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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NAGENDRA KUMAR NAKKA, et al. Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES and U.S. DEPARTMENT OF STATE, Defendants.	Case No.: 3:19-cv-02099-YY DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs' opposition to the motion to dismiss fails to explain how Plaintiffs can establish standing, ripeness, and state a claim on the merits of their complaint. First, Derivative Beneficiaries cannot establish that they have standing because they cannot advance a legal cognizable interest in an employment-based visa. Second, Plaintiffs cannot establish that their claims are ripe. Indeed, there are many contingent future events that must occur before a final

determination is made on their claims, and it is not a foregone conclusion that Derivative Beneficiaries will be denied permanent resident status solely on how their age is calculated under the Child Status Protection Act ("CSPA"). Third, Plaintiffs' Equal Protection claim fails because rational basis supports a distinction in the immigration context based on nationality and they are not entitled to intermediate scrutiny of their claim. Lastly, Plaintiffs cannot establish that the interpretation of the CSPA found in the United States Citizenship and Immigration Services ("USCIS") Policy Manual violates the Administrative Procedure Act ("APA"). The Court should therefore dismiss Plaintiffs' complaint.

A. Derivative Beneficiaries failed to meet their burden that they have standing to sue.

Plaintiffs' contention that Derivative Beneficiaries have standing fails to acknowledge the lack of a cognizable legal interest that Derivative Beneficiaries have over the approval of an employment-based petition filed on behalf of their parents. Derivative beneficiaries are not seeking permanent resident status based on any independent legal right they have to that status. Instead, their entire claim to permanent resident status is dependent on and wholly contingent on their parents' claim. A party cannot invoke standing based on the rights of third parties. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). But here, the claim to an employment-based visa (whether an EB-2 or EB-3 visa) rests on the petitioning employer and the principal beneficiary. 8 U.S.C. §§ 1153(b)(2)-(3), 1154(a)(1)(F), 1181(a), 1182(a)(5)(A) 1255(a)(3). As the Supreme Court explained, "a derivative's fate is tied to the principal's: if the principal cannot enter the country, neither can her children." *Scialabba v. Cuellar de Osorio,* 573 U.S. 41, 50 (2014). Derivative Beneficiaries do not have a legal interest in an employment-

based visa and therefore lack standing. Plaintiffs' arguments to the contrary are unpersuasive.[1]

Attempting to buttress their argument, Plaintiffs contend that some derivative beneficiaries may have claims for visas despite the principal beneficiary's inability to claim the visa due to death. Resp. at 5-6. However, the examples they provide do not demonstrate how the Derivative Beneficiaries' claims are independent from Principal Beneficiaries. Some surviving derivative beneficiaries may remain eligible for lawful permanent resident status despite the death of the principal beneficiary. 8 U.S.C. § 1154(*l*). That ability to proceed with adjudication of a petition filed on behalf of the principal beneficiary is granted by statute, but is still dependent upon the principal beneficiary's eligibility for the benefit.[2] *Id.* In contrast, Derivative Beneficiaries here cannot point to being statutorily eligible for an employment-based visa independent of the Principal Beneficiary.

Plaintiffs also characterize the Derivative Beneficiaries' H-4 nonimmigrant visa extensions under the American Competitiveness in the Twenty First Century Act of 2000 ("AC21") as "favored status" and argue that their inability to obtain extensions of their H-4 nonimmigrant status is an injury. Resp. at 2. This argument fails for several reasons. First, Plaintiffs' fail to explain what is "favored status" under the INA. *See id.* at 2-3. AC21 does not create a "favored status" as it simply allows for extensions beyond the standard six years for H-1B nonimmigrant workers, and their spouses and children, who are the beneficiaries of EB-1,

[1] Notably, Plaintiffs fail to cite any case law showing that derivative beneficiaries of visa petitions have standing to sue. *See* Resp. at 2-7. This is a crucial distinction, because while Ninth Circuit case law has found standing for the principal beneficiary to sue, the derivative beneficiary is not similarly placed to the principal beneficiary in relation to the employment-based visa and cannot assert their right to a visa independent of the principal beneficiary. Mot. at 15-16.

