No. 22-35203

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAGENDRA KUMAR NAKKA, NITHEESHA NAKKA, SRINIVAS THODUPUNURI, RAVI VATHSAL THODUPUNURI, RAJESHWAR ADDAGATLA, VISHAL ADDAGATLA, SATYA VENU BATTULA, SANDEEP BATTULA, SIVA PEDDADA, PAVANI PEDDADA, VENKATA PEDDADA, MIRIAM EDWARDS-BUDZADZIJA, AND ABIGAIL EDWARDS,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:19-cv-2099-YY
Hon. Michael H. Simon

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Children whose parents were born in India are aging out due to the application of per country limitations and national origin-based visa bulletin charts which result in decades long waits, while children with parents of other national origins remain protected. This lawsuit alleges that the disparate treatment of similarly situated children, purely on account of national origin, is unjust and violates the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Congress enacted the American Competitiveness in the Twenty First Century Act of 2000 (AC21),[1] which permits H-1B workers and their H-4 dependents to remain indefinitely in valid H-1B and H-4 status if their wait for lawful permanent resident status is extended due to the application of per country limitations on immigrant visas. Because of this special legislative provision, children of immigrants from India who were brought into this country legally by their parents at a young age, often prior to compulsory education, remain lawfully in H-4 status, grow up in the United States with their parents and attend public school for the entirety of their K-12 education, and in many cases most or all of their college years.

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[1] Pub. L. No. 106-313, 114 Stat. 1253, Title I, § 104(c) (Oct. 17, 2000) ("AC21 § 104(c)").

Despite being granted this special status by Congress, these children are denied equal protection under the Child Status Protection Act (CSPA)[2] as their derivative beneficiary immigrant status is revoked once their CSPA modified age passes the 21-year-old mark, and as they are stripped of their priority date and place in line. They are entirely separated legally from any benefits that they enjoyed together with their family as patient and lawful immigrants. Similarly situated children whose parents have a different national origin may have their age frozen concurrently with the filing of a petition or during the child's minority.

Additionally, some of these children (represented by Plaintiffs Edwards and Peddada) who were allowed to file adjustment of status applications based on an immediately available immigrant visa have faced a policy to deny their applications based on CSPA age calculations following policy changes in 2018 and 2019. These policy changes had direct and appreciable legal consequences for Plaintiffs and required the agencies to undergo notice and comment rulemaking, which they did not do. While Plaintiffs were invited to apply for adjustment of status through indication that a visa was immediately available to them, and they did so paying all filing fees and filing their applications, the policy threatened them with denial when their CSPA ages would be calculated to be in excess of age 21

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[2] Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002).

due to the policy's mandate that a different chart be consulted even though CSPA age lock provisions refer to a visa becoming available, and not that it must be actually issued.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331, and the Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered final judgment in this case disposing of all parties' claims on February 11, 2022. ER_4. The notice of appeal was filed March 4, 2022. ER_221. The appeal was timely filed pursuant to 28 U.S.C. § 2107(b).

STATUTORY AUTHORITIES

Except for the following, all applicable statutes are contained in the addendum: American Competitiveness in the Twenty First Century Act of 2000 ("AC21), Pub. L. No. 106-313, 114 Stat. 1253 (October 17, 2000), Title I, § 104(c):

> "Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)), any alien who –
> (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
> (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,
> may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon."

Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002), 8 U.S.C. § 1153(h)(1):

> For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using –
> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

ISSUES PRESENTED

I. Whether the court erred in finding that Plaintiffs whose parents were born in India, an oversubscribed country, were not similarly situated to derivative beneficiaries whose parents were born in non-oversubscribed countries despite Plaintiffs status as favored immigrants who are protected and provided special ability to establish a residence of long duration under the American Competitiveness in the Twenty First Century Act of 2000 (AC21), § 104(c), and thus similarly if not better situated than others.

II. Whether the court erred in finding that the prohibition on Plaintiffs' use of the Worldwide Visa Bulletin to calculate their Child Status Protection Act (CSPA) age has a rational basis despite Plaintiffs'

status as favored immigrants who are protected and provided special ability to establish a residence of long duration under the American Competitiveness in the Twenty First Century Act of 2000 (AC21), § 104(c).

III. Whether the court erred in finding that the 2018 update to the USCIS Policy Manual and 2019 update to the DOS FAM was not final agency action despite the policy's direct and appreciable legal consequences on Plaintiffs.

IV. Whether the court erred in finding that the 2018 update to the USCIS Policy Manual and 2019 update to the DOS FAM was not a legislative rule subject to notice and comment rulemaking despite evidence that the agencies extend lawful permanent resident status only after formalizing prerequisites contained in the new guidance, without which there would be no basis for the disputed interpretation.

