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

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge.

FINDINGS

Plaintiffs in this putative class action are a group of Indian nationals who have enjoyed long-term residency in the United States as beneficiaries of temporary work visas and who have been seeking permanent residency in the United States through employment-based immigration visas. The Second Amended Complaint ("SAC") states that plaintiffs bring this action "to ensure that provisions of the Child Status Protection Act ("CSPA") are applied equally to children regardless of the national origin of their parents." SAC 2, ECF 31. Plaintiffs assert violations of equal protection under the Fifth Amendment and challenge defendants' interpretations of the CSPA under the Administrative Procedure Act ("APA"). *See* SAC 20-30, ECF 31.

Defendants United States Citizenship and Immigration Services ("USCIS") and the United States Department of State ("State Department") have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Mot. 16-35, ECF 36. For the reasons discussed below, defendants' motion to dismiss should be DENIED to the extent they claim lack of subject matter jurisdiction and GRANTED on the basis that plaintiffs have failed to state a claim for relief.

I. Statutory Framework

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, *et seq.*, regulates the "temporary admission of nonimmigrants for specific purposes." *Ray v. Cuccinelli*, No. 20-CV-06279-JSC, 2020 WL 6462398, at *1 (N.D. Cal. Nov. 3, 2020). Under the INA, "[d]omestic employers who seek to hire foreign nationals for specialty occupations must apply and secure for these potential employees a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B)—an 'H-1B' visa." *Id.* An H-1B visa holder's spouse and children are "entitled to derivative immigration status under 8 C.F.R. § 214.2(h)(9)(iv), and [are] commonly referred to as holding an 'H-4' visa." *Id*.

If an H-1B worker seeks to adjust status to lawful permanent residence ("LPR"),[1] that process is generally initiated by an employer who applies to the Department of Labor ("DOL") for a labor certificate and then files Form I-140 Immigrant Petition for Alien Workers with USCIS to have the noncitizen worker classified into the appropriate employment preference category. *See* 8 U.S.C. §§ 1154(a)(1)(F), 1255(a)(2); 8 C.F.R. § 204.5(a). The INA establishes five preference categories based on variables such as education and job skills: (1) priority

[1] "Under the immigration laws, a noncitizen who is authorized to live permanently in the United States is a lawful permanent resident—also commonly known as a green-card holder." *Barton v. Barr*, 140 S. Ct. 1442, 1445 (2020).

workers; (2) professionals with advanced degrees or exceptional ability; (3) skilled workers and professionals; (4) special immigrants, including religious workers; and (5) foreign investors (commonly referred to as EB-1, EB-2, EB-3, EB-4, and EB-5, respectively). *See* 8 U.S.C. § 1153(b)(1)-(5). If USCIS approves the I-140 immigrant visa petition, the visa beneficiary may apply for LPR once an employment-based visa becomes "immediately available" to the worker in the appropriate category. *See Mehta v. United States Dep't of State*, 186 F. Supp. 3d 1146, 1149 (W.D. Wash. 2016) (citing 8 U.S.C. § 1255)).

The INA imposes an annual limit of 140,000 employment-based visas that are allocated by employment category and subject to the 7% "per-country limitation." *Id.* (citing 8 U.S.C. §§ 1151, 1153(b), 1154(b)). When employment-based visas become available, they are issued to eligible workers in the order in which the workers' employers filed their I-140 petitions. 8 U.S.C. § 1153(e)(1). A visa beneficiary's "place in line" is determined by the date on which the worker's employer filed its I-140 labor certification application, which is known as the beneficiary's "priority date." *Mehta*, 186 F. Supp. 3d at 1149 (citing 8 C.F.R. § 204.5(d)).

To determine whether an immigrant visa is "immediately available," a beneficiary consults a monthly Visa Bulletin published by the State Department. *See* 8 C.F.R. § 245.1(g); *Mehta*, 186 F. Supp. 3d at 1150. The Visa Bulletin is organized according to country of origin and visa preference category. *Mehta*, 186 F. Supp. 3d at 1150. If there are sufficient visas available for all known applicants from a specific country and of a specific preference category, the "Worldwide Employment Final Action Dates" chart lists that combination as "current," and all applicants matching that combination may file an I-485 form regardless of their priority date. *Id*. If there are not enough immigrant visas available to meet demand, the Visa Bulletin publishes one or more country-specific charts, each with applicable cut-off dates, and only those applicants

with priority dates earlier than the cut-off may file for an adjustment of status. *Id*. India, China, Mexico, and the Philippines, for example, are countries with high demand for employment-based immigrant visas; thus, the Visa Bulletin has, in recent years, published an Employment Final Action Dates chart specific to each country to show visa availability pursuant to 8 U.S.C. § 1153(b).

In July 2015, the "White House announced that it would revise the monthly Visa Bulletin to better estimate immigrant visa availability for prospective applicants, and to provide needed predictability to nonimmigrant workers seeking permanent residency." *Mehta,* 186 F. Supp. 3d at 1150. Starting in September 2015, the State Department published an additional "Dates for Filing Applications" chart and announced that USCIS would accept employment-based I-485 applications to adjust status based on the filing date listed in the "Dates for Filing" chart, in addition to the dates listed in the "Final Action Dates" chart. *See id.* at 1150-51. USCIS instructs potential applicants to "[c]heck the [State Department] Visa Bulletin" each month because "[i]t will explain" which chart to use to determine when applicants can file for adjustment of status. *Id.* The Dates for Filing chart "provides a mechanism to reduce further administrative delay by informing applicants when they can file their papers to ensure timely issuance of visas when they become available." *Lin Liu v. Smith*, 515 F. Supp. 3d 193 (S.D.N.Y 2021).

In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act ("AC21"), Pub. L. No. 106–313 (2000), *as amended by* Pub. L. No. 107-213, § 11030A (2002) (codified at 8 U.S.C. § 1184 note). Under the AC21, Congress authorized H-1B workers "who are pursuing LPR status, but face long waits due to backlogs resulting from the statutory limits on immigrant visas" to remain in the United States "beyond their initial 6-year period of authorized admission." *Hsiao v. Stewart*, 527 F. Supp. 3d 1237, 1246 n.9 (D. Haw. 2021).

Pursuant to the AC21, an EB-1, EB-2, and EB-3 visa petition beneficiary "may now remain in the United States for however long it takes for his I-485 application to be adjudicated[.]" *Musunuru v. Lynch*, 831 F.3d 880, 889 n.6 (7th Cir. 2016). Derivative beneficiaries of a visa petition beneficiary holding an H-4 visa also may extend their H-4 visas under the AC21, but only for as long as they meet the definition of a "child, " *i.e.*, under the age of 21 and unmarried. *See* 8 U.S.C. § 1101(d).

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

The child of a visa beneficiary also may apply for LPR status as the visa beneficiary's derivative family member. *See* 8 U.S.C. § 1153(d); 22 C.F.R. § 42.32(a)-(d). A child applicant is afforded "the same order of consideration" as the parent visa beneficiary. 8 U.S.C. § 1153(d). If the child of a principal beneficiary turns 21 or marries before a visa becomes available to the parent, the child may no longer be regarded as a child and may lose status as a derivative beneficiary. *Id.*; *see* 8 U.S.C. § 1101(b)(1) (defining "child").

