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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. 18, hereafter F&R).

I. Standing and Ripeness.

Plaintiffs do not object to the Court's recommendation that plaintiffs have established all three prongs of Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Further, plaintiffs do not object to the Court's recommendation that plaintiffs have established 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

should be dismissed. The F&R considered the Child Status Protection Act (CSPA) statute but did not consider other portions of the Immigration and Nationality Act cited by plaintiffs in their First Amended Complaint (ECF No. 10, hereafter "FAC") and in their Response to Motion to Dismiss (ECF No. 14).

Specifically, plaintiffs argued that they as a discrete class are not ordinary immigrants. They 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."

Defendants have not denied that AC21, § 104(c) applies to H-4 derivatives. Plaintiffs meet the qualifications of that protective law, in that they are each a beneficiary of a petition filed in the employment-based preference categories, and they are eligible but for per country limitations. AC21 § 104(c) entitles this class of people to visa and status extensions, without limit, until their applications for adjustment of status have been "processed and a decision made thereon." *Id*. Clearly there is Congressional intent to provide special status to these individuals to specifically enable them to live in the United States indefinitely as they transition to permanent resident status. 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.

The F&R did not weigh or consider the effect of this special AC21 legislation on the equal protection analysis. Instead, the Court focused solely on the CSPA statute and three CSPA cases that are distinguishable or otherwise unpersuasive. The Court noted that 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 immigrants are also in H-4 status and are also immigrating in the same employment-based ("EB") categories. Yet defendants permit the broader group of EB immigrants to lock their age using the more favorable Worldwide Visa Bulletin. Plaintiffs argued that their special status under AC21 § 104(c) made them not only similarly situated but in a special limited group. Plaintiffs specifically argued that, "[i]t is wholly irrational that these favored immigrants who have strong and lasting ties to this country are being treated less

[1] The F&R followed two other cases. 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.

favorably than immigrant children from other national origins who have never been to the United States. The only difference between this treatment is national origin."[2] The F&R did not discuss the favored status of plaintiffs under AC21 § 104(c). 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.

Plaintiffs argued that AC21 § 104(c) has provided them with congressionally sanctioned residence of long duration, resulting in a lengthy period of U.S. education during their formative years, and that their favored status under AC21 § 104(c) entitled them to treatment at least as favorable as those currently being assigned a CSPA age based on the Worldwide Visa Bulletin chart. ECF No. 14, pp. 12-14. The F&R did not discuss these arguments. In essence the F&R confined the analysis to the CSPA statute in a vacuum, rather than recognizing that plantiffs are a limited group based on a separate statute permitting them indefinite leave to remain in the United States while awaiting the conclusion of the process of becoming a lawful permanent resident. It makes no sense for Congress to have permitted these children to remain indefinitely 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 age.

[2] Plaintiffs concede that the caselaw supports rational basis review of even national origin discrimination in the immigration context, although such discrimination offends fundamental notions of fairness and plaintiffs respectfully renew their request that the Court adopt intermediate scrutiny and find that the discrimination based on national origin is not narrowly tailored to advance any important or compelling government interest.

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 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 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.

Plaintiffs' allegations regarding the equal protection claim were well plead and plaintiffs

cited specifically to the AC21 § 104(c) provisions that provided them with favored status and put them in a limited group. FAC ¶¶ 61-66. Congress provided them with this favored status. Congress determined that they would extend the character and duration of their residence and ties to this country. 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. The F&R did not address these arguments or allegations in finding that plaintiffs failed to state a claim for equal protection, and plaintiffs object to the Findings and Recommendations in Section IV, Part A Equal Protection (First Claim).

III. Plaintiffs state a claim that the USCIS Policy Manual and FAM violate the APA

Plaintiffs object to the Court's recommendation that plaintiffs' APA claim should be dismissed. The Court found plaintiffs had failed to demonstrate they are within the "zone of interests" that Congress intended to protect. Here as in the foregoing section, the F&R is confined to an analysis of the CSPA statute, without regard to the other statutes argued by plaintiffs as forming the basis of their claim. The Court found that plaintiffs are not within the zone of interests of the CSPA statute because their complaint is with the lack of visa availability, not with government processing delays. F&R pp. 23-25.

