Brent W. Renison, OSB No. 96475
E-mail: brent@entrylaw.com
Parrilli Renison LLC
610 SW Broadway Suite 505
Portland, OR 97205
Tel: (503) 597-7190
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

PLAINTIFFS' RESPONSE TO DEFENDANTS' SECOND MOTION TO DISMISS

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby respond to Defendants' Second Motion to Dismiss (ECF No. 36), 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 locking 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. Further, Defendants have issued a legislative rule in the form of the USCIS Policy Manual and DOS Foreign Affairs Manual which is subject to notice and comment rulemaking requirements and is

additionally arbitrary and capricious.

I. Plaintiff Derivative Beneficiaries have standing to sue

For all the reasons articulated in the Court's Findings and Recommendation (ECF No. 18) and Plaintiff's Response to Motion to Dismiss (ECF No. 14), Plaintiffs urge the court to find that Plaintiffs have established all three prongs of Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and have established their claims are ripe. Plaintiffs have clarified in the Second Amended Complaint that as far as those Plaintiffs who were unable to file adjustment of status applications are concerned, their applications would be "front desked." The calculation of CSPA age based on Defendants' challenged policies are not subject to chance, or subject to discretion, but readily determined when applying the Defendants' challenged policies. The same goes for Plaintiff Edwards' application for permanent resident status which was approved, but which is subject to recission. The government cannot be presumed to overlook their error forever, and one can easily predict that Defendants will pursue the rescission of Edwards' green card (placing her immediately in peril of unlawful status, subject to deportation) at any moment.

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 statutes were meant to protect.

Here, there are two statutes designed to protect Plaintiffs. The Child Status Protection

Act, 8 U.S.C. § 1153(h) specifically protects child derivative beneficiaries and the age calculation for eligibility. The American Competitiveness in the Twenty First Century Act of 2000, AC21, § 104(c), specifically protects beneficiaries (including derivative 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 both statutes are intended to protect.

III. 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*. The language of this statute, incorporating the "adjustment of status" process into the law is significant, showing that Plaintiffs are the intended beneficiaries of unlimited extensions of status up through the time

their green card has been processed. The AC21 statute, together with the CSPA statute, were intended to protect Plaintiffs during their journey to a green card.

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; 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.[1] 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

[1] 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.

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 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 wholly irrational 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 in the adjustment of status context.

The special treatment under AC21 § 104(c) makes a difference in this case. It goes to the heart of what is rational and what is not. 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.

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 and for the adjustment of status application to be decided upon. 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.

At issue here are two statutes not just one. While CSPA's goal was to protect children from aging out due to administrative delay, AC21's goal was to keep H-1B and H-4 families here indefinitely until the per country visa availability was rectified through a grant of lawful permanent resident status, and Plaintiffs' equal protection claims must be viewed from this special treatment under the law together with their extensive and Congressionally sanctioned residence of long duration in the United States.

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.

Congress provided Plaintiffs as beneficiaries of AC21 § 104(c) with favored status. Congress determined that they would extend the character and duration of their residence and ties to this country. It is wholly irrational to expect that they be treated far less favorably in an age calculation under CSPA than recent arrivals, based only upon their national origin.

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

Plaintiffs challenge the USCIS Policy Manual change to 7 USCIS-PM A.7 on applied and facial ground and the Department of State revision to 9 FAM 502.1-1(D)(4) on facial grounds.[2]

[2] 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.

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, 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 rescission of her lawful permanent resident status and threatened with loss of legal status and banishment from the country where she has spent most of her life with her mother. Plaintiff Pavani Peddada is threatened with impending denial of her properly filed adjustment of status application, loss of legal status and banishment from the country resulting in separation from her family. This will certainly occur based on the PM in the immediate future if defendants' policy is not declared invalid and enjoined. Upon rescission and denial Edwards and Peddada will be abruptly without work authorization and immediately without legal status and deportable as their 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. Edwards

and Peddada are not required to wait for rescission and denial and loss of these significant rights, incurring significant and long-lasting bars to admission, given the substantive rule change and the certainty of resulting adverse government action based on the PM. Plaintiffs Edwards and Peddada are lawful immigrants of long residence in this country with strong ties to the United States and they suffer the threat to their status in this country based first upon their parents' national origin and second based on an arbitrary and capricious interpretation of the immigration law.