STATEMENT OF THE CASE

Plaintiffs are parents and children of Indian nationality who have lived legally in the United States for extensive periods of time pursuant to statutory authorization for their long term residence while they await processing of their applications for lawful permanent resident status. The children came to the United States legally as dependents of their parents whose employers long ago filed

immigrant petitions on their behalf to include their spouse and children. They all assert violations of equal protection under the Fifth Amendment and two of the plaintiffs challenge the agency's interpretation of their age calculations under the Child Status Protection Act based on agency policy directives issued in 2018 and 2019.

The magistrate judge, upon whose Findings and Recommendations the district court based its decision, summarized the statutory framework and factual background well in her F&R issued November 30, 2021. ER 12-19. The magistrate recommended Defendants' motion to dismiss be denied to the extent they claimed lack of subject matter jurisdiction and granted to the extent plaintiffs failed to state a claim for relief. ER 12. The district court adopted the F&R with some additional analysis and granted the motion to dismiss on January 27, 2022. ER 9. Plaintiff's case was dismissed without prejudice on February 11, 2022. ER 4.

SUMMARY OF THE ARGUMENT

Plaintiffs argue that they are similarly situated to other immigrants, but with respect to CSPA age calculation they are treated differently based on the national origin of the parent, a result which is wholly irrational given their favored status under AC21 which permits them to establish a residence of long duration in the United States while awaiting their applications for lawful permanent resident status to be decided.

Plaintiffs also argue, with respect to a subclass of Plaintiffs (Edwards and Peddada) that the agencies have issued policy guidance which impermissibly directs officers to use the Dates for Filing charts to invite Plaintiff children to apply for adjustment of status together with their families, but then utilize the Final Action Date chart to determine CSPA age, resulting in denial of the application. Plaintiffs claim the interpretation of the statute embodied in the new policy guidance conflicts with the clear language of the statute, and that the agency was required to undergo notice and comment rulemaking prior to implementing the novel interpretation given the new two chart system and unprecedented way of determining CSPA age.

STANDARD OF REVIEW

The Court exercises de novo review over challenges to a dismissal for failure to state a claim under Fed. R. Civ. P 12(b)(6). *New Mexico State Inv. Council v. Ernst & Young, LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011).

ARGUMENT

I. The court erred in finding that Plaintiffs were not similarly situated to derivative beneficiaries whose parents were born in non-oversubscribed countries despite Plaintiffs' status as favored immigrants who are protected and provided special ability to establish a residence of long duration under AC21, and thus similarly if not better situated than others

An equal protection argument in the immigration context presents a distinctively uphill battle, but there exists a special factor in this case which

renders Plaintiffs not only similarly situated to others, but better situated. Plaintiffs qualify under the American Competitiveness in the Twenty First Century Act of 2000 (AC21), which permits H-1B workers and their H-4 dependents to remain indefinitely in valid H-1B and H-4 status if their wait for adjustment of status to lawful permanent resident status is extended due to the application of per country limitations on immigrant visas. They can obtain these extensions to remain in the U.S. without limit, until their applications for "adjustment of status" have been "processed and a decision made thereon." AC21, § 104(c). The language of this statute, incorporating the "adjustment of status" process into the law, is significant, because it shows that Plaintiffs are the intended beneficiaries of unlimited extensions of status up through the time their green card has been processed. The AC21 statute, together with the CSPA statute, were intended to protect Plaintiffs during their journey to a green card.

Plaintiffs were brought to the United States at an early age and have lived here for most of their lives (Plaintiff Nitheesha Nakka, age 4; Plaintiff Ravi Thodupunuri, age 11; Plaintiff Vishal Addagatla, age 8; Plaintiff Sandeep Battula, age 6; Plaintiffs Pavani Peddada and her brother Venkata Peddada, ages 6 and 11 respectively, and Plaintiff Abigail Edwards, age 7.) Despite the special AC21 legislation, and plaintiffs' favored status under its protections which permits them to stay for many years and decades in the United States, plaintiffs have been

treated less favorably than other derivative child immigrants from other countries based only upon their parents' national origin.

The district court found that Plaintiffs whose parents were born in the oversubscribed country of India were not similarly situated to other children whose parents were born in non-oversubscribed countries because their loss of CSPA benefits turns not on national origin but on supply and demand. ER 7, ER 30-31. The district court erred in this finding because Congress intended through AC21 to place Plaintiffs in a better situation than others from non-oversubscribed countries with respect to their ability to remain in the United States as long-term residents while awaiting a decision on their application for permanent resident status. This Act of Congress served as a counterbalance to their oversubscribed status and places them at least similarly situated to children from non-oversubscribed countries. This circumstance was not considered by the district court.