The APA claim (Second Claim) is represented by the cases of plaintiffs Abigail Edwards, Pavani Peddada and Havya Nimmagadda, who unlike other Plaintiffs were able to file adjustment of status applications despite not having their age locked in under the national origin-based visa bulletin chart.[3] Each filed adjustment of status pursuant to CSPA, because defendants permit beneficiaries to file adjustment of status applications when the "Dates for Filing" chart cutoff date is past their priority date, even though the CSPA age locking under defendants challenged interpretation only happens when the "Final Action Date" chart cutoff date is past

[3] Plaintiff Pavani Peddada was able to file her adjustment of status application recently in October 2020 and plaintiffs have sought leave to amend the complaint to include this recent development and plaintiff Peddada's inclusion in the APA claim. Plaintiffs seek to add Havya Nimmagadda as plaintiff representing the APA claim.

their priority date. Their CSPA age was under 21 when they filed for adjustment of status. Thus, plaintiffs Edwards, Peddada and Nimmagadda are indeed covered by CSPA, to the extent that defendants *already permitted them to apply for adjustment of status*, but it is the agency's use of the Final Action Date chart for locking their age under CSPA for adjustment of status purposes that is challenged.

The F&R did not discuss any of the other statutory provisions at play here, under which plaintiffs Edwards, Peddada and Nimmagadda and class members like them claim eligibility. The adjustment of status statute, 8 U.S.C. § 1255(a)(3) permitted plaintiffs Edwards, Peddada and Nimmagadda to apply for permanent resident status. Plaintiffs claim that the language of the adjustment of status statute, § 1255(a)(3) ("immediately available") holds essentially the same plain meaning as the language of the CSPA statute, § 1153(h)(1)(A) ("becomes available") but that the agency was giving them different meanings to the detriment of plaintiff Edwards, (and now plaintiffs Peddada and Nimmagadda) and class members like them. Plaintiffs Edwards, Peddada and Nimmagadda were permitted by defendants' regulations and interpretations to file for adjustment of status under § 1255(a)(3) because a visa was "immediately available" and yet face denial months later because defendants consider CSPA's language within § 1153(h)(1)(A) "becomes available" to mean something more immediate than "immediately available". The ordinary meaning of the word "immediately" is "in an immediate manner; specifically, (a) without intervening agency or cause; directly; (b) without delay; at once; instantly". Webster's New Twentieth Century Dictionary of the English Language – Unabridged, Second Edition, Simon & Schuster (1983). The meaning of this word is not a technical one over which the agency has special expertise. When the agency permitted them to file adjustment of status on the first of the given month, the agency was communicating that a visa was instantly available because the language of § 1255(a)(3) requires this.

The meaning of "becomes" is "1. To pass from one state to another; to enter into some state or condition, by a change from another state or condition, or by assuming or receiving new

properties or qualities, additional matter, or a new character, as, a scion becomes a tree; 2.To come into being." *Id*. Thus the common meaning as applied to the CSPA statute just means that the availability moves from unavailable to available. Since defendants already permitted plaintiffs Edwards, Peddada and Nimmagadda to file for adjustment of status while under 21 based on the statute that requires a visa be "immediately available" it would be laughable to say that it never became available when it was previously immediately available.

Plaintiffs claim that if plaintiffs and class members were able to file for adjustment of status only when a visa number was "immediately available" then surely later down the line (months, years) they could not be denied on the basis that the visa never "became available" since it had already been determined to be "immediately available" when they filed. The agency decided as of 2015 to start using two charts with different dates instead of one chart. Plaintiff presented extensive argument based upon well plead facts in the FAC (and in the proposed SAC) that the agency was not permitted to interpret these two statutes in this manner, and that in doing so they were applying the law in a fashion directly contrary to the plain language. The F&R did not discuss the importance of § 1255(a)(3) and its interplay with § 1153(h)(1)(A) to the zone of interests involved. The F&R doesn't mention the adjustment of status statute language at all. The adjustment of status statute is critical here, as each plaintiff complaining about the use of Final Action Date charts where they were able to file for adjustment of status based on Dates for Filing charts is directly impacted by the way that statute is interpreted.

