does the public not have input on such a shocking turn of interpretation?

These combined changes (culminating in the 2018 CSPA age lock pronouncement) were legislative as these results were *never* seen before the policy changes. The agency *could never have denied a properly filed adjustment application filed by a child claiming CSPA eligibility at time of filing prior to the changes*. The government cannot claim that any scenario we see here including Peddada's denial would have happened before the 2018 PM, because she would have had her age locked on the first day of visa availability based on the single chart. Plaintiff Peddada filed her adjustment of status application when she was still considered under CSPA to be a child, based on a visa that was "immediately available" since that is the statutory requirement of § 1255(a)(3) in the first place. She did that based on the Dates for Filing chart as permitted. If a visa was available when she filed, then it was also available for purposes of CSPA calculation and her age should be locked.

The use of the newly minted 2015 dual Visa Bulletin and the proclamation in the 2018 PM created a brand-new basis for denying a child who filed for adjustment of status based on all prerequisites being met at time of filing. This was a novel situation created by the 2018 determination. The case at bar is similar to *Nat. Council for Adoption v. Blinken*, 4 F. 4th 106, 114 (D.C. Cir. 2021) (finding Department of State "Guidance" on "soft referrals" constituted a legislative rule requiring notice and comment rulemaking where it involved a novel prohibition). Determining which of two newly created visa bulletins would be used for CSPA calculation created consequences never seen before, underscoring the PM and FAM's novelty.

The D.C. Circuit in *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020) (a case upon which the *Liu* Court relied), has applied the term "needle-threading rule"

to describe an agency rule which "can determine 'legal rights and obligations' or carry 'legal consequences' (so as to amount to final agency action) but still lack 'legal effects' (so as to fall short of a legislative rule)". *Id*. at 84. The case at bar is not such a needle-threading rule. The PM and FAM state that the agencies use the Final Action Dates chart and not the Dates for Filing chart, both of which were newly created in 2015, to "determine" CSPA age (and the key to determination of availability is which bulletin to use) and further imposes legal effect upon applications, proclaiming the agencies deny the application. The PM and FAM are legislative rules requiring notice and comment rulemaking and plaintiffs object to the F&R finding otherwise.

There is great value to the public in allowing public comment on such a drastic and devastating public policy. As the Court recognized, "a growing number of individuals and advocacy groups share plaintiffs' concerns about the particular impacts of the AC21 and the CSPA statutory scheme on derivative beneficiaries who arrive in the United States as children and reside in the United States for years awaiting an immigrant visa." F&R, p. 33, fn. 7 (citing to recent National Public Radio coverage, Hafsa Fathima, *They Came to the U.S. as Children, But at 21, Their Legal Status Runs Out*, NPR (Aug. 4, 2021)). After hearing from families, interest groups and legal representatives, the agency may decide that determining visa availability for adjustment of status filing purposes and visa availability for CSPA age determination purposes should be the same date, not two widely divergent dates based on the two new Visa Bulletin charts. The agency never asked, and never received, public input before it issued the pronouncement in 2018. The D.C. Circuit in *Nat. Council for Adoption*, supra, stated, "The notice-and-comment process makes agency consider those types of concerns." *Id*. at 115.

IV. Conclusion

For the reasons given above, Plaintiffs respectfully object to the aforementioned portions of the Findings and Recommendations.

PARRILLI RENISON LLC

By /s/ Brent W. Renison

BRENT W. RENISON
PARRILLI RENISON LLC
610 SW Broadway Suite 505
Portland, OR 97205
Phone: (503) 597-7190
brent@entrylaw.com
OSB No. 96475

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2021, I electronically filed the foregoing OBJECTIONS TO FINDINGS AND RECOMMENDATIONS with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Brent W. Renison
Brent W. Renison