UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NAGENDRA KUMAR NAKKA, NITHEESHA NAKKA, SRINIVAS THODUPUNURI, RAVI VATHSAL THODUPUNURI, GIRIJESH THODUPUNURI, RAJESHWAR ADDAGATLA, VISHAL ADDAGATLA, SATYA VENU BATTULA, SANDEEP BATTULA, SIVA PEDDADA, PAVANI PEDDADA, VENKATA PEDDADA, MIRIAM EDWARDS-BUDZADZIJA, ABIGAIL EDWARDS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF STATE,

Defendants.

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

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

FINDINGS

Plaintiffs in this putative class action are a group of Indian nationals who have enjoyed long-term residency in the United States as beneficiaries of temporary work visas and who have been seeking permanent residency in the United States through employment-based immigration visas. Plaintiffs' First Amended Complaint ("FAC") alleges a Fifth Amendment equal

protection claim (First Claim) and an Administrative Procedure Act ("APA") claim (Second Claim). FAC ¶¶ 55-82, ECF #10.

Defendants U.S. Citizenship and Immigration Services ("USCIS") and the U.S. Department of State ("DOS") have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. ECF #13. For the reasons discussed below, defendants' motion to dismiss should be denied to the extent they claim lack of subject matter jurisdiction, but granted on the basis that plaintiffs have failed to state a claim for relief.

I. Statutory Background

The Immigration and Nationality Act ("INA") establishes the multi-step process through which a limited number of immigrants may become lawful permanent residents ("LPRs")[1] through an employer-sponsored visa petition. *See generally Musunuru v. Lynch*, 831 F.3d 880, 882-83 (7th Cir. 2016) (describing the process); *Mehta v. United States Dep't of State*, 186 F. Supp. 3d 1146, 1149-50 (W.D. Wash. 2016) (same). An employer generally initiates the process on behalf of a noncitizen worker by applying to the Department of Labor ("DOL") for certification that the issuance of an employment-based visa and admission of the noncitizen worker will not adversely affect the American workforce. *See* 8 U.S.C. §§ 1153(b)(3)(c), 1182(a)(5)(A)(i). If DOL issues the labor certification, the employer then files Form I-140 Immigrant Petition for Alien Workers with USCIS to have the noncitizen worker classified into the appropriate employment preference category. *See* 8 U.S.C. §§ 1154(a)(1)(F), 1255(a)(2); 8 C.F.R. § 204.5(a). The INA establishes five employment preference categories based on

[1] LPRs are also known as a "green card" holders.

variables such as education and job skills: (1) priority workers; (2) professionals with advanced degrees or exceptional ability; (3) skilled workers and professionals; (4) special immigrants, including religious workers; and (5) foreign investors (commonly referred to as EB-1, EB-2, EB-3, EB-4, and EB-5, respectively). *See* 8 U.S.C. § 1153(b)(1)-(5). The noncitizen worker is regarded as the "beneficiary" of the I-140 visa petition. *See* 8 C.F.R. § 204.5.

If USCIS approves the I-140 petition, the visa beneficiary may apply to adjust his or her status to permanent resident once a visa becomes "immediately available" to the worker. 8 U.S.C. § 1255(a)(3); 8 C.F.R. § 245.2(a)(2). The INA imposes an annual limit of 140,000 employment-based visas that are allocated by employment category and subject to per-country limits. 8 U.S.C. §§ 1151(a)(2), 1152(a). The limited number of employment-based visas are issued to eligible workers as the visas become available for particular employment categories and in the order in which the workers' employers filed their I-140 petitions. 8 U.S.C. § 1153(e)(1). A visa beneficiary's 'place in line' is determined by the date on which the worker's employer filed its I-140 labor certification application, which is known as, the beneficiary's "priority date." 8 C.F.R. § 204.5(d).

To determine whether an immigrant visa is available, a visa beneficiary consults a monthly Visa Bulletin published by the DOS. 8 C.F.R. § 245.1(g); *Mehta*, 186 F. Supp. 3d at 1150. The Visa Bulletin is organized according to country of origin and visa preference category. *Id*. If there are sufficient visas available for all known applicants from a specific country and of a specific preference category, the "Worldwide" chart in the Visa Bulletin lists that combination as "current," and all applicants matching that combination may file an I-485 form regardless of their priority date. *Id*. If there are insufficient visas available, the Visa Bulletin publishes one or more country-specific charts, each with applicable cut-off dates, and

only those applicants with priority dates earlier than the cut-off may file for an adjustment of status. *Id*. Because India is a country with a large demand for employment-based immigrant visas, the Visa Bulletin contains a separate column for visa availability for Indian nationals pursuant to 8 U.S.C. § 1153(b).

Starting in September 2015, the DOS added to its monthly Visa Bulletin a second chart, dubbed "Dates for Filing Applications," and indicated USCIS would accept employment-based I-485 applications to adjust status based on the filing date as listed in the "Dates for Filing" chart, in addition to the dates listed in the "Final Action Dates" chart. *See Mehta*, 186 F. Supp. 3d at 1150-51. USCIS instructs potential applicants to "[c]heck the [State Department] Visa Bulletin" each month because "[i]t will explain" which chart to use to determine when applicants can file for adjustment of status. *Id.*

Once an immigrant visa becomes available, the visa beneficiary completes the final steps to LPR status by submitting to USCIS an I-485 Application to Register Permanent Residence or Adjust Status. *See* 8 U.S.C. § 1255(a); 8 C.F.R. § 204.5(n)(1). In accordance with 8 U.S.C. § 1255, USCIS determines whether to "adjust" the noncitizen's status to that of a lawful permanent resident entitled to work within the United States; if the USCIS so determines, the visa beneficiary receives a "green card." *See United States v. Ryan-Webster*, 353 F.3d 353, 356 (4th Cir. 2003).