The F&R, in addition, did not consider other statutes that plaintiffs argued were relevant in the statutory scheme under which they find themselves struggling against defendants' interpretations. Plaintiffs cited to 8 U.S.C. § 1153(e) which provides "Immigrant visas made available under subsection (a) [family based] or (b) [employment based] shall be issued to eligible immigrants in the order in which the petition in behalf of each such immigrant is filed with the Attorney General…" and also cited to 8 U.S.C. § 1153(g) which provides the DOS authority to "make reasonable estimates of the anticipated numbers of visas to be issued during

any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) and to rely upon such estimates in authorizing the issuance of visas." (emphasis supplied). The importance of the interplay of these various statutes is discussed more extensively below, and plaintiffs as derivative beneficiaries of petitions for immigrant status have a priority date and place in line, and eligibility under these statutes, and are within the zone of interest that these statutes were meant to protect.

The Supreme Court in *Lexmark Int'l Inc. v. Static Control Components, Inc*., 572 U.S. 118 (2014) reaffirmed that in the APA context the zone of interests test is not "especially demanding" and that the test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id*. 120-21. The Court also recognized the generous review provisions of the APA particularly for statutes which do not by themselves have a specific cause of action. *Id*. Here plaintiffs claim that multiple related statutory provisions permitting adjustment of status and locking in of a person's age for eligibility purposes has been wrongly interpreted contrary to the plain language of the statute, and the representative plaintiffs were beneficiaries of petitions with priority dates and who had actually filed an application pursuant to the statutory scheme and are at jeopardy of denial because of the wrongful interpretation. Considering the APA's generous review provisions, plaintiffs and class members with this fact pattern qualify for zone of interest standing.

The Ninth Circuit has described the zone of interest test under the APA as a "lenient" one, and has explained that the Court's review is "'not limited to considering the [specific] statute under which [plaintiffs] sued, but may consider any provision that helps us to understand Congress's overall purposes" in enacting the statute." *Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1270 (9th Cir. 2020) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987). Plaintiffs' claims under the APA for unlawful interpretation and application of the CSPA and adjustment of status statutes to plaintiffs and class members specifically impacted by defendants interpretations

of the statutes under which they filed and claim eligibility are not "marginally related" to the scope of the statute.

Because the F&R did not address the parties' arguments with respect to the APA claim (final agency action; legislative vs. interpretive rule) plaintiffs respectfully restate their substantive arguments below. Plaintiffs challenge the USCIS Policy Manual change to 7 USCIS-PM A.7 and the Department of State revision to 9 FAM 502.1-1(D)(4) on applied and facial grounds.[4] The PM and FAM revisions announced that while the Dates for Filing chart would be used to determine whether a child could file an application for adjustment of status, that the Final Action Dates would be used to determine when the child's age would be frozen under CSPA. These agency interpretations effected a substantive change to the statutory and regulatory regime constituting a legislative rule and not merely an interpretive rule. The agency interpretations are final agency action, both are subject to facial challenges, and the USCIS PM is also subject to an applied challenge.

Regarding the applied challenge, plaintiffs Edwards, Peddada and Nimmagadda filed their adjustment of status applications using the Dates for Filing chart, and fit squarely into the hole created by defendants' 2018 agency interpretation because the interpretation did not freeze their age based on the Dates for Filing chart and as of October 2020 plaintiff Peddada already reached age 21 under the agency's newly minted policy which relies upon the Dates for Final Action. Plaintiff Nimmagadda will imminently age out in March 2021. The Supreme Court has held that threat of administrative action where the governmental action is "sufficiently direct and immediate" is sufficient to meet the final agency action requirement of the APA, particularly where the rule is substantive and not merely interpretive or a general statement of policy. See

[4] 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. These agency interpretations fall within the 6-year statute of limitations for facial challenges.

Abbot Laboratories v. Garner, 387 U.S. 136, 152 (1967). Plaintiffs are threatened by impending denial of their properly filed adjustment of status applications, threatened with recission of Employment Authorization Documents (EADs), and threatened with loss of legal status and banishment from the country where each has spent most of their lives. This will certainly occur based on the PM in the immediate future if defendants' policy is not declared invalid and enjoined. Upon denial each will be abruptly without work authorization and immediately without legal status and deportable as their H-4 status has or will have expired due to defendants' policy not to permit extensions beyond age 21. Immigration law severely punishes visa overstays including the 3- and 10-year bars of 8 U.S.C. § 1182(a)(9)(B) which are implicated within just 180 days of denial. Plaintiffs are not required to wait for denial and loss of these significant rights, incurring significant and long-lasting bars to her admission, given the substantive rule change and the certainty of resulting adverse government action based on the PM. Plaintiffs are lawful immigrants of long residence in this country with strong ties to the United States and each suffers the threat to their status in this country based first upon their parents' national origin (Equal Protection) and second based on an arbitrary and capricious interpretation of the immigration law (APA).