There is no case directly on point in this circuit. The Ninth Circuit sustained an equal protection challenge to a statute which afforded discretionary relief from removal to permanent residents who have committed worse crimes than similarly situated permanent residents. See *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005) (vacated for lack of jurisdiction *Cordes v. Mukasey*, 517 F.3d 1094 (9th Cir. 2008) (*Cordes* also relied on the case below, which has been overruled). The Ninth Circuit sustained an equal protection challenge in a case involving a law granting

relief from removal to permanent residents in exclusion proceedings who left the United States temporarily and sought return, but not to those permanent residents in deportation proceedings who had never left the United States. See *Tapia-Acuna v. INS*, 640 F2d 223, 225 (9th Cir. 1981). The Court in *Tapia-Acuna* stated, "no purpose would be served by giving less consideration to the alien 'whose ties with this country are so strong that he has never departed after his initial entry' than to the alien 'who may leave and return from time to time.'" *Id*. at 225. The holding in *Tapia-Acuna*, however, was later overruled in *Abebe v. Mukasey*, 554 F.3d 1203, 1205-06 (9th Cir. 2009) (*en banc*).

The Court in *Abebe* found a rational basis in limiting 212(c) relief to those seeking to enter the country from abroad by incentivizing deportable aliens to leave the country. *Id*. at 1206. Judge Clifton (joined by Silverman and Gould) wrote a concurrence, noting that the majority unnecessarily overruled more than sixty years of precedent and created a circuit split, but also clarified that "[t]he majority doesn't quarrel with the legal rule of *Tapia-Acuna*, that the Equal Protection Clause prohibits irrational disparities in treatment. It simply disagrees with the application of that long-settled rule to a statutory provision that was repealed a dozen years ago. It disagrees that the disparate treatment our court previously concluded was irrational is, in fact, irrational." *Id*. at 1209.

II. The court erred in finding that the prohibition on Plaintiffs' use of the Worldwide Visa Bulletin to calculate their Child Status Protection Act (CSPA) age has a rational basis despite Plaintiffs' status as favored immigrants who are protected and provided special ability to establish a residence of long duration under AC21.

Of the bounty of benefits the federal government grants to those within this country Justice Stevens in *Mathews v. Diaz*, 426 U.S. 67 (1976) stated, "[t]he decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence…it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and duration of his residence." *Id*. at 80, 82-83. See *Korab v. Fink*, 797 F.3d 572 (9th Cir. 2014) (citing the latter sentence from *Matthews*). Congress has specifically passed legislation, AC21 § 104(c), which sanctions and encourages plaintiffs' ties to grow stronger, and which permits and welcomes the character and duration of plaintiffs' residence to exceed normal limitations.

Plaintiffs are culturally American, having grown up here. It is not rational that Congress would have had in mind when passing CSPA two years after AC21 § 104(c) that defendants would force these long-term H-4 status holders to use a drastically less favorable Visa Bulletin to lock CSPA age, causing them to lose eligibility to immigrate together with their parents, and lose utterly their place in

line as well. These twin disabilities cripple their chances of remaining with their family and the country they call home. This isn't at all reasonable. It is more reasonable to expect that Congress would treat this smaller minority of long-term legal residents at least as well as the newly arrived, particularly when the only difference between the two is their national origin. Plaintiffs are entitled to be treated similarly and have their CSPA ages determined based on the Worldwide Visa Bulletin chart.

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

Plaintiffs concede that the caselaw supports rational basis review of even national origin discrimination in the immigration context, although such discrimination offends fundamental notions of fairness and plaintiffs urge the court

to adopt intermediate scrutiny and find that the discrimination based on national origin is not narrowly tailored to advance any important or compelling government interest.[4]

Congress provided Plaintiffs as beneficiaries of AC21 § 104(c) with favored status. Congress determined that they would extend the character and duration of Plaintiffs' residence and ties to this country. It is wholly irrational to expect that they be treated far less favorably in an age calculation under CSPA than recent arrivals, who may have few if any ties to the U.S., based only upon their national origin. The district court erred in failing to consider and recognize the impact of Congress' decision to extend these special benefits to Plaintiffs under AC21.

III. The court erred in finding that the 2018 update to the USCIS Policy Manual and 2019 update to the DOS FAM was not final agency action despite the policy's direct and appreciable legal consequences on Plaintiffs.

