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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

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby respond to defendants' Motion to Dismiss (ECF No. 13), filed by all defendants. Plaintiffs respectfully request the Court deny defendants' motion because the child derivative beneficiary plaintiffs have cognizable legal interests in the visa petition, have suffered an injury-in-fact due to defendants' use of the national origin based visa bulletin and therefore have Article III standing, and are in the zone of protected interests, the case is ripe because plaintiffs have already been prevented from freezing their age under CSPA due to defendants' use of the national origin-based visa bulletin chart, and plaintiffs have stated a claim upon which relief can be granted because use of the national origin-based visa bulletin is wholly irrational.

I. Plaintiff Derivative Beneficiaries have standing to sue

Defendants have admitted that Ninth Circuit caselaw has established that beneficiaries of

visa petitions have standing. See ECF No. 13, p. 15, fn. 10, citing *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998).[1] The Supreme Court has held that to have Article III standing, a plaintiff must establish the following:

> "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs meet the *Lujan* test. Plaintiff Derivative Beneficiaries have suffered an injury in fact. They allege that despite receiving favored status under the American Competitiveness in the Twenty First Century Act of 2000 ("AC21") § 104(c), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000), being brought to the country at a young age and permitted to remain indefinitely in excess of the 6 year limitation on H-1B and H-4 status pursuant to AC21 § 104(c), they have been unjustly denied eligibility to immigrate together with their parent (and their other family members), stripped of their place in line after waiting most of their lives in line, and unjustly denied their ability to extend their H-4 status indefinitely under AC21 § 104(c). They allege that this is due to the defendants use of a national origin-based visa bulletin chart, instead of the worldwide visa bulletin chart, to fix their age under the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002). The injury is concrete and particularized, in that plaintiffs enumerate the injuries specifically, that they have irretrievably lost the ability to immigrate together with their parent and family members, that they have been denied the ability to utilize their original priority date (place in line) for any future purpose even if the parent becomes a permanent resident and in turn files an immigrant petition for the child, and that they have been denied the ability to receive unlimited H-4 extensions under AC21 § 104(c). These

[1] It is unclear whether defendants make the argument that plaintiff Principal Beneficiaries also lack standing, since the reference to this is by mere citation to one district court decision without elaboration. Because it is unclear, plaintiffs will address the issue of visa petition beneficiaries both principal and derivative.

injuries are fairly traceable to the actions of defendants, because plaintiffs claim that defendants utilize the national origin-based visa bulletin chart to determine their CSPA calculated age, while permitting immigrant children with even less favored status to use the worldwide visa bulletin chart, and were it not for this discrimination each derivative beneficiary child would have previously had their age frozen at under 21. Finally, it is likely that the injury would be redressed by a favorable decision because by using the worldwide visa bulletin chart to determine (and "freeze" or "lock in") their CSPA age they would be eligible to immigrate together with their families, and retain their place in line, and be eligible for extensions of their H-4 status indefinitely under AC21 § 104(c) while they await the availability of a visa number due to per country limitations.

Defendants cite to *Pai v. USCIS*, 810 F. Supp 2d 102, 111-12 (D.C.C. 2011) for the proposition that all beneficiaries, whether principal or derivative, lack standing to sue in connection with a visa petition. The court in *Pai*, however, relied upon *George v. Napolitano*, 693 F.Supp.2d 125 (D.D.C. 2010), which only briefly discussed the standing of the beneficiary of an I-140 immigrant petition. Instead of discussing the beneficiary's injury with any specificity, the court in *George* merely cited to an earlier New York decision which stated that the employer is the proper party having a personal stake in the outcome. See *Blacher v. Ridge*, 436 F.Supp.2d 602, 606 n. 3 (S.D.N.Y 2006). The court in *Blacher* relied upon a finding that the agency's decision not to grant the H-1B petition in that case was a discretionary matter, and beyond the jurisdiction of the court, and did not discuss any of the *Lujan* factors. *Id*. at 603, fn. 3. Likewise, other cases cited by the *Pai* court, *Li v. Renaud*, 709 F.Supp.2d 230, 236 n. 3 (S.D.N.Y. 2010) and *Ibraimi v. Chertoff*, 2008 WL 3821678 (D.N.J. 2008), merely cite to the *Blacher* district court decision without any analysis under *Lujan*. Therefore, none of these district court decisions, all outside this district, are particularly convincing as they do not discuss the relevant factors announced by the Supreme Court in *Lujan*.