A child of a visa beneficiary also may apply for LPR status as the visa beneficiary's derivative family member. *See* 8 U.S.C. § 1153(d); 22 C.F.R. § 42.32(a)-(d). A child applicant is afforded "the same order of consideration" as his or her parent visa beneficiary. 8 U.S.C. § 1153(d). Congress has defined "child," for immigration purposes, as an unmarried person under twenty-one years of age. 8 U.S.C. § 1101(b)(1). If the son or daughter of a principal

beneficiary turns 21 before a visa becomes available to his or her parent, he or she may no longer be regarded as a "child" and may lose status as a derivative beneficiary. *Id.*

The Child Status Protection Act ("CSPA"), Pub L. No. 107-208, 116 Stat. 927 (2002), amended the INA and protects derivative beneficiaries from "aging out" if they turn 21 due to delays caused by government processing time. *See* 8 U.S.C. § 1153(h). The CSPA does not protect derivative beneficiaries from aging out while they wait for a visa to become available to them. *See generally Matter of Wang*, 25 I. & N. Dec. 28, 29 (BIA 2009) (extensively discussing the legislative history and purposes of the CSPA). Under the CSPA, a derivative beneficiary's age is "locked in" on the date a visa becomes available to the visa beneficiary parent and the amount of time government spent processing application materials is subtracted from that age to produce the "CSPA age" of the derivative beneficiary. *See* 8 U.S.C. § 1153(h). In May 2018, USCIS issued an update to its Policy Manual stating that the Final Action Dates chart, and not the Dates for Filing chart, would be used to determine when a child's age is frozen under the CSPA. 7 USCIS-PM A.7.

II. Factual Allegations in the First Amended Complaint

The plaintiffs are six Indian nationals who came to the United States through employer-sponsored H-1B temporary work visas between 1998 and 2009 ("Principal Beneficiaries") [2] and the sons and daughters who accompanied them ("Derivative Beneficiaries") as H-4 temporary visa holders. FAC ¶¶ 6-19, ECF #10. Since their arrival, Principal Beneficiaries have been

[2] "Employers in the United States may petition for a nonimmigrant work visa under the H-1B program when they seek to employ foreign workers in specialty occupations that require theoretical or practical application of a body of highly specialized knowledge, including but not limited to architecture, engineering, medicine, law, and other fields that require the attainment of a bachelor's degree or higher." *Tenrec. Inc. v. United States Citizenship & Immigration Servs.*, No. 3:16-CV-995-SI, 2016 WL 5346095, at *1 (D. Or. Sept. 22, 2016).

permitted to extend their temporary work visas past the normal six-year limit pursuant to the American Competitiveness in the Twenty-First Century Act ("AC21"), and Derivative Beneficiaries have been eligible to extend their H-4 visas until they turn 21 years of age.[3] *See id.* As long-term residents of the United States, Derivative Beneficiaries have received most if not all of their formal education in United States schools and have established close ties to this country. *See id.*

Shortly after their arrival, each Principal Beneficiary was sponsored by an employer through an I-140 employment-based immigrant visa petition, and each Principal Beneficiary received a "priority date" between May 2008 and December 2011. *See id.* Since then, plaintiffs have waited for immigrant visas to become available and, while they have waited, seven of the eight Derivative Beneficiaries have turned 21. *See id.* Plaintiffs aver that "it is not within the realm of possibility" that Principal Beneficiary Srinivas Thodupunuri's priority date will become "current" in the Visa Bulletin for India before his now under-21 son, Derivative Beneficiary Girijesh Thodupunuri, turns 21. *Id.* at ¶ 10.

In 2018, when a visa became available to Principal Beneficiary Venkata Satya Venu Battula, he applied for and received LPR. *See id.* ¶ 13-14. His son, Derivative Beneficiary Sandeep Battula, turned 21 before the visa became available and did not submit an I-485 application with his father. *See id.* In 2019, Principal Beneficiary Miriam Edwards-Buzadzija and her daughter, Derivative Beneficiary Abigail Edwards, each submitted an I-485 application

[3] Temporary noncitizen workers are typically allowed to remain in H-1B status in the U.S. for a maximum of six years. 8 U.S.C. § 1184(g)(4). To address the disruptions to American businesses caused by the six-year limitation, Congress passed the AC21 and included a provision that allows automatic extensions to EB-1, EB-2, and EB-3 beneficiaries until their I-485 Adjustment to Status Applications can be processed by USCIS. 8 U.S.C. § 1184 note (2000) (One-Time Protection Under Per Country Ceiling); Pub. L. 106-313, § 104(c) (Oct. 17, 2000); S. Rep. 106-260, 22 (2000).

to adjust status when Edwards-Buzadzija's priority date became current on the Dates for Filing Chart. *See id.* ¶ 18-19. To date, their applications remain pending with USCIS and, while they were pending, Derivative Beneficiary Abigail Edwards turned 21. *See id.*

III. Rule 12(b)(1)—Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction." *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir. 2017) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). "Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Rainero v. Archon Corp.*, 844 F.3d 832, 841 (9th Cir. 2016). The court must dismiss any case over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

Defendants may challenge subject matter jurisdiction either through a "facial attack" or through a "factual attack." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A facial attack "'accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction.'" *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 614 (9th Cir. 2016) (quoting *Leite*, 749 F.3d at 1121). In contrast, a "factual attack 'contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings.'" *Id.* (emphasis omitted).