Plaintiffs challenge the USCIS Policy Manual (PM) change to 7 USCIS-PM A.7 and the Department of State revision to 9 FAM 502.1-1(D)(4).[5] Until 2015 the

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

Department of State had long maintained only one Visa Bulletin, but in 2015 it issued two separate Visa Bulletin Charts – one labeled Dates for Filing and the other Final Action Dates. The PM and FAM revisions in 2018 and 2019 respectively announced that while the Dates for Filing chart would be used to determine whether a child could file an application for adjustment of status, that the Final Action Dates would be used to determine when the child's age would be frozen under CSPA. Plaintiffs allege that because 8 U.S.C. § 1255(a)(3) dictates that an application for adjustment of status may only be filed when a visa is "immediately available" and the CSPA statute 8 U.S.C. § 1153(h)(1)(A) locks a child's age under 21 where an immigrant visa "becomes available" that their age was locked when they were able to file an adjustment of status application. ER 99-100. The challenged policy changes require use of the Final Action Date chart which reflects when a visa can actually be issued, but the standard for CSPA age locking is not actual issuance but rather when a visa becomes available. A visa becomes available when the Dates for Filing chart advances beyond the person's priority date, as evidenced by USCIS recognizing that a person may only file an

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[5] On May 23, 2018, USCIS issued an update to its Policy Manual, Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act (7 USCIS-PM A.7). ER 149-165. On July 29, 2019, Department of State revised its Foreign Affairs Manual, at 9 FAM 502.1-1(D)(4) Calculation of CSPA Age for Preference Categories and Derivative Petitions. The FAM largely tracks and follows the earlier issued USCIS update.

adjustment of status application when an immigrant visa is immediately available to the applicant pursuant to 8 U.S.C. § 1255(a)(3).

The district court did not reach the merits of Plaintiff's claim that the agency policies conflicted with the clear language of the statute, finding instead that the policies were not final agency action and therefore not subject to judicial review under the APA. ER 7. The district court held that the policies were akin to the manual at issue in *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, 5 F.4th 997, 1008 (9th Cir. 2021) ("*Whitewater II"*). ER 7-8. The court held that "while USCIS and consular officers are bound to follow the guidance contained in the agency manuals, the manuals have not 'bound [such officers] to any particular decision." ER 40, ER 8.

The USCIS Policy Manual does, however, bind officers to a particular decision:

> "An applicant who chooses to file based on the Dates for Filing chart may ultimately be ineligible for CSPA if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action dates chart. In such cases where the applicant's CSPA age is 21 or older, USCIS denies the application."

ER 154.[6] That is not a purely informational agency letter to a single entity which compels no one to do anything. See *Advanced Integrated Med. Science Inst. v. Garland*, 24 F.4th 1249, 1259-60 (9th Cir 2022) (describing the difference). This publicly available policy manual reflects a clear announcement that the agency has arrived at a "definitive position" on which chart to use for CSPA age determination which results in "USCIS den[ying] the application." *Id*. The legal consequences are also clear in that the applicant's application is denied, their considerable filing fee of $1,225 lost, rendering them without legal status and commanded to leave the country. This is precisely the situation which did in fact develop for Plaintiff Peddada. Her application for adjustment of status was denied in a decision issued on July 26, 2021, because USCIS determined she was no longer be eligible under CSPA. USCIS advised: "You are not authorized to remain in the United States. If you fail to depart the United States within 33 days of the date of this letter, USCIS may issue you a Notice to Appear and commence removal proceedings against you with the immigration court. This may result in your being removed from the

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[6] The language of the Policy Manual in the record differs inexplicably from the one now available on the USCIS website accessed on June 10, 2022 (https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7). Specifically, the last paragraph now omits the language "In such cases where the applicant's CSPA age is 21 or older, USCIS denies the application." The latter language was contained in the version reviewed by the district court and can be found in the Excerpts at ER 154. There is no explanation on the USCIS website as to why the language was modified on the USCIS website, nor was there a public announcement about the change. The Court may draw whatever conclusions appropriate.

United States and found ineligible for a future visa or other U.S. immigration benefit." ER 70-71.