The Honorable Judge Michael H. Simon of the District of Oregon discussed the *Blacher*

progeny of cases, in *Tenrec, Inc. v. USCIS*, 3:16-cv-00995-SI (D. Or. 2016). Judge Simon found that the cases relying on *Blacher* failed to discuss any of the relevant *Lujan* factors, and declined to find as persuasive the limited analysis in *Blacher*. See *Tenrec*, Slip Op., p. 12-13. The *Pai* decision cited by defendants relied on the *George* court which in turn relied on *Blacher*, all without sufficient analysis and consideration of the *Lujan* factors. In contrast, the *Tenrec* decision, authored by Judge Simon, discussed first the Ninth Circuit's decision in Abboud, which noted that "When a Relative Petition is filed, '[t]he immigrant beneficiary is more than just a mere onlooker; it is her own status that is at stake when the agency takes action on a preference classification petition.' As the Relative Petition's beneficiary, Abboud lost a significant opportunity to receive an immigrant visa when the INS denied the Relative Petition. This lost opportunity presents a concrete injury to Abboud that is traceable to the INS's conduct and remediable by a favorable decision in this case. Accordingly, we hold that Abboud has standing in this matter." *Tenrec*, Slip Op. at 9, citing *Abboud*, supra. Likewise, plaintiffs here are no mere onlookers, as the principal beneficiaries are facing separation from their children, and their children the derivative beneficiaries are losing a significant opportunity to immigrate together with their parents and losing their priority date as well as their longstanding ability to remain in the country in H-4 status. The Court in *Tenrec* dealt with beneficiaries of H-1B visas, which are nonimmigrant visas as opposed to immigrant visas (at issue in this case), and found that despite the government's attempt to distinguish nonimmigrant and immigrant visa beneficiaries (inferring the latter have more at stake), analysis of the *Lujan* factors established standing for beneficiaries of nonimmigrant visa petitions as well as immigrant visa petitions. *Tenrec*, supra, Slip Op. at 10-11.

The other two district court decisions cited by defendants are *Costelo v. Chertoff*, 258 F.R.D. 600, 608-09 (C.D. Cal. 2009) and *Aranas v. Napolitano*, No. SACV 12-1137 CBM (AJWx), 2013 WL 12251153, at *3-4 (C.D. Cal. April 19, 2013). In *Costelo*, the court found that principal beneficiaries had standing, but that it was "less clear" whether derivative beneficiaries

had standing. *Id*. at 609. The *Costelo* court explained that the government had cited a regulation relating to administrative appeals and noted a Board of Immigration Appeals case (*Matter of Wang*, 25 I&N Dec. 28, 35 (BIA 2009)) and then stated, "The Court finds Plaintiff's reply brief inadequate to address these concerns" and declined to certify a broad class due to the lack of clarity and doubt surrounding the issue. This does not constitute an analysis of the *Lujan* factors as they relate to derivative beneficiaries, and the most that the *Costelo* decision can be relied upon for guidance is that an inadequate briefing on an issue from the party with the burden of proof may result in the court rightly declining to find in favor of that party. Additionally, the fact that an administrative regulation may limit who can file an administrative appeal of a visa petition denial (only the petitioner can), this does not foreclose judicial review of a visa petition denial by an Article III court because federal courts are not bound by administrative appeal regulations with respect to jurisdiction. *Tenrec*, supra, at 12. The court in *Aranas* relied on the *Blacher* line of cases, which Judge Simon in *Tenrec* found unpersuasive. See *Aranas*, *supra*, at *3-4. The court in *Aranas* does, however, mention as a factor one of the arguments made by defendants in this lawsuit, namely that Aranas' status is "wholly dependent on that of his mother" who was the principal beneficiary. *Id*.; See also Motion to Dismiss, ECF No. 13, p. 16. (arguing, "The court noted that the derivative beneficiary's application for a visa is wholly dependent on the principal beneficiary's claim and as such was insufficient to have standing.").

