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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

Nagendra Kumar NAKKA et al.,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES et al.,

Defendants.

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

**MOTION TO DISMISS**

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**REGULATIONS**

## I. CERTIFICATION PURSUANT TO LR 7-1

In compliance with LR 7-1, undersigned counsel for the United States certifies that he conferred with Plaintiffs' counsel in good faith regarding this motion, and Plaintiffs' counsel stated that he intends to oppose it.

## II. MOTION

Defendants move to dismiss Plaintiffs for lack of subject matter jurisdiction based on lack of standing, because the case is not yet ripe, and because Plaintiffs failed to state a claim upon which relief may be granted. Defendants also move to dismiss all of Plaintiffs' claims for failure to state a claim. Defendants seek an order dismissing all claims with prejudice and entering judgment in Defendants' favor.

## III. INTRODUCTION

The Immigration and Nationality Act ("INA") balances various policy goals. It allows some alien nonimmigrant workers to work in the United States temporarily and apply for adjustment of status to permanent residence based on employment-based immigrant visas without affecting their nonimmigrant status. It also allows these workers' spouse and minor children under 21 years of age to immigrate as derivative beneficiaries. Even if these children turn 21 years of age while waiting to immigrate, the amendments made to the INA by the Child Status Protection Act ("CSPA") permit *some* of these derivative beneficiaries to immigrate as derivative beneficiaries.

However, the INA also imposes limits on the number of immigrant visas available for family-based and employment-based preference categories, as well as the number of aliens from any single country who obtain immigrant visas in these preference categories in a given year. Only seven percent of immigrant visas available per category can be allocated to nationals of a

single country, and two percent of visas to nationals of a dependent area of another country. If the demand from a particular country exceeds that limit, then the INA provides rules for how to allocate immigrant visas to those aliens. Because demand for employment-based immigrant visas is so high for intending immigrants from India, the Visa Bulletin chart for Final Action Dates for Employment-Based Preference Cases contains a separate column for visa availability for Indian nationals pursuant to 8 U.S.C. § 1153(b).

In addition, there are significant limits to the relief provided by the CSPA to those derivative beneficiaries who turn 21 years of age while waiting to immigrate as a derivative beneficiary. The CSPA statutory scheme contemplates that certain applicants will continue to age out. Under the CSPA, a derivative beneficiary's age may be adjusted by determining the age of the beneficiary at the time a visa becomes available to the principal beneficiary and subtracting the time it took the government to adjudicate the visa petition. If the derivative beneficiary's age is still over 21 years old even after being adjusted under this calculation, they would no longer qualify as a derivative beneficiary. The government consults the Final Action Date chart of Visa Bulletin of the Department of State to determine the date an immigrant visa becomes available. The Visa Bulletin also contains a Dates for Filing chart so that some applicants can choose (but not be required) to begin the process for applying for adjustment of status before their immigrant visa becomes available under the Final Action Date chart.

Plaintiffs are five Indian nationals who are the beneficiaries of employment-based immigrant visa petitions ("Plaintiff Principal Beneficiaries")[1] and their adult children who allege

[1] The Plaintiff Principal Beneficiaries are Nagendra Kumar Nakka, Srinivas Thodupunuri, Rajeshwar Addagatla, Venkata Satya Venu Battula, Siva Beddada, and Miriam Edwards-Budzadzija.

to be derivative beneficiaries of their parents' visa petitions ("Plaintiff Derivative Beneficiaries").[2] Plaintiffs allege that Defendants' reliance on the Indian nationals chart violates the equal protection guarantees of the Due Process of the Fifth Amendment. They request that the government calculate the age of Plaintiff Derivative Beneficiaries using the worldwide chart of the Visa Bulletin as opposed to the chart applicable to Indian nationals. Plaintiffs also contend that the USCIS Policy Manual, which explains the use of the Final Action Date chart in calculating age, is arbitrary and capricious. Plaintiffs reason that USCIS should not use the Final Action Date chart of the Visa Bulletin, which reflects actual availability of a visa, and instead it must consult the Dates for Filing chart, which does not reflect actual availability but instead provides as to when applicants may choose to begin the application process.

This Court should dismiss Plaintiff Derivative Beneficiaries from the lawsuit because derivative beneficiaries lack standing as they have no cognizable legal interest in a visa petition. Derivative beneficiaries have no standalone right to an employment-based visa; only their parents and their parents' employers have a cognizable legal interest in the visa petition. Plaintiffs' claims are also not ripe because they are not seeking review of a final agency decision denying their applications for adjustment of status.

The Court should also dismiss this lawsuit because Plaintiffs fail to state a claim that a relief can be granted. Defendants' age calculation is consistent with the statutory scheme and is supported by a rational basis. Defendants' reliance on the Indian national chart of the Visa Bulletin is consistent with the statutory scheme that imposes limits on visas per category and per country of origin. The statutory scheme is consistent with the rational government interests of

[2] The Plaintiff Derivative Beneficiaries are Nitheesha Nakka, Ravi Vathsal Thodupunuri, Girijesh Thodupunuri, Vishal Addagatla, Sandeep Battula, Pavani Peddada, Venkata Peddada, and Abigail Edwards.

making visas available to nationals of all countries on equal footing, regulating the national labor market, promoting diversity among migrants, and promoting foreign relations. Consulting the Indian nationals chart of the Visa Bulletin as opposed to the worldwide chart is rationally related to these purposes. Furthermore, the Court should reject Plaintiffs' challenge to the USCIS Policy Manual's reliance on the Final Action Date chart for two reasons. First, the USCIS Policy Manual is not final agency action under the Administrative Procedure Act ("APA"). And even if the USCIS Policy Manual were subject to review, the Policy Manual's explanation of how to calculate age under the CSPA and the role of the Final Action Date chart in that calculation is consistent with the statutory and regulatory requirements. The Court should therefore dismiss Plaintiff's complaint.

## IV. STATEMENT OF THE CASE

### A. Statutory background governing adjustment of status

To understand Plaintiffs' allegations, it is important to understand the process by which an alien beneficiary of an employment-based immigrant visa may become a permanent resident through employment, and how that alien's minor children may also obtain permanent resident status as a derivative of the principal beneficiary. As a general rule, the Attorney General may, in his discretion, adjust the status of an alien to that of a permanent resident if "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a). Critical in this case is the requirement for an immigrant visa. As will be discussed below, aliens and their derivative beneficiaries may obtain an immigrant visa subject to worldwide limits on the number of visas available imposed by Congress.