The district court erred in determining that the USCIS Policy Manual did not prescribe any course of action. ER 40. On the contrary, the PM was issued as a public facing guidebook to describe what will happen when a person files an application based on Dates for Filing and the Final Action Date is not current for issuance of a visa before your CSPA adjusted age moves beyond 21 years. USCIS denies the application, the Policy Manual states clearly. If the district court's interpretation were to be upheld, it would mean that only final agency decisions in individual cases are subject to APA review, but that is not required by the statute or caselaw. Instead, pronouncements which show the agency has reached a "definitive position" which will have impact on the public are reviewable under the APA. *Advanced Integrated Med. Science Inst. v. Garland, supra,* 24 F.4th at 1259. The 2018 and 2019 changes were communications of definitive position on the issue of which chart to use for CSPA age calculation and what to do in case someone filed based upon an immediately available visa but whose CSPA age 21 calculation was 21 or over at the time of the Final Action Date chart showing issuance. The PM and FAM pronouncements constituted final agency action on the issue of CSPA calculation using Dates for Filing or Final Action date and are reviewable under the APA.

Plaintiff Abigail Edwards filed her adjustment of status application using the Dates for Filing chart, and in December 2019 she already reached age 21 under the agency's newly minted policy which relies upon the Dates for Final Action. The Supreme Court has held that threat of administrative action where the governmental action is "sufficiently direct and immediate" is sufficient to meet the final agency action requirement of the APA, particularly where the rule is substantive and not merely interpretive or a general statement of policy. See *Abbot Laboratories v. Garner*, 387 U.S. 136, 152 (1967). Plaintiff Edwards is threatened by rescission of her lawful permanent resident status and threatened with loss of legal status and banishment from the country where she has spent most of her life with her mother. Plaintiff Pavani Peddada was faced with with impending denial of her properly filed adjustment of status application (which was ultimately denied), loss of legal status, and banishment from the country resulting in separation from her family. Plaintiff Peddada's application was denied based on the USCIS Policy Manual on July 26, 2021 in line with the Policy. Immigration law severely punishes visa overstays, including the 3- and 10-year bars of 8 U.S.C. § 1182(a)(9)(B) which are implicated within just 180 days of denial. Edwards and Peddada were not required to wait for rescission and denial and loss of these significant rights, incurring significant and long-lasting bars to admission, given the substantive rule change and the certainty of resulting adverse government

action based on the PM. It was precisely because they feared the inevitable that they sought to compel the agency to proceed through notice and comment rulemaking so that the agency could properly consider the public's concerns about the conflict with the statutory provisions caused by the agency's new rule.

Plaintiffs Abigail Edwards and Pavani Peddada do not complain merely about the years they have waited in line, but that they are entitled to indefinite stay as child derivatives under CSPA specifically because the agency determined their long wait in line had come up for an immigrant visa that was "immediately available" to them because they filed for adjustment of status under 8 U.S.C. § 1255(a), which requires an immigrant visa to be immediately available. They complain that Defendants now want to rescind Plaintiffs' eligibility for CSPA age locking due to Defendants' interpretation of immigrant visa availability under CSPA which contravenes the plain language of the statutory scheme of both the CSPA and the adjustment of status statute. CSPA was "enacted to provide relief to children who might 'age out' of their beneficiary status because of administrative delays." *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009). The administrative delay recognized under CSPA is the length of time between a petition being filed and being approved. 8 U.S.C. § 1153(h)(1)(B) (subtracting from a child's age the number of days during which the petition was pending).

Included in this age calculation, however, is the critical "age locking" provision of 8 U.S.C. § 1153(h)(1)(A) which locks the child's age indefinitely on the first day of the month during which an immigrant visa "becomes available" for them. The use of one or the other Visa Bulletin thus implicates the crux of the CSPA statute's essential protections. One of CSPA's core purposes is to lock a child's age indefinitely when a visa is available. Plaintiffs' APA Claim for Relief turns upon the meaning of immigrant visa availability. Because Plaintiffs claim that Defendants have issued a definitive position on the interpretation of visa availability under CSPA in a way contrary to the unambiguous language of the statutory scheme, Plaintiffs state a claim upon which relief may be granted.

IV. The court erred in finding that the agency policies were not legislative rules subject to notice and comment rulemaking despite evidence that the agencies extend lawful permanent resident status only after formalizing prerequisites contained in the new guidance, without which there would be no basis for the disputed interpretation.

Without the 2018 USCIS Policy Memo and 2019 FAM update, agency adjudicators would have no basis to determine CSPA age when adjudicating applications for lawful permanent resident status. This is a hallmark of a legislative rule. The district court, however, found that the policies were interpretive rules and not legislative rules requiring notice and comment rulemaking. ER 42. The district court adopted the magistrate's Finding and Recommendation on the legislative rule issue without elaboration. ER 8. The magistrate concluded the PM and FAM were

not legislative rules mainly by relying on another district court decision, *Lin Liu v. Smith*, 515 F.Supp. 3d 193 (S.D.N.Y. 2021). The court in *Lin Liu*, in turn, did not consider the adjustment of status statute, 8 U.S.C. § 1255(a)(3), which Plaintiffs claim supports their argument that the agency interpretation is in conflict with the clear language of the statute. The magistrate in the instant case did not acknowledge this argument nor discuss the standards for determining whether a rule is interpretive or legislative, seemingly deferring to the *Lin Liu* case. ER 40. The *Lin Liu* case, however, is distinguishable because it did not involve the adjustment of status statute. The court in *Lin Liu* engaged in a very limited analysis of the legislative rule issue and the case was wrongly decided.

The Ninth Circuit has explained that, "In general terms, interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Industries Ass'n v. Drug Enforcement Admin*., 333 F.3d 1082, 1087 (9th Cir. 2003). The creation of two separate visa bulletins in 2015 followed by agency guidance issued in 2018 and 2019 mandating that one chart must be used to allow filings and the other must be used for fixing CSPA age is a change in existing law. The Ninth Circuit in *Hemp Industries Ass'n*

cited favorably the D.C. Court of Appeals decision *American Mining Congress v. Mine Safety & Health Admin*., 995 F.2d 1106, 1109 (D.C. Cir. 1993), which stated that a rule is legislative when it has the "force of law" including "where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate." *Id*. *American Mining* also states, "Analogous cases may exist in which an agency may offer a government benefit only after it formalizes the prerequisites." *Id*. The government benefit here is permanent resident status, and the prerequisites are contained only in this new agency guidance. Here, the PM was accompanied by a "Policy Alert" ("PA-2018-05") stating that "This guidance is controlling and supersedes any prior guidance on the topic." ER 148. The PM states,

> "While an adjustment applicant may choose to file an adjustment application based on the Dates for Filing chart, USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes. Age at time of visa availability is the applicant's age on the first day of the month of the DOS Visa Bulletin that indicates availability according to the Final Action Dates Chart. An applicant who chooses to file an adjustment application based on the Dates for Filing Chart may ultimately be ineligible for CSPA if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action Dates chart. In such cases where the applicant's CSPA age is 21 or older, USCIS denies the application."

7 USCIS-PM A.7.F.4[7] ER 154. This is evidence that USCIS offers a government benefit (permanent resident status) only after it formalizes these prerequisites, and without the PM guidance on CSPA calculation, there would be no basis for agency enforcement of CSPA. See also *ITServe Alliance, Inc. v. Cissna*, 1:18-cv-02350-RMC (D.D.C. 2020) (analyzing similar challenge to a 2018 USCIS Policy Memo on H-1B adjudications, summarizing caselaw, and finding it is a legislative rule subject to facial and as applied challenge).

The authority to deny an adjustment of status application properly filed based on Dates for Filing is unprecedented and has never been a part of any agency interpretation, prior to the challenged 2018 and 2019 agency guidance. The agency interpretations here constitute legislative rules.

The adjustment of status statute, 8 U.S.C. § 1255(a)(3), permits the filing of an I-485 Application for Adjustment of Status where "an immigrant visa is immediately available to him at the time his application is filed." (emphasis supplied). The statutory language "immediately available" is significant as explained below. USCIS and DOS began using for the first time two visa bulletins as of 2015 (Final Action Dates, Dates for Filing), and adjustment of status applications may be filed under the Dates for Filing chart rather than the Final

[7] See also 7 USCIS-PM A.7.F.5, ER 154-55 explaining how applicants filing based on Final Action Dates are locked (frozen) but that applicants filing based on Dates for Filing are not locked in.

Action Dates chart during some times of the year as announced by USCIS just as occurred in plaintiff Abigail Edwards' case. The State Department also invites immigrant visa applicants to begin applying and paying fees when the Dates for Filing cutoff date advances beyond the priority date. This is proof that Defendants view the term "immigrant visa is immediately available" to include situations in which the Dates for Filing Chart (and not just the Final Action Dates chart) cutoff date has advanced beyond the child's parent's priority date.

Also, under the CSPA provision, 8 U.S.C. § 1153(h)(1)(A), the age of a child under 21 is frozen on the "date on which an immigrant visa number <u>becomes available</u> for such alien" (emphasis supplied) and because an adjustment application can be filed based on that same availability (compare "immediately available" to "becomes available"), then the child's age should similarly be frozen at that time using the same chart. Contrary to the clear language of this statutory scheme, however, USCIS has interpreted the term "available" to mean two different things to the detriment of Plaintiffs. This is a substantive change in the law, not just an interpretation or general policy statement. Defendants were required to engage in notice and comment rulemaking, instead of issuing policy guidance without public input, for such a substantive change, which constituted a legislative rule. Defendants did not engage in notice and comment rulemaking, and therefore the agency pronouncements are invalid.