Regarding whether the derivative beneficiaries have a claim independent of their principal beneficiary parent, there are situations in which a derivative beneficiary has a claim independent of the principal beneficiary. For example, under 8 U.S.C. § 1154(l), "Surviving Relative Consideration for Certain Petitions and Applications," a derivative beneficiary spouse or child has the right to request adjudication of the petition and reaffirmation of an approved petition, even where the principal beneficiary has died prior to the principal being granted lawful permanent resident status. See 8 U.S.C. § 1154(l)(2)(C), "a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in 203(d)". Thus, a

derivative beneficiary child may continue the process of immigration despite the principal beneficiary's death. Such significant right of survivorship shows that the derivative beneficiary is not wholly dependent and is no mere onlooker. In addition, the Ninth Circuit has entertained the appeal of foreign widow beneficiary of a visa petition filed by her deceased U.S. citizen spouse, without requiring the petitioner to sue in order to establish standing. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

More importantly, however, defendants argument that derivative beneficiaries lack standing because they are dependent on the principal beneficiary immigrating fails under *Lujan* analysis. For example, it can also be said that a principal beneficiary is dependent upon the employer's sponsorship of the I-140 petition, but that has not prevented courts from finding that principal beneficiaries have standing to sue over concrete and particularized injuries to their rights under a visa petition filed on their behalf and for their benefit and the benefit of all family members listed on the petition as beneficiaries whether principal or derivative.[2] The Supreme Court in *Lujan* did not require a showing that each litigant have a claim wholly independent of the claims of others, but rather established a test that separated mere onlookers from those who have identifiable injuries that can be traced to the conduct of defendants and may be remedied by a court of law. Derivative beneficiaries have traceable injuries and have standing.

In addition to the Ninth Circuit's decision in *Abboud*, circuit courts have consistently found beneficiaries of visa petitions have standing by applying *Lujan* factors. *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015); Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec., 783 F.3d 156 (3d Cir. 2015); *Taneja v. Smith*, 795 F.2d 355, 358 n. 7 (4th Cir. 1986); *Patel v. USCIS*, 732 F.3d 633 (6th Cir. 2013); Musunuru v. Lynch, 831 F.3d 880 (7th Cir. 2016); *Kurapati v. U.S. Bureau of Citizenship & Immigration Servs*., 775 F.3d 1255 (11th Cir.

[2] Form I-140, found at www.uscis.gov asks for the name, date of birth, country of birth, and relationship of spouse and all children of the principal beneficiary, as well as information relating to whether the derivative will apply for adjustment of status or for a visa abroad, in Part 7 of the form. Thus they are specifically included as beneficiaries on this petition.

2014). Principal and derivative beneficiaries have standing based upon analysis of *Lujan* factors of injury in fact, causation, and redressability. The distinction between principal and derivative is meaningless for an analysis of standing. That the child must apply for a green card together with or after the parent, and be approved for a green card together with or after the parent, unless the parent dies (in which case the child has an independent right to continue), does not remove the injury in fact, nor the causation, nor the redressability of the injury. It is still true that the derivative beneficiary children are denied immigrant status, stripped of their place in line, and not permitted to remain in H-4 status in the U.S. together with their parent and their families, that this is caused by defendants use of a national origin based visa bulletin chart to calculate their age under CSPA, and that an order requiring defendants to use the worldwide chart would redress their injuries. Plaintiff beneficiaries, both principal and derivative have Article III standing.

II. Plaintiffs Have Zone-of-Interest Standing

Plaintiffs also satisfy zone of interest standing for their APA claims. The APA provides judicial review for those who have suffered a "legal wrong" or who have been "adversely affected or aggrieved by" agency action. 5 U.S.C. § 702. Under the APA, plaintiffs must establish that the claims fall within the relevant "zone of interests" that the statute was arguably intended to protect. *Lexmark Intern. v. Static Control*, 134 S.Ct. 1377, 1388, 572 U.S. __ , 188 L.Ed.2d 392 (2014). The test is not "especially demanding" and the "benefit of any doubt goes to the plaintiff" since the APA has "generous review provisions." *Lexmark*, 134 S.Ct. at 1389 (internal citations omitted). Plaintiffs are within the zone of interests that the statute was meant to protect.