"The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Id.*

A. Article III Standing

Defendants contend that Derivative Beneficiaries have no standing because they lack an independent interest in the underlying visa petitions. Mot. Dismiss 14-16, ECF #13.

Article III of the United States Constitution provides that federal courts may only adjudicate "cases" and "controversies." U.S. Const. Art. III, § 2. The analysis for standing under Article III "focuses on whether the plaintiff is the proper party to bring this suit." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). It is well settled that to establish constitutional standing, "'[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The central inquiry in a constitutional standing analysis is whether the plaintiff has "'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Doran v. 7-Eleven, Inc*., 524 F.3d 1034, 1044 (9th Cir. 2008) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)).

The Ninth Circuit has not yet analyzed whether a derivative beneficiary of an employment-based immigration visa has standing under Article III to challenge the age calculation provisions of the CSPA. However, in *Abboud v. I.N.S.*, 140 F.3d 843 (9th Cir. 1998), *superseded by statute on other grounds as recognized in Spencer Enters., Inc. v. United States*, 345 F.3d 683, 692 n.5 (9th Cir. 2003), the Ninth Circuit rejected the argument that visa petitioners alone, and not visa beneficiaries, have a protected interest in the underlying visa for purposes of Article III standing, explaining 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.'" *Id*. (citation omitted). Further, the court found that the plaintiff, who was the beneficiary of a family-based petition, "lost a significant opportunity to receive an immigrant visa when the INS denied the Relative Petition." *Id.* at 847. Ultimately, the court held that the plaintiff's "lost opportunity represent[ed] a concrete injury" to the plaintiff and was "traceable to the INS's conduct and remediable by a favorable decision in this case." *Id*.

Recently, in *Hsiao v. Scalia*, 821 F. App'x 680, 682-83 (9th Cir. 2020), the Ninth Circuit revisited *Abboud* and reaffirmed its standing analysis. There, the plaintiff challenged the DOL's denial of a labor certification submitted on her behalf, and the court found that the DOL denial "place[d] her immigration status at stake" and had "concrete and lasting effects" on the plaintiff. *Id*. After noting that the plaintiff "lost a significant opportunity to proceed in the . . . immigration process when the DOL denied the application," the court concluded, "[a]s in *Abboud*, Hsiao's lost opportunity represents a concrete injury to her that is traceable to the DOL's denial and is remediable by a favorable decision in this case." *Id.* at 682.[4]

[4] Other circuits have also relied on *Abboud's* "lost opportunity" language in finding standing for visa beneficiaries under Article III. In *Kurapati v. U.S. Citizenship & Immigration Servs.*, 775 F.3d 1255 (11th Cir. 2014), for example, the Eleventh Circuit applied the "tripartite test" for standing and held that the visa beneficiaries had "suffered an injury-in-fact from USCIS's revocation of the I-140 visa petitions—namely, the deprivation of an opportunity to apply for adjustment of status—which is fairly traceable to USCIS and would be redressable by a favorable decision." *Id*. The court's standing analysis in *Kurapati* cited the Sixth Circuit's decision in *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633 (6th Cir. 2013). In *Patel*, the court found that the beneficiary of an employment-based visa had "'lost a significant opportunity' to receive an immigrant visa," and concluded that "that lost opportunity is itself a concrete injury" for purposes of Article III standing. *Id*. at 638 (citing *Abboud*, 140 F.3d at 847); *see also Mantena v. Johnson*, 809 F.3d 721, 731 (2d Cir. 2015) (finding that the agency's contested action had "ended [plaintiff's] multiyear attempt to secure a green card," which constituted a lost opportunity and sufficient grounds for Article III standing).

In this case, as in *Abboud* and *Hsiao*, Derivative Beneficiaries' claims stem from lost opportunities they have suffered as a result of defendants' policies and practices. These plaintiffs are, or have been, long-standing holders of H-4 temporary visas who arrived in the U.S. as children and have waited for many years to apply for permanent residence with their respective parents. *See* FAC ¶¶ 6-19, ECF #10. Despite waiting for years in the U.S. as lawful residents, they have "aged out" (or will soon) pursuant to defendants' policies and practices. Resp. Mot. Dismiss 2, ECF #14. This means that Derivative Beneficiaries have been (or will soon be) "denied eligibility to immigrate together," "stripped of their place in line" for a priority date, and deprived of their "ability to extend their H-4 status." *Id*. Simply put, Derivative Beneficiaries are, much like the plaintiff in *Hsiao*, "prevented from taking the next step in the process toward obtaining permanent residency through an employment visa and ultimately applying for citizenship." *Hsiao*, 821 F App'x at 682. Thus, plaintiffs have satisfied the injury and causation prongs of the standing rubric under *Lujan*, 504 U.S. at 555, 560-61.