Had the agency engaged in notice and comment rulemaking, the conflict between the two instances of "available" would have been brought to the agency's attention. It is an irrational interpretation to hold that the term "immediately available" means something less immediate than "becomes available." In other words, if a child's age is frozen under CSPA only when the priority date is earlier than the Final Action Date cut off based on the term "becomes available," but that same child's application was previously accepted for filing when the visa was "immediately available" based on the Dates for Filing Chart, then it shows the visa was immediately available (and thus at least "becomes available") when the adjustment application was filed. Because the term "immediate" is understood in the temporal sense to mean without any intervening time (in other words, instantly), it cannot mean that it would be available at some future indeterminate date months or years later. The court in *Lin Liu* based its decision on a presumption that CSPA age must be determined based upon when the agency "legally could issue the visa number." *Lin Liu, supra*, 515 F.Supp 3d at 198. But neither 8 U.S.C. § 1255(a)(3) nor 8 U.S.C. § 1153(h)(1)(A) require the agency to actually issue the visa number to permit the filing of an adjustment or the locking of a child's age. Instead, when a person files adjustment of status they are required by 8 U.S.C. § 1255(a)(3) to have a visa number immediately available, which means without an

intervening period of time, or instant. That cannot also mean it becomes available months or years later.

Plaintiff Abigail Edwards' adjustment application was filed in January 2019 when the Dates for Filing chart was current (thus showing an immediately available visa number) but the Final Action Date chart was not.[9] Plaintiff Pavani Peddada's adjustment of status application was filed in October 2020 when the Dates for Filing chart was current (thus showing an immediately available visa number) but the Final Action Date chart was not. The applications were filed on the basis of the adjustment of status statute, 8 U.S.C. § 1255(a)(3), which permits an adjustment filing only where the "immigrant visa is immediately available to [her] at the time [her] application is filed" which is proof that her CSPA age could be frozen as of January 2019 and October 2020, respectively, because the CSPA statute, 8 U.S.C. § 1153(h)(1)(A), permits freezing the age on the "date on which an immigrant visa number becomes available for such alien" (emphasis supplied). If they were deemed by USCIS to have a visa *immediately available* at the time of filing under 8 U.S.C. § 1255(a)(3), then surely an immigrant visa number also *became available* at that time and not more than a year later. That is because

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[9] The Visa Bulletin charts are available at this website: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html. For historical charts in a format which can be compared more readily through 2018, see Exh. C for Worldwide and Exh. D for India. ER 166-193. These charts can also be accessed at the bottom of the Visa Bulletin site.

immediately available must mean something even more immediate and available than the language becomes available without the immediate modifier, or at the very least that these two terms mean the same thing. The fact that the government may take months to "actually issue" them permanent resident status does not change the fact that they were considered to have an immediately available visa when the adjustment was filed, and when their CSPA age was under 21. Plaintiffs claim their ages were locked in at under 21 under CSPA when a visa became immediately available.

Reference to the entire statutory scheme also supports this view. For example, 8 U.S.C. § 1153(e) provides: "Immigrant visas made available under subsection (a) [family based] or (b) [employment based] shall be issued to eligible immigrants in the order in which the petition in behalf of each such immigrant is filed with the Attorney General…" and 8 U.S.C. § 1153(g) provides the DOS authority to "make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) and to rely upon such estimates in authorizing the issuance of visas." (emphasis supplied). It is clear from the statutory scheme that visa availability is just an "estimate" of anticipated "availability" and, pursuant to 8 U.S.C. § 1153(h)(1)(A), which references "availability" for issuance and "such availability" for filing applications to seek permanent resident status (whether

through an immigrant visa application with DOS or an adjustment of status application with USCIS), that "availability" means when a child has been invited to apply for an immigrant visa or an adjustment of status (because a visa number must be "immediately available" pursuant to statute) based on the published chart which applies for those applications (Dates for Filing). Using one chart to invite a child to apply because an immigrant visa is immediately available and a different chart to determine their age and then deny them permanent residency flies in the face of Congress's statutory scheme.

In light of the overall statutory scheme and the plain meaning of "immediately available," the new policies are erroneous and constitute an arbitrary and capricious interpretation, not in accordance with the law, that conflicts with the unambiguous statute, and is therefore invalid on its face. Further, the policies are legislative rules because they changed the law by mandating that one Visa Bulletin Chart be used to allow filing of applications, and another chart to be used for locking CSPA age. The policies in the PM and FAM represented the culmination of a definitive position on the use of one bulletin over the other for CSPA age locking purposes, a calculation at the heart of CSPA eligibility for derivative children, and are therefore legislative rules which required notice and comment rulemaking pursuant to the APA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for consideration of Plaintiff's claims on the merits.

Date: June 10, 2022

Parrilli Renison LLC

/s/ Brent W. Renison
Brent W. Renison

Attorneys for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I.FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number 22-35203

I am the attorney or self-represented party.

This brief contains 6,835 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature ___*s/Brent W. Renison*_____ Date June 10, 2022

ADDENDUM

8 U.S.C. § 1153(e)

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

8 USC § 1153(g)

(g) Lists For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

8 U.S.C. § 1153(h)

(h) Rules for determining whether certain aliens are children

(1) In general For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

8 U.S.C. § 1182(a)(9)(B)

(B) Aliens unlawfully present (i) In general Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) 3 of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

8 U.S.C. § 1255(a)

(a)Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence 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.

USCIS Policy Manual, 7 USCIS-PM A.7.F.4

4. Determining Age at Time of Visa Availability

In order to calculate an adjustment applicant's CSPA age according to the formula above, the officer must first determine the age at time of visa availability.

In order for the immigrant visa to be considered available, two conditions must be met:

The petition must be approved; and

The visa must be available for the immigrant preference category and priority date.

Therefore, the date the visa is considered available for family and employment-based preference applicants is the later of these two dates:

The date of petition approval; or

The first day of the month of the DOS Visa Bulletin that indicates availability for that immigrant preference category and priority date in the Final Action Dates chart. [28]

For DVs, the date a visa is considered available is the first day on which the principal applicant's rank number is current for visa processing.[29]

Determining When an Applicant May File an Adjustment Application

Adjustment applicants can determine when to file their applications by referring first to the USCIS website and then to the DOS Visa Bulletin.[30]

In September 2015, DOS and USCIS announced a revision to the Visa Bulletin, which created two charts of dates.[31] DOS publishes a new Visa Bulletin on a monthly basis. Since October 2015, the Visa Bulletin has featured two charts per immigrant preference category:

Dates for Filing chart; and

Final Action Dates chart.

USCIS designates one of the two charts for use by applicants each month.[32] Applicants must check the USCIS website to see which chart to use in determining when they may file adjustment applications. Applicants cannot rely on the DOS Visa Bulletin alone because the Visa Bulletin merely publishes both charts; it does not state which chart can be used. The DOS Visa Bulletin website contains a clear warning to applicants to consult with the USCIS website for guidance on whether to use the Dates for Filing chart or Final Action Dates chart.

Visa Bulletin Final Action Dates Chart used for Child Status Protection Act Age Determination

While an adjustment applicant may choose to file an adjustment application based on the Dates for Filing chart, USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes. Age at time of visa availability is the applicant's age on the first day of the month of the DOS Visa Bulletin that indicates availability according to the Final Action Dates chart.

An applicant who chooses to file an adjustment application based on the Dates for Filing chart may ultimately be ineligible for CSPA if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action Dates chart.[33]

NOTE: The above was taken from the USCIS website on June 10, 2022 (https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7) and the last paragraph inexplicably differs from the USCIS Policy Manual in the Excerpts at ER 154. The new USCIS website version lacks the language "In such cases where

the applicant's CSPA age is 21 or older, USCIS denies the application." The latter language was contained in the version reviewed by the district court.

9 FAM 502.1-1(D)(4)
Calculation of CSPA Age for Preference Categories and Derivative Petitions
(CT:VISA-1486; 02-24-2022)

a. For most preference category and derivative petitions, the "CSPA age" is determined on the date that the visa, or in the case of derivative beneficiaries, the principal applicant's visa became available (i.e., the date on which the priority date became current in the Application Final Action Dates and the petition was approved, whichever came later). The CSPA age is the result of subtracting the number of days that the IV petition was pending with USCIS (from date of receipt to date of approval, including any period of administrative review) from the actual age of the applicant on the date that the visa became available. Administrative review includes any period during which USCIS is reviewing a previously approved petition. The administrative review period may include the time it takes for USCIS to review a previously approved petition returned to USCIS by a consular officer for review and revocation. The CSPA age adjustment period would run from the date of petition filing until the date USCIS takes final action on the petition. You should note that in some cases, such as employment preference cases based on the filing of a labor certification, the priority date is not the same as the petition filing date. The petition filing and petition approval dates are the only relevant dates. Time waiting for a labor certification to be approved or for a priority date to become current is not considered.