The Child Status Protection Act, 8 U.S.C. § 1153(h) specifically protects child derivative beneficiaries and the age calculation for eligibility. The AC21 provision, § 104(c), specifically protects beneficiaries (without limiting it to just principal beneficiaries) of petitions filed in the employment based categories. Plaintiff derivative beneficiaries are not third parties, but rather

listed beneficiaries of the immigrant petitions filed on behalf of their parent, and they claim special protection under CSPA and under AC21. Plaintiffs are in the zone of interests that the statute is intended to protect.

III. Plaintiffs' claims are ripe for judicial review

Defendants argue that plaintiffs' claims are not ripe because they allegedly "depend on a series of future events occurring." Defendants claim that a visa must come available to the principal beneficiaries, the principal must apply, showing they are eligible and not inadmissible, and merit an exercise of discretion. Def. Mot. to Dismiss, ECF No. 13, p. 17. Plaintiffs claims, however, depend upon circumstances which have already occurred, and they are prevented from freezing their age under CSPA due to defendants' use of the national origin-based visa bulletin chart, prevented from retaining their priority date, and prevented from seeking H-4 extensions under AC21 § 104(c).

The Ninth Circuit has explained that, "[f]or a case to be ripe, it must present issues that are 'definite and concrete, not hypothetical or abstract.' [citation omitted]. Constitutional ripeness is often treated under the rubric of standing because 'ripeness coincides squarely with standing's injury in fact prong.'…For a plaintiff to meet the injury-in-fact prong of standing, the plaintiff must demonstrate 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017), quoting *Lujan*.

Plaintiff derivative beneficiaries have adequately plead that had defendants allowed them to use the worldwide visa bulletin dates to freeze their age, they would have had their ages frozen already. This is concrete and not hypothetical. Specifically, Plaintiff Nitheesha Nakka alleged her age would have been frozen at age 16 in February 2011, but instead she is considered by defendants to have aged out in April 2015 (FAC, ECF No. 10, ¶ 7); Plaintiff Ravi Vathsal Thodupunuri plead that his age would have been frozen at age 14 in March 2011, but instead he aged out in June 2018 (¶ 9); Plaintiff Girijesh Thodupunuri plead that his age would have been

frozen at age 10 in March 2011, but he will exceed 21 in March 2022 (¶ 10); Plaintiff Vishal Addagatla plead that his age would have been frozen in December 2011 but he will age out August 2020 (¶ 12); Plaintiff Sandeep Battula plead that his age would have been frozen in June 2013 at age 16 but he aged out in May 2018 just 8 days away from being eligible, and his father became a permanent resident along with his mother and younger sister (¶ 14); Plaintiff Pavani Peddada plead that her age would have been frozen at age 11 in December 2010 but instead will be considered to age out in October 2020 (¶ 16); Plaintiff Venkata Peddada plead that his age would have been frozen at age 14 in December 2010 but is considered to have aged out in March 2017 (¶ 17); Plaintiff Abigail Edwards plead that her age would have been frozen at age 14 in September 2013 but is considered to have aged out in December 2019, despite having been invited to apply for adjustment of status prior to that time and despite having filed an application to adjust status together with her mother. (¶ 19). These are concrete injuries which have occurred, and which are of a continuing nature to the present.

Defendants claim that only after the principal beneficiaries have filed for adjustment of status and received approval and then the derivative beneficiaries have filed adjustment of status applications can the agency engage in CSPA age calculations.[3] Def. Mot. to Dismiss, ECF No. 13, p. 17. Contrary to this assertion the CSPA age calculation is not complicated and relies only upon discrete variables all currently in factual existence, including the child's date of birth, the priority date of the I-140 petition, the number of days that the I-140 petition remained pending with USCIS, and the published visa bulletin chart cut off dates. Such calculations were plead for each plaintiff, using the national origin-based visa bulletin chart and the worldwide visa bulletin

[3] Defendants incorrectly state that "Only if the Plaintiff Principal Beneficiaries have applied for adjustment of status and has [sic] been approved, can the Plaintiff Derivative Beneficiaries seek adjustment of status as derivatives of their parents' petitions and only then can the agency engage in the age calculation of 8 U.S.C. § 1153(h)." Applications for adjustment of status for principals and derivatives can be filed at the same time. There is no requirement in the law or regulations for derivatives to wait for an approval of the principal's application before filing for adjustment of status. An example is Plaintiff Abigail Edwards who filed for adjustment of status concurrently with her mother Miriam.