Derivative Beneficiaries also satisfy the redressability requirement. They seek declaratory and injunctive relief that would, if granted, restore their eligibility to apply for visa extensions and permanent residence with their respective families using their original priority dates. FAC ¶¶ 24-25; *cf. Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 161-62 (3d Cir. 2015) (noting that questions of redressability in the context of "multi-part proceedings" should be based on the "availability of relief at a given step," and finding that judicial action could redress the plaintiff's injuries by restoring his ability to proceed with the steps toward a green card); *Patel*, 732 F.3d at 638 (finding that the visa beneficiary's injury was redressable because the relief sought would have restored his opportunity to seek an immigrant visa).

In sum, Derivative Beneficiaries have sufficiently alleged that they suffered an injury-in-fact caused by defendants that would be redressed if they were to prevail in this action. Derivative Beneficiaries therefore satisfy all three prongs of standing and have standing under Article III. [5]

B. Ripeness

Defendants next argue that plaintiffs' claims should be dismissed due to lack of subject matter jurisdiction because their claims are not ripe, *i.e.*, they depend on a series of "contingent future events that may not occur." Mot. Dismiss 18, ECF #13 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). Specifically, defendants contend that plaintiffs' claims cannot be ripe until, at the very least, immigrant visas become available to Principal Beneficiaries and Derivative Beneficiaries submit applications for LPR because it is only then that USCIS will engage in a formal calculation of their ages. *Id.*

"Ripeness is an Article III doctrine designed to ensure that courts adjudicate live cases or controversies and do not issue advisory opinions [or] declare rights in hypothetical cases."

[5] Defendants also argue that Derivative Beneficiaries lack third-party standing. Mot. Dismiss 14-15, ECF #13 (citing *Aranas v. Napolitano*, No. SACV121137CBMAJWX, 2013 WL 12251153, at *3 (C.D. Cal. Apr. 19, 2013)). *Aranas* relied on that argument in denying standing to a beneficiary an I-485 Adjustment of Status application, *see id.*, but that argument is inapposite here. The doctrine of third-party standing is "a prudential limitation on the ability of third parties to challenge actions that injure others who are not before the court." *United States v. TDC Management Corp.*, 263 F. Supp. 3d 257, 272 (D.D.C. 2017) (citation omitted)); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("A litigant must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties."). In this case, Derivative Beneficiaries plainly allege that they—not a third party—have suffered specific and individual harms to their own interests by losing their own eligibility for permanent residency. *See generally* FAC, ECF #10. This is the kind of particularized injury the Supreme Court found sufficient for plaintiff to have standing in another case defendants cite, *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 952 (1984) (holding that plaintiff had standing because he suffered "both threatened and actual injury as a result of the statute"). Mot. Dismiss 14, ECF #13.

Bishop Paiute Tribe v. Inyo Cty., 863 F.3d 1144, 1153 (9th Cir. 2017) (citation and internal quotation marks omitted). "For a case to be ripe, it must present issues that are 'definite and concrete, not hypothetical or abstract.'" *Id*. "Constitutional ripeness is often treated under the rubric of standing because ripeness coincides squarely with standing's injury in fact prong." *Id*. (citation and internal quotation marks omitted). However, the constitutional inquiry of ripeness is distinct from the standing analysis in that it "is peculiarly a question of timing," *Thomas v. Anchorage Civil Rights Comm'n*, 220 F.3d. 1134, 1138 (9th Cir. 2002), and asks whether the "impact of the regulations upon [a plaintiff] is sufficiently direct and immediate as to render the issue appropriate for judicial review *at this stage*." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 (1977) (emphasis added). A challenge to a regulation will be deemed ripe "where a regulation requires an immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance." *Id.* at 153.

In the Ninth Circuit, ripeness is also analyzed through application of the so-called "firm prediction rule" in cases where parties challenge the legality of particular "benefit-conferring rule[s]" and do so before the parties actually apply for those benefits or before an agency renders a final decision on an application for such benefits. *See Montana Environmental Information Center v. Stone-Manning*, 766 F.3d 1184, 1190 (9th Cir. 2014) (explaining the "firm prediction" rule's origins in *Reno v. Catholic Social Services*, 509 U.S. 43, 69 (1993) (O'Connor, J., concurring) and citing the Ninth Circuit's decision to adopt and apply the rule in *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1436 (9th Cir. 1996)).

In *Catholic Social Services*, a group of noncitizens brought a pre-application challenge against Immigration and Naturalization Service ("INS")[6] regulations that established criteria for lawful permanent residence. *See* 509 U.S. at 45. The Supreme Court found that a class member's claim "would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him," which could involve the INS either denying applications based on the contested criteria or "front-desking" applications, *i.e.*, refusing to accept applications for processing based on the contested criteria. *Id*. at 59, 61-62. In either situation, plaintiffs would be impacted by the regulations at issue in a "particularly concrete manner" that would render their claims ripe. *Id.* at 60-63. In a concurrence, Justice O'Connor wrote, "I cannot agree with the Court that ripeness will never obtain until the plaintiff actually applies for the benefit[,]" *id*. at 71, and instead advocated an alternative approach as more consistent with Supreme Court precedent: "[I]f the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the [contested] rule—then there may well be a justiciable controversy[.]" *Id*. at 69.