Plaintiffs also claim that defendants failed to follow proper notice and comment rulemaking in issuing their agency interpretations because these interpretations were substantive legislative rules and not interpretive rules. The Ninth Circuit has explained that, "In general terms, interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Industries Ass'n v. Drug Enforcement Admin*., 333 F.3d 1082, 1087 (9th Cir. 2003). The creation of two separate visa bulletins in 2015 followed by agency guidance issued in 2018 and 2019 explaining that one chart must be used to allow filings and the other must be used for

locking CSPA age is a change in existing law. The Ninth Circuit in *Hemp Industries Ass'n* cited favorably the D.C. Court of Appeals decision *American Mining Congress v. Mine Safety & Health Admin*., 995 F.2d 1106, 1109 (D.C. Cir. 1993), which stated that a rule is legislative when it has the "force of law" including "where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate." *Id*. *American Mining* also states, "Analogous cases may exist in which an agency may offer a government benefit only after it formalizes the prerequisites." *Id*. The government benefit here is permanent resident status, and the prerequisites are contained only in this new agency guidance. Here, the PM was accompanied by a "Policy Alert" ("PA-2018-05") stating that "This guidance is controlling and supersedes any prior guidance on the topic." See Exh. A. 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." 7 USCIS-PM A.7.F.4[5]

See ECF No. 14, Exh. B. This is evidence that USCIS offers a government benefit (permanent resident status) only after it formalizes these prerequisites, and without the PM guidance on CSPA calculation, there would be no basis for agency enforcement of CSPA. See also *ITServe Alliance, Inc. v. Cissna*, 1:18-cv-02350-RMC (D.D.C. 2020) (analyzing similar challenge to a 2018 USCIS Policy Memo on H-1B adjudications, summarizing caselaw, and finding it is a legislative rule subject to facial and as applied challenge). The agency interpretations here

[5] See also 7 USCIS-PM A.7.F.5 explaining how applicants filing based on Final Action Dates are locked (frozen) but that applicants filing base on Dates for Filing are not locked in. Also, the PM discusses two hypothetical scenarios, one in which the applicant can remain eligible and the other (precisely plaintiffs Edwards, Peddada's and Nimmagadda's cases) where "USCIS denies the application."

constitute legislative rules.

The adjustment of status statute, 8 U.S.C. § 1255(a)(3) permits the filing of an I-485 Application for Adjustment of Status where "an immigrant visa is immediately available to him at the time his application is filed." (emphasis supplied). The statutory language "immediately available" is significant as explained below. USCIS and DOS began using for the first time two visa bulletins as of 2015 (Final Action Dates, Dates for Filing), and under the challenged agency action adjustment of status applications may be filed under the Dates for Filing chart rather than the Final Action Dates chart during some times of the year as announced by USCIS just as occurred in plaintiffs Edwards', Peddada's and Nimmagadda's cases. The State Department also invites immigrant visa applicants to begin applying and paying fees when the Dates for Filing cutoff date advances beyond the priority date. This is proof that Defendants view the term "immigrant visa is immediately available" to include situations in which the Dates for Filing Chart (and not just the Final Action Dates chart) cutoff date has advanced beyond the child's parent's priority date.

Also, under the CSPA provision, 8 U.S.C. § 1153(h)(1)(A), the age of a child under 21 is frozen on the "date on which an immigrant visa number becomes available for such alien" (emphasis supplied) and because an adjustment application can be filed based on that same availability (compare "immediately available" to "becomes available"), then the child's age should similarly be frozen at that time using the same chart. Contrary to the clear language of this statutory scheme, however, defendants have interpreted the term "available" to mean two different things to the detriment of plaintiffs. This is a substantive change in the law, not just an interpretation or general policy statement. Defendants were required to engage in notice and comment rulemaking, instead of issuing policy guidance without public input, for such a substantive change, which constituted a legislative rule. Defendants did not engage in notice and comment rulemaking, and therefore the agency interpretations are invalid.