chart. For purposes of plaintiffs' constitutional challenge to the unjust use of national origin-based charts, it is not required that the agency have adjudicated an application. In the case of plaintiffs Venkata Satya Venu Battula and his son Sandeep Battula, the father's application for a lawful permanent resident status was approved, but the son was not permitted to file an adjustment of status. FAC, ECF No. 10, ¶¶ 13-14. He is not required to engage in a futile application attempt to file an adjustment application to have a ripe claim. See *Matthews v. Diaz*, 426 U.S. 67, 76 (1976). Plaintiffs Abigail Edwards and her mother Miriam are likewise not required to receive a denial on their combined applications, because the CSPA calculation used by defendants is clear and all the variables are in factual existence. Further, plaintiffs' claims to continuing eligibility for H-4 extensions based on their favored status under AC21 § 104(c) are ripe because plaintiffs would be eligible now to file for H-4 extensions were it not for defendants' policies. They are not required to submit fruitless applications just to have them denied when defendants' policies are clear. Neither are plaintiffs required to violate immigration status by seeking a nonimmigrant H-4 extension (which can only be filed within 6 months of expiration) when such a filing, given the defendants' position, would surely be denied leaving them without legal status.[4] See *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (holding "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'"). If plaintiffs were required to file adjustment of status applications and/or H-4 extension applications and rely upon them they could be subject to potential civil penalties including detention, deportation, and loss of future eligibility for immigration benefits due to unlawful presence. This is not required. Plaintiffs plead adequately that they are injured by the national origin-based visa bulletin chart being used for CSPA age calculation and that they are denied

[4] USCIS processing times are often longer than 6 months. California Service Center quotes 10 to 10 months, and Vermont Service Center quotes 6 to 8 months. Filing at the earliest possible time in the 6-month window would not result in a decision before the current status expired, leaving the applicant without legal status before they could obtain judicial review.

equal protection afforded others from different national origins including ability to remain with their families legally and receive work authorization, despite their residence of long duration and favored status under AC21 § 104(c), and are treated less favorably than children who have never even been to the United States and are not provided favorable status under AC21 § 104(c).

IV. 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 are not ordinary immigrants. They are favored immigrants who are protected and 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 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. This entitles them to extensions, without limit, until their applications for adjustment of status have been "processed and a decision made thereon." *Id*. Plaintiffs were brought to the United States at an early age and have lived here for most of their lives (Plaintiff Nitheesha Nakka, age 4; Plaintiff Ravi Thodupunuri age 11 and his brother Girijesh Thodupunuri age 7; Plaintiff Vishal Addagatla age 8; Plaintiff Sandeep Battula age 6; Plaintiffs Pavani Peddada and her brother Venkata Peddada ages 6 and 11 respectively, and Plaintiff Abigail Edwards age 7. Despite the special AC21 legislation, and plaintiffs favored status under its 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. It is wholly irrational that these favored immigrants who have strong and lasting ties to this country are being treated less 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.

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 urge the court to adopt intermediate scrutiny and find that the discrimination based on national origin is not narrowly tailored to advance any important or compelling government interest.[5] As the Court is bound by precedent to apply rational basis, however, plaintiffs urge the court to find that defendants' use of the national origin-based visa bulletin chart to determine plaintiffs' ages under CSPA does not serve a legitimate government interest. Utilizing the national origin-based visa bulletin chart to determine the order in which an immigrant visa may be issued to different nationalities is a legitimate purpose, but using that same national origin-based visa bulletin chart instead of the worldwide chart to determine CSPA age does not.

Specifically, plaintiffs are given special status under AC21 § 104(c), permitting indefinite extension of H-4 status until plaintiffs applications for adjustment of status have been processed, and it is wholly irrational to extend their status for many years and at the end of those long years strip them of eligibility to immigrate with their families, strip them of their place in line, and deny them further extensions even though they have not in fact been permitted to have their

[5] There exists a valid rationale for extending intermediate scrutiny in the immigration context where the litigants have strong ties to the United States, are residents of long duration under legal authority sanctioned by Congress, and have spent most of their lives beginning at a young age in the United States. Such long-term lawful residents have heightened expectation that they will not be discriminated against based on national origin without some compelling government reason to do so. They have been educated in American schools and share the view that discrimination, particularly based on national origin, is to be avoided in the absence of important interests.

adjustment of status applications processed and a final decision issued.

