UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANDAN PANDA

[redacted]

C/A No.: 1:20-cv-1907

COMPLAINT

COMPLAINT

Proclamation 10052's H-1B/H-4 visa ban hurts the United States economy, separates families, and defies congress. While the two former points render it unseemly, the latter point renders it unlawful. As such, 174 Indian nationals—including 7 minor children—now challenge Proclamation 10052's H-1B/H4 visa ban. They seek an order (1) declaring Proclamation 10052's restriction on issuing new H-1B or H-4 visas or admitting new H-1B or H-4 visa holders as unlawful; (2) compelling the Defendant Department of State to issue decisions on the Plaintiffs pending requests for H-1B and H-4 visas; and (3) enjoining the Defendant Department of Homeland Security from refusing entry to the United States based on Proclamation 10052.

PARTIES

1. [redacted]

[redacted]

172. Defendant Chad Wolf is the long-time Acting Secretary of the United States Department of Homeland Security. In this capacity, he is in charge of the sub-agency U.S. Customs and Border Protection throughout the United States. Proclamation 10052 orders Secretary Wolf to implement its terms.

173. Defendant Michael Pompeo is the Secretary of the United States Department of State. In his official capacity he is in charge of the United States Embassies throughout India, including the U.S. Embassy in New Delhi, the Consulate General in Chennai, Consulate General in Hyderabad, Consulate General in Kolkata, Consulate General in Mumbai, and the Virtual Consulate in Bengaluru. Proclamation 10052 orders Secretary Pompeo to implement its terms.

174. Defendant Eugene Scalia, Secretary, United States Department of Labor. In this capacity, he is in charge of the Department of Labor's. In this capacity, he is in charge of the United States Department of Labor and enforcing and implementing its policies under the Immigration and Nationality Act. Proclamation 10052 orders Secretary Scalia to implement its terms.

JURISDICTION AND VENUE

175. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

176. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA").

177. Under the APA, this Court can compel agency action that is unlawfully withheld and set aside final agency action that is arbitrary and capricious. 5 U.S.C. §§ 555(b), 706.

178. The Court has jurisdiction to review executive action that is *ultra vires*. Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

179. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

180. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because Defendants reside in the District of Columbia.

181. Plaintiffs have exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

182. Regardless of the Doctrine of Consular Non-Reviewability this Court has jurisdiction over this complaint because Plaintiffs challenge "the authority of the consul to take or fail to take an action." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

183. Plaintiffs have standing to bring this suit as they all have substantial connections to the United States including but not limited to *bona fide* job offers or jobs, houses, mortgages, spouses in the United States, United States citizen children, bank accounts, years of lawful residence, cars, car payments, and insurance.

184. Joinder is appropriate here because Plaintiffs allege that the Defendants are refusing to issue their visas based on the June 22, 2020 Proclomation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronovarus Outbreak ("Proclamation 10052"). *See, e.g., Al Daraji v. Monica*, 2007 U.S. Dist. LEXIS 76205, 2007 WL 2996408 (E.D. Pa. Oct. 12, 2007) (finding joinder appropriate where plaintiffs challenge a common practice, order, or policy).

LEGAL BACKGROUND

185. This case presents a question left open by *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018): whether the 8 U.S.C. § 1182(f) allows the president to override particular provisions of the Immigration and Nationality Act. *See Hawaii*, 138 S. Ct. at 2411 ("We may assume that §1182(f) does not allow the President to expressly override particular provisions of the INA.).

186. Unlike the ban challenged in *Hawaii*, Proclamation 10052 overrides a detailed and reticulated statutory regime, and subverts Congress's legislative compromises, regulating the employment of foreign nationals and providing for the needs of United States employers.

H-1B Visas

187. "H-1B visas" are available for foreign nationals who will work in the United States in a specialty occupation. 8 U.S.C. § 1101(a)(15)(H).

188. A specialty occupation is, essentially, a job that requires a college degree in a specific field. *See* 8 U.S.C. § 1184(i).