[2] Also, this provision is not relevant to the extent it relates to widowers because a widower under 8 U.S.C. § 1154(*l*) would not be considered a derivative beneficiary given that the widow must have had a qualifying relationship with the deceased petitioner.

EB-2, and EB-3 visa petitions, but are unable to adjust their status to permanent residence because of the per country limitations. Mot., 10-11. In fact, the term "favored status" is not used in AC21 or anywhere in the INA, and Plaintiffs simply fail to cite to any provision that defines or explains what is meant by, let alone the legal significance, of favored status. Second, any extensions of a derivative beneficiary's H-4 nonimmigrant status consistent with AC21 are just extensions of that status. Plaintiffs do not explain how those extensions (let alone the Derivative Beneficiaries' claimed injury from their inability to obtain further extensions under AC21) relate to the CSPA, nor can they because the CSPA was not intended to protect non-immigrants. *E.g.* H.R. REP. 107-45 (describing need for CSPA in order to protect children who aged out while waiting for immigrant visas).

As for Plaintiff Derivative Beneficiaries' argument that they have standing to pursue their APA claim because they are within the zone of interests the CSPA sought to protect, Resp. 7-8, that argument also fails. Under the "zone of interests" analysis, courts apply traditional rules of statutory construction to determine if a particular plaintiff is among the class of plaintiffs Congress intended to authorize to sue.[3] *Lexmark Int'l v. Static Control*, 572 U.S. 118, 127-28 (2014). As explained above, in the context of immigrant visas, the Plaintiff Derivative Beneficiaries have no standalone right to an immigration benefit because that benefit belongs to the Principal Beneficiary. While it is true that the CSPA sought to protect some children from aging out, any CSPA benefit here is wholly contingent on the principal beneficiary's employer filing an immigrant visa petition and the principal beneficiary's application for permanent resident status or an immigrant visa. And even more, in CSPA cases, principal beneficiaries

[3] To the extent the challenge arises under the APA, the zone of interest analysis focuses not on the zone of interest under the APA but that of the statute the plaintiff alleges was violated. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767-68 (9th Cir. 2018).

have been able to litigate issues relating to the application of the CSPA on derivative beneficiaries without having the derivative beneficiaries present in the lawsuit. *See Costelo v. Chertoff*, 258 F.R.D. 600, 608-09 (C.D. Cal. 2009) (certifying class of principal beneficiaries and declining to certify class including derivatives due to standing issues). The Derivative Beneficiaries have no independent legal cognizable legal interest in the employment-based visa petition the parents' employer filed on behalf of their parents. In light of this context, even though the CSPA could provide some ameliorative protections to derivatives of immigrant visas, they have no cognizable legal interest in their parents' petition filed by their employers and therefore are not within the zone of interests that Congress intended to authorize to sue. The Derivative Beneficiaries lack standing to sue. The Court should therefore dismiss their claims.

B. Plaintiffs' have failed to show their claim is ripe.

Plaintiffs contend that their claims are ripe because they have plead that they have already aged out under the CSPA and they are not required to file an application in order for their claims to ripen. Resp. at 8-11. The problem with Plaintiffs' argument is that they are assuming the final agency action that may be taken on their applications. As explained in Defendants' motion, Plaintiffs must take several steps before the agency can even determine the age of Derivative Beneficiaries under 8 U.S.C. § 1153(h). Mot. at 17-18. These steps include that the Principal Beneficiaries have sought and been granted permanent resident status based on an employment-based petition,[4] and the Derivative Beneficiaries also have sought lawful permanent

[4] Plaintiffs erroneously contend that Defendants stated that the principal and derivative beneficiary cannot apply simultaneously for adjustment of status. Resp. at 9 n.3. Defendants do not contend that the principal and derivative may not file simultaneously. Instead, Defendants explained that if the principal beneficiary is denied permanent residency, the derivative beneficiary (whose claims for residency is wholly dependent on the principal) would also be denied. *See* 8 U.S.C. § 1153(d).

residence status as their derivatives. Even then, the age calculation in 8 U.S.C. § 1153(h) applies "only if" the Derivative Beneficiary has sought to acquire lawful permanent residence within one year of a visa becoming available. Mot. at 9-10.