The Ninth Circuit adopted Justice O'Connor's "firm prediction" rule in *Freedom to Travel*, a pre-application case brought by parties who challenged restrictions on travel to Cuba, noting, "[b]ecause the majority [in *Catholic Social Services*] did not expressly disapprove of O'Connor's 'firm prediction rule,' we are free to adopt it in this Circuit and do so now." 82 F.3d at 1436. The court then found it could "firmly predict that [plaintiff's] application would be

[6] The Homeland Security Act of 2002 Pub. L. No. 107–296, § 471; 116 Stat. 2135, 2205; 6 U.S.C. § 291, abolished the INS and placed its functions under three new agencies: USCIS, Immigration and Customs Enforcement, and Customs and Border Patrol—all within the newly created Department of Homeland Security. *See Abiodun v. Gonzales*, 461 F.3d 1210, 1212 n.1 (10th Cir. 2006) (explaining the history of the HSA and describing the specific functions of the new agencies it created).

denied" based on plaintiffs' failure to meet the stated criteria, and held, in turn, that their claims were ripe. *Id.* The Ninth Circuit reached a similar conclusion in another pre-application case, *Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor (ALF-CIO) v. INS*, 306 F.3d 842 (9th Cir. 2002), finding the claims of particular plaintiffs ripe based on the court's ability to "firmly predict that the INS will eventually deny these applications.'" *Id.* at 863. The Court also noted that the claims of other plaintiffs would be ripe under *Catholic Social Services*, 509 U.S. at 61-62, if those parties could show that their applications had been "front-desked" by the agency or that such a policy was a "substantial cause" of their failure to submit applications. *Immigrant Assistance Project*, 306 F.3d at 865-66.

Here, plaintiffs' claims satisfy the standards for ripeness. First, plaintiffs allege that their claims "depend on circumstances that have already occurred," as Derivative Beneficiaries have been and continue to be "prevented from freezing their age under CSPA, . . . from retaining their priority date, and . . . from seeking H-4 extensions[.]" Resp. Mot. Dismiss 8, ECF# 14. These "lost opportunities" to receive the immigration benefits they seek are akin to those recognized by circuit courts as sufficiently concrete for purposes of standing under Article III,[7] and the analysis for standing and ripeness "is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'"[8] *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (citation omitted). Moreover, these are not the kind of contingent or future-oriented harms that the Ninth Circuit has found insufficiently "concrete" to be considered ripe. *See, e.g.*, *Clark*

[7] *See Hsiao*, 821 F. App'x at 682-83, *Mantena*, 809 F.3d at 721; *Kurapati*, 775 F.3d at 1255; *Patel*, 732 F.3d at 633; *Abboud*, 140 F.3d at 843.

[8] *See also* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 172 (1987) (noting that "measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing").

v. City of Seattle, 899 F.3d 802, 813 (9th Cir. 2018) (finding the claimed impacts of a new ordinance "wholly speculative" as they hinged on a "prospective chain of events that have not yet occurred, and may never occur[]"); *see also, e.g.*, *Thomas*, 220 F.3d at 1141 (noting the plaintiffs' inability to show they had been impacted let alone harmed by the challenged law and finding the dispute "purely hypothetical and the injury . . . speculative").

Plaintiffs also allege that they could be considered to be in "unlawful presence" and "subject to potential civil penalties including detention, deportation, and loss of future eligibility for immigrant benefits" if they sought visa extensions or lawful permanent residence as ineligible applicants. Resp. Mot. Dismiss 10, ECF #14. These purported penalties are similar to the fines and penalties that were the focus of the Supreme Court's ripeness analysis in *Abbott Laboratories* when it found the plaintiffs had been impacted by the contested regulation "in a concrete way." 387 U.S. at 148.

In addition, plaintiffs allege that a Derivative Beneficiary who had aged out before his parent's priority date became current "was not permitted to file an adjustment of status" with the rest of his family and "was prevented from immigrating with his family." FAC ¶ 14, ECF #10. Although plaintiffs' use of passive voice here makes it unclear how, exactly, that beneficiary was unable to file an I-485 Application to Adjust Status, plaintiffs' claims demonstrate that Derivative Beneficiaries are similarly situated to the type of plaintiff described in *Catholic Social Services* who had taken whatever "affirmative steps . . . he could take before the INS blocked his path" through the practice of "front-desking." *Catholic Social Services*, 509 U.S. at 59.

Lastly, this court has no trouble predicting that USCIS would deny any applications for LPR submitted by Derivative Beneficiaries, including the one currently pending for Derivative Beneficiary Edwards. *See* FAC ¶¶ 19, ECF #10. After all, there is no dispute between the

parties concerning the key eligibility factors: (1) the respective priority dates of Principal Beneficiaries; (2) the respective ages of Derivative Beneficiaries; (3) the worldwide and per-country limits on employment-based immigrant visas; (4) the high demand for employment-based visas for Indian nationals; (5) the CSPA statutory scheme that ties the age calculation of a would-be beneficiary to a principal beneficiary's priority date; and (6) the fact that Derivative Beneficiaries turned 21 (or will soon) before a visa became or will become available on the Final Action Date chart for their respective parents. Presented with these facts, it is all but certain that USCIS would deny LPR applications from Derivative Beneficiaries based on them "aging out" just as the agency would deny any application that failed to meet clear statutory criteria. Thus, the firm prediction rule also supports ripeness in this case. *Cf.*, *Safer Chemicals, Healthy Families v. U.S. Envtl. Prot. Agency*, 943 F.3d 397, 415 (9th Cir. 2019) (applying the firm prediction rule and finding it "very uncertain whether [the agency] ever plans to do what Petitioners fear," and finding the purported impacts of the regulation "too speculative at this time to establish Article III jurisdiction") (citation omitted).