Under the Child Status Protection Act ("CSPA"), Pub. L. No. 107–208, 116 Stat. 927 (2002) (codified at 8 U.S.C. § 1153(h)(1)(A)), derivative beneficiaries are not protected from "aging out" due to the time they spend waiting for a visa to become available to their parents. *See generally Matter of Wang*, 25 I. & N. Dec. 28, 29 (BIA 2009) (extensively discussing the

legislative history and purposes of the CSPA). Rather, the CSPA helps "prevent an alien from 'aging out' because of—but only because of—bureaucratic delays: the time Government officials spend reviewing (or getting around to reviewing) paperwork at what we have called the front and back ends of the immigration process." *Scialabba*, 573 U.S. at 53. Under the CSPA regulatory scheme, a derivative beneficiary's age is "locked in" on the date a visa becomes available to the visa beneficiary parent and the amount of time government spent processing the I-140 immigrant petition is subtracted from that age to produce the "CSPA age" of the derivative beneficiary. *See* 8 U.S.C. § 1153(h).

Regarding the USCIS's calculation of a beneficiary's CSPA age, USCIS updated its Policy Manual in May 2018 to state as follows:

> 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.

7 USCIS-PM A.7. In July 2019, the State Department Foreign Affairs Manual was revised to provide that "the CSPA age is determined on the date that the visa, or in the case of derivative beneficiaries, the principal alien's visa becomes 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)." *See* 9 FAM 502.1-1 (D)(4).

II. Factual Background

Plaintiffs are six parents ("Principal Beneficiaries") who are professionals and highly-skilled workers who came to the United States from India through H-1B nonimmigrant worker visas, as well as their children ("Derivative Beneficiaries") who came to the United States as young dependents of their respective parents and were issued H-4 visas. SAC 2-11, ECF 31.

Plaintiffs arrived in the United States between 1998 and 2009 and have resided in this country since that time. SAC 3-11, ECF 31. *Id*. Sometime after coming to the United States, each Principal Beneficiary plaintiff was sponsored for an employment-based visa petition in the EB-2 or EB-3 preference category, and each one obtained a priority date between May 2008 and December 2011. *Id.* While they waited for an immigrant visa that would enable them to apply for LPR, Principal Beneficiaries were able to extend their H-1B temporary work visas past the normal six-year limit pursuant to the AC21. *Id*. Plaintiffs indicate that most or all Derivative Beneficiaries, who are currently between the ages of 22 and 27, have been able to remain in the U.S. in lawful status under F-1 student visas or other sanctioned status. *Id*. As long-term residents of the United States, Derivative Beneficiaries have received most if not all of their formal education in United States schools and have established close ties to the United States. *Id*.

Principal Beneficiaries applied for LPR when their respective priority dates became current between 2018 and 2020. *Id.* Since submitting their applications, five Principal Beneficiaries have been granted LPR by USCIS (Nakka, Peddada, Battula, Addagatla, and Edwards-Buzadzija), and one has an application currently pending with USCIS (Thodupunuri). *Id.* Five of the Derivative Beneficiaries (Nakka, Thodupunuri, Battula, Addagatla, and Venkata Peddada) turned 21 and "aged out" of eligibility before their respective parents' priority dates became current and did not apply for LPR. *Id.*

Derivative Beneficiary Edwards also aged out prior to the earliest date on which her mother could submit an application for LPR, but Edwards nevertheless applied for LPR with her mother in January 2019. *Id.* At that time, her mother's priority date of October 6, 2009, fell before the cut-off date on the January 2019 Dates for Filing Chart, which was April 1, 2010. Despite Edwards not meeting the criteria for age eligibility, "she was approved for [LPR] . . . on

the same day as her mother, October 20, 2020." SAC 11, ECF 31. However, Edwards "fears she will be served with a notice of intent to rescind her LPR status" because the "government cannot be presumed to overlook their error forever[.]" Reply 2, ECF 37.

Derivative Beneficiary Pavani Peddada had not "aged out" before her father submitted an application for LPR and therefore applied with him as a derivative beneficiary in October 2020. At that time, her father's priority date of December 7, 2010, fell before the cut-off date on the Dates for Filing Chart, which was May 15, 2011. *Id*. However, while Peddada's application was pending, she "aged out of eligibility," and USCIS denied her application in July 2021, stating, "USCIS has determined that you are ineligible for protection under CSPA. You no longer qualify as a 'child' for immigration purposes as defined by the INA." Pls.' Supp. Ex. A at 1, ECF 39-1.

Plaintiffs contend that Derivative Beneficiaries have been "excluded from treatment as children . . . solely because of their principal beneficiary parents' national origin," and that this occurred due to defendants' improper use of the Final Action Date chart specific to India ("India Chart") to determine their ages—rather than the "more favorable date[s]" on the "Worldwide" Final Action Date chart that non-oversubscribed countries use for immigrant visas. *Id*. Plaintiffs argue that defendants should have calculated and "locked" the ages of Derivative Beneficiaries under the CSPA when their respective parents' priority dates became current on the Worldwide chart—which would have been as much as ten years ago. Plaintiffs also claim that they "enjoy special status under the AC21" and argue that defendants use of the India Chart "does not serve a legitimate government interest and stands in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment[.]" *Id*. at 21. Further, Derivative Beneficiaries Peddada and Edwards challenge provisions of the USCIS 2018 Policy Manual and 2019 State Department Foreign Affairs Manual for failing to direct USCIS to use the more favorable dates

on the Dates for Filing chart for calculating their CSPA ages and for improperly linking the CSPA age calculation to the Final Action Dates chart—which, for Indian nationals, is the India Chart—in a manner that "is arbitrary and capricious[.]" *Id*. at 29. Last, Derivative Beneficiaries Edwards and Peddada allege that defendants published their manuals in contravention of the notice and comment procedures required by the APA for legislative rules. *Id*. at 30, ECF 31.

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

"Federal courts are courts of limited jurisdiction." *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir. 2017) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court over the subject matter of the complaint. FED.R.CIV.P. 12(b)(1). "Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Rainero v. Archon Corp.*, 844 F.3d 832, 841 (9th Cir. 2016). The court must dismiss any case over which it lacks subject matter jurisdiction. FED.R.CIV.P. 12(h)(3). "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Once a defendant has moved to dismiss for lack of subject matter jurisdiction, the plaintiff "bears the burden to establish subject matter jurisdiction by a preponderance of the evidence." *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 569 (9th Cir. 2016).