Plaintiffs Abigail Edwards and Pavani Peddada do not complain merely about the years they have waited in line but claim that they are entitled to indefinite treatment as child derivatives under CSPA specifically because the agency determined their long wait in line had come up for an immigrant visa "immediately available" to them because they filed for adjustment of status under 8 U.S.C. § 1255(a) which requires an immigrant visa be immediately available. They complain that Defendants now want to rescind Plaintiffs' eligibility for CSPA age locking due to Defendants' interpretation of immigrant visa availability under CSPA which contravenes the plain language of the statutory scheme including CSPA but also the adjustment of status statute. CSPA was "enacted to provide relief to children who might 'age out' of their beneficiary status because of administrative delays." *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009). The administrative delay recognized under CSPA is the length of time between a petition being filed and being approved. 8 U.S.C. § 1153(h)(1)(B) (subtracting from a child's age the number of days during which the petition was pending). Included in this age calculation, however, is the critical "age locking" provision of 8 U.S.C. § 1153(h)(1)(A) which locks the child's age indefinitely on the first day of the month during which an immigrant visa "becomes available" for them. One of CSPA's core purposes, therefore, is to lock a child's age indefinitely when a visa is available. Plaintiffs' APA Claim for Relief turns upon the meaning of immigrant visa availability. Because Plaintiffs claim that Defendants have interpreted visa availability under CSPA in a way contrary to the unambiguous language of the statutory scheme, Plaintiffs are

within CSPA's zone of interests

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 mandating 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[3]

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 authority to deny an adjustment of status properly filed based on Dates for Filing is unprecedented and has never before been a part of any agency interpretation, prior to the challenged 2018 and 2019 agency guidance. 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 <u>immediately available</u> 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 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

[3] 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 based 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 Abigail's case) where "USCIS denies the application."

date has advanced beyond the child's parent's priority date.[4]

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, 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. Because the term "immediate" is understood in the temporal sense to mean without

[4] Defendants cite to the unpublished District Court decision from New York, *Lin Liu v. Smith*, --- F.Supp. 3d ---, 2021 WL 232890 (S.D.N.Y. Jan. 25, 2021) in support of their position the FAM is interpretive and not legislative. 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. There was no analysis in *Liu* 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. *Liu* is not persuasive.

any intervening time (in other words, instantly), it cannot mean that it would be available at some future indeterminate date months or years later. Defendants seek to insert a difference by using the word "actually" available in their brief. ECF No. 36, p. 32. But the term "actually" available is nowhere in the statute. Instead, when a person files adjustment of status they are required by statute to have a visa number immediately available, which means without an intervening period of time, or instant. That cannot also mean it becomes available months or years later.

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.[5] Plaintiff Pavani Peddada's adjustment of status application was filed in October 2020 when the Dates for Filing chart was current but not the Final Action Date chart. 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 available* to her at that time and not more than a year later. 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. The fact that the government may take months to "actually" grant them permanent resident status does not change the fact that they were considered to have an immediately available visa when the adjustment was filed, and when their CSPA age was under 21. Plaintiffs claim their ages were locked in at under 21 under CSPA when a visa became immediately available.

[5] 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.

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. It is also something that could not have before 2018 been done, because the USCIS Policy Manual (and later the DOS FAM) was the first time this new policy was announced and made mandatory for adjudicators to follow.

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.

Defendants argues that the USCIS PM and DOS FAM are not final agency action and thus not reviewable. ECF No. 36, p. 30. These published policies do have "direct and appreciable legal consequences" as required for an agency action to be final. *Bennet v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). There are "direct and appreciable legal consequences" implicated by the agency policies challenged here. The PM and FAM clearly state that age locking for CSPA age calculation purposes is to be based upon the Final Action Date chart and not the Dates for Filing chart. The practical and legal effect of this is that Plaintiffs and class members in their situation face denial (or in the case of Edwards, rescission).