Had the agency engaged in notice and comment rulemaking, the conflict between the two

instances of "available" would have been brought to the agency's attention. It is an irrational interpretation to hold that the term "immediately available" means something less immediate than "becomes available." In other words, if a child's age is frozen under CSPA only when the priority date is earlier than the Final Action Date cut off based on the term "becomes available" but that same child's application was previously accepted for filing when the visa was "immediately available" based on the Dates for Filing Chart, then it shows the visa was immediately available (and thus at least "becomes available") when the adjustment application was filed. Plaintiffs Peddada's and Nimmagadda's adjustment applications were filed in October 2020 when the Dates for Filing chart was current but not the Final Action Date chart.[6] Nonetheless, the adjustment of status statute, 8 U.S.C. § 1255(a)(3), permits an adjustment filing only where the "immigrant visa is immediately available to [her] at the time [her] application is filed" which is proof that her CSPA age could be frozen as of January 2019 since the CSPA statute, 8 U.S.C. § 1153(h)(1)(A), permits freezing the age on the "date on which an immigrant visa number becomes available for such alien" (emphasis supplied). If she was deemed to have a visa *immediately available* to her in October 2020, then surely an immigrant visa number also *became available* to her at that time as well. That is because immediately available must mean something even more immediate and available than the language becomes available without the immediate modifier, or at the very least that these two terms mean the same thing.

Reference to the entire statutory scheme also supports this view. For example, 8 U.S.C. § 1153(e) provides "Immigrant visas made available under subsection (a) [family based] or (b) [employment based] shall be issued to eligible immigrants in the order in which the petition in behalf of each such immigrant is filed with the Attorney General…" and 8 U.S.C. § 1153(g)

[6] The Visa Bulletin charts are available at this website: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html. For historical charts in a format which can be compared more readily through 2018, see ECF No. 14, Exh. C for Worldwide and Exh. D for India. These charts can also be accessed at the bottom of the Visa Bulletin site.

provides the DOS authority to "make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) and to rely upon such estimates in authorizing the issuance of visas." (emphasis supplied). It is clear from the statutory scheme that 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. Using one chart to invite a child to apply because an immigrant visa is immediately available and a different chart to determine their age and deny them in light of the overall statutory scheme and meaning of "available" is erroneous and constitutes an arbitrary and capricious interpretation, not in accordance with the law, that conflicts with the unambiguous statute and is invalid on its face.

Defendants recent agency interpretations in the USCIS PM and the DOS FAM are subject to facial challenge as conflicting with the unambiguous statute fixing "available" visas at the same point in time for both adjustment of status filings and CSPA age freezing. In addition, neither interpretation went through notice and comment rulemaking and is unlawful under the APA. The USCIS PM is also subject to plaintiffs Peddada's and Nimmagadda's as applied challenge.

Since the parties briefed this claim there has been a significant increase in the number of children nationwide who are impacted by the Dates for Filing versus Final Action Date controversy. Specifically, from September 2020 to October 2020 defendants rapidly advanced the Dates for Filing chart in the EB-2 India category from August 15, 2009 to May 15, 2011 (21 months) and in the EB-3 category from February 1, 2010 to January 1, 2015 (nearly 5 years).

Defendants specified for the months of October 2020 and November 2020 that Dates for Filing charts would be used for adjustment of status filings. The Final Action Dates for EB-2 and EB-3 India have only advanced to September 22, 2009 and March 1, 2010 respectively.

This rapid forward movement of the Dates for Filing but not the Final Action Dates has resulted in huge disparity between the two charts and consequently a large number of H-4 children filing for adjustment of status to Lawful Permanent Resident status but who have either now aged out under defendants' challenged policies or who will imminently age out. The number of impacted individuals is in the thousands. Existing plaintiff Pavani Peddada's priority date permitted her to file her adjustment of status application in October 2020 (which she did), but now she has aged out under defendants' challenged policies and plaintiffs have proposed the addition of another representative plaintiff of this subclass (Nimmagadda). Plaintiffs' APA claim is of enormous importance to a large subclass of impacted individuals, and a full discussion of the substantive claim is critical for any meaningful review. We respectfully urge the Court to decline to adopt the F&R, Section IV, Part B, APA (Second Claim).

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2020, 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