Accepting plaintiff's allegations as true and drawing all reasonable inferences in plaintiffs' favor, *Leite*, 749 F.3d at 1121, plaintiffs' claims are ripe. For all of the foregoing reasons, the court has subject matter jurisdiction over this matter.

IV. Rule 12(b)(6)—Failure to State a Claim

Defendants alternatively contend that plaintiff's claims should be dismissed because they fail to state claims under Rule 12(b)(6). Mot. Dismiss 18-29, ECF #13.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate where a complaint fails to state a cognizable legal theory or alleges insufficient facts under a cognizable

legal theory. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). A complaint may be dismissed pursuant to Rule 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A court may dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff does not 'fall within the zone of interests protected by the law invoked[.]'" *Huynh v. Bracamontes*, No. 5:16-CV-01457-HRL, 2016 WL 3683048, at *1 (N.D. Cal. July 12, 2016) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 120-21 (2014)).

In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett–Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012); *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

A. Equal Protection (First Claim)

Plaintiffs' first claim alleges that the CSPA age calculation provisions violate the equal protection principles of the Fifth Amendment because they treat Derivative Beneficiaries less favorably than other derivative child immigrants "based solely on national origin of the parent of the child." FAC ¶ 45, ECF #10. Plaintiffs, emphasizing their long-term residence in the United States, claim that Derivative Beneficiaries' inability to "lock in" their ages has the "wholly irrational" effect of denying CSPA protections to them while extending the protections to beneficiaries who lack close ties to the United States but have the "fortuitous circumstance" of being from a country with shorter waiting periods for an immigration visa. *Id.* at ¶ 64.

Defendants argue that plaintiffs have failed to allege facts to support a claim that the CSPA statutory scheme has violated their equal protection rights. Mot. Dismiss 18-19, ECF #13. In particular, defendants argue that the CSPA age calculation provisions in question do not

discriminate against plaintiffs based on national origin[9] and are, in all events, rationally related to legitimate policy choices regarding visa allocation. *Id.* at 19-25.

Equal protection principles apply to the federal government through the Due Process Clause of the Fifth Amendment to the Constitution. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Due Process Clause of the Fifth Amendment "assures every person the equal protection of the laws, 'which is essentially a direction that all persons similarly situated should be treated alike.'" *Philips v. Perry*, 106 F3d 1420, 1424-25 (9th Cir. 1997) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)). An "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The Equal Protection Clause of the Fourteenth Amendment "'requires that all persons subject to . . . legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in liabilities imposed.'" *Engquist v. Or.* Dept. of Agric., 553 U.S. 59, 602 (2008) (citation omitted).

Laws that do not burden a protected class or infringe on a constitutionally protected fundamental right are subject to rational basis review. *Romer v. Evans*, 517 U.S. 620, 631 (1996). It is well established that Congress has "exceptionally broad power to determine which classes of aliens may lawfully enter the country[,]" *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), and that "[d]istinctions between different classes of aliens in the immigration context are subject to

[9] Plaintiffs allege that defendants have violated their equal protection rights through "unequal CSPA age determinations based solely on national origin," FAC ¶ 45, ECF #10, but it is clear from the plain text of the statute that national origin is not a factor in defendants' age calculations under the CSPA. *See* 8 U.S.C. § 1153(h). Beneficiaries from countries with a high number of visa applicants may age out before a visa becomes available to them, but that loss of CSPA benefits turns on the neutral laws of supply and demand, not national origin.

rational basis review." [10] *Tista v. Holder*, 722 F.3d 1122, 1126-27 (9th Cir. 2013) (citation omitted). The Supreme Court, in emphasizing the "need for special judicial deference to congressional policy choices in the immigration context," has also remarked that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 793 (citations omitted). Thus, "[a] legislative classification must be wholly irrational to violate equal protection [and] [c]hallengers have the burden to negate every conceivable basis which might support a legislative classification whether or not the basis has a foundation in the record." *Tista*, 722 F.3d at 1127.

Here, it is not hard to find a conceivable basis for Congress extending CSPA protections to derivative beneficiaries of employment-based visa petitions only at the point a visa becomes available to the principal beneficiary and no sooner. First, plaintiffs themselves concede there is a "legitimate government interest" in establishing per country limits that "serve to apportion immigrant visas in a fashion that ensures immigrant visa availability in a given fiscal year to all nationalities." FAC ¶ 62, ECF #10. Plaintiffs also acknowledge that defendants' use of the visa bulletin chart "to determine the order in which an immigrant visa may be issued to different nationalities is a legitimate purpose," Resp. Mot. Dismiss 13, ECF #14, and go even further in stating, "it is legitimate to discriminate between different nationalities in the immigration context where there is good reason to do so, such as the per country limits which seek to avoid one country monopolizing all the visa numbers." *Id.*

[10] Plaintiffs urge this court to adopt "intermediate scrutiny" (while also conceding that case law dictates rational basis review). Resp. Mot. Dismiss 12, ECF#14. The court declines to do so. As the Ninth Circuit has made clear, "[d]istinctions between different classes of aliens in the immigration context . . . must be upheld if they are rationally related to a legitimate government purpose." *Tista*, 722 F.3d at 1126-27 (9th Cir. 2013) (quoting *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008)).