The PM and FAM also do not leave the implementing adjudicator any freedom to exercise discretion to follow, or not to follow, the policy. *Gill v. U.S. Dept. of Justice*, 913 F.3d 1179, 1186 (9th Cir. 2019) (finding rule was not legislative "because it requires significant analyst discretion"). With the USCIS and DOS policies, the adjudicator is left with no choice but to deny CSPA age locking if the child's adjusted age is no longer under 21 when the Final Action Date chart shows the priority date is current, even though the child filed for adjustment of status based upon an immediately available visa number under the Dates for Filing chart. Defendants have nowhere claimed that Plaintiff Edwards was approved for lawful permanent resident status based on some adjudicatory discretion, and neither have they denied that according to agency guidance the approval was not in accordance with the guidance. Defendants have nowhere argued that an adjudicator will have discretion to approve Plaintiff Peddada's application, where she filed her adjustment of status application with her family in October 2020 but where her CSPA adjusted age was no longer under 21 when the Final Action Date came current this year. The reason is because adjudicators are not given discretion to make a different calculation of a person's CSPA age and their eligibility for CSPA age locking than the calculations specified in the PM and FAM. Should Plaintiffs Edwards and Peddada have their applications for permanent resident status rescinded and denied respectively they would surely be forced to precipitously leave the country in order to avoid the unlawful presence bars and

would face the same interpretation (harmonized between USCIS and DOS) with the FAM when forced to apply to return through the DOS' consular immigrant visa process. Both the USCIS' PM and the DOS' FAM sections leave no room for adjudicatory discretion and on the contrary spell out clearly what happens. These are legislative, not interpretive agency actions. As such, the agencies were required to go through notice and comment rulemaking and solicit input from the public.

Defendants admit that the USICS policy manual "must be followed by adjudicators" but also hint that there is some "discretion in making adjudicatory decisions." ECF No. 36, p. 30. Lest the Court be led to believe that adjudicators have discretion to disregard the specific CSPA calculations if they want, it is important to note that adjudicators only have discretion to excuse failure to seek to acquire permanent resident status within 1 year of visa availability.[6] USCIS adjudicators have the general ability to deny an adjustment of status application in discretion "even if the applicant meets all of the other statutory and regulatory requirements."[7] This does not work in the reverse, however, and if an applicant (according to application of the USCIS Policy Manual) does not meet a threshold statutory or regulatory requirement they cannot be granted adjustment of status in discretion. The USCIS Policy Manual states, "For discretionary benefits, there is never discretion to grant an immigration benefit if the benefit requestor has not first met all applicable threshold eligibility requirements."[8] CSPA age determination and age locking calculations are "threshold eligibility requirements," and are not a part of any

[6] See USCIS Policy Manual, Volume 7, Part A, Chapter 7. (https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7) last accessed June 21, 2021.

[7] See USCIS Policy Manual, Volume 7, Part B, Chapter 10, Adjustment of Status Applications Involving Discretion. (https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10) last accessed June 21, 2021. See also USCIS Policy Manual, Volume 1, Part E, Chapter 8, Discretionary Analysis. (https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8#S-C) last accessed June 21, 2021.

[8] USCIS Policy Manual, Volume 1, Part E, Chapter 8, Discretionary Analysis, Id. Note that Department of State has no discretion to deny an immigrant visa to an applicant who meets threshold eligibility requirements.

discretionary decision. Discretion is only exercised after the threshold CSPA age locking determination is made, and adjudicators have no discretion to make a different determination than by utilizing the mandates in the USCIS PM and DOS FAM. Defendants cannot claim otherwise. Therefore, because adjudicators have no discretion not to follow the policy of locking age for CSPA purposes only when the Final Action Date chart is current, final agency action under the APA is established.

V. Conclusion

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

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 June 21, 2021, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS' SECOND 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