A. Ripeness

Defendants argue that "Plaintiff's claims are not ripe for judicial review because they all depend on a series of future events occurring." Mot. 17, ECF 36. Specifically, defendants argue, "in order to reach the question of whether Plaintiff Derivative Beneficiaries may still qualify as

under 21 years old under [the CSPA] age calculation," "derivative beneficiaries must apply for adjustment of status and must demonstrate that they are eligible." *Id*. Plaintiffs allege that all seven Derivative Beneficiaries are over 21 and have "aged out" of eligibility for obtaining LPR as part of their respective parent's applications for LPR. *See* SAC 3-11, ECF 31. Thus, plaintiffs assert, "their claims are ripe." Resp. 2, ECF 37.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies[.]'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Ripeness is "designed to ensure that courts adjudicate live cases or controversies and do not 'issue advisory opinions [or] declare rights in hypothetical cases.'" *Bishop Paiute Tribe v. Inyo Cty*., 863 F.3d 1144, 1153 (9th Cir. 2017) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services ("CSS"), Inc*., 509 U.S. 43, 57 n.18 (1993) (citations omitted).

For a claim to be "'ripe' for judicial consideration," the "effects of the administrative action challenged [must] have been felt in a concrete way by the challenging parties[.]'" *CSS*, 509 U.S. at 57. In *CSS*, a group of noncitizens brought a pre-application challenge against Immigration and Naturalization Service ("INS") regulations that established criteria for LPR. *Id.* at 45. The Supreme Court found that a class member's claim "would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him," by either denying LPR applications based on the contested criteria or "front-desking"

them, *i.e.*, refusing to accept applications for processing based on the contested criteria. *Id*. at 59, 61-62. In either situation, plaintiffs would "have felt the effects of the . . . regulation in a particularly concrete manner" that would render their claims ripe. *Id*. at 62.

Under *CSS*, a plaintiff's claim may be ripe even where there is no LPR application submitted nor attendant agency action. As the Court noted, "we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure to apply." *Id*. at 66 n.28. In that situation, the Court explained, the plaintiffs will have shown that the "regulation (had been) applied to them in a sufficiently concrete manner to satisfy ripeness concerns." *Id*. In a concurrence, Justice O'Connor recognized a related circumstance in which a plaintiff's claim could be found ripe: "'Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.'" *Id.* at 69 (citation omitted). In such a case, Justice O'Connor wrote, "if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may be well be a justiciable controversy that the court may find prudent to resolve." *Id.*

The Ninth Circuit adopted Justice O'Connor's approach in *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996), explaining, "[b]ecause the majority [in *CSS*] did not expressly disapprove of O'Connor's 'firm prediction rule,' . . . we are free to adopt it in this Circuit and do so now." *Id.* at 1436 (citation omitted). In *Freedom to Travel*, the plaintiff challenged federal regulations that restricted travel to Cuba to certain license holders who met stated criteria. *Id.* at 1434. The government argued that the plaintiff's claims were not ripe

because the plaintiff "never applied for and was therefore never denied a specific license." *Id.* at 1434. Although the court "recogniz[ed] that the . . . [plaintiff] has never applied for a license," it also determined that any application submitted by the plaintiff would be "summarily rejected" because the plaintiff did not meet the listed criteria for licensure. *Id.* Thus, the court concluded, "we can firmly predict that [the plaintiff's] application would be denied," and held that the plaintiff's claims were therefore "ripe under *CSS*." *Id.*

Here, plaintiffs' claims are also ripe under *CSS*. Beginning with plaintiff Pavani Peddada, defendant acknowledges that USCIS recently "denied Plaintiff Pavani Peddada's application for adjustment of status" after the agency "concluded that [she] did not meet the definition of the term 'child' under the [CSPA]." Resp. Pls.' Supp. 1-2, ECF 40. Further, defendants concede that "the ripeness argument raised in their motion to dismiss may no longer be applicable to Plaintiff Peddada." *Id*. Indeed, the fact that Derivative Beneficiary Pavani Peddada applied for and was denied LPR on the basis of defendants' contested regulations and policies means that her situation is precisely what the Supreme Court described in *CSS*:

> In these circumstances, the promulgation of the challenged regulation did not itself give each . . . class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him. Ordinarily, of course, that barrier would appear when the INS formally denied the alien's application on the ground that the regulation rendered him ineligible for legalization.

509 U.S. at 59-60. Because there is no question that the USCIS "blocked" the path of Derivative Beneficiary Pavani Peddada when it denied her application for LPR, her claims are ripe. *See id.*

Regarding Derivative Beneficiary Abigail Edwards, who applied for and was granted LPR, defendants argue that Edwards' claims cannot be ripe unless the court can "firmly predict that USCIS *will* initiate recission proceedings in order to rescind her permanent residence status." Mot. 20, ECF 36 (emphasis in original). In response, Derivative Beneficiary Edwards

argues that "[t]he government cannot be presumed to overlook their error forever, and one can easily predict that Defendants will pursue the rescission of Edwards' green card." Reply 2, ECF 37. Edwards' point is persuasive. It is not clear why USCIS overlooked Edwards' non-qualifying age in her LPR application, but the situation is clearly anomalous. Edwards alleges she "aged out" of eligibility as a derivative beneficiary of her mother's LPR application based on clear statutory criteria, and defendants do not specifically contest that fact. Nor is there any question that USCIS recently denied Derivative Beneficiary Pavani Peddada LPR based on her "aging out" under the same statutory criteria. Under these circumstances, it appears "inevitable that the challenged rule will operate to the plaintiff's disadvantage." *Freedom to Travel*, 82 F.3d at 1436 (quoting *CSS*, 509 U.S. at 69). Therefore, the court can "firmly predict" that the contested agency rules will be applied to Derivative Beneficiary Edwards in the future and that "she will be served with a notice of intent to rescind her LPR status." SAC 11, ECF 31. Thus, her claims are ripe.[2]

As for the five plaintiffs who have not submitted applications for LPR—Derivative Beneficiaries Nakka, Thodupunuri, Battula, Addagatla, and Venkata Peddada—defendants acknowledge that their claims may nevertheless be ripe but "only if the Court 'can make a firm

[2] Defendants do not assert a mootness challenge to Derivative Beneficiary Edwards' claims, but the issue of mootness was discussed at oral argument, and plaintiffs' counsel cited *Abou-Elmajd v. Gonzales*, No. CIV.06 1154 KI, 2006 WL 2994840, at *2 (D. Or. Oct. 19, 2006), in support of the argument that Edwards' claims cannot be moot under the doctrine of voluntary cessation. In *Abou-Elmajd*, USCIS argued that the plaintiff's claim was moot because USCIS had granted the plaintiff LPR. *Id.* The court held that the claims were not moot because USCIS could still "rescind [the plaintiff's] status for a period of five years," and it was not "absolutely clear" that USCIS would "comply with its regulations . . . in the future." *Id*. The court in *Innovation L. Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1164 (2018), also rejected the defendants' mootness argument because the defendants had not instituted a "permanent change" to the policies at issue and offered "little guarantee that the policies currently in place will remain in place going forward." *Id.* Here, there is also "little guarantee" that USCIS will not discover its age calculation error and rescind Derivative Beneficiary Edwards's LPR status. Thus, her claims are not moot. *See id.*

prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule.'" Mot. 18, ECF 36 (citing *Freedom to Travel*, 82 F.3d at 1436). However, under *CSS*, a nonapplicant plaintiff who alleges that an agency's "front-desking policy" was "a substantial cause of their failure to apply," may also be able to show that the contested regulation has been "applied to them in a sufficiently concrete manner to satisfy ripeness concerns." 509 U.S. at 66 n.28; *see also Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor (ALF-CIO) v. INS*, 306 F.3d 842, 865-66 (9th Cir. 2002) (citing *CSS*, 509 U.S. at 66 n.28, and holding that a plaintiff's claims would be ripe if the plaintiff could show the agency's front-desking policy was a "substantial cause" of the failure to submit an application for LPR).