Neither USCIS nor the Court should assume that any Derivative Beneficiary will be denied adjustment of status at this juncture based on the application of 8 U.S.C. § 1153(h). If the Principal Beneficiary is not eligible for adjustment of status under 8 U.S.C. § 1255(a), then the Derivative Beneficiaries cannot obtain permanent resident status in any case. And if any Derivative Beneficiary is inadmissible or otherwise ineligible for adjustment of status, they would be unable to obtain permanent residency regardless of the age calculation under 8 U.S.C. § 1153(h). *See* 8 U.S.C. §§ 1152 (listing grounds of inadmissibility), 1255(a)(2) (requiring that adjustment of status applicant be "admissible"). If the Court were to interfere with the adjudicatory process and render judgment on the Derivative Beneficiaries' age calculation under 8 U.S.C. § 1153(h) without providing the agency the opportunity to evaluate their eligibility for these applications and render a final decision, the Court would entangle itself into a premature adjudication on this issue. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (explaining that ripeness protects courts from entangling themselves in abstract disagreements and to protect agencies from judicial interference until a decision is made). Plaintiffs fail to establish that their claims are ripe for review.

C. Plaintiffs' attempt to argue that their Equal Protection claim is not subject to rational basis review is completely unsupported.

As Defendants explained in their motion, 8 U.S.C. § 1153(h) does not discriminate on its face based on national origin. Mot. at 18-19. Indeed, 8 U.S.C. § 1153(h) is a statute that applies equally to all derivative beneficiaries regardless of their country of origin, and any issue with application of this provision is merely a consequence of the supply and demand for visas. *Id.*

But even if this statutory provision discriminated based on national origin as alleged by Plaintiffs, such a challenge survives constitutional scrutiny. Plaintiffs correctly concede that the case law supports rational basis review of their Equal Protection claim because it is well established that immigration rules that distinguish based on nationality are subject to rational basis review. ECF No. 14 at 12; *see Tista v.Holder*, 722 F.3d 1122, 1126-27 (9th Cir. 2013). Plaintiffs, however, attempt to argue that intermediate scrutiny should be adopted in light of Plaintiffs' links to the country. ECF No. 14 at 11-14. Their argument lacks any support.

Plaintiffs rely on *Tapia Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), and *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005), in order to justify a higher level of scrutiny. ECF No. 14 at 13. These cases are not good law. *Tapia-Acuna* was overruled in *Abebe v. Mukasey*, 554 F.3d 1203, 1205-06 (9th Cir. 2009) (*en banc*). *Cordes* relied on *Tapia-Acuna*, making its rationale unavailing. *Cordes*, 421 F.3d at 898-99 (citing *Tapia-Acuna*, 640 F.2d at 225). But even more to the point, *Cordes* was subsequently vacated for lack of jurisdiction. *Cordes v. Mukasey*, 517 F.3d 1094 (9th Cir. 2008).

Even if *Tapia-Acuna* and *Cordes* were still good law, those cases are completely distinguishable. Both aliens in *Tapia-Acuna* and *Cordes* were permanent residents. *Cordes*, 421 F.3d at 892; *Tapia-Acuna*, 640 F.2d at 223. None of the derivative beneficiaries are permanent residents and instead are or were in the United States on H-4 nonimmigrant visas. They are not similarly placed so as to justify a higher level of scrutiny.

The *Abebe* decision provides further support to Defendants' argument. When *Abebe* overruled *Tapia-Acuna*, the Ninth Circuit noted that "Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or

other matters pertaining to aliens." *Abebe*, 554 F.3d at 1206. The Ninth Circuit added that, where, as here, the immigration scheme does not discriminate against a "discrete and insular minority" or on a fundamental right, the court applies "a standard of bare rationality." *Id.*; *see also Alvarez v. Dist. Dir. of the United States INS*, 539 F.2d 1220, 1224 (9th Cir. 1976) ("it is clear that classifications made under the immigration laws need only be supported by some rational basis to fulfill equal protection guarantees."). Under rational basis review, the Court's task is "to determine . . . whether [the Court] can conceive of a rational reason Congress may have in adopting" the rule at issue. *Abebe*, 554 F.3d at 1206. Even a hypothetical rationale would be sufficient to support the immigration rule under rational basis. *Id.* at 1206 n.4.

Indeed, if 8 U.S.C. § 1153(h) were to be found to discriminate based on national origin, the statute survives rational basis. Congress can grant, deny, or limit relief under the CSPA based on nationality to advance various policy goals. *See Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009) ("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."). Relying on the India chart of the Visa Bulletin to calculate age under 8 U.S.C. § 1153(h) can serve the legitimate purpose of promoting *limited* relief arising from bureaucratic delays. *Scialabba*, 573 U.S. at 53. The limits on immigrant visas as reflected on the India chart of the Visa Bulletin serve the legitimate purpose of putting all countries on the same footing in relation to eligibility for immigrant visas. *See De Avila v. Civiletti*, 643 F.2d 471, 475-76 (7th Cir. 1981) (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). The limits on employment-based visas can also serve to protect the United States

labor market, a legitimate interest given that Plaintiffs are seeking to obtain permanent residency on employment-based visas. *United States v. Baca*, 368 F. Supp. 398, 401 (S.D. Cal. 1973) (citing *Karnuth v. United States*, 279 U.S. 231 (1929)). Any of these one reasons would provide a rational basis to justify limits on employment-based visas available for Indian nationals for both the principal and derivative beneficiaries that is reflected on the longer wait times for visas on the India chart. Therefore, because rational basis supports USCIS's practice, this Court should dismiss Plaintiffs' equal protection challenge.

D. Plaintiffs failed to explain how the USCIS Policy Manual (or the State Department's Foreign Affairs Manual) are inconsistent with 8 U.S.C. § 1153(h).

Lastly, as for Plaintiffs' challenge to the USCIS Policy Manual, that claim should also be dismissed.[5] Plaintiffs fail to explain why the USCIS Policy Manual is a final agency action as to their cases. As explained in Defendants' motion, the USCIS Policy Manual does not make a final determination in any of Plaintiffs' cases as to their eligibility for permanent residency. Mot. 26-27. To the contrary, the adjudicator must make an independent determination as to Plaintiffs' applications after reviewing their applications and the appropriate relevant authority before rendering a final determination. *Id.* That concern is particularly relevant as to Plaintiff

[5] Defendants note Plaintiff Abigail Edwards alleges to bring an "as applied challenge" on her behalf and not on behalf of the putative class. Resp. at 20 (describing argument as "Plaintiff Edwards' as applied challenge"). In fact, Plaintiff Abigail Edwards is the only plaintiff that alleges facts claiming that she would be considered a minor child if the agency consults the Dates of Filing chart. *Compare* Am. Compl. ¶ 19 (Edwards), *with id.* ¶ 6-18 (all other Plaintiffs). If the Court dismisses the cause of action brought as a class claim, there is a question as to whether this Court is the proper venue to adjudicate Plaintiff Abigail Edwards' individual claim because she is a resident of Massachusetts. Am. Compl. ¶ 19; *see* 28 U.S.C. § 1391(e)(1)(C); *F.L.B. v. Lynch*, 180 F. Supp. 3d 811, 815 (W.D. Wash. 2016). Even if Plaintiff Edward's mother were a party to that claim, she is not a resident of this district either. Am. Compl. ¶ 18 (claiming New York residency). Should the Court dismiss claims brought by the putative class, Defendants intend to move to transfer venue of Plaintiff Abigail Edwards' claim to the appropriate judicial district.

Abigail Edwards' claim. Plaintiff Abigail Edwards and her mother pleaded in their complaint that they have pending applications with USCIS that have yet to be adjudicated, Am. Compl. ¶¶ 18-19, and therefore could be decided on grounds independent of the CSPA. While Plaintiff Abigail Edwards contends that she would be injured by a denial because she would be unable to obtain residency, work authorization, or accrue unlawful presence, Resp. at 15, those injuries do not arise out of the interpretation of the CSPA but would arise out of a final agency determination (which could be on grounds other than the CSPA) that has yet to be issued. Plaintiffs failed to show that the USCIS Policy Manual is final agency action.

Additionally, Plaintiffs claim should be dismissed because the USCIS Policy Manual guidance on calculating visa availability dates is internal guidance that states the process in a manner consistent with the statutory scheme. Under 8 U.S.C. § 1153(h), age is calculated by reducing the time the application was pending with the agency from the age "on which an immigrant visa number became available" for the principal beneficiary, but only if the alien has sought to acquire the status of an alien admitted for lawful permanent residence within one year of such availability. 8 U.S.C. § 1153(h)(1). The date the visa becomes available is represented by the Final Action Date chart of the Visa Bulletin. *Mehta v. United States Dep't of State*, 186 F. Supp. 3d 1146, 1150-51 (W.D. Wash. 2016). The Dates for Filing Chart was added to the Visa Bulletin in the October 2015 to modernize the Visa Bulletin and provide better estimations of actual visa availability. *Id.* The Dates for Filing Chart does not represent actual visa availability; the Final Action Date chart is the representation of *actual* visa availability. *Mehta*, 186 F. Supp. 3d at 1151; 8 C.F.R. § 245.1(g)(1). Therefore, the age of the child at the time a visa becomes available for issuance to the principal beneficiary when their priority date becomes current under the Final Action Date chart is the proper age to use when making the calculation at 8 U.S.C.

§ 1153(h) as this is the date the their status can be adjusted to that of a permanent resident. The USCIS Policy Manual accurately describes this scheme.[6] To the extent that Plaintiff Edwards alleges that the USCIS Policy Manual was subject to notice and comment, Resp. at 18-19, her argument goes contrary to Supreme Court precedent. As an interpretive rule, the USCIS Policy Manual's description of 8 U.S.C. § 1153(h) is not subject to notice and comment. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 105 (2015) (explaining that interpretive rule does not require notice and comment and that it should be overturned only if it is inconsistent with the statutory text).

Plaintiffs try to argue that the Dates for Filing chart should be considered for calculating age under 8 U.S.C. § 1153(h) because applicants may file applications by relying on the Dates for Filing chart. Resp. 17-19. The problem with their argument is that whatever issue there may be by allowing applicants to begin submitting documents using the Dates for Filing chart but prior to their visas being available under the Final Action Date chart, 8 U.S.C. § 1153(h) requires use of the age when the visa *becomes available* to the beneficiary. That is important because even if the agency receives applications before a visa is available, the statute mandates reliance on the age when the visa is available, not on a date prior to that actual availability.

If Plaintiffs interpretation were adopted in place of the agency's interpretation, it also

[6] Plaintiffs alleges in her response that the Department of State's Foreign Affairs Manual has the same defect as the USCIS Policy Manual. Resp. at 14 (alleging challenge to Foreign Affairs Manual). The Foreign Affairs Manual addresses adjudications abroad at the consulate, not applications filed in the United States with USCIS. None of the Plaintiffs alleges that they intend to seek a visa through the consulate abroad or that they have done so, Am. Compl. ¶¶ 6-19, nor have they explained why the Foreign Affairs Manual would apply to their cases while physically present in the United States. This is significant given that as admitted aliens, they can pursue adjustment of status without departing the United States. 8 U.S.C. § 1255(a). And in the case of Plaintiff Abigail Edwards, she has sought adjustment of status with USCIS, not abroad at a consulate. In any event, the Foreign Affairs Manual is a valid interpretation of 8 U.S.C. § 1153(h) for the same reasons that the USCIS Policy Manual accurately explains that provision.

could disadvantage applicants in regard to meeting the requirements for the age calculation to apply. . To enjoy the age reduction of 8 U.S.C. § 1153(h), the applicant must have "sought to acquire" permanent resident status within one year of visa availability. 8 U.S.C. § 1153(h)(1)(A). If the age is calculated under the earlier Dates for Filing Chart, then the applicant must seek to acquire permanent resident status within one year of that date as opposed to one year from the Final Action Date. But under current agency practice, the applicant would have met the "sought to acquire" requirement if they filed under the Dates for Filing chart prior to the visa available under the Final Action Dates chart, 7 USCIS Policy Manual A.7.G.2 ("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.").

Ultimately, the statute requires that the age of the beneficiary be reduced using the age at the time the visa becomes available. 8 U.S.C. § 1153(h). The Final Action Date chart represents when a visa is available. The Court should therefore dismiss Plaintiffs challenge on this basis.

CONCLUSION

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

RESPECTFULLY SUBMITTED THIS May 28, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 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.

/s/ Victor M. Mercado-Santana

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