**1. Employment-based immigrant classifications and derivative beneficiaries**

Employment-based immigrant classifications are divided into five preference categories based on factors such as education, skills, and qualifications required for the job. 8 U.S.C. § 1153(d). These categories are:

| Category | Definition | Citation |
|---|---|---|
| EB-1 | Priority Workers | 8 U.S.C. § 1153(b)(1) |
| EB-2 | Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability | 8 U.S.C. § 1153(b)(2) |
| EB-3 | Skilled Workers, Professionals, and Other Workers | 8 U.S.C. § 1153(b)(3) |
| EB-4 | Certain Special Immigrants | 8 U.S.C. § 1153(b)(4) |
| EB-5 | Employment Creation | 8 U.S.C. § 1153(b)(5) |

Relevant to this case are EB-2 and EB-3 classifications because these are the categories under which Plaintiff Beneficiaries seek permanent residence.[3] To apply for permanent residence based on an EB-2 or EB-3 immigrant petition, the beneficiary generally must have a U.S. employer apply for a labor certification with the United States Department of Labor ("DOL") on behalf of an alien beneficiary.[4] 8 U.S.C. §§ 1153(b)(3)(C), 1182(a)(5)(A). Once DOL approves the labor certification, the employer applies for an immigrant visa petition with USCIS by filing Form I-140, Immigrant Petition for Alien Workers, accompanied by the labor certification. 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5(c). If the employer meets its burden of proof for an immigrant visa petition in the relevant employment-based preference category,

[3] Plaintiffs allege in their complaint that they represent a class of applicants seeking adjustment of status as either EB-1, EB-2, and EB-3. Compl. ¶ 44. However, none of the Principal Beneficiaries Plaintiffs are EB-1 applicants. *See* Compl. ¶¶ 6, 8, 11, 15 (EB-2 beneficiaries), ¶¶ 13, 18 (EB-3 beneficiaries).

[4] An exception to the labor certification exists for some EB-2 beneficiaries who can obtain a national interest waiver. 8 U.S.C. § 1153(b)(2)(B)(i). The EB-2 Plaintiffs do not allege that they sought or obtained a national interest waiver. Compl. ¶¶ 6, 8, 11, 15.

USCIS approves the I-140 petition. *See Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 940 (S.D. Cal. 2015) (describing burden on employer); 8 C.F.R. § 204.5(g)-(m) (describing type of evidence that may support an employment-based visa petition).

Being the beneficiary of an approved Form I-140 petition does not necessarily mean that the beneficiary is immediately eligible for an immigrant visa or that the beneficiary may apply for permanent residence. Instead, the approved Form I-140 petition is given a priority date and classified in the appropriate category depending on the visa category and country of origin of the beneficiary. 8 C.F.R. § 204.5(d). This is because Congress imposes statutory limits on the number of employment-based visas available each year.[5] *See* 8 U.S.C. § 1151(d) (listing annual limit in employment-based immigrant visas). For most EB-2 and EB-3 immigrant visa petitions (those requiring labor certifications certified by DOL), the priority date is the date DOL accepted a labor certification application for processing. 8 C.F.R. § 204.5(d). The beneficiary cannot seek to become a permanent resident until an immigrant visa becomes available in the appropriate category based on the priority date. 8 U.S.C. §§ 1181(a), 1255(a)(3); 8 C.F.R. § 145.1(a), (g)(1).

The statute imposes annual limits on visas available per employment-based immigrant visa category at 140,000 plus the number of unused visas as calculated by a formula set at 8 U.S.C. § 1151(d)(2). *See* 8 U.S.C. § 1151(d). Each employment category in turn is allocated a specific percentage of the annual limit. 8 U.S.C. § 1153(b)(1), (2)(A), (3)(A)-(B), (4), (5)(A), (5)(B)(i); *Metha v. United States Dep't of State*, 186 F. Supp. 3d 1146, 1149 (W.D. Wash. 2016). Only seven percent of visa available per category can be allocated to nationals of a single

[5] Congress also imposed statutory limits on the number of visas available for some family-based categories. *See* 8 U.S.C. § 1151(c).

country and two percent of visas to nationals of a dependent area of another country. 8 U.S.C. § 1152(a)(2); 22 C.F.R. § 40.1(f); *Metha*, 186 F. Supp. 3d at 1149.

As a result of the congressionally imposed limits on visas, demand for some employment-based immigrant visas exceeds the number of available visas. *Metha*, 186 F. Supp. 3d at 1149-50. When that happens, the Department of State considers a category "oversubscribed" and imposes a cutoff date. *Id.* at 1150. If the beneficiary's priority date is earlier than the cutoff date, then a visa may be available and the beneficiary may apply for an immigrant visa or, if present in the United States, apply for adjustment of status. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 48 (2014); *Metha*, 186, F. Supp. 3d at 1150; *Li v. Renaud*, 654 F.3d 376, 378 (2d Cir. 2011); 8 U.S.C. 1255(a). The Department of State determines the cutoff date based on, among other things, reports from consular officers abroad and the Department of Homeland Security about applications for visas and for adjustment of status. 8 C.F.R. § 42.51; *Metha*, 186 F. Supp. 3d at 1149. The amount of time the beneficiary must wait to apply for adjustment of status depends on supply and demand for visas within a given category, and some beneficiaries may wait years before a visa in a given preference category becomes available. *Scialabba*, 573 U.S. at 50; *Li*, 654 F.3d at 378.

