IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANDAN PANDA, *et al.,* Plaintiffs, v. CHAD WOLF, Acting Secretary of Homeland Security, *et al*., Defendants.	CIVIL NO. 1:20-01907-KBJ

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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Dated: July 15, 2020

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INTRODUCTION

Each Plaintiff is the beneficiary of an approved skilled worker H-1B petition, or the derivative beneficiary of an H-1B worker, who were recently residing in the United States in lawful non-immigrant status under petitions approved by the Department of Homeland Security. The H-1B Plaintiffs have been working in the United States for their sponsoring United States employers and several have approved immigrant petitions that allow them to pursue permanent resident status. Each Plaintiff has substantial connections to the United States in terms of employment or family ties (or both) and, in some cases, ownership of real property. Plaintiffs want to return to the United States to resume employment or reunite with family members (or both) based on approved H-1B petitions.

Based on those approved H-1B petitions filed on their behalf, or on behalf of their family members, Plaintiffs submitted DS-160 applications to obtain visas that will allow them to return to the United States to resume H-1B or H-4 status. However, the United States consulates, acting under the direction of the Secretary of Homeland Security and the Secretary of State, have decided to withhold the adjudication of those DS-160 visa applications. *See* 6 U.S.C. § 236(b)(1); 8 U.S.C. § 1104(a). The consulates are withholding a final adjudication of Plaintiffs' applications based on the application of the President's recently issued Proclamation 10052 (dated June 22, 2020), which purports to suspend the entry of foreign nationals who seek to enter the United States in H-1B or H-4 status. The Proclamation directs the Secretary of Homeland Security and the Secretary of State to exclude the entry of Plaintiffs despite the fact that they are the beneficiaries, or derivative beneficiaries, of approved H-1B petitions filed by United States employers who have already been employing the H-1B Plaintiffs as skilled workers. The Proclamation also excludes the entry of many Plaintiffs who are the beneficiaries

of approved immigrant petitions based on their employers' receiving approved labor certification applications from the Department of Labor showing there are no qualified United States workers available for the permanent positions that their employers intend to have those Plaintiffs fill.

As a result of Defendants' application of Proclamation 10052, many Plaintiffs are deprived of income and related employment in which they are authorized to engage under their approved H-1B petitions. Several Plaintiffs are also deprived of the ability to re-unite with immediate family members in the United States. Still others are deprived of the ability to attend to their financial affairs and the real property they own in the United States.

Based on Defendants' application of Proclamation 10052 in withholding the adjudication of Plaintiffs' DS-160 visa applications, Plaintiffs move for a preliminary injunction under Federal Rule 65(a) to enjoin the Secretary of State and the Secretary of Homeland Security from applying Proclamation 10052 in determining whether Plaintiffs qualify for visas and admission to the United States. The Proclamation and its application by Defendants are *ultra vires* in violation of the terms of the Immigration and Nationality Act, as amended, in which Congress crafted a balanced and reticulated scheme to allow for and encourage the entry of skilled foreign workers to fill critical technology sector jobs upon the completion of detailed statutory conditions that Plaintiffs and their employers have already met. Proclamation 10052 subverts that congressionally created balance by precluding the H-1B Plaintiffs' return to the United States to perform skilled services under already approved petitions issued by the Department of Homeland Security based on certifications from the Department of Labor.

STATUTORY AND REGULATORY BACKGROUND

Through the Immigration and Nationality Act, as amended (INA), Congress provided detailed grounds on which foreign nationals abroad are rendered inadmissible to the United

States. *See* 8 U.S.C. § 1182(a); *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018). In the employment-based context, the statute specifies detailed criteria for determining whether foreign nationals may be admitted to the United States to perform temporary or permanent labor for United States employers. *See* 8 U.S.C. § 1182(a)(5)(A), (n)(1).

A. Permanent Labor Certification Program

The INA provides that an "employer" may petition for the classification of a foreign national seeking admission to the United States based on an offer of permanent employment as a skilled worker or a member of the professions holding an advanced degree. *See* 8 U.S.C. §§ 1153(b)(2)(A), (b)(3)(A)(i), 1154(a)(1)(F). Congress delegated to the United States Citizenship and Immigration Service (USCIS) the authority to adjudicate immigrant visa petitions to classify foreign nationals under defined preference categories. *See* Homeland Security Act of 2002, Pub. Law No. 107-296, § 451(b)(1) (Nov. 25, 2002). But before filing a petition with USCIS to classify a foreign national as an employment-based immigrant, the statute requires employers to obtain a certification from the Department of Labor (DOL) stating that there are no qualified, able, and willing United States workers available to fill the employer's job opportunity. *See* 8 U.S.C. §§ 1153(b)(3)(C), 1182(a)(5)(A)(i)(I); *Patel v. Johnson*, 2 F. Supp. 3d 108, 113-14 (D. Mass. 2014). DOL must also certify that the employment of foreign nationals will not adversely affect the wages and working conditions of similarly employed workers in the United States. *See* 8 U.S.C. § 1182(a)(5)(A)(i)(II). Through those statutory requirements, Congress provided protections for the domestic labor market. *See Intercontinental Placement Service, Inc. v. Shultz*, 461 F.2d 222, 223 (3d Cir. 1972). The labor market findings DOL must make are designed to effectuate that purpose. *See Prod. Tool Corp. v. ETA*, 688 F.2d 1161, 1168 (7th Cir. 1982).

In applying the statute, DOL's regulations have traditionally set forth several provisions designed to ensure that the permanent employment of foreign nationals does not adversely affect the domestic labor market. For example, DOL's current regulations require an employer to engage in a good faith effort to recruit United States workers before obtaining certification, *see* 69 Fed. Reg. 77,326, 77,348 (Dep't of Labor) (Dec. 27, 2004); *H.C. LaMarche Enterprises*, 87-INA-607 (BALCA Oct. 27, 1988),[1] including advertising the position, *see* 20 C.F.R. § 656.17(e), and demonstrating that the job opportunity is clearly open to any qualified United States workers. *See* 20 C.F.R. § 656.10(c)(8). The employer is also required to offer employment and advertise its position at no lower than the prevailing wage rate, as determined by DOL. *See* 20 C.F.R. §§ 656.17(f)(5), 656.40(a)-(b). The employer must also document that its requirements for the job opportunity represent the employer's "actual minimum requirements" for the job opportunity. 20 C.F.R. § 656.17(i).

DOL is only authorized to issue an approved labor certification for permanent employment of a foreign national when the employer, after completing the mandated test of the domestic labor market, is unable to locate an able, willing, qualified, and available United States worker for the advertised job opportunity. *See* 20 C.F.R. § 656.24(b)(2). After DOL approves the labor certification application, the employer may file a Form I-140 immigrant visa petition with USCIS to classify the foreign national beneficiary as an employment-based immigrant. *See* 8 C.F.R. § 204.5(c); *Patel*, 2 F. Supp. 3d at 114. The approved labor certification must be filed in support of a Form I-140 petition within 180 calendar days of the date DOL granted the

[1] The Board of Alien Labor Certification Appeals (BALCA) consists of administrative law judges of DOL assigned to hear appeals of denied labor certification applications. *See* 52 Fed. Reg. 11217, 11218 (Dep't of Labor) (Apr. 8, 1987).

certification. *See* 20 C.F.R. § 656.30(b)(1). USCIS is bound by DOL's determination that there are no qualified and available United States workers to fill the employer's job opportunity. *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987, 988 (7th Cir. 2007).

Once USCIS approves an immigrant visa petition, the foreign national may use the approved petition to apply for adjustment of status to a lawful permanent resident if he has already been admitted and is physically present in the United States. *See* 8 U.S.C. § 1255(a); 8 C.F.R. §§ 205.5(n)(1), 245.1(a). If the foreign national beneficiary is overseas, he may use the approved immigrant visa petition to apply for an immigrant visa at a United States Consulate abroad for subsequent admission into the United States as a permanent resident. *See* 8 U.S.C. § 1201(a)(1); 8 C.F.R. § 204.5(n)(1). However, due to backlogs in available immigrant visas, many foreign nationals must wait several years before applying for adjustment of status or an immigrant visa overseas. *See* 8 C.F.R. § 245.1(a); 22 C.F.R. § 42.51(a)-(b); *see also* Dep't of State, Visa Bulletin, available at: travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-july-2020.html. In the meanwhile, if the foreign national meets the statutory qualifications, he or she may work in the United States in a temporary capacity for an employer as a non-immigrant. *See* 8 U.S.C. § 1184(b), (c)(1).

B. The H-1B Program

The INA also provides for the admission of temporary, skilled workers in H-1B classification to perform services for United States employers in specialty occupations. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b). The statute defines "specialty occupation" to mean an occupation that requires the theoretical and practical application of a body of highly specialized knowledge, and the 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. *See* 8 U.S.C. § 1184(i)(1)(A)-(B).

The regulations require employers to establish that their jobs require the minimum of a bachelor's degree as a pre-condition for employing foreign nationals in H-1B classification. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A).

The current H-1B program was established through the passage of the Immigration Act of 1990, which was the product of a legislative compromise to afford United States businesses greater access to skilled foreign workers while providing protections to the domestic labor market. *See* Pub. Law No. 101–649 § 205(c) (Nov. 29, 1990); *Greater Missouri Medical*, ARB No. 12-015 at 9-10 (Dep't of Labor, Admin. Rev. Bd. 2014),[2] overruled on other grounds, *Greater Mo. Med. Pro-Care Providers, v. Perez*, 812 F.3d 1132 (8th Cir. 2015); 56 Fed. Reg. 54720, 54,721 (Dep't of Labor) (Oct 22, 1991). Responding to the concerns of organized labor, Congress capped the number of H-1B visas issued where no quota had existed in prior law and introduced the labor condition application (LCA) process into the H-1B program. *See Greater Missouri Medical*, ARB No. 12-015 at 10. The LCA process was designed to prevent employers from using foreign workers to undercut domestic wages and working conditions. *Id.; see also* House Rep. No. 101-723, Part 1, at 6743-44 (Sept. 19, 1990). However, Congress addressed the recognized need of United States businesses to have expedited access to skilled H-1B workers by requiring DOL to approve LCAs under strict deadlines. *See* Pub. Law No. 102-232, § 303(a)(7)(B) (Dec. 12, 1991); 57 Fed. Reg. 1316, 1318 (DOL) (Jan. 13, 1992).

Recognizing the continued need for skilled foreign workers in the technology sector, Congress increased the number of available H-1B workers for Fiscal Year 1999 through Fiscal Year 2003. *See* American Competitiveness and Workforce Improvement Act of 1998 (ACWIA),

[2] Decisions of the Administrative Review Board are available at: https://www.dol.gov/arb/decisions.htm.

Pub. Law No. 105-277, Title IV § 411 (Oct. 21, 1998). The congressional statements accompanying the increase in H-1B visa numbers recognized that the continued competitiveness of the technology sector in the United States is crucial for this nation's economic development and for expanded economic opportunity for domestic workers. *See* 144 Cong. Rec. S12741, S12749 (Oct. 21, 1998) (Sen. Abraham). The new legislation addressed the issue of labor shortages and recognized that skilled workers create more jobs for everyone in the domestic market. *Id*. But Congress also put in place protections to ensure that businesses would not displace domestic workers with foreign nationals. *See* ACWIA, Pub. Law No. 105-277, Title IV § 412; *see also* 144 Cong. Rec. E2323, E2324 (Nov. 12, 1998) (Rep. Lamar Smith) ("It is the intent of the Congress through this provision to prevent covered employers from replacing or displacing American workers with H-1B nonimmigrants.").

Congress also ensured that the importation of H-1B workers would not adversely affect the domestic labor market by mandating that employers pay foreign workers a required wage rate. *See* 8 U.S.C. § 1182(n)(1)(A)(i), (D); House Rep. No. 101-723, Part 1, at 6743 (Sept. 19, 1990). When filing an LCA with DOL, the employer must identify the specialty occupation position, the location of employment, and attest that it will comply with the mandated wage rate. *See* 20 C.F.R. §§ 655.730(c)(4), 655.731(a); *Kutty v. Dep't of Labor*, 764 F.3d 540, 544 (6th Cir. 2014). Employers must pay H-1B workers the required wage rate for all work performed in the United States. *See Avenue Dental Care*, ARB No. 07-101 (Dep't of Labor, Admin. Rev. Bd. Jan. 7, 2010).[3] Moreover, Congress further protected the domestic labor market by requiring that

[3] Although DOL is generally not permitted to investigate the veracity of the employer's attestations on the LCA prior to certification beyond obvious inaccuracies, *see* 8 U.S.C. § 1182(n)(1), Congress authorized DOL to investigate an employer's compliance with the terms and conditions of employment specified in the LCA. *See* 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R.

employers pay the H-1B workers the required wage during any time the employer places the H-1B worker in non-productive status. *See* ACWIA, Pub. Law No. 105-277, Title IV § 413(a); *Rajan v. Int'l Business Solutions*, ARB No. 03-104 at 7 (Dep't of Labor, Admin. Rev. Bd. Aug. 31, 2004) ("if the H-1B nonimmigrant is not performing work and thus is in a nonproductive status because of lack of assigned work, lack of a permit or license, or some other employment-related reason, the employer is required to pay the wages due under the LCA.").[4]

After DOL approves an LCA, the employer may file a petition with USCIS to classify the foreign worker as an H-1B nonimmigrant. *See* 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). USCIS may approve the H-1B petition if the employer establishes that its job requires the minimum of a bachelor's degree for entry into the position. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A). The approved H-1B petition allows the foreign national beneficiary to reside in United States and work in the position identified in the petition. *See* 8 C.F.R. §§ 214.2(h)(13)(i), 274a.12(b)(9). The spouses and children of H-1B workers who accompany the H-1B principal are permitted to stay in the United States in H-4 classification during the same period of admission as the H-1B nonimmigrant. *See* 8 C.F.R. § 214.2(h)(9)(iv).

C. The American Competitiveness in the 21st Century Act

Although skilled H-1B workers are limited to a six-year period of authorized stay in the United States, *see* 8 U.S.C. § 1184(g)(4), employers may file immigrant visa petitions on behalf of those workers to retain their services as permanent residents. *See* 8 U.S.C. §§ 1153(b),

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§§ 655.805-807; *Cyberworld Enterprise Technologies v. Napolitano*, 602 F.3d 189, 193 (3d Cir. 2010).

[4] The employer's decision to place an H-1B worker in non-productive status is referred to as "benching," during which time the employer is required to pay the H-1B worker the wage rate identified in the LCA. *See* 65 Fed. Reg. 80,110; 80,169-71 (Dep't of Labor) (Dec. 20, 2000).

1154(b). However, employment-based immigrant visas are limited to 140,000 for each fiscal year, *see* 8 U.S.C. § 1151(d)(1)(A), stratified according to preference category, *see* 8 U.S.C. § 1153(b), with further specific numerical limits per country. *See* 8 U.S.C. § 1152(a)(2). As a result of those numerical limits, many of the employment-based preference categories are oversubscribed, limiting the ability of skilled H-1B workers to obtain permanent resident status and continue to fill the sustained needs of American companies. *See* 80 Fed. Reg. 10284, 10286-87 (USCIS) (Feb. 25, 2015).

In 2000, Congress again recognized the importance of retaining skilled H-1B workers long term by enacting an extension of the normal six year limit, *see* 8 U.S.C. § 1184(g)(4), for those H-1B workers who are beneficiaries of an employer's pending or approved employment-based immigrant visa petition or labor certification application as part of the process for their obtaining permanent resident status. *See* American Competitiveness in the 21st Century Act (AC21), Pub. Law No. 106-313, § 106(a)-(b) (Oct. 17, 2000); Pub. Law No. 107-273 § 11030A(a)-(b) (Nov. 2, 2002). Congress addressed the issue of long waiting times for skilled H-1B nonimmigrants in obtaining permanent resident status by, among other things, directing legacy INS (now USCIS) to extend the stay of H-1B workers in one-year increments during the pendency of their employer's immigrant visa petition and the H-1B worker's application for adjustment of status to permanent resident. *Id.* As stated in the legislative history, Congress was concerned that artificially limiting United States companies' ability to hire skilled foreign professionals would stymie this country's economic growth and thereby partially atrophy its creation of new jobs. *See* Senate Report No. 106-260, at 11 (Apr. 11, 2000). In support of amending the statute to allow for H-1B workers to remain in the United States long term, the legislative history noted that forcing those workers to return home at the conclusion of their

allotted six-year time limit would disrupt projects and American workers. *Id*. at 22. The amendment was designed to limit disruption to American businesses. *Id*.

Under the legislative mandate of AC21, the Department of Homeland Security acknowledged that Congress sought to improve economic growth and job creation by immediately increasing this country's access to high-skilled workers. *See* 81 Fed. Reg. 82398, 82408-11 (USCIS) (Nov. 18, 2016). According to the agency, Congress "passed legislation specifically encouraging, and removing impediments to, the ability of H-1B nonimmigrants to seek LPR [legal permanent resident] status, such that they may more readily contribute permanently to United States economic sustainability and growth." 80 Fed. Reg. at 10289. Obtaining and retaining skilled labor, as the Department of Homeland Security recognized, provides this country with competitive economic advantage and induces further job creation. *Id.* at 10285, 10295, 10309. It stated that foreign-born high-skilled individuals play an important role in domestic economic prosperity and the competitiveness of United States companies in numerous fields. *See* 81 Fed. Reg. at 82409.

To implement the congressional policy of AC21, the Department of Homeland Security recently published regulations to ensure employers retain skilled foreign workers in H-1B classification while those workers are pursuing permanent resident status. *Id*. at 82486-89. In assessing the costs and benefits of those regulations, the agency acknowledged that they would likely have no adverse effect on the domestic labor market because in many instances, the need for those individuals' employment has already been demonstrated under the labor certification process through which DOL has certified that there are no United States workers who are ready, willing, and available to fill those positions in the area of intended employment. *Id*. at 82479.

By increasing flexibility and mobility for H-1B workers, they are more likely to remain in the United States to help fill the demonstrated need for their services. *Id*.

D. Visa Requirements for Entry

If the foreign national is the beneficiary of an approved H-1B petition, but is outside the United States, she must present a valid visa to apply for admission and entry into the United States. *See* 8 U.S.C. § 1182(a)(7)(B)(i)(II); 8 C.F.R. § 235.1(f). Based on the approved H-1B petition, the foreign national beneficiary may apply for a visa with the United States consulate using Form DS-160. *See* 8 U.S.C. § 1201(a)(1)(B); 22 C.F.R. §§ 41.53(a), 41.103(a)(1). When the foreign national completes and signs Form DS-160, the consular officer "must either issue or refuse the visa." 22 C.F.R. § 14.121(a). Visa refusals "must be based on legal grounds." *Id*. In addition, the consular officer must inform the applicant of the grounds of ineligibility. *See* 22 C.F.R. § 41.121(b). Consular officers work under the direction of the Secretary of State and the Secretary of Homeland Security. *See* 6 U.S.C. § 236(b)(1); 8 U.S.C. § 1104(a).

E. The Presidential Proclamation

The statute provides that the President may by proclamation suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants if he finds that the entry of such aliens would be detrimental to the interests of the United States. *See* 8 U.S.C. § 1182(f). Although the statute entrusts to the President decisions whether and when to suspend entry of foreign nationals seeking admission, it does not allow the President to expressly override particular provisions of the INA. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018).

On April 22, 2020, President Trump issued Proclamation 10014 suspending the entry of immigrants who are outside the United States without an approved immigrant visa or other valid travel document. *See* Proclamation Suspending Entry of Immigrants Who Present Risk to the

U.S. Labor Market, § 2(a) (April 22, 2020).[5] On June 22, 2020, the President issued Proclamation 10052 continuing to suspend the entry of immigrants outside the United States in addition to adding further suspensions to the entry of several classes of non-immigrants outside the United States. *See* Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market, §§ 1-3 (June 22, 2020). Among other classes, Proclamation 10052 suspends the entry of any alien seeking admission to the United states as an H-1B non-immigrant, including any alien accompanying or following to join an H-1B nonimmigrant, who is outside the United States without a non-immigrant visa or other travel document that is valid on or before June 24, 2020. *Id*. §§ 2(a), 3(i)-(iii).[6]

Proclamation 10052 states that suspending the entry of various non-immigrant categories is meant to address the unemployment rate due to COVID-19. *Id*., Preamble. By its express terms, the Proclamation seeks to regulate domestic economic relations by preventing the entry of H-1B non-immigrants with already-approved petitions so that domestic workers might fill the high-skilled jobs for which employers sought foreign nationals with a bachelor's degree. *Id*. In support of that theory, the Proclamation states, without disclosing any details, that the Secretary of Labor found the present admission of workers within several non-immigrant visa categories poses a risk of displacing United States workers. *Id*. However, the Proclamation did not discuss whether or to what extend the Secretary of Labor determined that the Department of Labor's prior certification of employers' testing the job market through the permanent labor certification

[5] The relevant Proclamations are available at: www.whitehouse.gov/issues/immigration/

[6] On June 29, 2020, the President issued an amendment to Proclamation 10052 clarifying that the suspension applies to non-immigrants outside the United States who do not have a valid H-1B visa on or before June 24, 2020. See Proclamation on Amendment to Proclamation 10052, § 1 (June 29, 2020).

program was no longer relevant or insufficient. *Id*. Although Proclamation 10052 purported to address the high unemployment rates due to COVID-19, it did not make any factual findings in connection with the congressional policy, as reflected in ACWIA and AC21, that the importation of skilled foreign labor makes the United States more competitive economically and helps overall with domestic job creation.

Proclamation 10052 also states that suspending the entry of non-immigrant workers will supposedly address the historical disadvantage that domestic workers without college degrees face in competing for job opportunities. *Id*. However, the Proclamation does not address the fact that H-1B classification mandates that the employer's job opportunity require a bachelor's degree as a minimum qualification for entry into their positions as a pre-condition for using the H-1B program. The Proclamation does not make any factual findings about whether the employment of foreign nationals with bachelor's degrees adversely affects the domestic labor pool composed of workers lacking bachelor's degrees. Nor does the Proclamation address the congressional finding that employing skilled foreign labor helps with job creation.

Proclamation 10052 requires the Secretary of State, consular officers, the Secretary of Homeland Security, and the Secretary of Labor to implement the mandatory suspension specified in the Proclamation. *Id*. § 4(a). The Proclamation went into effect on June 24, 2020, and expires on December 31, 2020. *Id*. Preamble, § 7.

FACTUAL BACKGROUND

Plaintiffs are 171 nationals of India who are currently in India,[7] but they maintain a residence in the United States based on their living and working in this country in lawful H-1B

[7] Plaintiff Anju Toor, though an Indian national, is currently stranded in Canada. *See* Compl., ECF No. 1, ¶ 194. She is the only Plaintiff not stranded in India.

status or H-4 status. Many Plaintiffs are also in the process of pursuing permanent residency based on their approved immigrant visa petitions that they obtained through their employer's approved permanent labor certification applications filed on their behalf. However, Plaintiffs are prevented from returning to the United States to resume employment and residence in this country in H-1B or H-4 status based on Defendants' application of Proclamation 10052. Acting under the direction of the Secretary of Homeland Security and the Secretary of State, the consulates are withholding the processing of Plaintiffs' visa applications based on Proclamation 10052. *See* Appendix 220 (consulate's email to Nisha Balakrishan stating that the Department of State will continue not to issue visas based on Presidential Proclamations), 331, 484, 648.[8]

To provide a succinct summary of the relevant facts, Plaintiffs detail the situation of the three Plaintiff families below. Those Plaintiffs are similarly situated to the other Plaintiffs on the issues of financial harm or separation from immediate family members, or both, based on Defendants' application of Proclamation 10052.

A. Plaintiff Vinod Winston Albuquerque

Mr. Albuquerque has been working in the United States in H-1B status for the past three years. App'x 139-142. USCIS recently approved an extension for his H1B status through July 31, 2022. *Id.* Mr. Albuquerque, his wife, and his 6-year-old son have a residence in Duluth Georgia. *Id*. His son is in school in Gwinnett County, but due to COVID-19 precautions, he has been attending online and will continue online in the fall. Mr. and Mrs. Albuquerque are expecting their second child in September 2020. *Id.*

[8] Plaintiffs file a separate Appendix containing their declarations and exhibits in support of their motion for a preliminary injunction. Due to the size of the Appendix, Plaintiffs' counsel is filing the Appendix through ECF under at least two separate, subsequent docket entries.

On February 20, 2020, Mr. Albuquerque's father had a stroke, and so, on February 21, 2020, Mr. Albuquerque flew to India to visit him. *Id.* Mr. Albuquerque's wife and son did not travel to India primarily because Mr. Albuquerque's wife is pregnant and his son was still in school at that point. *Id.* After arriving in India, Mr. Albuquerque's father passed away. *Id.*

Mr. Albuquerque submitted a DS-160 to the Chennai Consulate to obtain a visa commensurate with his recent H-1B extension. As is common with extension visa appointments, Mr. Albuquerque scheduled a "drop box appointment," where he would deposit his passport with the consulate and the consulate would return it with the visa foil inserted. But the consulate in Chennai cancelled his appointment. He repeatedly requested to expedite his appointment, but those requests were denied. In June 2020, the Chennai Consulate told him all appointments had been withdrawn.

Mr. Albuquerque and his family are suffering significantly from family separation. Mr. Albuquerque's wife is on H-4 status and does not have authorization to work. She also does not drive a car. Despite those impediments, she is required to attend various prenatal checks because her pregnancy is considered at risk. When she goes to the OB/GYN, she must take a cab or convince a friend to transport her. As a result, they are concerned about the risk of infection to her when she goes to the doctor. During this critical time, Mr. Albuquerque is separated from his wife and child, unable to support them from afar, standing helpless in India with no return in sight and little hope of being present at his second child's birth.[9]

[9] Various other Plaintiffs have similar stories of the irreparable harm related to family separation. *See* Poorva Dixit, App'x 164 (separated from minor daughter), Dharmendra Dixit, App'x 234 (separated from wife and son with autism, where child's therapy had to stop because wife does not have driver's license and can't get son to appointments), Sridher Medishetti, App'x 281 (child in U.S. with autism), Saptha Asiwini Gidugu, App'x 358 (enhanced post-partum depression from separation), and Siva Krishna Ptola, App'x 694 (will miss the birth of child).

B. Plaintiff Siddhartha Adla

Mr. Adla has lived in the United States for at least 12 years. App'x. 1240-1245. He has a valid H-1B petition, and an approved immigrant visa petition based on an approved permanent labor certification. *Id.* Mr. Alda, his wife, and two children (both of which are United States citizens) live in Texas where they own their home. *Id.* Mr. Adla's older child is 5 years of age and expected to start school this August in Texas.

In June of 2019, Mr. Adla's 3-year-old son was diagnosed with Autism Spectrum Disorder. Because early childhood treatment is imperative for such diagnosis, treatments began immediately. In December 2019, the family traveled to India to get a second opinion from a world-renowned physician in India. The physician in India confirmed that Mr. Alda's son is exhibiting extreme signs of autism. The family intended to return to the United States as quickly as possible to re-start treatments. Despite making timely visa appointments, the consulates have not issued Mr. or Mrs. Adla their visas.

In addition to Mr. Adla's son's continued deterioration, Mr. Alda continues to make payments on his mortgage. Based on Proclamation 10052, it is likely Mr. Adla's company will put him on their "Indian payroll," which means he will be paid wages commensurate with those paid in India, not the United States. Those wages are significantly lower. As Mr. Alda states in his declaration: "This payroll conversion will cause me a lot of financial distress since I'll not be able to make my mortgage payments anymore due to the drastic difference in pay once converted to Indian payroll." App'x 1244.[10] In addition, he states, "I may have to either sell my house or

[10] Many other Plaintiffs are suffering similar immediate or impending, irreparable financial harm in terms of lost or reduced income. *See, e.g.,* Narendra Singh, App'x 344 (losing U.S. salary will disallow loan payments), Devendrakumar Ramachandran, App'x 475 (loss of salary due to furlough and now termination), Rohit Seshadri, App'x 743 (out of paid time off and lost salary), Revathy Janakiraman, App'x 786 (lost salary from January to June), Chandan Panda, App'x

file for bankruptcy soon depend on how worst things turn into[] [and] Our home may end up undergoing foreclosure as well." *Id*.

C. Plaintiff Anup Bhagirathbhai Tiwari

Mr. Tiwari has lived and worked in the United States for the last six and a half years in H-1B status. App'x 1126-1229. In addition, he has an approved immigrant petition that is based on an approved labor certification application. Swati Sharma, Mr. Tiwari's wife, also has an approved H-1B with an approved immigrant visa based on an approved labor certification. They reside in the United States where they continue to rent an apartment for $2,700 a month.

Mr. Tiwari and Mrs. Sharma traveled to India in February of 2020 to deal with a family emergency. At the time, Mrs. Sharma was 5-monthts pregnant. The couple timely made visa appointments and filed DS-160 applications in February 2020, but the consulate has yet to make decisions on their applications. App'x 1226-1229.

Due to the stress of the delay, Mrs. Sharma had a lot of anxiety and depression in her last trimester of pregnancy. She eventually gave birth to their child in India amidst the troubling situations at the hospital due to COVID-19. *Id*. In addition to the stress of the pregnancy, the family did not have health insurance in India, requiring them to pay out of pocket for the pregnancy and hospitalization, despite paying medical insurance in the United States. They continue to pay their rent every month and bills, totally over $2,700 a month.

Mr. Tiwari also recently filed a DS-160 application on behalf of his newborn, AT, but has yet to receive a decision based on Proclamation 10052, which prevents AT from acquiring an

1211 (furloughed without pay), Plaintiff Gospisetty, App'x at 01097 (wife lost job because she could not remotely work), Anju Toor, App'x 1083 (cannot continue research from India).

H-4 visa to travel to the United States because, according to Proclamation 10052, the newborn may take jobs from unemployed United States workers.

BASIS AND SCOPE OF JUDICIAL REVIEW

In the absence or inadequacy of a special statutory review provision under the agency's organic statute, the Administrative Procedure Act (APA) provides for review of a final agency action, *see* 5 U.S.C. § 704, under "any applicable form of legal action, including acts for declaratory judgments or writs of prohibitory or mandatory injunction" in a court of competent jurisdiction. 5 U.S.C. § 703; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). The APA incorporated the common law forms of action that the courts historically used to review agency action. *See INS v. Doherty*, 502 U.S. 314, 330 (1991) (Scalia, J., concurring); Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 97 (Dep't of Justice 1947). The courts traditionally used, and the APA incorporates, the equity injunction as a form of action for judicial review. *See* 5 U.S.C. § 703; *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); Kenneth Culp Davis, *Administrative Law* 729-32 (West 1951). Judicial review is also available when an agency acts *ultra vires*. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996).

"Section 702 of the APA eliminates the defense of sovereign immunity as a bar to judicial review of federal administrative action in a broad array of suits against the federal agencies, agency officials, and agency employees, provided the relief sought is not for money damages." Harry T. Edwards, *et al*., *Federal Standards of Review* 150 (Thomson Reuters 3d Ed. 2018). The APA's waiver of sovereign immunity also applies outside the context of the APA where the plaintiff brings a non-statutory cause of action alleging *ultra vires* conduct. *See Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006). Under a non-statutory cause of action,

based on the APA's waiver of sovereign immunity, the Court has jurisdiction to review the legality of Presidential action in a suit seeking to enjoin the officials who attempt to enforce the President's directive. *See Franklin v. Massachusetts*, 505 U.S. 788, 828-29 (1992) (Scalia, J. concurring in part and concurring in the judgment); *Chamber of Commerce*, 74 F.3d at 1328.

For claims under the APA, the statute authorizes the Court to "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706. Accordingly, the Court may review at least two types of claims: those seeking to compel required agency actions not yet taken (§ 706(1)), and those seeking to set aside arbitrary agency actions and determinations (§ 706(2)). *See Alliance to Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 9 (D.D.C. 2007). The APA also permits the Court to set aside agency action that fails to observe procedures required by law. *See* 5 U.S.C. § 706(2)(D). Under those provisions, the APA provides a generic cause of action in favor of persons aggrieved by agency action. *See Trudeau,* 456 F.3d at 188.

The APA imposes on all agencies the requirement of reasoned decision making. *See Judulang v. Holder,* 132 S. Ct. 476, 483-84 (2011). More specifically, an agency's action is arbitrary and capricious if it entirely failed to consider an important aspect of the problem, or the agency's explanation runs counter to the evidence before it. *See Am. Bankers Ass'n v. NCUA*, 934 F.3d 649, 663 (D.C. Cir. 2019). An agency acts contrary to law when it issues a decision inconsistent with the statute. *See Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 86 & 96 (2002); *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013).

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

The purpose of a preliminary injunction is merely to preserve the relative position of the parties until a trial on the merits can be held. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A party moving for a preliminary injunction must demonstrate (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Courts in this circuit traditionally have evaluated the four factors on a "sliding scale"—if a movant makes a particularly strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor. *See Davis v. Pension Benefit Guar. Corp*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009).[11] A movant's demonstration of likelihood of success on the merits is particularly important. *See Human Touch DC, Inc. v. Merriweather*, 2015 U.S. Dist. LEXIS 186805, *6 (D.D.C. May 26, 2015). The first two factors are the most important, and the third and fourth factors typically "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 434-35 (2009).

ARGUMENT

A. Plaintiffs Have Standing

Before addressing the merits of Plaintiffs' claims under the APA, they will briefly discuss the issue of standing, which the H-1B Plaintiffs have based on suffering an injury in fact through the loss of their ability to benefit from the economic and immigration-related grants afforded to

[11] The D.C. Circuit has not ruled on whether the sliding scale standard no longer applies after *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). *See League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016).

them as beneficiaries of approved petitions permitting them to return to the United States to resume work for their United States employers. *See Mantena v. Johnson*, 809 F.3d 721, 731 (2d Cir. 2015). Plaintiffs have established an injury in fact through the loss of income or the separation from their family members (or both) along with, in some cases, the inability to tend to their financial affairs and real property in the United States as a result of Defendants' application of Proclamation 10052. *See Stellar IT Sols., Inc. v. USCIS*, 2018 U.S. Dist. LEXIS 196284, *14 (D.D.C. Nov. 19, 2018). Moreover, a judicial order setting aside the Proclamation, or enjoining Defendants from applying the Proclamation, will redress their grievances by correcting the lost opportunity of having their visa applications decided based on their approved H-1B petitions. *See Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998).

Plaintiffs state in their declarations that as a result of the consulates' refusal to process their visa applications based on the application of Proclamation 10052, they are prevented from returning to the United States, where many have resided for years in lawful nonimmigrant status. *See* App'x. As a result, many Plaintiffs are deprived of income and related employment in which they are authorized to engage under their approved H-1B petitions. Several Plaintiffs are also deprived of the ability to re-unite with close family members in the United States. Still others are deprived of the ability to attend to their financial affairs and their real property that they own in the United States. Any one of those injuries easily satisfies the injury-in-fact requirement. Likewise, the identified economic and personal harms are directly traceable to Defendants' application of Proclamation 10052, which establishes Plaintiffs' standing in this case. *See Parcha v. Cuccinelli*, 2020 U.S. Dist. LEXIS 22197, *8 (E.D. Tex. Feb. 7, 2020).

Moreover, many Plaintiffs are the beneficiaries of approved immigrant visa petitions and, on that basis, are pursuing permanent residence status while working as H-1B non-immigrants so

that they may remain in the United States to continue contributing to the economic development of this country. In that connection, the Department of Homeland Security's own statements further show that those Plaintiffs have standing. *See Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 114-15 (D.C. Cir. 1990) (relying on the "agency's own experience and sound market analysis" and the "public comments" contained in the administrative record as evidence of standing). In a recent rulemaking, the Department acknowledged that Congress through ACWIA and AC21 sought to retain skilled foreign workers, which the Department hoped to achieve by implementing rules to make it easier for H-1B workers to remain in the United States and develop professionally. *See* 81 Fed. Reg. at 82408-11. The Department also published another rule allowing for the employment of H-4 nonimmigrants to "incentivize H-1B non-immigrants and their families to continue to wait and contribute to the United States" by working "through an often lengthy waiting period for an immigrant visa to become available." 80 Fed. Reg. at 10296. In that rule, the Department sought to "assist H-1B families in integrating into the U.S. community and economy." *Id*. at 10304. Thus, the Secretary of Homeland Security already acknowledged that H-1B nonimmigrants are harmed by being deprived of an opportunity to continue working in the United States while pursuing permanent resident status.

B. Plaintiffs Are Challenging Final Agency Actions

Each Plaintiff is the beneficiary of an approved H-1B petition, or the derivative beneficiary of an H-1B non-immigrant, who were recently residing in the United States in lawful non-immigrant status under approved petitions. The H-1B Plaintiffs have been working in the United States for their sponsoring United States employers and several have approved immigrant petitions that allow them to pursue permanent resident status. Based on approved H-1B

petitions, Plaintiffs submitted DS-160 applications for visas that will allow them to return to the United States to resume H-1B or H-4 status. However, the consulates acting under the direction of the Secretary of Homeland Security and the Secretary of State, decided to withhold the adjudication of Plaintiffs' applications based on Proclamation 10052. *See* 6 U.S.C. § 236(b)(1); 8 U.S.C. § 1104(a); *see also* App'x 220, 484, 648, 3331.

The regulation requires the consular officer to issue or refuse a visa after the applicant files a complete DS-160. *See* 22 C.F.R. § 41.121(a). Despite that mandate, the consulates have withheld adjudicating, or refused to issue decisions on, Plaintiffs' applications based on Proclamation 10052. Those decisions to withhold adjudications are final agency actions for which Plaintiffs may seek relief under the APA. *See* 5 U.S.C. §§ 702, 704.

In the administrative law context, it is black letter law that inaction may represent effectively final agency action that the agency has not frankly acknowledged. *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). When administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief. *Id.*; *see also Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990). Moreover, because "agency action" encompasses a "failure to act," 5 U.S.C. § 551(13), a failure to act amounts to consummated agency action that is final, notwithstanding the fact that the agency did nothing, which allows a party may seek relief under the APA. *See Alliance to Save Mattaponi*, 515 F. Supp. 2d at 9.

Applying those principles in this case shows that Plaintiffs are challenging final agency actions. Even if the consulates are withholding actions on Plaintiffs' applications, which it apparently admits is compelled by Proclamation 10052, the withheld actions deprive Plaintiffs of

the opportunity to obtain visas so that they may return to the United States to resume H-1B or H-4 status. Thus, Plaintiffs have a cause of action available to challenge the agency's decision to withhold action as arbitrary and capricious or otherwise contrary to law.

C. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

The consulates acting under the direction of the Secretary of Homeland Security and the Secretary of State, *see* 6 U.S.C. § 236(b)(1); 8 U.S.C. § 1104(a), committed at least three reversable errors in refusing to process Plaintiffs' visa applications. The first error relates to the Proclamation's *ultra vires* suspension of Plaintiffs' entry in violation of the INA's detailed and reticulated criteria for determining whether and under what conditions to admit skilled foreign workers. The second error relates to the arbitrary and capricious application of the Proclamation by Defendants in failing to support their decisions with sufficient factual information to show that Plaintiffs' entry would adversely affect the domestic labor market despite the Department of Labor prior approval of related LCAs and permanent labor certification applications. *See* 5 U.S.C. § 706(2)(A). The third error relates to Defendants' unlawful suspension of Plaintiffs' approved and valid H-1B petitions contrary to the procedural requirements of the APA. *See* 5 U.S.C. §§ 558(c), 706(2)(D). Because Proclamation 10052 violates the INA and Defendants' application of the Proclamation as a basis for refusing to consider Plaintiffs' applications constitutes reversible error, Plaintiffs are likely to succeed on the merits of their *ultra vires* and APA claims.

1. *Proclamation 10052 and its Application are* Ultra Vires

Congress already addressed the economic and domestic employment concerns supposedly underlying the Proclamation through an "extensive and complex" framework governing the categories of aliens who are deemed inadmissible to the United States. *See*

Arizona v. United States, 567 U. S. 387, 395 (2012). The INA sets forth in detail a highly reticulated scheme regulating the categories of aliens who are authorized to work in the United States and the bases for determining whether they should be admitted to the United States. *See* 8 U.S.C. §§ 1182(a)(5), 1182(n), 1184(c), 1184(g), 1184(i); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 207 L. Ed. 2d 353, 385 (2020) (Thomas, J., dissenting). The statute bears in its text and purpose the legislative compromises that Congress balanced between competing interest groups to determine how best to regulate the domestic economy by allowing for the entry of skilled foreign workers. Proclamation 10052 and its application by Defendants subvert that careful balance by precluding the entry of H-1B workers with approved petitions, many of whom are the beneficiaries of approved immigrant petitions that stem from their employers' Department of Labor-authorized recruitment efforts to locate United States workers. *See Ragsdale*, 535 U.S. at 93-94.

Proclamation 10052 enters and displaces an area of economic regulation for which Congress provided an express process to determine the admissibility of skilled foreign labor. *See* 8 U.S.C. § 1182(a)(5)(A)(i)(I); *Prod. Tool Corp.*, 688 F.2d at 1168. Under that congressional directive, the Department of Labor already has in place detailed requirements for employers to test the domestic labor market whenever they propose to hire skilled foreign workers. *See* 20 C.F.R. § 656.17; *Simply Soup, Ltd.*, 2012-PER-00940, *4-6 (BALCA Jan. 13, 2015) (*en banc*) (employers are required to prepare a full recruitment reports showing their efforts to locate United States workers).[12] The Department of Labor also has a process for ensuring that the employment of the foreign national will adversely affect the wages and working conditions of

[12] The Department of Labor's BALCA decisions are available at: https://www.dol.gov/agencies/oalj/PUBLIC/INA/REFERENCES/CASELISTS/BALCA_DECISIONS_PERM.

the domestic labor market by setting prevailing wage rates. *See* 8 U.S.C. § 1182(a)(5)(A)(i)(II); 20 C.F.R. § 656.17(f)(5), 656.40(a)-(b); *see also Karl Story Endoscopy-America*, 2011-PER-00040, at *14-17 (BALCA Dec. 1, 2011) (*en banc*) (discussing requirement to engage in recruitment using prevailing wage determination).

Similarly, Congress set detailed requirements for determining whether temporary skilled foreign workers may be admitted to the United States. Over the course of thirty years, Congress carefully crafted a balance between providing skilled foreign labor to United States businesses and protecting the domestic labor market through directing the Department of Labor to oversee the filing of LCAs and the enforcement of related employer attestations. *See* 8 U.S.C. § 1182(n); *Greater Missouri Medical*, ARB No. 12-015 at 9-10. Congress has consistently sought to make available skilled foreign labor because they benefit the national economy and help induce job growth. And Congress spoke in a detailed textual manner under AC21 to ensure, despite limits on the number of immigrant visas, that skilled foreign workers will be able to remain in the United States to help the domestic economy. *See* AC21, Pub. Law No. 106-313, § 106(a)-(b); 81 Fed. Reg. at 82409-11; 80 Fed. Reg. at 10287, 10289. Nor will the continued retention of H-1B workers harm the domestic economy because, as the Department of Homeland Security recently recognized, many of those H-1B workers already had their jobs subjected to a detailed labor market test through which no available United States workers have been located. *See* 8 U.S.C. § 1182(a)(5)(A); 81 Fed. Reg. at 82479.

By preventing the entry of Plaintiffs into the United States to resume their employment as H-1B workers, Proclamation 10052 subverts Congress's detailed regulatory scheme that intertwines the H-1B and permanent labor certification programs to ensure the retention of skilled foreign labor to benefit the national economy and induce job growth while protecting

domestic workers. *See Ragsdale*, 535 U.S. at 93-94. Rather than fill in the details of the statute by determining whether Plaintiffs may be admitted consistent with the statutory requirements, the Proclamation specifically overrides 8 U.S.C. § 1182(a)(5)(A) and § 1182(n) by completely blocking the return of skilled foreign workers who already have approved petitions allowing them to work in the United States. Proclamation 10052 also blocks the entry of Plaintiffs contrary to statute because it contradicts the Department of Labor's specific factual findings and certifications satisfying the statutory conditions for permitting Plaintiffs' return to this country to help United States businesses while they pursue permanent resident status. The Proclamation's broad programmatic objective of purporting to help the domestic labor market cannot trump the statute's specific instructions to allow for the importation of skilled foreign labor under the statutory conditions that have already been satisfied. *See API v. EPA*, 706 F.3d 474, 479 (D.C. Cir. 2013).

Acting contrary to the INA's express terms, Proclamation 10052's suspension exceeds the outer reaches of the President's authority that the Supreme Court outlined in *Trump v. Hawaii*. In that case, the Court based its analysis of Section 1182(f) on the assumption that the statute does not allow the President expressly to override particular provisions of the INA. *See* 138 S. Ct. at 2411. The proclamation at issue in *Trump v. Hawaii* set out a detailed process used for determining whether each foreign government had supplied sufficient information to assess the risks that those countries pose to the national security of the United States when their nationals enter this country. *Id*. at 2408-09. Based on findings about the deficiency in information from specific countries, the proclamation directed the suspension of entry of foreign nationals from those countries with information gaps, which served to protect, as the title of the proclamation indicated, against the entry of persons who may be inadmissible on terrorism-

related grounds. *Id*. at 2404. As such, the proclamation served as an information gathering mechanism advancing the individualized approach for determining admissibility to exclude actual or potentially dangerous individuals. *Id*. at 2411; *see also* 8 U.S.C. § 1182(a)(3)(B) (inadmissibility of foreign nationals for terrorist activities).

Unlike the proclamation in *Trump v. Hawaii*, Proclamation 10052 does not advance an individual case-by-case approach for determining inadmissibility, but rather supersedes express provisions of the INA that determine the conditions for admitting skilled foreign nationals to perform labor or services on temporary and permanent bases. Moreover, unlike the proclamation related to terrorism concerns, Proclamation 10052 does not serve to gather relevant factual information regarding admissibility, but expressly negates or countermands factual findings and certifications that the Department of Labor already made with respect to Plaintiffs' and their current temporary or intended permanent employment in the United States in positions requiring skilled labor and persons with bachelor's degrees. Thus, Proclamation 10052 is contrary to the limited scope of the President's power in suspending the entry of foreign nationals.

Proclamation 10052 is the type of executive action that the court in *Chamber of Commerce v. Reich* found to be *ultra vires* as contrary to statute law. In that case, the D.C. Circuit precluded the Secretary of Labor from applying an executive order prohibiting the government from contracting with employers who permanently replaced lawfully striking employees. *See Chamber of Commerce*, 74 F.3d at 1324. The executive order sought to balance between allowing business to operate during a strike and preserving workers' rights in engaging in collective action. *Id*. Although the executive order was issued to govern Federal contracting and procurement, the Court held the order *ultra vires* because it attempted to regulate and restrict

the employers' economic activities of terminating employees which Congress authorized through the National Labor Relations Act. *Id*. at 1332.

Proclamation 10052 creates a similar *ultra vires* conflict in this case. Congress carefully balanced the need to develop the economy through the importation of skilled foreign workers while protecting the domestic labor market. Congress also sought to supply businesses with a labor supply to meet a recognized and sustained shortage in skilled workers in the technology sector. In that connection, the Department of Labor already certified the need for Plaintiffs' skills and services while in many cases additionally certifying that the employment of Plaintiffs will not adversely affect the domestic labor market based on the recruitment efforts of their employers. Proclamation 10052 upends the carefully crafted legislative scheme and countermands the operation of the specific statutory conditions relating to the Department of Labor's certifications. Like in *Chamber of Commerce*, the Proclamation here takes away the economic activity that Congress specifically authorized upon completing the conditions specified under Sections 1182(a)(5)(A) and 1182(n). Because Plaintiffs and their employers have obtained those statutory certifications, Proclamation 10052 seeks to negate the operation of those foreign labor certification programs in violation of the statute. *See Am. Bankers Ass'n v. SEC*, 804 F.2d 739, 754 (D.C. Cir. 1986) (agency cannot "change basic decisions made by Congress").

Relatedly, the free-floating regulation of economic relations that the Proclamation attempts to achieve further shows its transcending statutory authority. The Proclamation evokes Section 1182(f) to address the current downturn in employment by blocking the entry of skilled labor into the United States. *See* Proclamation 10052, Preamble. The purported goal is to assist vulnerable domestic workers without college degrees in finding employment. *Id*. However, outside the required certification needed to employ skilled foreign workers, which the

Department of Labor has already issued to Plaintiffs' employers in this case, the INA does not authorize the President to regulate further economic relations among employers and the foreign nationals they are approved to employ. *See* 8 U.S.C. § 1182(n). Unlike other statutes that expressly authorize the President to regulate economic relations in connection with foreign imports, *see Motions Systems Corp. v. George W. Bush*, 437 F.3d 1356, 1357-58 (Fed. Cir. 2006), it has not done so in the context of the INA. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so.").

Nor does Proclamation 10052 operate in a narrow compass by directing Defendants to engage in information gathering in the service of making admissibility determinations within the limits of the INA. Rather, Proclamation 10052 purports to block globally the entry of all H-1B workers purportedly to help domestic workers without college degrees find employment in the United States. *See* Proclamation 10052, Preamble. The irrationality of that stated goal shows how the Proclamation is unmoored from the text of the INA because domestic workers lacking bachelor's degrees are not by definition competing for the same jobs in which employers hire H-1B foreign nationals who must possess bachelor's degrees to qualify. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(i). Moreover, Congress already addressed the issue of assisting the domestic work force in obtaining employment by providing education and training programs funded through surcharges on United States employers seeking to import foreign workers. *See* ACWIA, Pub. Law No. 105-277, Title IV § 414; Senate Report No. 106-260 at 10; 8 U.S.C. § 1184(c)(9)(A)-(B). Again, Proclamation 10052 countermands the legislative programs that Congress specifically tailored to address the economic relations and employment conditions that the Proclamation now attempts to regulate in a different manner. *See API*, 706 F.3d at 479.

Nor does the President have a general power to dispense with statute law. Rather, the President is bound to abide by the requirements of duly enacted and otherwise constitutional statutes. *See* U.S. CONST. Art. II, § 3, cl. 3 (the President "shall take Care that the Laws be faithfully executed"); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible . . ."); *Chamber of Commerce*, 74 F.3d at 1332 (denying the President can bypass statutory limitations on governmental activity); *NTEU v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) (the President may not refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary). The purported power of the head of state to grant a dispensation *non obstante* or to suspend enacted law has a dark history that was in any event resolved in favor of legislative supremacy by the time the Constitution was ratified. *See* Carolyn Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 Eighteenth-Century Studies 434 (1977); William Holdsworth, IV *History of English Law* 240 (Sweet and Maxwell 2d Ed. 1937) (under the English Bill of Rights the suspending power was absolutely condemned). As a result, under the Constitution, the President is not endowed with a general dispensing power. *See Kendall*, 37 U.S. at 613. He lacks the authority to set aside specific provisions of the INA to achieve a perceived public good.[13] Rather, that legislative power remains in the hands of

[13] The purported emergency nature of the current economic downturn also fails to trigger an executive power to suspend statute law or regulatory norms. Aside from the ability to suspend the writ of habeas corpus in times of rebellion or for public safety, *see* U.S. CONST. Art. I, § 9, the Constitution does not provide for a state of exception permitting the suspension of the laws. *Compare* Carl Schmitt, *Constitutional Theory* 80, 214 (Duke Univ. Pr. 2008) (1928) (discussing Article 48 of the Weimar Constitution that expressly provides for a state of exception). An emergency cannot create a power that does not already exist. *See Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952); *cf. Federalist Papers* Nos. 33 & 78 (Hamilton) (Clinton Rossiter Ed. 1961).

Without a general dispensing authority on which to base Proclamation 10052, the power to suspend the entry of foreign nationals must be based in statute law. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 585. However, Proclamation 10052 fails on that basis because the purported suspension it effects is contrary to the parameters of the INA. Thus, Proclamation 10052 is *ultra vires* and the Secretary of Homeland Security and the Secretary of State must be enjoined from applying the Proclamation to the Plaintiffs in this case who seek to return to the United States to resume H-1B employment or follow to join H-1B family members. *See* 5 U.S.C. § 706(2)(A), (C); *Chamber of Commerce*, 74 F.3d at 1332.

2. The Agencies' Withholding Adjudication of Plaintiffs' Visa Applications is Arbitrary and Capricious

Under the direction of Proclamation 10052, the Secretary of Homeland Security and the Secretary of State, through the consulates, refused to process visa applications for Plaintiffs who are seeking to return to the United States to resume H-1B or H-4 status and employment for United States companies under already approved petitions. *See* Proclamation 10052, § 2(a), 3(a), 4(a). However, neither the Proclamation, the Secretaries, nor the consulates justified the suspension of Plaintiffs' entry in terms of their already approved LCAs, and in many cases, approved labor certification applications supporting their continued stay in the United States under AC21. Nor did they explain how restricting the entry of skilled workers holding positions that require bachelor's degrees will assist domestic workers lacking college degrees in locating employment. Defendants' ignoring that relevant information at odds with their conclusions is the hallmark of arbitrary and capricious conduct. *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018).

In addition to approved H-1B petitions relating to their current United States employers, many Plaintiffs also have approved immigrant petitions based on approved labor certification applications showing the lack of available and qualified United States workers to fill their positions. Despite those approved petitions and labor certifications, the Secretary of Labor apparently found in support of Proclamation 10052 that the admission of H-1B workers like Plaintiffs pose a risk of displacing and disadvantaging United States workers. *See* Proclamation 10052, Preamble. The Proclamation did not discuss whether or to what extend the Secretary of Labor determined that the Department of Labor's prior certifications of employers' testing the job market through the permanent labor certification program was no longer relevant or insufficient. *Id*. Nor did the consulates address the relevant facts regarding Plaintiffs' approved labor certifications when deciding to withhold visa application processing. But those facts cannot be brushed aside because the Department of Homeland Security found them pertinent in justifying the continued retention of H-1B workers in the United States while they pursue permanent residence. *See* 81 Fed. Reg. at 82479.

Given those relevant facts and the pertinent regulatory history following AC21, the conclusion is inescapable that Defendants in applying Proclamation 10052 erred in failing to consider an important aspect of the issue relating to the continued employment of skilled H-1B workers and their contribution to domestic economic development. *See Dep't of Homeland Security v. Regents of the Univ. of Ca*., 140 S. Ct. 1891, 207 L. Ed. 2d 353, 375-76 (2020). By failing to explain the decision to withhold the processing of visa applications in the face of obviously contradictory facts regarding relevant labor market tests underlying many of Plaintiffs' approved labor certification applications, Defendants' decisions to withhold adjudication were arbitrary and capricious. *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). The

agencies must at minimum respond meaningfully to relevant evidence. *Tesoro Alaska Petroleum v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000).

Moreover, the Secretary of Labor's terse and unexplained factual findings conflict with the basic economic theory that the Department of Homeland Security used to justify retaining H-1B workers and their dependents in the United States while they pursue permanent residency. 80 Fed. Reg. at 10285, 10295, 10309; 81 Fed. Reg. at 82469. The Department stated that from a labor market perspective, it is important to note that the number of jobs in the United States is not fixed or static. *Id*. Basic principles of labor market economics recognize that individuals not only fill jobs, but also stimulate the economy and create demand for jobs through increased consumption of goods and services. *Id*. Moreover, consistent with the legislative findings underlying ACWIA and AC21, the Department also noted that highly skilled foreign workers contribute to important advances in research and development with a positive impact on domestic economic growth. 80 Fed. Reg. at 10309. The Proclamation and the Secretary of Labor's purported findings stated in the Proclamation depart from those basic principles of economics without explanation. The consulates similarly fail to justify their decisions in the face of countervailing economic theory. Such a conflict with basic economics constitutes arbitrary and capricious decision making. *See Fresno Mobile Radio v. FCC*, 165 F.3d 965, 969-70 (D.C. Cir. 1999).

Similarly, neither the Proclamation nor Defendants resolve the flat contradiction of restricting the entry of skilled H-1B workers filling positions requiring bachelor's degrees to assist in re-employ domestic workers lacking college degrees. *See* Proclamation 10052, Preamble. An agency's decision cannot stand without factual support. *See Safe Extensions v. FAA*, 509 F.3d 593, 604-05 (D.C. Cir. 2007). More critically, as a matter of logic is unclear how

Defendants could resolve the contradictory reasoning given the economic theory the Department of Homeland Security used to justify the continued retention of H-1B workers as a tool of economic development. This flaw is fundamental. An agency's statement must be one of reasoning and not just a conclusion. *See Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).[14]

Because the Proclamation and Defendants charged with implementing it failed to explain or provide adequate support for the decision to withhold the processing of visa applications for Plaintiffs, those decisions or unlawfully withheld actions must be set aside as arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A).

3. Proclamation 10052 Resulted in a Procedurally Defective Suspensions of Plaintiffs' Approved H-1B Petitions

In addition to the *ultra vires* nature of Proclamation 10052 and Defendants' arbitrary and capricious application of the Proclamation, the suspension of Plaintiffs' approved H-1B petitions was also done in violation of the procedural protections under the APA. *See* 5 U.S.C. § 558(c); *Air North America v. DOT*, 937 F.3d 1427, 1436 (9th Cir. 1991).

After the Department of Labor approves an employer's LCA, and USCIS approves a related H-1B petition, the foreign national beneficiary is permitted to reside in United States and work in the position identified in the petition. *See* 8 C.F.R. §§ 214.2(h)(13)(i), 274a.12(b)(9). Based on the approved H-1B petition, the foreign national beneficiary may also apply for a visa,

[14] The Supreme Court brushed aside without resolving the question of whether a Proclamation under Section 1182(f) must contain sufficient factual findings. *See Trump v. Hawaii*, 138 S. Ct. at 2409. As a result, the level of factual support required is an open question. However, even if the Proclamation is not required to contain detailed factual assertions, those assertions cannot present a flat contradiction. Moreover, even if the Proclamation itself is not required to contain detailed facts, the agencies applying it must still adhere to the strictures of the APA. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 286, 301-02 (1979).

which is required for entry into the United States. *See* 8 U.S.C. § 1182(a)(7)(B)(i)(II); 8 C.F.R. § 235.1(f); 22 C.F.R. §§ 41.53(a), 41.103(a)(1).

The authorization to work and reside in the United States permitted through Plaintiffs' approved H-1B petitions constitutes a license within the meaning of the APA. The definition of license is extremely broad. *See Air North America*, 937 F.2d at 1437. It includes "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). Proclamation 10052 and its application by the Secretary of Homeland Security and the Secretary of State operated to suspend the Department of Homeland Security's approval of Plaintiffs' H-1B petitions permitting them to reside and work in the United States. However, neither the Proclamation nor Defendants' implementing it provided Plaintiffs with prior notice and opportunity to demonstrate or achieve whatever compliance may have been required under the INA.

The resulting suspension of Plaintiffs' approved H-1B petitions without prior notice and opportunity to provide any corrective action violated the requirements under the APA for suspending licenses. *See* 5 U.S.C. § 558(c). The statute requires before a suspension occurs that the licensee be afforded an opportunity to put its house in lawful order before more formal agency proceedings are undertaken. *Blackwell College of Business v. Att'y Gen*., 454 F.2d 928, 934 (D.C. Cir. 1971). The Proclamation obliquely suggests, through the purported finding of the Secretary of Labor, that Plaintiffs' approved H-1B petitions are apparently defective because, despite the Department of Labor's approved certifications, Plaintiffs' entry into the United States poses a risk to the domestic labor market. *See* Proclamation 10052, Preamble. Whether the Secretary of Labor's factual predicate is valid or not, the statute entitled Plaintiffs to written

notice that would afford them an opportunity to correct any apparent deficiencies in the approved petitions. *See Anchustegui v. Dep't of Agriculture*, 257 F.3d 1124, 1129 (9th Cir. 2001).

Because Proclamation 10052 and Defendants' application of the Proclamation resulted in procedurally defective suspensions of Plaintiffs' approved petitions, the resulting decisions must be set aside. *See* 5 U.S.C. § 706(2)(D). It is not a legitimate response to this defect to suggest that Section 1182 supersedes or overrides the APA's procedural requirements. Statutes may only supersede the APA's procedural requirements to the extent that they do so expressly. *See* 5 U.S.C. § 559. Nothing in the INA suggests that Section 1182(f) supersedes the procedural requirements of the APA with respect to suspending licenses, which leaves in place those procedures required for suspensions that Defendants violated in this case.

D. Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief

Plaintiffs will suffer and are currently suffering immediate irreparable harm in the absence of a preliminary injunction compelling the Department of State to adjudicate their applications without the restrictions imposed by Proclamation 10052. Plaintiffs declarations detail the ongoing, irreparable harm to themselves or family members because of the agency's refusing to process or adjudicate visa applications, resulting in their lost income, the inability to return to the United States to resume employment or rejoin family members (or both), or tend to their property in the United States. *See* App'x.

As a legal matter, financial harm is irreparable in this context because there is no way for Plaintiffs to recover lost wages or reduced income against Defendants through a money judgment. *See* 5 U.S.C. § 702 (suits for money damages precluded); *Everglades Harvesting & Hauling v. Scalia*, 2019 U.S. Dist. LEXIS 217474 *29 (D.D.C. Dec. 16, 2019); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015). Similarly, those Plaintiffs that are prevented

from maintaining close physical relationships with their immediate relatives because of the agency's action (or inaction) is also a form of irreparable harm. *See de Nolasco v. ICE*, 319 F. Supp. 3d 491, 502-03 (D.D.C. 2018); *Goings v. Court Services*, 786 F. Supp. 2d 48, 78 (D.D.C. 2011). The harm that Plaintiffs suffer in lost income or through family separation, or both, constitute injury for purposes of a preliminary injunction because the injury is both certain and actual. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

E. A Preliminary Injunction Serves the Public Interest and Will Not Harm the Agencies

The equities militate in favor of the requested relief. One of the primary purposes of the H-1B program is to provide a consistent source of highly skilled labor to United States companies. Through ACWIA and AC21, Congress issued statutory directives to ensure that the United States may compete economically in the global market by having skilled workers in the technology sector. Moreover, the congressional policy of providing access to skilled foreign labor ensures innovation that helps create jobs in the domestic economy. The Department of Homeland Security recognized those statutory goals recently in a rulemaking, stating that Congress intended through relevant statutory amendments to the H-1B program to improve economic growth and job creation by immediately increasing U.S. access to high-skilled workers. *See* 81 Fed. Reg. at 82409. The agency acknowledged a clear congressional intent that H-1B non-immigrants are intended to provide United States employers a consistent source of talent necessary to compete in today's global economy. *Id.* Because Plaintiffs' interests mirror those that Congress sought to protect, as expressed in express statutory terms, the equities favor the Plaintiffs in their request to have their visa applications decided based on their approved H-1B petitions and without Defendants applying the unlawful suspension set forth in Proclamation 10052.

Many of Plaintiffs are also the beneficiaries of approved immigrant petitions filed by their United States employers. As such, they intend to pursue permanent residency status once a visa number becomes available. *See* 8 C.F.R. § 245.1(a). Plaintiffs' continued employment as H-1B workers while they wait for available immigrant visa numbers to pursue permanent residence is also in line with the statutory amendment allowing skilled workers like Plaintiffs to continue working in the United States while pursuing permanent status. *See* AC21, Pub. Law No. 106-313, § 106(a)-(b). Under that statutory amendment, the Department of Homeland Security acknowledged that Congress has passed legislation specifically encouraging, and removing impediments to, the ability of H-1B nonimmigrants to seek lawful permanent resident status, such that they may readily contribute permanently to United States economic sustainability and growth. *See* 80 Fed. Reg. at 10289.

Finally, the public also has an interest in ensuring that the government acts lawfully and within the bounds of statute law and reason. *See* 5 U.S.C. § 706(2)(A), (C). This Court's order granting a preliminary injunction to set aside Defendants' arbitrary and capricious refusal to act will reinforce that public interest. Thus, Defendants are not be harmed in any way by a preliminary injunction compelling lawful conduct.

CONCLUSION

Based on the foregoing, the Court should grant Plaintiffs' motion for a preliminary injunction and enjoin Defendants from applying Proclamation 10052 (issued on June 22, 2020) in adjudicating their visa applications and determining whether they are admissible to the United States to resume H-1B or H-4 status. The Court should further direct the Secretary of State and the United States consulates to process, adjudicate, and render final decisions on Plaintiffs' DS-160 visa applications within fourteen (14) days of the date of this Court's order.

Dated: July 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 15, 2020, I filed the forgoing PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION through the Court's CM/ECF system. After filing, I will cause a true and correct copy to be served on Defendants at the United States Attorney's Office by express delivery:

U.S. Attorney's Office
Civil Process Clerk
555 4th Street, NW
Washington, DC 20001

After filing, I will also deliver a copy of the forgoing PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION to Daniel Van Horn, Civil Chief, United States Attorney's Office, by transmitting an electronic copy to following email address:

daniel.vanhorn@usdoj.gov.

s/Geoffrey Forney
GEOFFREY FORNEY
Wasden Banias LLC