Yet plaintiffs claim that the CSPA was enacted "to prevent minor children from 'aging out' when they reach 21 years of age and losing eligibility to immigrate together with their parents," FAC ¶ 1, ECF #10, and insist that it is "wholly irrational" for defendants to deny CSPA benefits to Derivative Beneficiaries after they have waited for many years for a visa but extend them to individuals who have waited less time and who lack the kind of close ties to the United States that Derivative Beneficiaries enjoy. *Id.* ¶ 62. Contrary to plaintiffs' central claim, however, there is "no indication in the legislative history that the CSPA was intended to provide relief to all children who age-out." *Jieling Zhong v. Novak*, No. CIV.A. 08-4597, 2010 WL 3302962, at *9 (D.N.J. Aug. 18, 2010). Rather, it is well established that Congress enacted the CSPA "only to cure age-outs that occur as a result of administrative delay in visa petition processing." *Matter of Wang*, 25 I. & N. Dec. at 29; *see also Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 50 (2014) (deferring to the BIA's interpretation of CSPA and finding "no clear evidence [the CSPA] was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates").

Further, as the Supreme Court has pointed out, "a derivative's fate is tied to the principal's: if the principal cannot enter the country, neither can her children." *Scialabba*, 573 U.S. at 50 (citing 8 U.S.C. § 1153(d); 22 C.F.R. § 40.1(a)). Indeed, here, Derivative Beneficiaries assert no independent legal entitlement to permanent residency in the United States and acknowledge that their hoped-for I-485 applications have hinged entirely on the eligibility of their respective parents as principal beneficiaries of employment-based visa petitions. FAC ¶¶ 6-19, ECF #10. Given that the CSPA's main purpose is to address and "cure" the unfair effects of long processing delays—and not delays caused by visa availability—and given the dependent nature of a derivative beneficiary's immigration status, plaintiffs cannot successfully argue that

Congress lacked legitimate or rational purposes in creating a CSPA statutory scheme that calculates the age of a derivative beneficiary of an employment-based visa petition based on the date a visa becomes available to the principal beneficiary.

The legitimacy of Congress's CSPA policy choices is underscored by *Tista*, 722 F.3d at 1122. In *Tista*, the plaintiff brought an equal protection claim against the CSPA, arguing that it was irrational for Congress to extend CSPA protections to family members of some classes of asylum seekers but not those seeking relief under the Nicaragua Adjustment and Central American Relief Act ("NACARA"). *Id.* The Ninth Circuit pointed out various rationales that could explain the applicability of the CSPA to some but not all asylum seekers—including humanitarian concerns—and found, ultimately, "[b]ecause Congress could have believed any or all of these premises (and, no doubt, others) without being 'wholly irrational,' it is not for us to declare that 'it would have been more reasonable for Congress to select somewhat different requirements.'" *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 83 (1976)). The Fourth Circuit reached the same result in an identical equal protection challenge to the CSPA and concluded, "[w]e cannot say that Congress's decision to deny CSPA protection to [the Haitian Refugee Immigration Fairness Act] applicants lacks any rational basis." *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009); *see also Ramirez v. Holder*, 590 F. App'x 780, 785 (10th Cir. 2014) (noting Congress's "plenary authority over immigration matters" and holding that the denial of CSPA benefits to NACARA applicants did not violate the Fifth Amendment).

Here, the context in which the CSPA age formula provisions at issue operate—Congress's plenary authority over immigration policy, the INA-imposed worldwide quotas on employment-based immigrant visas, the DOS's duty to allocate those visas according to per-country caps, and the limited universe of beneficiaries Congress intended to protect through the

CSPA—provides ample rationale for Congress's decision to withhold CSPA protections from derivative beneficiaries who age out before an employment visa becomes available to the principal beneficiary named in the visa. Like the courts in *Tista*, *Midi*, and *Ramirez*, this court acknowledges plaintiffs' concerns about family separation, but finds, ultimately, that the lines drawn by the INA between eligible and ineligible derivative beneficiaries to be "just one of many drawn by Congress pursuant to its determination to provide some but not all families with relief from various immigration restrictions." *Fiallo*, 430 U.S. at 794. Because plaintiffs have not met their burden under rational basis review to "negate every conceivable basis" behind the CSPA age calculation rules, *Tista*, 722 F.3d at 1127, they fail to state a claim for equal protection on which relief can be granted.

B. APA (Second Claim)

Plaintiffs' second claim for Relief alleges that the USCIS Policy Manual constitutes arbitrary and capricious agency action that violates the APA. FAC ¶¶ 70-82, ECF #10. Defendants argue that plaintiffs have failed to state a colorable claim because the Policy Manual does not constitute final agency action as required under 5 U.S.C. § 704, or, in the alternative, is an interpretive rule and not subject to notice and comment requirements. Mot. Dismiss 25-29, ECF #13.