In contrast, a child whose parent has a national origin in a country that is not subject to a per-country chart may immigrate at the age of 19 or 20 years old, not having ever been to the United States before, not having had any U.S. education, not speaking any English, and having no special status other than being fortuitous enough to be born to parents who are born elsewhere. This disproportionately impacts countries with large populations, while benefitting countries with small populations. These distinctions are wholly irrational and do not serve some legitimate government interest. For a discriminatory law to be upheld, the interest that the government has in discriminating on the basis of national origin must be legitimate.

As stated before, it is legitimate to discriminate between different nationalities in the immigration context where there is a good reason to do so, such as the per country limits which seek to avoid one country monopolizing all the visa numbers. But it is a different matter to utterly deny the opportunity to immigrate to children who are long term residents, protected by special legislation and thus even better situated than other immigrants who do not have such protections. The special treatment under AC21 § 104(c) makes a difference in this case.

The Ninth Circuit has 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). The Ninth Circuit has also 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.

Plaintiffs here are residents of long duration having arrived at a tender age. They have

enjoyed longstanding protection pursuant to special legislation which has permitted them to stay in the United States indefinitely until their adjustment of status applications are finally determined. No purpose would be served by giving them drastically less favorable treatment than a derivative child who at age 20 has never set foot on U.S. soil. There is no legitimate government interest in such disparate treatment. Plaintiffs' ties to this country are strong, due to their congressionally sanctioned residence of long duration, and their lengthy period of U.S. education during their formative years. The happenstance of a parent's national origin should not serve as the basis to deny important and life altering opportunities. Plaintiffs, based on their favored status under the statute and residence of long duration are entitled to be treated at least as favorably as those currently being assigned a CSPA age based on the worldwide visa bulletin chart and being able to immigrate with their families and stay together with them in the United States until their adjustment of status applications have been ruled upon.

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

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.[6] 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.

[6] 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.

Regarding the applied challenge, plaintiff Abigail Edwards filed her adjustment of status application using the Dates for Filing chart, and as of December 2019 fits squarely into the hole created by defendants' 2018 agency interpretation because the interpretation did not freeze her age based on the Dates for Filing chart and as of December 2019 she already reached age 21 under the agency's newly minted policy which relies upon the Dates for Final Action. 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 *Abbot Laboratories v. Garner*, 387 U.S. 136, 152 (1967). Plaintiff Edwards is threatened by impending denial of her properly filed adjustment of status application, threatened with recission of her valid Employment Authorization Document (EAD), and threatened with loss of legal status and banishment from the country where she has spent most of her life with her mother. This will certainly occur based on the PM in the immediate future if defendants' policy is not declared invalid and enjoined. Upon denial she will be abruptly without work authorization and immediately without legal status and deportable as her H-4 status has 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. She is 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. Plaintiff Edwards is a lawful immigrant of long residence in this country with strong ties to the United States and she suffers the threat to her status in this country based first upon her mother's national origin and second based on an arbitrary and capricious interpretation of the immigration law.

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 fixing 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[7]

[7] 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

See 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 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 plaintiff Abigail Edwards' case. 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

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discusses two hypothetical scenarios, one in which the applicant can remain eligible and the other (precisely Abigail's case) where "USCIS denies the application."

should similarly be frozen at that time using the same chart. Contrary to the clear language of this statutory scheme, however, USCIS has 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. Plaintiff Abigail Edwards' adjustment application was filed in January 2019 when the Dates for Filing chart was current but not the Final Action Date chart.[8] 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 January 2019, then surely an immigrant visa number also *became*

[8] 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 Exh. C for Worldwide and Exh. D for India. These charts can also be accessed at the bottom of the Visa Bulletin site.

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) 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 Plaintiff Edwards' as applied challenge.

VI. Conclusion

For the reasons given above, and based upon the written submissions of the parties, Defendants' Motion to Dismiss should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2020, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO MOTION TO DISMISS 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