Here, Derivative Beneficiaries Nakka, Thodupunuri, and Battula allege exactly that. They allege that they did not apply for LPR because "it would have been futile" for them to do so given that each one of them "aged out" of eligibility well before their respective parents applied for LPR. SAC 4-5, 7, ECF 31. Further, they state, "[b]ecause USCIS considers [them] to have aged out, it is clear that USCIS would 'front desk' [their] applications to adjust status and reject [them] if [they] were to have attempted to file an adjustment application" at the time their parents submitted their own applications for LPR. *Id.* At oral argument, plaintiffs' counsel confirmed that Derivative Beneficiaries Vishal Addagatla and Venkata Peddada also did not apply based on their lack of eligibility due to aging out.

Defendants argue that plaintiffs have not identified or cited to any "front-desking" policy "that would demonstrate that their applications will indeed be immediately rejected[,]" Reply 3, ECF 38, and point out that, in *CSS*, the Supreme Court "identified an INS manual that instructed agency clerks to reject applications upon receipt and prior to filing if the applicant was ineligible

for Legalization." *Id.* While that is all true, it is also the case that the existence of a formal front-desking policy was irrelevant to the Ninth Circuit's ripeness analysis in *Freedom to Travel*, in which the court adopted the firm-prediction rule. *See* 82 F.3d at 1434-36. In *Freedom to Travel*, instead of looking for evidence of a front-desking policy, the court focused on whether "it is inevitable that the challenged rule will operate to the plaintiff's disadvantage." *Id*. at 1436 (quoting *CSS*, 509 U.S. at 69). The court reviewed the specific criteria for licensure and observed that the plaintiff was plainly ineligible. *Id*. at 1434-36. Thus, while the court acknowledged that the plaintiff "never applied" for a license, the issue of ripeness did not turn on *why* plaintiffs had failed to do so. *Id.* Rather, the court held that the plaintiff's claims were ripe because the court could "firmly predict that [plaintiff's] application *would be* denied" *id.* (emphasis added)—which is to say, the court could firmly predict that any *future application* submitted by the plaintiff would be denied, even though no application was pending. *Id*. at 1436.

The Ninth Circuit's ripeness analysis in *Chang v. U.S.*, 327 F.3d 911 (9th Cir. 2002), was likewise focused on the "inevitable" impacts of the contested rule and "'whether plaintiffs face a realistic danger of sustaining a direct injury' from the challenged act." *Id*. at 921 (citation omitted). In *Chang*, the "immigrant investor" plaintiffs challenged a change in immigration regulations, and the court found their claims ripe despite their failure to show that they had been denied LPR on the basis of the disputed regulations. *Id*. at 916. While the court noted that the government had not issued "a formal denial" to plaintiffs that would "ordinarily" render their claims ripe, it also stated that the "'firm prediction' rule . . . eliminates the need to await an inevitable application of a regulation to a plaintiff before determining a claim to be justiciable." *Id*. at 922 (citing *CSS*, 509 U.S. at 69, and *Freedom to Travel*, 82 F.3d at 1436). The court also stated, "if denial is certain[,] review will not be barred based on ripeness." *Id*. at 922 (citing *CSS*,

509 U.S. at 69-71). Further, after reviewing the relevant agency regulations, the court determined, "[i]t is undisputed that Appellants' I-829 petitions will be rejected if the standards of the precedent decisions are applied to them." *Id.* Thus, the court concluded, "[r]ipeness is not a bar to this action[.]" *Id.*

The same is true here. Although five Derivative Beneficiaries never submitted applications for LPR as part of their respective parent's applications, it is clear they were not eligible for LPR under the relevant statutory criteria—just as it was clear to the Ninth Circuit that the plaintiffs did not meet the statutory criteria in *Freedom to Travel*, 82 F.3d at 1436, and *Chang*, 327 F.3d at 921. Under the applicable sections of the INA, children of principal beneficiaries are eligible for LPR as derivative beneficiaries of their parents' applications for LPR only for as long as they qualify as a "child"—*i.e.*, unmarried and under 21 years of age as calculated under defendant's rules and policies. *See* 8 U.S.C. § 1153(d), § 1101(b)(1). Plaintiffs have alleged facts regarding all relevant factors—birthdates, priority dates, and when plaintiffs' priority dates became current in the India Chart—and point out that "[t]he calculation of CSPA age based on Defendants' challenged policies are not subject to chance, or subject to discretion, but readily determined when applying the Defendants' challenged policies." Resp. 2, ECF 37. Presented with these facts, it is "all but certain" that USCIS would deny LPR applications from Derivative Beneficiaries based on aging out, just as the agency denied the application of Derivative Beneficiary Pavani Peddada for the same reason. Thus, the claims of the five Derivative Beneficiaries who did not apply for LPR—Nakka, Thodupunuri, Battula, Addagatla, and Venkata Peddada—are ripe under the firm prediction rule.[3] *See Yeganeh v. Mayorkas*, No.

[3] As the Ninth Circuit noted in *Chang*, "[p]rudential considerations also favor review" and support a finding of ripeness where the "issues remaining are legal and do not require further

21-CV-02426-EMC, 2021 WL 5113221, at *8 (N.D. Cal. Nov. 3, 2021) (noting the uncontested criteria for eligibility and holding that the plaintiffs' claims "satisfied the standard for ripeness" because the court could "firmly predict" that the plaintiffs' applications for immigrant visas would be denied "based on plaintiffs' failure to meet the stated criteria"); *cf., Safer Chemicals, Healthy Families v. U.S. Envtl. Prot. Agency*, 943 F.3d 397, 415 (9th Cir. 2019) (finding a "lack of clarity" regarding the challenged regulations, noting it was "very uncertain whether [the agency] ever plans to do what Petitioners fear," and holding their claims were not ripe because "it is not even clear what [the agency's] procedures will be, let alone whether the agency will employ them in a way that injures Petitioners.").

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

A Rule 12(b)(6) motion tests whether there is a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). To survive a Rule 12(b)(6) motion, "the complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). A Rule 12(b)(6) motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Mollett v. Netflix, Inc.*, 795 F.3d

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factual development." 327 F.3d at 922. In considering the hardship to the parties, the court found, "[d]elay injures Appellants' hopes for obtaining permanent resident status," and said, "[n]othing is gained from postponement[.]" *Id*. Here, plaintiffs' claims also present legal issues and plaintiffs would benefit from knowing "if their position is indeed futile." *Id*. Thus, the finding of ripeness in this case is supported by prudential considerations.