To bring a statutory cause of action, plaintiffs must demonstrate that they are within the "zone of interests" that Congress intended to protect when it promulgated the law in question. *See Sierra Club v. Trump*, 963 F.3d 874, 893 (9th Cir. 2020) (noting that the "zone of interests test limits which plaintiffs can invoke statutorily created causes of action"). While the zone of interests test has been traditionally part of a "prudential standing" analysis, that misnomer was clarified and corrected in *Lexmark*, 572 U.S. 118. There, the Supreme Court noted that "[t]he

modern 'zone of interests' formulation . . . applies to all statutorily created causes of action," and asks whether "'this particular class of persons ha[s] a right to sue under this substantive statute.'" *Id.* at 129 (citation omitted). To determine whether a plaintiff falls within the zone of interests protected by a specific statutory provision, a court must "apply traditional principles of statutory interpretation." *Id.* at 128. A plaintiff who fails to establish that a particular claim falls within the zone of interests created by a given statute "will face dismissal of that claim [under Rule 12(b)(6)] due to the plaintiff's failure to state a claim upon which relief can be granted, not due to any concerns of prudential standing." *Nat'l Rifle Ass'n of Am. v. Ackerman McQueen, Inc.*, No. 3:19-CV-2074-G, 2020 WL 5526548, at *4 (N.D. Tex. Sept. 14, 2020).

When a plaintiff brings an APA claim against a federal agency, "zone of interest" "is defined by 'the statute that [the plaintiff] says was violated,' rather than the APA itself." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 128 (2d Cir. 2020) (citation omitted); *see also East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767-68 (9th Cir. 2018)). The zone-of-interests test is not "especially demanding" in the APA context, *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (internal quotation marks omitted), but "it is not toothless" and requires that a plaintiff show "more than a marginal relationship to the statutory purposes." *Moya v. U.S. Dept. of Homeland Sec.*, 975 F.3d 120, 2020 WL 5523213, at *8 (2d Cir. Sept. 15, 2020).

Plaintiffs allege in general terms that the CSPA applies to them, but they fail to plead specific facts that show they are the kind of parties whose interests the CSPA was specifically intended to protect. As discussed above, it is well established that Congress passed the CSPA to "prevent an alien from 'aging out' because of—but only because of—bureaucratic delays: the time Government officials spend reviewing (or getting around to reviewing) paperwork at what

we have called the front and back ends of the immigration process." *Scialabba*, 573 U.S. at 53. Derivative Beneficiaries in this action have aged out (or may soon) not because of government processing time but solely because of the years they have waited for an immigrant visa to become available to their respective parents. Thus, plaintiffs are not within the zone of interests Congress intended to protect in passing the CSPA. Indeed, the legislative history of the CSPA makes it clear that Congress had no intention "to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line" nor "to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." *Matter of Wang*, 25 I. & N. at 29. Instead, Congress enacted the CSPA "to provide relief for children who 'age-out' of dependent status due to agency processing delays." *Midi*, 566 F.3d at 134; *see also Padash v. I.N.S.*, 358 F.3d 1161, 1174 (9th Cir. 2004) ("Congress had but one goal in passing the Child Status Protection Act, an affirmative one—to override the arbitrariness of statutory age-out provisions that resulted in young immigrants losing opportunities, to which they were entitled, *because of administrative delays*.") (emphasis added).

Like the Supreme Court in *Scialabba* and the Board of Immigration Appeals in *Matter of Wang*, this court recognizes the difficulties families face when the children of principal beneficiaries age out of certain types of visa eligibility due to long waiting periods and a finite supply of immigration visas. In determining whether plaintiffs are within the zone of interests Congress intended to protect with the CSPA, however, courts "do not ask whether in our judgment Congress *should* have authorized [the plaintiffs'] suit, but whether Congress in fact did so." *Lexmark*, 572 U.S. at 128 (emphasis in original). Because Congress did not intend to provide a cause of action for derivative beneficiaries of I-140 visa petitions who lose their ability

to "lock in" their ages due to extended waiting periods for a visa, plaintiffs' second claim fails to state a claim.

Plaintiffs have not asked for leave to amend or explained how they would cure the defects described above. Where amendment would be futile, dismissal with prejudice is the appropriate remedy. *See Abboud*, 140 F.3d at 847 (upholding the district court's dismissal of plaintiff's claims under Rule 12(b)(1) for failure to state a claim despite finding that plaintiff had standing to bring his claims); *Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th Cir. 1990) (per curiam) (finding that courts "may affirm the district court's dismissal only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations") (citation and internal quotation marks omitted). Thus, unless plaintiffs explain how they can cure these defects through an amended complaint, dismissal should be with prejudice.

RECOMMENDATIONS

Defendants' motion to dismiss (ECF #13) should be DENIED IN PART to the extent they claim lack of subject matter jurisdiction, but GRANTED IN PART on the basis that plaintiffs have failed to state a claim for relief. Unless plaintiffs show how the defects in their complaint can be cured through amendment, this case should be dismissed with prejudice.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Monday, November 16, 2020. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED November 2, 2020.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge