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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MADKUDU INC.; QUICK FITTING, INC., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Kenneth T. CUCCINELLI, Senior Official Performing Duties of the Director, U.S. Citizenship and Immigration Services, in his official capacity, Defendants.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **CLASS ACTION** **Immigration Case**

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**Applications for admission pro hac vice forthcoming*

INTRODUCTION

1. Employing boilerplate language and uniform faulty reasoning, Defendant U.S. Citizenship and Immigration Services (USCIS) routinely and unlawfully denies nonimmigrant employment-based petitions filed by U.S. employers under 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(c)(1) and 1184(i), also known as H-1B petitions, to classify market research analyst positions as a "specialty occupation." Defendant USCIS' denials violate the Immigration and Nationality Act (INA) and implementing regulations, and the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq*. Plaintiffs MadKudu Inc. and Quick Fitting, Inc., two U.S. corporations, challenge Defendant USCIS' denial of H-1B petitions they filed on behalf of noncitizens they sought to hire in the market research analyst occupation, as well as Defendant USCIS' pattern and practice of arbitrarily and unlawfully denying petitions for market research analysts filed by similarly situated H-1B petitioners.

2. The H-1B nonimmigrant visa classification allows highly educated noncitizens to work for U.S. employers in specialty occupations. A specialty occupation is one which requires the theoretical and practical application of a body of highly specialized knowledge for which a bachelor's or higher degree in a specific specialty (or its equivalent) is required. *See* 8 U.S.C. § 1184(i)(1).

3. By regulation, a U.S. employer petitioner can establish that a position is within a specialty occupation through any one of several tests set forth in the governing regulation. 8 C.F.R. § 214.2(h)(4)(iii)(A) (2020). Relevant here is the first test, which authorizes a position to qualify as a specialty occupation if "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position." 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020) (hereinafter, the first regulatory test). Where Defendant USCIS

determines that a U.S. employer petitioner satisfies this test, it has demonstrated that the occupation is a "specialty occupation" and it can hire a qualified noncitizen to fill the position.

4. In denying H-1B petitions for market research analysts, Defendant USCIS relies on the Occupational Outlook Handbook (OOH), a publication of the Bureau of Labor Statistics of the U.S. Department of Labor, as an authoritative source on the educational requirements for the occupations which it profiles. Defendant USCIS thus relies upon it to determine if a bachelor's or higher degree in a specific specialty, or its equivalent, is normally required for entry into the occupation, thus satisfying the first regulatory test.

5. The OOH's profile of the market research analyst occupation demonstrates that this occupation satisfies the first regulatory test; that is, it demonstrates that a bachelor's degree in a specific specialty—market research or a related field—is typically, or normally, required for work as a market research analyst.

6. Defendant USCIS has a pattern and practice of misinterpreting the OOH's profile of a market research analyst, mistakenly finding that it does not demonstrate that this occupation satisfies the first regulatory test. In so finding, Defendant USCIS also has a pattern and practice of misinterpreting the INA, 8 U.S.C. § 1184(i)(1), and the first regulatory test, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020).

7. Had Defendant USCIS correctly applied the first regulatory test and found that the occupation was a specialty occupation in Plaintiffs' and putative class members' cases, it would have approved their petitions. Plaintiffs seek relief under the APA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, on behalf of themselves and putative class members to remedy Defendants' misapplication of the specialty occupation statute and regulations and its misinterpretation of the OOH.

JURISDICTION

8. This case arises under the INA, 8 U.S.C. § 1101 *et seq*., and the APA, 5 U.S.C. § 701 *et seq*. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). This Court has authority to grant relief under the APA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. The United States has waived sovereign immunity under 5 U.S.C. § 702.

VENUE

9. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(C) because Defendants are a U.S. agency and an officer of a U.S. agency acting in his official capacity, Plaintiff MadKudu Inc. resides in this District, and no real property is involved in this action.

INTRADISTRICT ASSIGNMENT

10. This action is properly assigned to the San Jose Division of this Court as Plaintiff MadKudu Inc. resides in Santa Clara County and a substantial part of the events which give rise to this claim occurred in Santa Clara County.

FINAL AGENCY ACTION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

11. Defendant USCIS' denial of Plaintiffs' and putative class members' H-1B petitions constitutes final agency action under the APA, as does its policy, pattern and/or practice regarding its adjudications of H-1B petitions for market research analysts. *See* 5 U.S.C. §§ 551(13); 701(b)(2); 704. Neither the INA nor implementing regulations require an administrative appeal of the denials. Accordingly, Plaintiffs have no further administrative remedies to exhaust.

PARTIES

12. Plaintiff MadKudu Inc. is a marketing analytics software company headquartered in Mountain View, Santa Clara County, California. MadKudu filed an H-1B petition for a

position in the market research analyst occupation on or about April 2, 2019, which Defendant USCIS denied on February 24, 2020 for, inter alia, failing to demonstrate that the position satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020), the first regulatory test for a specialty occupation.

13. Plaintiff Quick Fitting, Inc. is a supplier of plumbing fittings headquartered in Warwick, Rhode Island. Quick Fitting filed an H-1B petition for a market research analyst on or about August 20, 2019, which Defendant USCIS denied on January 23, 2020 for, inter alia, failing to demonstrate that the position satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020), the first regulatory test for a specialty occupation.

14. Defendant USCIS is a component of the Department of Homeland Security, 6 U.S.C. § 271, and an agency within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is responsible for adjudicating immigration benefits, including H-1B petitions. USCIS denied Plaintiffs' H-1B petitions.

15. Defendant Kenneth T. Cuccinelli is, at the time this Complaint is filed, the Senior Official Performing Duties of the Director, as the position of USCIS Director remains vacant. In this position, he is responsible for overseeing the adjudication of immigration benefits and establishing and implementing governing policies. The USCIS Director has ultimate responsibility for the adjudication of H-1B petitions. Defendant Cuccinelli is sued in his official capacity.

OVERVIEW OF THE LAW AND ADMINISTRATIVE DECISIONMAKING PROCESS

16. Congress established a nonimmigrant classification to permit noncitizens to temporarily perform services in the United States in specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b). This nonimmigrant classification is commonly referred to as H-1B.

17. A U.S. employer must follow a multi-step, two-agency process to obtain an H-1B classification for a position it seeks to fill with a foreign worker. First, it must file a Labor Condition Application with the U.S. Department of Labor in which it attests to standards to which it will adhere. On this application, the employer must identify the Standard Occupational Classification (SOC) code and occupational title of the position it seeks to fill. The SOC system is a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.

18. Upon the Department of Labor's certification of the Labor Condition Application, the U.S. employer will file it and an H-1B petition with Defendant USCIS. In its H-1B petition, the U.S. employer petitioner must demonstrate by a preponderance of the evidence that the position it seeks to fill is in a specialty occupation.

19. A "specialty occupation" is one that requires the "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1).

20. The regulatory definition of "specialty occupation" first repeats the statutory definition and then provides a non-exhaustive list of fields as examples of specialty occupations:

> Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

8 C.F.R. § 214.2(h)(4)(ii) (2020).

21. A proposed job must satisfy one—but only one—of four independent regulatory tests to qualify as a specialty occupation. Relevant here is the first regulatory test, which is satisfied if the petitioning U.S. employer demonstrates that:

> A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020).[1] Defendant USCIS interprets this test as consistent with 8 U.S.C. § 1184(i)(1) only if the bachelor's or higher degree is in a "specific specialty."

22. When considering whether the petitioning U.S. employer's job meets the first regulatory test for a specialty occupation, Defendant USCIS first must identify the occupation within which the job falls. To do this, Defendant USCIS routinely considers the SOC code and corresponding occupational title the employer provided in the Labor Condition Application it submitted to the U.S. Department of Labor.

23. After identifying the occupation within which the position falls, Defendant USCIS consults the OOH with respect to that position. The OOH, updated every two years, provides profiles of hundreds of occupations that represent most, though not all, jobs in the United States. U.S. Bureau of Labor Statistics, *Occupational Information Contained in the OOH* (Jan. 16, 2020), https://www.bls.gov/ooh/about/occupational-information-included-in-the-

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[1] The other three tests are:
(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
(3) The employer normally requires a degree or its equivalent for the position; or
(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.
8 C.F.R. § 214.2(h)(4)(iii)(A) (2020). None is relevant here as each presents an alternative means of demonstrating that a position is a specialty occupation. Consequently, an approval under any one of them is sufficient even where Defendant USCIS denies a petition under one or more of the other regulatory tests. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

ooh.htm. Among other data, each occupational profile describes the "typical duties performed by the occupation" and the "typical education and training needed to enter the occupation." *Id*. Defendant USCIS recognizes the OOH as an authoritative source on the duties and educational requirements of the occupations profiled within it.

24. If the occupation the petitioning employer designated in the Labor Condition Application is in the OOH, Defendant USCIS will compare the H-1B petitioning employer's job duties and education requirements with the OOH entry. Where Defendant USCIS decides that the petitioning employer has correctly identified the job as being within the specified occupation, it relies upon the OOH to determine whether to approve the H-1B petition under the first regulatory test—that is, whether the OOH establishes that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum prerequisite for entry into the occupation.

25. The OOH entry for market research analyst contains the following description of the educational requirements for entry into the occupation:

> *Market research analysts typically need a bachelor's degree in market research or a related field*. Many have degrees in fields such as statistics, math, or computer science. Others have backgrounds in business administration, the social sciences or communications.
>
> *Courses in statistics, research methods, and marketing are essential* for these workers. Courses in communications and social sciences, such as economics or consumer behavior, are also important.
>
> Some market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics and marketing, and/or earn a master's degree in business administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

OOH, *How to Become a Market Research Analyst* (Sept. 4, 2019) https://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4 (emphasis added).

26. The OOH establishes that a market research analyst satisfies the first regulatory test for a specialty occupation. First, by establishing that market research analysts "typically need" a bachelor's degree, with some jobs requiring a master's degree, it demonstrates that a bachelor's degree is "normally" the minimum degree requirement for the occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020). Second, the OOH also establishes that entry into the occupation "typically" requires a bachelor's degree in "market research or a related field," and identifies the coursework that is "essential" for this occupation—statistics, research methods and marketing—, thus demonstrating that a "body of highly specialized knowledge" is necessary to perform the job of a market research analyst. Combined, this information demonstrates that the degree is in a specific specialty.

27. Defendant USCIS has a pattern and practice of erroneously denying H-1B petitions for market research analysts. In its decisions, which routinely employ the same reasoning and general language, Defendant USCIS ignores the OOH's statement: "Market research analysts typically need a bachelor's degree in market research or a related field." Instead, Defendant USCIS finds that the OOH indicates that several degrees or fields of study may qualify a person to perform the duties of a market research analyst, and then erroneously concludes that this indicates that the degree requirement is *not* in a specific specialty. In so deciding, Defendant USCIS erroneously ignores the regulatory term "normally."

28. Defendant USCIS' adjudicators rely on—and on information and belief, are bound by—training materials, templates, and other guidance from Defendant USCIS when

making H-1B specialty occupation decisions, including decisions regarding petitions for market research analysts. Upon information and belief, Defendant USCIS generally, and erroneously, fails to include these documents in the administrative record of the case that is being decided. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (explaining that the administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's positions") (emphasis in original) (quotation omitted). The training and guidance which Defendant USCIS provides its adjudicators reflects Defendant USCIS' policy with respect to the adjudication of market research analyst H-1B petitions.

29. In its decisions, Defendant USCIS misinterprets the plain meaning of the term "specific specialty." 8 U.S.C. § 1184(i)(1). That multiple degrees will prepare a person to be a market research analyst does not negate the fact that the typical degrees for this occupation are all closely related to market research and, thus, constitute a specific specialty. *See, e.g., Raj & Co. v. U.S. Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1241, 1247 (W.D. Wash. 2015) (rejecting USCIS' interpretation of the OOH entry for market research analysts and holding that it "impermissibly narrows the plain language of the statute"). Defendant USCIS also ignores the statutory language that the equivalent of a bachelor's or higher degree in a specific specialty can satisfy the statutory definition of a specialty occupation. *See* 8 U.S.C. § 1184(i)(1).

30. The denials in Plaintiffs' cases are representative of a pattern and practice of similar USCIS decisions. Plaintiffs know of at least 66 H-1B market research analyst petitions that Defendant USCIS denied in the past three calendar years, employing the same reasoning and similar language in all. On information and belief, these 66 decisions represent only a fraction of Defendant USCIS' decisions denying market research analyst H-1B petitions on this basis during

this period. Moreover, this pattern and practice is continuing. Including their own cases, Plaintiffs are aware of 6 decisions issued in the first two months of 2020, in which Defendant USCIS denied H-1B petitions for market research analyst positions on this same basis. On information and belief, these 6 decisions are only a fraction of the total number of market research analyst H-1B petitions that have been denied by Defendant USCIS on this basis to date in 2020.

PLAINTIFFS' FACTUAL ALLEGATIONS

31. Plaintiff MadKudu Inc. is a marketing analytics software company headquartered in Mountain View, California. Established in 2014, its clients are business-to-business software as a service (SaaS) companies who want an alternative to the incomplete, yet time-intensive manual development of sales leads. MadKudu analyzes a client's customers and segments sales leads based on relevant demographic data, such as the lead's title, industry and business size. Its data analysis determines which customers are ready to buy from the client. MadKudu's predictive models adapt automatically based on data, accounting for changes in its clients' products and markets for new customers.

32. On or about April 2, 2019, MadKudu filed a petition with Defendant USCIS seeking to employ Rafikah Binte Mohamed Halim in H-1B status in a market research analyst job with the title of product manager. Ms. Mohamed Halim, a national of Singapore, had worked for MadKudu in H-1B1[2] status since June 2018 as product manager. Ms. Mohamed Halim holds

[2] Congress established the H-1B1 classification for nationals of Chile and Singapore under Fair Trade Agreements with Chile and Singapore. *See* 8 U.S.C. § 1184(g)(8)(A)(i)-(ii), (g)(8)(B)(ii)(I)-(II). The job must be in a "specialty occupation" and the definition is identical to the definition for the H-1B classification. 8 U.S.C. § 1184(i)(3).

a bachelor's degree in Business Administration with specializations in marketing and analytics from the National University of Singapore.

33. MadKudu attached to its H-1B petition a Labor Condition Application certified by the Department of Labor, which identified the position by SOC Code 13-1161, an occupation entitled Market Research Analysts and Marketing Specialists.

34. Defendant USCIS denied the petition on February 24, 2020 for failing to demonstrate that the position was a specialty occupation under any of the independent regulatory tests.

35. Following its pattern and practice, Defendant USCIS determined that Plaintiff MadKudu's petition did not meet the first regulatory test because the OOH did not show that market research analyst positions normally require a minimum of a bachelor's degree or its equivalent in a specialty occupation at the entry level. Defendant USCIS stated that "a range of educational credentials may qualify an individual to perform the duties of a Market Research Analysts [sic]."

36. In concluding that Plaintiff MadKudu did not meet the first regulatory test, Defendant USCIS ignored entirely the OOH's statements that "[m]arket research analysts typically need a bachelor's degree in market research or a related field" and that "[c]ourses in statistics, research methods, and marketing are essential for these workers."

37. Established in 2004, Plaintiff Quick Fitting, Inc. is a corporation headquartered in Warwick, Rhode Island. It is the leading supplier of quick connection technologies that can be used in plumbing, electrical, heating, air-conditioning, fire suppression and oil and gas applications. It holds over fifty-five patents and has another sixty that are pending. Currently, it is launching eight new product lines.

38. On or about August 20, 2019, Quick Fitting, Inc. filed a petition with Defendant USCIS seeking an extension of Xiaomeng Liu's H-1B status based on her employment as a market research analyst. It sought to continue to employ Ms. Liu in this position for an additional period with no change in job duties from the H-1B petition previously approved by Defendant USCIS. Ms. Liu, who had been working with Quick Fitting, Inc. in H-1B status since December 2012, holds a master's degree in Business Administration with a marketing concentration from Johnson and Wales University in Providence, Rhode Island.

39. Quick Fitting, Inc. attached to its H-1B petition a Labor Condition Application certified by the Department of Labor, which identified the position by SOC Code 13-1161, an occupation entitled Market Research Analysts and Marketing Specialists.

40. Defendant USCIS denied the petition on January 23, 2020 for failing to demonstrate that the position was a specialty occupation under any of the independent regulatory tests.

41. Following its pattern and practice, Defendant USCIS determined that Plaintiff Quick Fitting, Inc.'s petition did not meet the first regulatory test because the OOH did not show that market research analyst positions normally require a minimum of a bachelor's degree or its equivalent in a specialty occupation at the entry level. Defendant USCIS noted that "[a] range of educational qualifications such as business administration and the social sciences may qualify an individual to perform the duties of a Market Research Analyst and Marketing Specialist." Defendant USCIS concluded that the "requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility."

42. In concluding that Plaintiff Quick Fitting, Inc. did not meet the first regulatory test, Defendant USCIS ignored entirely the OOH's statements that "[m]arket research analysts typically need a bachelor's degree in market research or a related field" and that "[c]ourses in statistics, research methods, and marketing are essential for these workers."

CLASS ALLEGATIONS

43. Named Plaintiffs bring this action on behalf of themselves and all others who are similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). A class action is proper because this action involves questions of law and fact common to the class, the class is so numerous that joinder of all members is impractical, Plaintiffs' claims are typical of the claims of the class, Plaintiffs will fairly and adequately protect the interests of the class, and Defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

44. The named Plaintiffs seek to represent the following class:

> All U.S. employers who in 2019 filed, or in the future will file, a petition (Form I-129 or any successor) with USCIS for an H-1B classification under 8 U.S.C. § 1101(a)(15)(H)(i)(b) for a market research analyst where:
>
> - USCIS denied or will deny the petition solely or in part based on a finding that the OOH entry for market research analyst does not establish that the occupation is a specialty occupation, and thus does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); and
> - But for this finding, the petition would be approved.

45. The proposed class is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the precise number of potential class members but reasonably estimate that the number of class members totals at least 40; Defendants, however, are in a position to identify this number. Upon information and belief, there are many more than two dozen current members of the class and an unknown number—likely in the hundreds—of future members.

46. Defendant USCIS denied an average of 22 H-1B petitions for market research analysts in each of the last three full calendar years (between 18 and 25 each year) and is on track to deny at least that many in 2020—having denied at least 6 such petitions, including Plaintiffs', in the first two months of the year. All such denials found that the OOH did not establish that a market research analyst was a specialty occupation under the first regulatory test. All such denials contained the same or similar language as that found in Plaintiffs' denials, along with the same reasoning.

47. On information and belief, these decisions represent only a fraction of the H-1B petitions for market research analysts denied on this basis each year. These decisions were issued by Defendant USCIS' Administrative Appeals Office (USCIS AAO) and posted on Westlaw. They are the only USCIS decisions that are publicly available. Only a small fraction of H-1B petitioners whose petitions are denied appeal the denial to USCIS' AAO. Consequently, it is reasonable to infer that these decisions represent only a fraction of the H-1B petitions for market research analysts that were denied during the years in question. These numbers, thus, support a reasonable estimate that there are at least several dozen current putative class members, and likely many more. This reasonable estimate of current class members coupled with the existence of unknown future class members makes joinder impracticable.

48. Questions of law and fact common to the proposed class predominate over any questions affecting only the individually named Plaintiffs. These include, but are not limited to, whether Defendant USCIS misinterprets the OOH entry for market research analyst; whether Defendant USCIS misinterprets 8 U.S.C. § 1184(i)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020); whether Defendant USCIS has a pattern and practice of denying the H-1B petitions of Plaintiffs and putative class members on the basis alleged in this suit; and whether its denial of

Plaintiffs' and putative class members' H-1B petitions violates the APA in that it is arbitrary and capricious, and contrary to the INA and its implementing regulations. Resolution of these common questions will resolve the entire case.

49. Plaintiffs' claims are typical of the claims of the proposed class insofar as they have been subject to Defendant USCIS' pattern and practice of denying H-1B petitions for market analyst positions under the first regulatory test based upon a misinterpretation of the statute, regulations and the OOH.

50. Plaintiffs will fairly and adequately protect the interests of the proposed class members because they seek relief on behalf of the class as a whole and have no interest antagonistic to other class members.

51. Plaintiffs are represented by competent counsel with extensive experience in complex class actions and extensive knowledge of immigration law.

52. In denying the H-1B petitions of Plaintiffs and putative class members, Defendants have acted and will continue to act on grounds generally applicable to the entire class, thereby making final injunctive and declaratory relief appropriate to the class as a whole. The class may therefore be properly certified under Fed. R. Civ. P. 23(b)(2).

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

53. An actual and substantial controversy exists between the Plaintiffs and proposed class members and the Defendants as to their respective rights and obligations. Plaintiffs contend that Defendants' actions violate Plaintiffs' rights and the rights of the proposed class members.

54. Defendants' pattern and practice of misinterpreting the OOH and misapplying the law forecloses Plaintiffs and the class they seek to represent from demonstrating that their jobs are in a specialty occupation based on the first regulatory test. Where the OOH demonstrates that

a bachelor's or higher degree in a specific specialty is normally the minimum requirement for entry in the occupation that includes the job the H-1B petition seeks to fill, no further evidence is needed. This is the case with respect to the OOH entry for market research analyst.

55. Plaintiffs and proposed class members have suffered a legal wrong and have been adversely affected or aggrieved by agency action for which there is no adequate remedy at law. Defendants' policy and practice of denying H-1B petitions for market research analysts under the first regulatory test constitutes final agency action. There are no administrative remedies that Plaintiffs must exhaust.

56. Based on the foregoing, the Court should grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706.

CAUSES OF ACTION
COUNT ONE
(Violation of the APA)

57. Plaintiffs re-allege and incorporate by reference, as if fully set forth herein, the allegations in paragraphs 1-56 above.

58. Plaintiffs and proposed class members seek to hire noncitizens to work in the specialty occupation of market research analyst. Plaintiffs and proposed class members have a right to have their H-1B petitions adjudicated by Defendants in accordance with 8 U.S.C. § 1184(i)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020).

59. Defendants have a pattern and practice of denying these petitions in violation of these statutory and regulatory provisions. Defendants' pattern and practice of denying these petitions reflects a policy, whether written or unwritten, that is contrary to law.

60. Although recognizing the OOH as authoritative for purposes of determining whether an occupation profiled within it satisfies the first regulatory test for a specialty occupation, Defendant USCIS routinely misreads the OOH's profile for market research analyst.

Simultaneously, Defendant USCIS misinterprets the meaning of the statutory term "specific specialty," 8 U.S.C. § 1184(i)(1), ignores entirely the regulatory term "normally," 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020), and misapplies the statute and the regulation. But for Defendant's violation of the law, Defendant USCIS would find that Plaintiffs and putative class members satisfy the first regulatory test for demonstrating that their jobs are in a specialty occupation.

61. Defendants' pattern and practice of misinterpreting the OOH and misinterpreting and misapplying 8 U.S.C. § 1184(i)(1) and C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020) renders its denials of Plaintiffs' and putative class members' H-1B petitions arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

COUNT TWO

(Violation of the INA and its Implementing Regulations)

62. Plaintiffs re-allege and incorporate by reference, as if fully set forth herein, the allegations in paragraphs 1-56 above.

63. Plaintiffs and proposed class members seek to hire noncitizens to work in the specialty occupation of market research analyst. Plaintiffs and proposed class members have a right to have their H-1B petitions adjudicated by Defendants in accordance with 8 U.S.C. § 1184(i)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020). Defendants have a pattern and practice of denying these petitions in violation of these statutory and regulatory provisions.

64. Although recognizing the OOH as authoritative for purposes of determining whether an occupation profiled within it satisfies the first regulatory test for a specialty occupation, Defendant USCIS routinely misreads the OOH's profile for market research analyst. Simultaneously, Defendant USCIS misinterprets the meaning of the statutory term "specific specialty," 8 U.S.C. § 1184(i)(1), ignores the regulatory term "normally," 8 C.F.R.

§ 214.2(h)(4)(iii)(A)(1) (2020), and misapplies the statute and the regulation. But for Defendant's violation of the law, Defendant USCIS would find that Plaintiffs and putative class members satisfy the first regulatory test for demonstrating that their jobs are in a specialty occupation.

65. Defendants' pattern and practice of misinterpreting the OOH and misinterpreting and misapplying 8 U.S.C. § 1184(i)(1) and C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020) renders their denial of Plaintiffs' and putative class members' H-1B petitions contrary to law. An actual controversy exists between the parties over which this Court may issue a declaratory judgment, specifying the legal rights of the Plaintiffs and putative class members and the legal obligations of the Defendants, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(1) Assume jurisdiction over this matter;

(2) Certify the case as a class action, as proposed herein;

(3) Appoint Plaintiffs as representatives of the class and Plaintiffs' counsel as class counsel;

(4) Set aside and vacate the denials of Plaintiffs' and proposed class members' H-1B petitions;

(5) Declare that Defendants have unlawfully engaged in a pattern and practice of misinterpreting the OOH and misinterpreting and misapplying 8 U.S.C. § 1184(i)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(1);

(6) Enjoin Defendants from violating the plain meaning of "typically" as used in the OOH as anything other than "normally" when determining whether a U.S. employer has met the first regulatory test for demonstrating that its job is in a specialty occupation;

(7) Award Plaintiffs' counsel reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and

(8) Grant such other and further relief as the Court deems just, equitable and appropriate.

Respectfully submitted this 16th day of April. 2020,

/s/ Trina Realmuto

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* *Applications for Admission Pro Hac Vice Forthcoming*