1062, 1065 (9th Cir. 2015); *Shroyer v. New Cingular Wireless Servs., Inc*., 622 F.3d 1035, 1041 (9th Cir. 2010). When evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the plaintiff. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 971 (9th Cir. 2018) (citing *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)); *Dowers v. Nationstar Mortg.*, LLC, 852 F.3d 964, 969 (9th Cir. 2017) (citing *Iqbal*, 556 U.S. at 678).

A. Equal Protection

Plaintiffs allege that defendants' interpretation and implementation of the CSPA age calculation provisions violate the equal protection principles of the Fifth Amendment because they treat Derivative Beneficiaries less favorably than other derivative beneficiary immigrants "based solely on national origin of the parent of the child." SAC 18, ECF 31. Plaintiffs, emphasizing their long-term residence in the United States and their "special status under the AC21," claim that defendants' use of the India Chart to calculate the ages of Derivative Beneficiaries "does not serve a legitimate government purpose" and is "wholly irrational." SAC 22, ECF 31. Defendants counter that the CSPA statutory scheme "does not distinguish or single out Indians based on their nationality" and argue, "even if the statutory scheme distinguished based on nationality[,] . . . rational basis supports the reliance on the India chart." Mot. 21-22, ECF 36.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Although the words "equal protection" do not appear in the text, the Fifth Amendment's Due Process Clause includes an equal protection component and "[e]qual protection analysis in the Fifth Amendment area is the

same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The Fourteenth Amendment ensures "equal protection of the laws," U.S. Const. amend. XIV, § 1, but those guarantees "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (noting that most laws will "differentiate in some fashion between classes of persons" without implicating equal protection concerns). Accordingly, the Equal Protection Clause of the Fourteenth Amendment "'requires that all persons subject to . . . legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in liabilities imposed.'" *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 59, 602 (2008) (citation omitted). Thus, "[t]o state an equal protection claim of any stripe, whatever the level of scrutiny it invites, a plaintiff must show that the defendant treated the plaintiff differently from similarly situated individuals." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1106 (9th Cir. 2012).

Laws that do not burden a protected class or infringe on a constitutionally protected fundamental right are subject to rational basis review. *Romer v. Evans*, 517 U.S. 620, 631 (1996). It is well established that "[d]istinctions between different classes of aliens in the immigration context are subject to rational basis review." *Tista v. Holder*, 722 F.3d 1122, 1126-27 (9th Cir. 2013) (citation omitted).[4] This is because Congress has "exceptionally broad power to determine which classes of aliens may lawfully enter the country." *Fiallo v. Bell*, 430 U.S. 787, 794 (1977). The Supreme Court, in emphasizing the "need for special judicial deference to congressional

[4] Plaintiffs urge this court to adopt "intermediate scrutiny" (while also conceding that case law dictates rational basis review). Resp. 4, ECF 37. However, the Ninth Circuit has made clear that "[d]istinctions between different classes of aliens in the immigration context . . . must be upheld if they are rationally related to a legitimate government purpose." *Tista*, 722 F.3d at 1126-27 (quoting *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008)).

policy choices in the immigration context," has remarked that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 793 (citations omitted). Thus, in the immigration context, "[a] legislative classification must be wholly irrational to violate equal protection [and] [c]hallengers have the burden to negate every conceivable basis which might support a legislative classification whether or not the basis has a foundation in the record." *Tista*, 722 F.3d at 1127.

Here, plaintiffs do not allege that they have been treated in a different and less favorable manner from similarly situated individuals. Plaintiffs refer to the "disparate treatment of similarly situated children," SAC 2, ECF 31, but they do not claim that defendants have calculated the CSPA ages of other derivative beneficiaries from India or from other over-subscribed countries in a different or more favorable manner than Derivative Beneficiaries in this case. Rather, they allege disparate treatment based on derivative beneficiaries from *non*-oversubscribed countries qualifying for CSPA protections, on the one hand, and Derivative Beneficiaries not being able to do so, on the other. Those groups, however, are not similarly situated.

In claiming disparate treatment, plaintiffs also contend, erroneously, that Derivative Beneficiaries "are excluded from treatment as children under [the CSPA] solely because of their principal beneficiary parents' national origin." SAC 18, ECF 31. However, national origin is not a factor in defendants' age calculations under the CSPA. *See* 8 U.S.C. § 1153(h).[5] Beneficiaries

[5] 8 U.S.C. § 1153 provides in relevant part:

(h) Rules for determining whether certain aliens are children
(1) In general

from countries like India with a high number of visa applicants may age out before a visa becomes available to them, but that loss of CSPA benefits turns on supply and demand, not national origin. Plaintiffs say as much in stating that children from other countries are treated more favorably than Derivative Beneficiaries "due to the fortuitous circumstance of their parents' birth in a country which at a given time happens not to be oversubscribed due to per country limits." SAC 22, ECF 31. Because plaintiffs have not plausibly alleged that defendants have treated them less favorably than others similarly situated, their equal protection claim cannot succeed. *See Okwu v. McKim*, 682 F.3d 841, 846 (9th Cir. 2012) (upholding the dismissal of an equal protection claim where the plaintiff "did not allege that any of the defendants treated any similarly-situated individual differently.").

Even if plaintiffs could show disparate treatment, it is not hard to find a rational basis for USCIS extending CSPA protections to a derivative beneficiary only when a principal beneficiary's priority date becomes current on the relevant visa bulletin and no sooner—even when that results in derivative beneficiaries from oversubscribed countries aging out of eligibility. First, as the Supreme Court has pointed out, "a derivative's fate is tied to the principal's: if the principal cannot enter the country, neither can her children." *Scialabba v.*

> 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.

Cuellar de Osorio, 573 U.S. 41, 50 (2014) (citing 8 U.S.C. § 1153(d); 22 C.F.R. § 40.1(a)). Here, Derivative Beneficiaries assert no independent legal basis for permanent residency in the United States prior to aging out and acknowledge that their hoped-for LPR applications hinged, prior to aging out, entirely on the eligibility of their respective parents. *See* SAC 3-11, ECF 31.

Further, because a visa beneficiary awaiting a visa may be deemed inadmissible under 8 U.S.C. § 1182(a) for a number of reasons, including grounds related to public health and criminal activity, it is rational for USCIS to extend CSPA protections to derivative beneficiaries only when an immigration visa can be legally issued to a principal beneficiary. Of course, there is also no guarantee that the principal beneficiary will remain employed up to that point—another rational reason to not prematurely apply CSPA age protections. *See Musunuru*, 831 F.3d at 889 n.6 (referring to the benefits of the AC21 and noting, "[e]ven though an EB-2 petition beneficiary may now remain in the United States for however long it takes for his I-485 application to be adjudicated, his potential for permanent employability is nonetheless uncertain"). Finally, because "the State Department determines an applicant's position in the visa queue by referring to his or her priority date," it is rational for USCIS to calculate the CSPA age of a beneficiary when the beneficiary reaches the front of the "queue" to ensure uniform treatment of all applicants and to ensure conformity with the statutory provisions that establish annual limitations on immigration visas, per-country allocation of visas, and the publication of monthly visa bulletins. *See Mehta*, 186 F. Supp. 3d at 1149-50 (citing 8 U.S.C. §§ 1151, 1152(a), 1153(b), 1153(g), and 1154(b), and describing the State Department's "responsib[ility] for administering the provisions of the INA relating to numerical limitations on immigrant visa issuances, including managing the individual of employment-based visas").

Despite this, plaintiffs maintain that defendants' failure to extend CSPA protections to Derivative Beneficiaries lacks rational basis because they are "favored immigrants" under the AC21, Resp. 3, ECF 37, who "have a stronger claim to equal protection than other immigrants due to the sweeping legal and practical effects of the AC21 § 104(c)." SAC 23, ECF 31. Plaintiffs emphasize they are "provided special protection by special legislation," Resp. 3, ECF 37, and argue that their "equal protection claims must be viewed from this special treatment under the law together with their extensive and Congressionally sanctioned residency of long duration[.]" SAC 23-24, ECF 31. To bolster their claims to "special status under AC21," plaintiffs allege, repeatedly, that the provisions of the AC21 "permit[ed] their indefinite residence," SAC 20, ECF 31, "entitle[d] them to extensions, without limit," Resp. 3, ECF 37, and allowed them "to remain indefinitely in valid H-1B and H-4 status" until they applied for LPR. SAC 21, ECF 31. In short, plaintiffs argue, "AC21's goal was to keep H-1B and H-4 families here indefinitely until the per country visa availability was rectified through a grant of [LPR]." SAC 23, ECF 31.

Plaintiffs' reliance on the AC21 is misplaced. First, under the applicable provisions of the INA, derivative beneficiaries of H-1B visas are not permitted "indefinite extension of H-4 status until [their] applications for adjustment of status have been processed." Resp. 5, ECF 37. Rather, an H-4 visa holder who is a child derivative beneficiary may receive extensions of an H-4 visa only until the child reaches the age of 21. Plaintiffs seem to acknowledge this in describing defendants' age calculations as "foreclosing H-4 extensions beyond Plaintiff's 21st birthday." SAC 23, ECF 21. Still, plaintiffs insist, "[t]he special treatment under AC21 § 104(c) makes a difference in this case[.]" Resp 5, ECF 37.

Plaintiffs cite no authority to support their 'special treatment' argument and nothing in the text of the AC21 statute itself or its legislative history suggests that the AC21 was "intended to protect Plaintiffs during their journey to a green card." Resp. 4, ECF 37. Although there is no question that the AC21 enables certain H-1B visa holders to remain in lawful status until those visa holders can obtain LPR, like Principal Beneficiaries in this case, the specific goal of the AC21 "was to help employers acquire and retain the skilled workers necessary for the technological revolution that was beginning to pick up steam." *Musunuru*, 831 F.3d at 883–84 (citing S. Rep. 106-260, *2 (2000)). As the Senate Report makes clear, the AC21, among other things, increased the number of H-1B visas issued annually and eliminated the six-year limit on H-1B extensions to strengthen and support American businesses that "cannot grow, innovate, and compete in global markets without increased access to skilled personnel." *Mantena v. Johnson*, 809 F.3d 721, 734 (2d Cir. 2015) (quoting S. Rep. 106-260, *2 (2000)). As the title of the act indicates, the AC21 "seeks to help the American economy." S. Rep. 106-260, at *10. Again, while it is evident that plaintiffs have *benefitted* from the AC21, the statute does not grant "indefinite extension of H-4 status" to Derivative Beneficiaries, and plaintiffs go too far in claiming that the very purpose of the AC21 was to "keep H-1B and H-4 families here indefinitely." Resp. 6, ECF 31. Thus, contrary to plaintiffs' claims, they do not enjoy "special status" under the AC21 that bolsters their equal protection arguments.

Plaintiffs also argue that defendants' age calculations lack rational basis because the "CSPA was enacted in 2002 to prevent minor children from 'aging out' when they reach 21 years of age and losing eligibility to immigrate together with their parents." SAC 2, ECF 31. However, there is "no indication in the legislative history that the CSPA was intended to provide relief to all children who age-out." *Jieling Zhong v. Novak*, No. 2:08-cv-4597, 2010 WL

3302962, at *9 (D.N.J. Aug. 18, 2010). Indeed, the legislative history of the CSPA makes it clear that Congress had no intention "to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line" nor "to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." *Matter of Wang,* 25 I. & N. at 29. Instead, Congress enacted the CSPA "to provide relief for children who 'age-out' of dependent status due to agency processing delays." *Midi*, 566 F.3d at 134; *see also Padash v. I.N.S.*, 358 F.3d 1161, 1174 (9th Cir. 2004) ("Congress had but one goal in passing the Child Status Protection Act, an affirmative one—to override the arbitrariness of statutory age-out provisions that resulted in young immigrants losing opportunities, to which they were entitled, *because of administrative delays*.") (emphasis added).

Further, the legitimacy of Congress's CSPA policy choices and defendants' attendant policies is underscored by the Ninth Circuit's analysis in *Tista*, 722 F.3d at 1122. In *Tista*, the plaintiff brought an equal protection claim against the CSPA, arguing it was irrational for Congress to extend CSPA protections to family members of some classes of asylum seekers but not those seeking relief under the Nicaragua Adjustment and Central American Relief Act ("NACARA"). *Id.* The Ninth Circuit pointed out various rationales that could explain the applicability of the CSPA to some but not all asylum seekers—including humanitarian concerns—and found, ultimately, "[b]ecause Congress could have believed any or all of these premises (and, no doubt, others) without being 'wholly irrational,' it is not for us to declare that 'it would have been more reasonable for Congress to select somewhat different requirements.'" *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 83 (1976)). The Fourth Circuit reached the same result in an identical equal protection challenge to the CSPA and concluded, "[w]e cannot say that Congress's decision to deny CSPA protection to [the Haitian Refugee Immigration Fairness

Act] applicants lacks any rational basis." *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009); *see also Ramirez v. Holder,* 590 F. App'x 780, 785 (10th Cir. 2014) (unpublished) (noting Congress's "plenary authority over immigration matters" and holding that the denial of CSPA benefits to NACARA applicants did not violate the Fifth Amendment).

In sum, plaintiffs fail to plausibly allege that defendants have treated them less favorably from others similar situated and that defendants' age calculations lack rational basis. Despite their efforts to leverage provisions of the AC21 and the CSPA, plaintiffs' equal protection claim cannot succeed because the context in which the CSPA age calculation operates—Congress's plenary authority over immigration policy, the INA-imposed worldwide quotas on immigrant visas, the State Department's duty to allocate visas according to per-country caps, the CSPA's limited protections, and the threshold necessity of the principal beneficiary's admissibility—provides ample rationale for USCIS to determine the CSPA age of a derivative beneficiary only when the relevant visa bulletin shows that an immigration visa is current for a principal beneficiary. Because plaintiffs have not met their burden under rational basis review to "negate every conceivable basis" behind the CSPA age calculation rules, *Tista*, 722 F.3d at 1127, they fail to state a claim for equal protection on which relief can be granted.

B. APA

Derivative Beneficiaries Edwards and Pavani Peddada argue that defendants violated the APA when they published the May 2018 update to the USCIS Policy Manual ("PM"), *see* 7 USCIS-PM A.7, and the July 2019 revisions to the State Department Foreign Affairs Manual ("FAM"). *See* 9 FAM 502.1-1 (D)(4). Edwards and Peddada claim that the PM and FAM prevented USCIS from calculating and "freezing" their CSPA age when they submitted applications for LPR under the Dates for Filing Chart—which, they contend, caused them both to

age out and lose eligibility for LPR. *See* SAC 24-30, ECF 31. For this reason, Edwards and Peddada argue that the PM and FAM interpret the CSPA in a manner that is "contrary to the plain language of the statute and is arbitrary, capricious, and not in accordance with law." SAC 28, ECF 31. They further allege that defendants were "required to engage in formal rulemaking" before issuing guidance regarding the calculation of a beneficiary's CSPA age. *Id.* at 29, ECF 31. Defendants counter that Edwards' and Peddada's APA claims should be dismissed because the lack of final agency action precludes judicial review and because the manuals constitute interpretive rules that do not require notice and comment under the APA. Mot. 29-31, ECF 36.[6]

"In order to seek judicial review under the APA, the plaintiff or petitioner must have suffered a 'legal wrong' or been 'adversely affected or aggrieved' by a 'final agency action.'" *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1007 (9th Cir. 2021) ("*Whitewater II*") (citing 5 U.S.C. §§ 702, 704). Whether "an agency action is final" is determined through a two-part test established in *Bennett v. Spear*, 520 U.S. 154 (1997). *Id*. Under *Bennett*, the action must (1) "mark the consummation of the agency's decisionmaking process [and] must not be of a merely tentative or interlocutory nature," and (2) "be one by

[6] Defendants make their motion regarding lack of final agency action under Rule 12(b)(1). However, "the fact that an agency decision is not final under the APA is not a defect in subject matter jurisdiction." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 830 (9th Cir. 2002), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, (2008), *as recognized in Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). Rather, a motion to dismiss an APA claim for lack of final agency action is properly raised via a Rule 12(b)(6) motion for failure to state a claim. *See Whitewater Draw Nat. Res. Conservation Dist. v. Nielsen* ("*Whitewater I*"), No. 3:16-CV-02583-L-BLM, 2018 WL 4700494, at *2 (S.D. Cal. Sept. 30, 2018), *aff'd sub nom*. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021) (clarifying that a "lack of finality" in an APA action is not "a jurisdictional issue" and considering defendants' arguments in that regard as part of its Rule 12(b)(6) motion and not under Rule 12(b)(1)).

which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Bennett*, 520 U.S. at 177-78). "'In determining whether an agency's action is final, [courts] look to whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance with the terms is expected.'" *Id.* (citing *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)).

In *Whitewater II*, the plaintiffs alleged that the Department of Homeland Security ("DHS") had violated the APA by issuing an "Instruction Manual" that failed to comply with provisions of the National Environmental Protection Act ("NEPA"). *See* 5 F.4th at 1005. The district court found that the manual in question did not constitute "final agency action" under § 704 of the APA and dismissed the plaintiffs' claims. *Id.* at 1007. The Ninth Circuit agreed with the district court and found that the manual did not mark the "culmination of . . . [a] decisionmaking process" and "[did] not make any decision." *Id.* at 1008. After observing the manual "establishes procedures for ensuring DHS's compliance with NEPA" and "does not prescribe any decisions regarding NEPA review of proposed actions," *id*. at 1008-09, the Ninth Circuit concluded it "contains very general instruction and has not bound DHS to any particular decision." *Id*. at 1010. Thus, the court held that the plaintiffs failed to satisfy the "finality" prong of the *Bennett* analysis. *Id.* at 1009.

Additionally, the Ninth Circuit found the plaintiffs failed to show the manual constituted "agency action" that would "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'" *Id.* (citing *Or. Nat. Desert Ass'n*, 465 F.3d at 987). After noting that the "Manual does not augment or diminish DHS's NEPA obligations; it simply facilitates DHS's fulfillment of those obligations," the court also pointed out that the

plaintiffs did "not claim that the Manual imposes any obligation upon them." *Id*. The court held, therefore, that the plaintiffs could not "satisfy the second prong of the 'final agency action' test [under *Bennett*]." Ultimately, the court affirmed the district court's dismissal of the plaintiffs' APA claims because the agency manual in question was "not a final agency decision subject to review under the APA." *Id*. at 1010.

Here, Edwards and Peddada assert claims similar to those in *Whitewater II* by alleging that defendants' manuals "contravene[] the plain language of the statutory scheme including CSPA but also the adjustment of status statute." SAC 25, ECF 31. Edwards and Peddada argue that the USCIS PM and State Department FAM constitute "final agency action" because they "effectuated a substantive regulatory change to the CSPA statutory or regulatory regime." *Id*. at 30. To show that the PM and FM are final agency action and also to capture the crux of their APA claims, Edwards and Peddada argue that defendants' manuals misconstrue the meaning of the word "available" and do so to the detriment of their efforts to adjust status. Specifically, they allege "the clear language of the CSPA statute [8 U.S.C. § 1153(h)(1)(A)] locks the child's age when the immigrant visa 'becomes available,'" and "the adjustment of status statute, 8 U.S.C. § 1255(a) permits an application to be filed only when an immigrant visa is "'immediately available.'" *Id.* at 26. They further allege that because USCIS allows derivative applicants like them to file for LPR using the Dates for Filing chart, "it is clear that the chart used to permit applications for adjustment of status (the Dates for Filing chart) is the relevant chart to determine if a number is 'available.'" *Id*. at 28. They allege, however, that the PM states "USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes," 7 USCIS-PM A.7, and the FAM provides identical guidance regarding the Final Action Dates chart as appropriate for CSPA age calculations. *Id.* at 29. Thus,

they allege, "[d]efendants' interpretation conflicts with the unambiguous language of the statutory scheme." *Id*.at 27.

However, judicial review of Edwards and Peddada's APA claims is only possible if they can show that the PM and FAM "marked the consummation of the agency's decisionmaking process," and they have not done so. As defendants put it, and as these provisions show, "the USCIS Policy Manual is not a final agency decision, but a decision-making reference tool for the use of adjudicators and does not direct adjudicators to decide individual applications a certain way." Mot. at 31, ECF 36. Much like the manual at issue in *Whitewater II*, the PM and FAM both describe how USCIS and the State Department "will implement" the relevant provisions of the INA—the CSPA and the adjustment of status statute—and, as defendants correctly contend, they "do not tell the adjudicators to decide their individual applications in a specific manner." Reply 8, ECF 38. Indeed, the PM itself states that the manual "assists immigration officers in rendering decisions" and "provides transparency, including outlining policies that are easy to understand, while also furthering consistency, quality, and efficiency." 7 USCIS-PM A.7. Moreover, the FAM, "by its own terms" "contains directives and guidance for Department of State personnel based on statutes, regulations, . . . and other sources." *Lin Liu v. Smith*, 515 F. Supp. 3d 193, 199 (S.D.N.Y. 2021). Indeed, 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." *Whitewater II*, 5 F.4th at 1009. As the Ninth Circuit remarked in *Whitewater II*, "[t]his is not the stuff of final agency decisionmaking." *Id.* As a result, it is not possible for either the PM or FAM to satisfy the "finality" prong of the *Bennett* analysis. *See* 520 U.S. at 177-78.