The Department of State publishes a "Visa Bulletin" every month that reports the priority dates that are current within each preference category and per country of chargeability. *See* 8 C.F.R. § 245.1(g)(1); 22 C.F.R. § 42.51(b). The Visa Bulletin publishes a "Final Action Dates" chart that shows if a visa in a category is "current," i.e. available regardless of priority date, and if not current, it indicates the priority date for which a visa is available. *Metha*, 186 F. Supp. 3d

at 1150. The Visa Bulletin for March 2020[6] (when the amended complaint was filed) had the following information regarding employment-based visa availability in the EB-2 and EB-3 visa categories:

| **Employment-based** | **All Chargeability Areas Except Those Listed** | **China (mainland born)** | **El Salvador Guatemala Honduras** | **India** | **Mexico** | **Philippines** | **Vietnam** |
|---|---|---|---|---|---|---|---|
| EB-2 | Current | 15AUG15 | Current | 22MAY09 | Current | Current | Current |
| EB-3 Skilled Workers and Professionals | 01JAN17 | 22MAR16 | 01JAN17 | 15JAN09 | 01JAN17 | 01JAN17 | 01JAN17 |
| EB-3 Other Workers | 01JAN17 | 01JUN08 | 01JAN17 | 15JAN09 | 01JAN17 | 01JAN17 | 01JAN17 |

This Visa Bulletin indicates that demand for employment-based immigrant visas from certain categories by nationals from mainland China, El Salvador, Guatemala, Honduras, India, Mexico, the Philippines, and Vietnam exceeds the statutory limits on visas available per country of nationality.

In addition to the Final Action Date chart, the Visa Bulletin of the Department of State publishes a "Dates for Filing" chart. USCIS advises the public each month if they can rely on the Dates for Filing chart to file for adjustment of status with USCIS that month. 7 USCIS Policy Manual A.7.F.4.[7] In the USCIS Policy Manual, USCIS explains that the Dates for Filing chart was added to the Visa Bulletin on October 2015. *Id.*

**2. Derivative Beneficiaries and the Child Status Protection Act ("CSPA")**

The beneficiary's spouse and minor children under the age of 21 are given "the same status, and the same order of consideration" as the principal beneficiary. 8 U.S.C. §§ 1101(b)(1)

[6] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-march-2020.html.
[7] The USCIS Policy Manual is available at https://www.uscis.gov/policy-manual.

(defining "child" as an unmarried person under 21 years of age), 1153(d). This means that these s beneficiaries may immigrate at the same time, in the same visa category, and with the same priority date as the principal beneficiary. *Feng Wang v. Pompeo*, 354 F. Supp. 3d 13, 22 (D.D.C. 2018). Derivative beneficiaries do not generally have an independent basis to obtain permanent resident status outside of their relationship to the parent. Therefore, an immigrant visa becomes available to the derivative beneficiary only when an immigrant visa becomes available to the parent as the principal beneficiary based on their visa category and country of origin. *See Scialabba*, 573 U.S. at 48 ("when a visa becomes available for the principal, one becomes available for her spouse and minor children too."). However, if the derivative beneficiary child turned 21 years while waiting for an employment-based visa to become available to the principal beneficiary, the child would age out and no longer be considered a derivative beneficiary. *See id.* at 45.

In 2002, Congress passed the CSPA to protect certain beneficiaries who were minors when the petitions were filed but aged-out because of administrative processing delays (i.e., the time it took the agency to adjudicate the petition and adjustment application). *See* H.R. REP. 107-45. For derivative beneficiaries, the CSPA provided a rule now found at 8 U.S.C. § 1153(h), captioned "Rules for determining whether certain aliens are children." Under section 1153(h), the statutory age of a derivative beneficiary is calculated by reducing "the age of the alien on . . . the date on which an immigrant visa number became available for the alien's parent" by "the number of days in the period during which the applicable [immigrant] petition was pending [adjudication with USCIS]." *Id.* § 1153(h)(1). Section 1153(h)(1) also requires that the derivative beneficiary seek to acquire LPR status "within one year of such [visa] availability" in order to benefit from the "statutory age" calculation. *Id.* The Visa Bulletin fulfills the role of

determining when the visa becomes available. In applying the age calculation provision at section 1153(h), the agencies look at the Visa Bulletin to see if a visa is available. *See Scialabba*, 573 U.S. at 48-49. If a visa is available for the principal beneficiary, then the agencies will determine the age of the derivative beneficiary using the date that visa became available. *Id.* While the applicant needs to seek to acquire within one year of the visa becoming available, 8 U.S.C. § 1153(h), USCIS will consider the applicant to have met the requirement if the applicant files using the Dates for Filing chart. 7 USCIS Policy Manual A.7.G.2.

**3. American Competitiveness in the Twenty-First Century Act of 2000**

The wait for an employment-based visa affected some United States employers and their employees who were already living and working in the United States. This included workers present in the United States on H-1B nonimmigrant visas who were also waiting for an employment-based visa to become available.[8] The period of authorized admission into the United States for H-1B workers is generally limited to six years. 8 U.S.C. § 1184(g)(4). H-1B workers can be sponsored for employment-based immigrant visas but may have to wait more than six years before a visa becomes available if subject to longer wait times due to the per country limit on immigrant visas.

On October 17, 2000, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") to address issues pertaining to H-1B nonimmigrant visas.

[8] The INA provides for the classification of qualified temporary worker ("nonimmigrant") aliens who are coming to the United States to perform services for a sponsoring employer in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see Caremax, Inc. v. Holder*, 40 F. Supp. 3d 1182, 1185-86 (N.D. Cal. 2014) (discussing requirements for an H-1B visa). These aliens are classified as "H-1B" nonimmigrants. The "H-1B" designation derives from the section of the INA providing for this category of temporary workers, namely, 8 U.S.C. § 1101(a)(15)(H)(i)(b). (emphasis added). "Nonimmigrants" are aliens who are admitted to the United States for a temporary period of time for a specific purpose, *e.g.*, to visit, study or work. *See* 8 U.S.C. § 1101(a)(15).

Pub. L. No. 106-313, 114 Stat. 1251 (2000). Under section 104(c) of AC21, Congress provided an exception to the general rule that the period of authorized admission under an H-1B visa cannot exceed six years. AC21 § 104(c). Congress allowed for extensions of H-1B nonimmigrant visas beyond the six-year limitation for H-1B nonimmigrant workers who are beneficiaries of EB-1, EB-2, and EB-3 visa petitions but are unable to adjust their status to permanent residence because of the per country limitations. *Id*.

The spouse and children ofH-1B nonimmigrant workers are eligible for H-4 nonimmigrant status. 8 U.S.C. § 1101(a)(15)(H) (stating that visa is available to "the alien spouse and minor children of [an H-1B worker] if accompanying him or following to join him."). The H-4 status of derivatives may also be extended in accordance with AC21. 8 C.F.R. § 214.2(h)(9)(iv). The children, however, would lose H-4 derivative status once they turn 21 years because they would no longer be considered a "child." *See* 8 U.S.C. § 1101(b)(1) (defining "child" as an unmarried person under 21 years of age). Neither the CSPA nor AC21 make any special provisions relating to derivatives who cease to be H-4 derivatives after turning 21 years.

**B. Plaintiffs' Claims[9]**

Plaintiffs are five Indian national principal beneficiaries of employment-based immigrant visa petitions who are present in the United States on H-1B non-immigrant visas and their derivative children beneficiaries who are or were present in the United States as H-4 derivative beneficiaries of their parents' H-1B visas and who expect to seek immigrant visas as derivative beneficiaries of their parent's visa petitions. Am. Compl. ¶¶ 6-17.

Plaintiff Narendra Kumar Nakka is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition with a priority date of February 1, 2011. Am.

[9] Unless stated otherwise, the factual statement is based on Plaintiffs' allegations.

Compl. ¶ 6. His daughter, Plaintiff Nithessha Nakka, was admitted to the United States at age 4 as an H-4 derivative of her father's H-1B non-immigrant visa. Am. Compl. ¶ 7.

Plaintiff Shrinivas Thodupunuri is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition. Am. Compl. ¶ 8. His two sons, Ravi and Girijesh Thodupunuri, were admitted as H-4 derivatives of their father's H-1B visa. Am. Compl.¶¶ 9-10.

Plaintiff Rajeswar Addagatla is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition with a priority date of December 16, 2011. Am. Compl. ¶ 11. His son, Vishal Addagatla, was admitted to the United States as an H-4 derivative beneficiary but is now in the United States as a student on an F-1 student visa. Am. Compl ¶ 12.

Plaintiff Venkata Satya Venu Battula was present in the United States on an H-1B visa and was the principal beneficiary of an EB-3 visa petition with a priority date of May 9, 2008. Am. Compl. ¶ 13. His son, Sandeep Battula, was admitted to the United States as an H-4 derivative beneficiary. Am. Compl. ¶ 13. On February 2019, Plaintiff Venkata Battula adjusted his status to that of a permanent resident. *Id.* Following adjustment of status, Plaintiff Venkata Battula filed a Form I-130 Petition for Alien Relative on behalf of his son Sandeep Battula as the adult son of a permanent resident. Am. Compl. ¶ 13.

Plaintiff Siva Peddada is present in the United States on an H-1B visa and is the principal beneficiary of an EB-2 visa petition with a priority date of December 7, 2010. Am. Compl. ¶ 15. His two children, Pavani and Venkata Peddada, were admitted to the United States as H-4 derivative beneficiaries. Am. Compl. ¶¶ 16-17.

Plaintiff Miriam Edwards-Buzadzija is present in the United States on an H-1B visa and is the principal beneficiary of an EB-3 visa petition with a priority date of October 6, 2009. Am. Compl. ¶ 18. Her daughter, Abigail Edwards, was admitted to the United States as an H-4

derivative beneficiary. Am. Compl. ¶ 19. Miriam Edwards-Buzadzjia applied for adjustment of status in January 2019 under the Dates for Filing chart. *Id.* Her daughter, Abigail Edwards, also filed for adjustment of status as the derivative beneficiary of her mother's application. *Id.* The Edwards do not allege that their applications have been adjudicated.

On December 27, 2019, Plaintiffs filed their Complaint. *See generally* Compl. Plaintiffs amended their Complaint on March 19, 2020. *See generally* Am. Compl. Plaintiffs do not allege that the Plaintiff Derivative Beneficiaries were denied adjustment of status because they aged out. Instead, they contend that if and when Plaintiff Derivative Beneficiaries apply for adjustment of status (or in the case of Abigail Edwards when USCIS renders a decision on her application), they would have aged out under the CSPA. Am. Compl. ¶¶ 6-19. They contend that reliance on the India chart of the Visa Bulletin instead of the worldwide chart in order to calculate the Derivative Beneficiaries' ages under the CSPA violates the Equal Protection guarantees of the Due Process Clause of the Fifth Amendment. Am. Compl. ¶¶ 55-69. They also contend that USCIS' reliance on the Final Action Date chart instead of the Dates for Filing chart of the Visa Bulletin violates the APA. Am. Compl. ¶¶ 70-82.

## V. LEGAL STANDARD

### A. Federal Rule of Civil Procedure 12(b)(1) Standard

Federal district courts are courts of limited jurisdiction. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005). Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move to dismiss claims for lack of subject-matter jurisdiction. A facial challenge asserts that the complaint, on its face, fails to allege facts that would invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The party asserting jurisdiction bears the burden of establishing that it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d

770, 778-79 (9th Cir. 2000). A court may dismiss a complaint under Rule 12(b)(1) on an APA claim if the complaint does not challenge final agency action. *See Rattlesnake Corp. v. EPA*, 509 F.3d 1095, (9th Cir. 2007) (upholding dismissal of APA lawsuit under Rule 12(b)(1) for lack of final agency action).

**B. Federal Rule of Civil Procedure 12(b)(6) Standard**

A defendant may move a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Naffe v. Frey*, 789 F.3d 1030, 1035 (9th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the plaintiff is liable for the alleged misconduct." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). While a court "must accept as true all of the allegations contained in a complaint," this tenet is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Courts have granted motions to dismiss of Equal Protection claims and of claims seeking review under the APA under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *Herguan Univ. v. ICE*, 258 F. Supp. 3d 1050, 1064-74 (N.D. Cal. 2017).

## VI. ARGUMENT

**A. Derivative Beneficiaries have no standing to sue.**

A plaintiff must first meet the jurisdictional element of standing before seeking injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). At a constitutional minimum, standing requires an injury-in-fact that is traceable to the opposing party and is redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A party normally "cannot rest his claim to relief on the legal rights or interests of third parties." *Sec'y of*

*State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quotation marks omitted)). A litigant may only assert the constitutional rights of a third party if there is "some hindrance to the third party's ability to protect his or her own interests" and there is a close relation between the litigant and third party. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). This is because "third parties themselves usually will be the best proponents of their rights." *Miller v. Albright*, 523 U.S. 420, 446 (1998) (O'Connor, J., concurring in the judgment) (internal citations and quotations marks omitted).

Plaintiff Derivative Beneficiaries have no standing to sue because they cannot assert their independent right or interest on an employment-based visa petition.[10] Plaintiff Derivative Beneficiaries have no cognizable legal interest in a visa petition. The petitioning employer petitions for the alien principal beneficiary and the principal beneficiary seeks permanent residence based on the employer's petition. 8 U.S.C. §§ 1153(b)(3)(C), 1154(a)(1)(F), 1181(a), 1182(a)(5)(A) 1255(a)(3). The interest of a derivative beneficiary is not independent to that of a principal beneficiary; "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)). The derivative beneficiary cannot file an administrative appeal of the denial of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). Indeed, there is no provision that allows the derivative beneficiary to obtain permanent resident status if the principal beneficiary of an employment-based visa petition does not obtain permanent residence. Plaintiff Derivative

[10] Defendants maintain that beneficiaries of visa petition, whether principal derivative or derivative beneficiary, lack standing to sue in connection to a visa petition and that only the petitioner may sue. *See Pai v. USCIS*, 810 F. Supp. 2d 102, 111-12 (D.D.C. 2011) (collecting cases). However, Defendants recognize that Ninth Circuit precedent provide standing to the principal beneficiary to sue in connection to a visa petition. *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998).

Beneficiaries have no standing to sue and therefore they should be dismissed from this lawsuit.

Accordingly, courts that have reviewed the standing of derivative beneficiaries have declined to find standing because a derivative beneficiary lacks a legal interest in the underlying visa petition. For example, in a class action suit involving the CSPA, the court refused to certify a class that included derivative beneficiaries. *Costelo v. Chertoff*, 258 F.R.D. 600, 608-09 (C.D. Cal. 2009). The *Costelo* plaintiffs attempted to certify a class that included derivative beneficiaries of visa petitions who aged out. *Id.* at 604. The court found that there was doubt as to whether the derivative beneficiaries had standing to sue. *Id.* at 608 (citing 8 C.F.R. § 103.3(a)(1)(iii)(B)). In *Aranas v. Napolitano*, the district court dismissed a derivative beneficiary child from a lawsuit challenging the denial of a waiver of inadmissibility. *Aranas v. Napolitano*, No. SACV 12-1137 CBM (AJWx), 2013 WL 12251153, at *3-4 (C.D. Cal. April 19, 2013). The court noted that the derivative beneficiary's application for a visa is wholly dependent on the principal beneficiary's claim and as such was insufficient to have standing. *Id.* Similarly, the Plaintiff Derivative Beneficiaries in this action also have no interest independent from their principal beneficiaries, and thus have no standing to sue. The Court should dismiss Plaintiffs Derivative Beneficiaries for lack of standing.

**B. Plaintiffs' claims are not ripe for judicial review because the determination of whether Plaintiff Derivative Beneficiaries are eligible for a visa as minor derivative beneficiaries is contingent on many future events that may or may not occur.**

Plaintiffs' claims are also unripe for review. To determine if a case is ripe for judicial review, courts consider the fitness of the issue for judicial decision and the hardship on the parties if judgment is withheld. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Addington v. U.S. Airlines Pilots Ass'n*, 606 F.3d 1174, 1179 (2010). Ripeness is a question about the proper timing of a claim.

*Amer.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Plaintiffs' claims are not ripe for judicial review because they all depend on a series of future events occurring. Before the CSPA age calculation would even come into play, several things must happen. First, and most importantly, a visa must become available to Plaintiff Principal Beneficiaries. 8 U.S.C. § 1255(a)(3) (requiring immigrant visa be immediately available). This is critical because Plaintiff Derivative Beneficiaries cannot even be considered for an immigrant visa as a derivative beneficiary if the principal beneficiary has no immigrant visa available. 8 U.S.C. § 1153(d) (stating the derivative beneficiary is considered "in the same status, and the same order of consideration" as the principal beneficiary). And once the visa becomes available, if seeking an adjustment of status, the Plaintiff Principal Beneficiaries must apply for adjustment of status, which requires them to establish that they are eligible for permanent residence, that they are not inadmissible, and that they merit the agency's exercise of discretion. 8 U.S.C. § 1255(a). Only if the Plaintiff Principal Beneficiaries have applied for adjustment of status and has been approved, can the Plaintiff Derivative Beneficiaries seek adjustment of status as derivatives of their parents' petitions and only then can the agency engage in the age calculation of 8 U.S.C. § 1153(h).[11] In order to reach the question of whether Plaintiff Derivative Beneficiaries are entitled to a visa as derivative minor children of their

[11] Plaintiff Abigail Edwards did plead that she filed an application, but her mother's application for adjustment of status remains pending and a visa has not become available. Am. Compl. ¶¶ 18-19. Plaintiff Venkata Satya Venu Battula adjusted his status to a permanent resident. *Id.* ¶ 13. His son, Sandeep Battula, has not pleaded that he applied for adjustment of status as a derivative beneficiary of his father. *Id.* at ¶ 14.

parents' visa petition, there are many contingent future events that may or may not happen. Plaintiffs' claims are not ripe. *See Reno v. Catholic Soc.l Svcs.*, 509 U.S. 43, 58-59 (1993) (explaining that challenge to regulation involving legacy INS program was not ripe because applicants were required to take steps before denial became judicially reviewable).

### C. Plaintiffs failed to state a claim that the statutory scheme violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment.

Plaintiffs claim that the government reliance on the India chart in order to calculate Plaintiff Derivative Beneficiaries' adjusted age under the CSPA violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. *See generally* Am. Compl. But Plaintiffs failed to state a claim for an equal protection violation because the statutory scheme on its face does not distinguish or single out Indians based on their nationality, but instead is a neutral statute that is applied equally to all aliens regardless of national origin. Plaintiffs recognize that all countries are equally subject to annual per county limits on the number of visas available to nationals of that country. Am. Compl. ¶ 60. Plaintiffs concede that these limits are permissible to serve the government interest "to apportion immigrant visas in a fashion that ensures immigrant visa availability in a given fiscal year to all nationalities." Am. Compl. ¶ 62. It is therefore beyond reasonable dispute that limits on immigrant visas based on national origin is consistent with the Constitution. *See, e.g.*, *Pedroza-Sandoval v. INS*, 498 F.2d 899, 900 (7th. Cir. 1974) (finding that under prior statutory scheme that allocated visas differently based on country of origin, courts consistently held that Congress may set different immigration legislation that treats nationals of western hemispheric countries differently from other nationals, based on their country of origin).

Plaintiffs contend that reliance on the India chart of the Visa Bulletin when engaging calculating age under 8 U.S.C. § 1153(h)—as opposed to the general worldwide chart—is an

equal protection violation. Compl. ¶¶ 55-69. However, section 1153(h) requires that age under the CSPA be calculated depending on when a visa becomes available. A visa becomes available to the Plaintiff Derivative Beneficiaries only when a visa becomes available to the Plaintiff Principal Beneficiaries. *Scialabba*, 573 U.S. at 48. Plaintiffs have a longer wait for an immigrant visa in the EB2 and EB3 categories than nationals from most countries because India is oversubscribed, a fact that is reflected on the India chart of Visa Bulletin. That the government has to consult the India chart of the Visa Bulletin is a mere consequence of the extreme demand for immigrant visas by Indians in light of the limited number of visas available and is neutral on its face. But even if the statutory scheme distinguished based on nationality, Plaintiffs' argument fails because rational basis supports the reliance on the India chart. Congress may limit the number of visas available to nationals of certain countries in order to make visas available to nationals of every country. The Visa Bulletin reflects that policy and applies the limits as Congress intended. Indeed, Congress may limit and regulate migration based on nationality in order to encourage diversity in immigration from all nations, promote racial and ethnic diversity, promote foreign relations, serve diplomatic goals, or many other purposes. *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009). Congress' choice to subject visa availability to per country limits is rationally related to these purposes. Plaintiffs therefore cannot establish that Defendants violated the equal protection guarantees of the Due Process Clause of the Fifth Amendment.

**1. Courts review equal protection challenges to immigration statutes and regulations that distinguish on nationality under the rational basis standard of review.**

While the Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, the Due Process Clause of the Fifth Amendment contains an equivalent

equal protection guarantee that require federal laws to treat all persons similarly situated alike unless there is adequate justification for treating them differently. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). It is well established that where, as here, a party challenges an immigration rule that distinguishes based on nationality, that challenge is subject to rational basis. *Tista v. Holder*, 722 F.3d 1122, 1126-27 (9th Cir. 2013); *see also Midi*, 566 F.3d at 137 ("Although courts usually subject national-origin classifications to strict scrutiny, when such classifications involve unadmitted aliens in the immigration context, we subject them only to rational basis review. This is so because Congress has plenary power over immigration and naturalization, and may permissibly set immigration criteria based on an alien's nationality even though such distinctions would be suspect if applied to American citizens")(internal citations and quotations omitted); *Masnauskas v. Gonzales*, 432 F.3d 1067, 1070-71 (9th Cir. 2005) (applying rational basis to a Lithuanian alien's equal protection challenge to NACARA based on national origin); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) ("Federal classifications distinguishing among groups of aliens are thus valid unless wholly irrational."); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (reviewing an immigration-related regulation under the rational basis test). In immigration and naturalization, Federal authority is plenary. *Sandoval-Luna*, 526 F.3d at 1247; *see Fiallo*, 430 U.S. at 792 ("[T]he power to expel or exclude aliens . . . [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). Similarly, the Supreme Court has held that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the *political branches* of the Federal Government." *Mathews*, 426 U.S. at 81.[12]

[12] Thus, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Eldridge*, 426 U.S. 67, 79-80 (1976)).

In the immigration context, a distinction that differentiates based on nationality must be upheld under the rational basis standard if it is rationally related to a legitimate government purpose. *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008). Under this standard, "line-drawing decisions made by Congress or the President in the context of immigration and naturalization must be upheld if they are rationally related to a legitimate government purpose." *Jimenez-Angeles v. Ashcroft,* 291 F.3d 594, 603 (9th Cir. 2002) (internal quotations omitted). A distinction must be "wholly irrational to violate equal protection" and Plaintiffs bear 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 1126-27 (citing *Aguilera-Montero*, 548 F.3d at 1252) (emphasis added). Courts can dismiss equal protection claims under Rule 12(b)(6) if the plaintiff failed to state an equal protection violation. *See HSH, Inc. v. City of El Cajon*, 44 F. Supp. 3d 996, 1006-09 (S.D. Cal. 2014).

**2. Rational basis supports Defendant's reliance on the India country chart in calculating Plaintiff Derivative Beneficaries' age under the CSPA.**

To the extent that Plaintiffs contend that the application of the CSPA causes a distinction based on their Indian nationality, those distinctions survive rational basis review. It is well established that in the immigration context, Congress has the power and authority to create and remove distinctions among immigrants based on national origin.[13] *See, e.g.*, *De Avila v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981) (deferring to agency interpretation of caps in visas for Mexican nationals after Congress removed preferential treatment of western hemisphere countries in visa allocation); *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) ("Distinctions on the basis of nationality may be drawn in the immigration field by Congress or

[13] Similarly, the Supreme Court has stated that the Executive has the authority to suspend entry of aliens based on nationality. *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018).

the Executive.").

The government relies on the India chart of the Visa Bulletin to calculate age under 8 U.S.C. § 1153(h) because the Visa Bulletin reflects when a visa is available to an Indian national and their derivatives. *See supra* Part IV.A.1-2. Reliance on the per-country limits established by Congress as reflected in the Visa Bulletin to determine visa availability serves the legitimate purpose of promoting diversity among immigrants. The difference between the India chart and the worldwide chart is that the India chart reflects a longer wait for visas. However, Indian nationals and nationals of other countries are equally treated in that they are all subject to a per country limit on visas. 8 U.S.C. § 1152(a)(2). Congress intended to promote diversity by imposing per country limits on visas by placing all countries at the same footing for visas. *See De Avila*, 643 F.2d at 475-76 (explaining that imposition of limit on visas at 20,000 per country in 1976 and remove separate treatment to Mexican and Canadian nationals served to provide uniform treatment to all countries). Therefore, the reliance on the India chart of the Visa Bulletin is rationally related to the purpose of promoting immigration diversity, making visas available to all countries in an equal footing, and avoiding having nationals of a handful of countries monopolize visas in one category.

Section 1153(h) is also a statute of limited applicability that only provide some relief against aging out "because of—but only because of—bureaucratic delays." *Scialabba*, 573 U.S. at 53. The CSPA does not provide relief against aging out involving statutes that provide immigration benefits available to nationals of certain countries, such as the Cuban Adjustment Act ("CAA," available to certain Cuban nationals and relatives), the Nicaraguan and Central American Relief Act ("NACARA," available to certain nationals of Central America), and the Haitian Refugee Immigrant Fairness Act ("HRIFA," available to certain Haitian nationals). *See*

*Tista*, 722 F.3d at 1126-28 (holding that failure of Congress to apply the CAA to NACARA beneficiaries does not violate equal protection); *Midi*, 566 F.3d at 137 (4th Cir. 2009) (finding that CSPA does not apply to HRIFA); *Schloser v. Dir. Miami Field Office, USCIS*, 2019 WL 7371815, at *8-9 (S.D. Fla. 2019) (holding that CSPA does not apply to CAA).

Even if visa availability could be determined differently for derivative beneficiaries than principal beneficiaries when calculating age under 8 U.S.C. § 1153(h), reliance on the India chart when calculating age under 8 U.S.C. § 1153(h) is not an equal protection violation because Congress can grant, deny, or limit relief under the CSPA based on nationality to advance various policy goals. *See Midi*, 566 F.3d at 137 ("Congress grants or denies many immigration benefits based on nationality, presumably to advance security, foreign relations, humanitarian, or diplomatic goals. We cannot say that Congress's decision to deny CSPA protection to HRIFA applicants lacks any rational basis."). The limited protection against age out at 8 U.S.C. § 1153(h) reflects Congressional balance of providing some relief against aging out due to processing delays and the understanding that the new statutory scheme would not displace or affect other people who have been waiting in line in their respective visa category. *Matter of Wang*, 25 I. & N. Dec. at 37-38 (citing 148 Cong. Rec. H4989 at *H4992 (statement of Rep. Jackson-Lee)). Even if Plaintiff Derivative Beneficiaries could rely on the worldwide chart to determine visa availability for the age calculation *before* a visa becomes available to their parent under the India chart, Plaintiff Derivative Beneficiaries would in essence run around the statutory scheme, claim an age, and retain a spot in a category based on an age calculation that was not intended by Congress. By calculating age based on the India chart, the government advances the interest in making visas available to aliens in their respective category and country of chargeability without displacing others. *See Matter of Wang*, 25 I. & N. Dec. at 37-38. The

government's use of the India chart in the Visa Bulletin is rationally related to this interest to provide limited relief in the respective category without displacing others.

Reliance on the Visa Bulletin also serves the government's interest in protecting the United States labor market. Limits on the number of visas allocated—including employment-based visas—rationally serve the interest in controlling and protecting the domestic labor market from an influx of foreign labor. *United States v. Baca*, 368 F. Supp. 398, 401 (S.D. Cal. 1973) (citing *Karnuth v. United States*, 279 U.S. 231 (1929)). The Visa Bulletin, based on relevant provisions of the Immigration and Nationality Act regarding immigrant visa allocation, is the tool the government uses to determine how employment-based visas are allocated so as to remain within the statutory limits imposed by Congress. The Visa Bulletin serves the purpose of protecting the labor market. This provides the government with additional rational basis to rely on the India chart of the Visa Bulletin.

Plaintiffs contend that the government's reliance on the India chart is irrational because Plaintiffs have "special status" due to the extension of their H-1B and H-4 status under section 104(c) of AC21. Am. Compl. ¶ 63. However, section 104(c) of AC21 does not provide "special status" or any other special immigration preferential treatment. Instead, Congress intended for AC21 to provide some relief from lengthy adjudications by allowing H-1B visa holders to remain in the United States while a decision on their cases is made. S. Rep. 106-260, at *10. In fact, a lot of the relief provided under AC21 relates to issues involving H-1B visas and not EB-2 or EB-3 visas. *See, e.g.*, AC21 § 102 (temporary increase in H-1B availability); AC21 § 105 (allowing increased portability of H-1B status). And while Congress knew that worldwide limits affected employment-based visas availability, S. Rep. 106-260, at *10 (stating that AC21 modified per country limits to "eliminate discriminatory impact" of visa limits), AC21 did not

eliminate the per country limits but instead eliminated the caps in a category if demand exceeded supply for a visa. AC21 §104(a) (codified at 8 U.S.C. § 1152(a)(5)). In sum, AC21 does not provide Plaintiffs with any special status nor does it modify the statutory scheme in such a way that compels changing the way the government calculates Plaintiff Derivative Beneficiaries age.

Plaintiffs have failed to plead facts supporting the conclusion that reliance on the India chart of the visa bulletin in calculating age for purposes of the CSPA violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. Plaintiffs' Equal Protection claim should be dismissed for failure to state a claim upon which relief may be granted.

## D. Plaintiffs failed to state a claim that the USCIS Policy Manual explanation of how age is calculated violates the APA.

### 1. The USCIS Policy Manual is not subject to APA review because it is not final agency action.

As a preliminary matter, the USCIS Policy Manual is not final agency action reviewable under the APA. Under the APA, only final agency action is subject to review. 5 U.S.C. § 704. To be considered final, the agency action must meet the following requirements: (1) it "marks the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature" and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotations omitted). The key question for this inquiry is whether the agency completed its decision-making process and whether the result of that process will directly affect the parties. *Indus. Customers of N.W. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (quoting *Franklin v. Mass.*, 505 U.S. 788, 797 (1992)). Courts consider "whether the [action] amounts to a definitive statement of the agency's position, whether the

[action] has a direct and immediate effect on the day-to-day operations of the party seeking review, and whether immediate compliance [with the terms] is expected" provide "an indicia of finality." *Id.* (quoting *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 909 (9th Cir. 2003)). The Ninth Circuit focuses on the "practical and legal effects of the agency action and interpret finality in a pragmatic and flexible manner." *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179 (9th Cir. 2019) (quotations omitted). The finality requirement under the APA is jurisdictional. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

The USCIS Policy Manual is not final agency action. The USCIS Policy Manual informs staff of the most recent interpretation of the INA and applicable regulation. USCIS, About the Policy Manual, https://www.uscis.gov/policy-manual ("The USCIS Policy Manual provides transparency, including outlining policies that are easy to understand, while also furthering consistency, quality, and efficiency."). An adjudicator must review Plaintiffs' submissions and, after consulting the USCIS Policy Manual and any relevant authority, the adjudicator must exercise their discretion (when appropriate) and issue a final decision on the application presented. *Id.* (stating that the USCIS Policy Manual "assists immigration officers in rendering decisions" and that while it must be followed by adjudicators, it "does not remove their discretion in making adjudicatory decisions."). The USCIS Policy Manual is not a final agency decision, but a decision-making tool for the use of adjudicators. *See Whitewater Draw Natural Res. Conservation Dist. v. Nielsen*, No. 3:16-cv-02583, 2018 WL 4700494, at *3-4 (S.D. Cal. Sept. 30, 2018) (holding that agency manual used by government officials determine agency compliance with environmental statute is not final agency action). The USCIS Policy Manual is not the final consummation in the agency's decision-making process relating to Plaintiffs' applications for permanent residency—applications that have not even been filed for most

Plaintiffs. The Court therefore lacks jurisdiction over Plaintiffs' challenge under the APA because the USCIS Policy Manual is not final agency action. Their claim should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction under the APA.

**2. Alternatively the USCIS Policy Manual is interpretive, not a new rule subject to notice and comment, that accurately explains how the CSPA age calculation provisions are applied.**

Even if the USCIS Policy Manual were considered final agency action, Plaintiffs' contention that the USCIS Policy Manual is subject to notice and comment under the APA is wrong because it is an interpretive document. Notice and comment does not apply to interpretative rules. 5 U.S.C. § 553(b)(A). Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) (internal quotation marks omitted). An agency need not pursue notice and comment when it issues an interpretive rule, nor when it amends or repeals such rule. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015).

The USCIS Policy Manual's explanation of the application of the CSPA to derivative beneficiaries is an interpretive rule. The USCIS Policy Manual merely explains how the age calculation rule at 8 U.S.C. § 1153(h) is implemented by the agency. The Policy Manual explains that a visa is available when the petition is approved and when the visa is available for the preference category and priority date. 7 USCIS PM A.7.F.4. This is consistent with the statutory scheme and regulations requiring that a visa be available based on the visa priority date. *See* 8 U.S.C. §§ 1151(d), 1255(a); 8 C.F.R. § 204.5(d). The Policy Manual also explains that while a petitioner may file for adjustment of status using the Date for Filing chart in the Visa Bulletin, the Final Action Date chart should be used to calculate age under the CSPA. 7 USCIS PM A.7.F.4. Calculating age using the Final Action Date chart is consistent with the statutory

and regulatory scheme because the Final Action Date chart reflects when a visa is actually available for issuance to an individual. *See* 8 C.F.R. § 245.1(g)(1); 22 C.F.R. § 42.51(b); *Metha*, 186 F. Supp. 3d at 1150. The statutory and regulatory scheme requires that age for derivative beneficiaries be calculated using the age when a visa is available, as well as that the derivative beneficiary must seek to acquire permanent resident status within one year of "such availability". 8 U.S.C. § 1153(h). The Final Action Date chart of the Visa Bulletin and not the Dates for Filing Chart reflect that visa availability. USCIS reliance on the Final Action Date chart as stated in the USCIS Policy Manual is consistent with the statutory and regulatory scheme. The USCIS Policy Manual provisions relating to the CSPA do not impose a new rule over Plaintiffs, but merely interprets how the CSPA is applied in the context of the statutory and regulatory scheme, as well as agency's use of the Visa Bulletin's allocation of visas.

Plaintiffs place heavy weight on his argument that an applicant may rely on the Dates for Filing chart because it allegedly invites an application for a child who aged out that would be subsequently denied. Am. Compl. ¶¶ 75-82. The USCIS Policy Manual states that an applicant *may* apply based on the Dates for Filing chart, it does not *require* that an application be submitted using the Dates for Filing chart. 7 USCIS PM A.7.F.4 (explaining that applicants "may choose to file" for adjustment of status using the Dates for Filing chart). The applicant may choose to wait and apply at a moment when a visa is available under the Final Action Date chart in order to avoid filing an application that could be denied due to having aged out.

Plaintiffs do not adequately explain how the Dates for Filing chart, which was only added to the Visa Bulletin in October 2015, would fit with the statutory scheme, nor can they. Plaintiffs attempt to explain that by allowing applicants to file using the Dates for Filing chart, the agency understands the Dates for Filing chart to be when the visa is "available". Am. Compl.

¶ 77-78. To the contrary, the USCIS Policy Manual does not reflect such an understanding as it specifically explains that the one-year sought to acquire period of 8 U.S.C. § 1153(h) commences when the visa becomes available under the Final Action Dates chart. 7 USCIS PM A.7.G.2 ("While the Final Action Dates chart determines the date of visa availability for CSPA purposes and starts the 1-year clock, an applicant may choose to file an adjustment application based on the Dates for Filing chart. . . . If an applicant files based on the Dates for Filing chart prior to the date of visa availability according to the Final Action Dates chart, USCIS considers the applicant to have met the sought to acquire requirement. However, the applicant's CSPA age calculation is dependent on visa availability according to the Final Action Dates chart."). Indeed, no adjustment of status applicant can be approved for adjustment of status if the visa is not immediately available under the Final Action Date chart. Plaintiffs cannot explain how the Dates for Filing chart represent visa availability under 8 U.S.C. § 1153(h) so as to justify calculating age under the CSPA using the Dates for Filing chart. Plaintiffs' complaint should therefore be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

## VII. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' lawsuit.

RESPECTFULLY SUBMITTED THIS May 1, 2020.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the applicable word-count limitation under the rules of this Court because it contains 8,828 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I certify that all participants are CM/ECF users and that service will be accomplished by the CM/ECF system.

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