Edwards and Peddada also have failed to show that the PM or FAM meets the definition of "agency action" under 5 U.S.C. § 551(13) or *Bennett*, 520 U.S. at 177-78, because neither manual can be characterized as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Whitewater II*, 5 F.4th at 1009 (quoting 5 U.S.C. § 551(13)). Indeed, while Edwards and Peddada argue that the PM and FAM "effect a substantive change to the statutory and regulatory regime," they do not show how either manual "impose[s] an obligation, denies a right, or fix[es] some legal relationship as a consummation of the administrative process." *Id*. (citing *Or. Nat. Desert Ass'n*, 465 F.3d at 987). Further, as the Ninth Circuit noted regarding the manual in *Whitewater II*, the PM and FAM do "not augment or diminish" USCIS's obligations under the provisions of the INA; rather, they "simply facilitate[]" USCIS's "fulfillment of those obligations." *Id.* Edwards and Peddada cannot show that the manuals constitute agency action because it is clear that the PM and FAM "do[] not impose new legal requirements or alter the legal regime to which [USCIS] is subject." *See id.* at 1010. Edwards and Peddada have therefore failed to show that the PM or FAM are final agency action, and, consequently, have failed to state an APA claim as required by Rule 12(b)(6). *See Whitewater I*, 2018 WL 4700494, at *2 (dismissing the plaintiffs' APA claim under Rule 12(b)(6) for failure to show that the contested manual constituted final agency action).

However, even if Edwards and Peddada could show that the PM and FAM constitute final agency action, they have failed to establish that either manual is a legislative rule that is subject to notice and comment under the APA. In *Lin Liu v. Smith*, 515 F. Supp. 3d 193 (S.D.N.Y. 2021), the district court considered a similar challenge to the agency's use of the Final Action Dates chart rather than the Dates for Filing chart for calculating a beneficiary's CSPA age, and held that the agency's use of the former chart—pursuant to the State Department's

FAM—did not constitute a "legislative rule requiring notice and comment rulemaking under the APA." *Id*. at 198-99. Rather, the court found, the FAM was "more appropriately characterized as an interpretative rule" because it was "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* at 199 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015)). Further, after highlighting the FAM's instruction that "the CSPA age is determined on the date that . . . the principal alien's visa became available," the court concluded that the FAM "'puts the public on notice of pre-existing legal obligations or rights.'" *Id*. (citation omitted). Significantly, the court found, "even without the rule [*i.e.*, the FAM], the defendants would still be able to interpret the [CSPA] in accordance with their conclusions in this case." *Id.* Thus, the court held, "the agency decision linking the availability of a visa number to the time when an applicant's priority date becomes current on the Final Action Date chart cannot be said to be a legislative rule requiring notice and comment under the APA." *Id*. at 199-200.

The same conclusion is warranted here. While *Lin Liu* involved the State Department's FAM, the provisions are identical to those in the USCIS PM, which leads to the same conclusion: neither manual "amend[s] a prior legislative rule." *Id.* at 199. In issuing the PM and FAM, defendants did not modify any material aspect of the CSPA nor alter any policies regarding CSPA age calculations. *See id.* at 197. Rather, a close review of the relevant statutory provisions makes it clear that the PM and FAM both explain aspects of CSPA age calculations, visa availability, and applicable dates, and do so in a manner consistent with the INA and USCIS regulations. *See* 8 U.S.C. §§ 1151(d), 1153(h), 1153(e); 8 C.F.R. § 204.5(d)). The PM and FAM are also consistent with the CSPA statutory scheme because, "pursuant to the ordinary meaning of the term 'available,' a visa number cannot be considered available until it is issued legally."

Lin Liu, 515 F. Supp. 3d at 197. Thus, as court held in *Lin Liu*, "defendants were correct to tether availability to the Final Action Date chart," and the defendants' interpretations were "consistent with the ordinary meaning of the text of the CSPA and with the text and history of the statute." *Id.* Because Edwards and Peddada have not shown that either the PM or FAM constitutes a legislative rule, their claim alleging violations of the notice and comment provisions of the APA must fail. *See id.*

Plaintiffs have had the opportunity to amend their complaint twice but have yet to state a valid claim for relief. It is also not apparent how they would cure the defects described above even if given another opportunity to so. Although dismissal with prejudice is a serious result, because amendment would be futile, it is the only appropriate remedy. *See Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1161 (9th Cir. 2021) (holding that "[t]he district court did not abuse its discretion in dismissing the complaint without leave to amend because [the plaintiff] never asked to amend, and if it had, amendment would have been futile"); *Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th Cir. 1990) (per curiam) (finding that courts "may affirm the district court's dismissal only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations") (citation and internal quotation marks omitted).[7]

[7] While dismissal of plaintiffs' claims is the correct result in this legal action, the court acknowledges the impacts on immigrant families, like plaintiffs in this case, when Congress enacts immigration laws that "provide some but not all families with relief from various immigration restrictions." *Fiallo*, 430 U.S. at 797. The court further acknowledges that a growing number of individuals and advocacy groups share plaintiffs' concerns about the particular impacts of the AC21 and the CSPA statutory scheme on derivative beneficiaries who arrive in the United States as children and reside in the United States for years awaiting an immigrant visa. *See* Hafsa Fathima, *They Came to the U.S. as Children, But at 21, Their Legal Status Runs Out*, NPR (Aug. 4, 2021), https://www.npr.org/2021/08/01/1023393351/documented-dreamers-live-their-whole-lives-in-

RECOMMENDATIONS

Defendants' motion to dismiss (ECF 36) should be DENIED to the extent they claim lack of subject matter jurisdiction, but GRANTED on the basis that plaintiffs have failed to state a claim for relief, and plaintiffs' claims should be dismissed with prejudice.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Tuesday, December 14, 2021. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

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

NOTICE

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

DATED November 30, 2021.

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

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the-u-s-then-face-deportation-at-2. Indeed, members of Congress are currently considering H.R. 4331 that addresses the exact concerns raised by plaintiffs regarding the status and rights of derivative beneficiaries of H-1B visas when they reach the age of 21 after long-term residency, *see* America's Cultivation of Hope and Inclusion for Long-term Dependents Raised and Educated Natively Act of 2021, H.R. 4331, 117th Cong (2021), and a bi-partisan bill that parallels the provisions of H.R. 4331 was recently introduced in the Senate. *See* Press Release, U.S. Senator Alex Padilla, Padilla, Paul Introduce Bipartisan Bill to Protect Thousands of 'Documented Dreamers' (September 15, 2021), https://www.padilla.senate.gov/newsroom/press-releases/padilla-paul-introduce-bipartisan-bill-to-protect-thousands-of-documented-dreamers/.