189. For each fiscal year, congress allots only 65,000 Cap H-1B Visas for foreign nationals with a college degree. *See* 8 U.S.C. § 1184(g)(1)(A)(vii). It allots an additional 20,000 Cap H-1B Visas for applicants with master's degrees or higher. This pool of 85,000 Cap H-1B Visas comprises "Cap H-1B Visas."

190. There are also cap-exempt H-1B Visas available to employees of public universities and some non-profit entities. *See* 8 U.S.C. § 1184(g).

191. Every fiscal year employers seek far more than 85,000 Cap H-1B Visas. *See generally Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens*, 84 Fed. Reg. 888, 925 (Jan. 31, 2019).

192. In fact, for Fiscal Year, 2021—the period between October 1, 2020 and September 30, 2021—employers sought nearly 300,000 Cap H-1B visas.

193. As such, the Agency conducts a lottery each year to determine who gets that Fiscal Year's allotment of Cap H-1B Visas. *See generally* 84 Fed. Reg. at 925-926.

194. If an employer's petition is chosen in the lottery, the employer can then file a Form I-129, Petition for a Non-Immigrant Worker on behalf of their employee with proof that their petition was selected in the lottery. *Id.*

195. As part of the application Form I-129, the employer must also complete a Labor Condition Application with the Department of Labor. 8 U.S.C. § 1182(n). To complete a Labor Condition Application, all H-1B employers must attest to the following:

a. They will pay the H-1B higher of the prevailing wage (as determined by the Bureau of Labor Statistics) or the wage the employer actually pays similar employees;

b. They will provide the H-1B employee working conditions "that will not adversely affect the working conditions" of other similar workers; and

c. They will post notice of the proposed H-1B employment or provide such information to a union representative.

See 8 U.S.C. § 1182(n)(1).

196. In addition, "H-1B Dependent" employers must attest that they did not displace and will not displace, directly or indirectly, a United States Worker "beginning 90 days before and ending 90 days after the date of filing of any" H-1B visa petition." *See* 8 U.S.C. § 1182(n)(1)(E)(i), (F).

197. H-1B Dependent employers must also attest that they have "taken good faith steps to recruit . . . United States workers" and "offered the job to any United States worker who applies and is equally or better qualified for the job." 8 U.S.C. § 1182(n)(1)(G).

198. The Secretary of Labor has significant civil enforcement powers to investigate and penalize any H-1B employers who violate the terms of their Labor Condition Applications.

199. Once the Labor Department certifies the Labor Certification Application, the employer may file the Form I-129 with United States Citizenship and Immigration Services ("USCIS"), who then reviews the application to determine whether the position and the beneficiary are eligible for the visa. 8 U.S.C. § 1184(a).

200. Typically, USCIS approves an initial cap H-1B visa for three years. 8 C.F.R. § 214.2(h)(15(ii)(B) ("The alien's total period of stay may not exceed six years."); 8 U.S.C. § 1184(g)(4).

201. A beneficiary can acquire Cap H-1B Visa status, generally, for up to 6 years. *See* 8 C.F.R. § 214.2(h)(15(ii)(B) ("The alien's total period of stay may not exceed six years."); 8 U.S.C. § 1184(g)(4).

Employment Based Immigrant Visas

202. During these six years, employers often seek an immigrant visa on behalf of their foreign national employee. 8 U.S.C. § 1153(b) (listing employment-based immigrant visas).

203. Immigrant visas are not limited in duration or scope and, colloquially, provide a path to a "green card." *Id.*

204. Because H-1B workers are employed in a position that requires at least a college degree and those workers have a relevant college degree or equivalent experience, the positions and H-

1B employees typically meet the standards for an employment based immigrant visa under 8 U.S.C. § 1153(b)(3), or if they have a master's degree under 8 U.S.C. § 1153(b)(2).

205. Before applying for these types of immigrant visas, employers must, generally, go through a labor certification process with the Department of Labor.

206. 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).

207. 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).

208. To get a labor certification, 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) 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).

209. The employer is also required to offer employment and advertise its position at no lower than the prevailing wage rate, which DOL determines. *See* 20 C.F.R. §§ 656.17(f)(5), 656.40(a)-(b).

210. 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).

211. 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).

212. 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 certification. *See* 20 C.F.R. § 656.30(b)(1).

213. 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).

214. Once USCIS approves the immigrant visa, a foreign national may qualify for an immigrant visa, but only if one is available to a person from their country of nationality.

Immigrant Visa Country Caps

215. The INA, however, imposes a country-cap on the number of immigrant visas nationals of any particular countries may acquire during a fiscal year. 8 U.S.C. § 1151(d). When single country's demand for immigrant visas exceeds its allotted number, nationals with an approved immigrant visa from that country must wait until the following fiscal year for new visas become available. *Id.*

216. The Department of State is charged with maintaining a visa bulletin, which indicates which countries are backlogged and for how long. *See, e.g.,* July 2020 Visa Bulletin (available at https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_july2020.pdf (last visited July 14, 2020)).

217. Relevant to this case, employment-based immigrant visas are available to Indian nationals who had their immigrant visa approved on or by June or July of 2009. *Id.*

218. This would seem to imply that Indian nationals with approved immigrant visas would have to wait approximately 11 years for them to be available. However, month-to-month the priority date for Indian nationals typically moves less than a month at a time.

219. Some experts predict Indian nationals will wait 54 years for an immigrant visa to be available for those immigrant visas that go through the labor certification process. *See* Bier, David J., Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and Inequitable, Policy Analysis No. 873 (CATO Inst. June 18, 2019) (available at https://www.cato.org/publications/policy-analysis/immigration-wait-times-quotas-have-doubled-green-card-backlogs-are-long (last visited July 14, 2020)).

American Competitiveness in the Twenty-first Century Act of 2000

220. In the late 1990s and early 2000s, congress recognized that this 6-year limitation on an H-1B combined with the growing backlog often disrupted labor for United States companies and sought a legislative fix.

221. In 2002, congress passed the American Competitiveness in the Twenty-first Century Act of 2000 ("AC21"), Public Law 106-313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 Start Printed Page 82400 (2002).

222. Congress intended AC21 to "improve economic growth and job creation by immediately increasing U.S. access to high-skilled workers." Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82409 (Nov. 18, 2016).

223. One such provision sought to increase employers' continuous access to specialty occupation workers from countries with long waits for immigrant visas. *Id.*

224. Prior to AC21, employers would hire foreign national workers, sponsor their Cap H-1B Visas, and then sponsor an immigrant visa for the same worker. However, after six years in H-1B status, the worker would have to leave the United States to wait for the immigrant visa to be available. This wait could be years long. Thus, employers would lose highly skilled, experienced employees for years while the workers returned home after six years in Cap H-1B Visa status.

225. This problem effected Chinese and Indian nationals primarily. *Id.* ("This provision recognized ''the discriminatory effects of [the per country limitations] on nationals from certain Asian Pacific nations,'' specifically Chinese and Indian nationals, which ''prevent[ed] an employer from hiring or sponsoring someone permanently simply because he or she is Chinese or Indian, even though the individual meets all other legal criteria.'')

226. To fix this problem, AC21 mandated one-year extensions for Cap H-1B Visa holders with approved immigrant visa petitions who were waiting for visas to become available:

> AC21 also sought to more generally ameliorate the impact of the lack of employment-based immigrant visas on the high-skilled beneficiaries of approved Form I–140 petitions. Sections 106(a) and (b) of AC21, as amended by section 11030A of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273 (2002), authorized the extension of H– 1B status beyond the statutory 6-year maximum for H–1B nonimmigrant workers who are being sponsored for LPR status by U.S. employers and are subject to lengthy adjudication or processing delays. Specifically, these provisions exempted H–1B nonimmigrant workers from the 6-year limitation on H–1B status contained in INA 214(g)(4), if 365 days or more have elapsed since the filing of a labor certification application (if such certification is required under INA 212(a)(5), 8 U.S.C. 1182(a)(5)), or a Form I–140 petition under INA 203(b), 8 U.S.C. 1153(b). These provisions were intended to allow such high-skilled individuals to remain in the United States as H–1B nonimmigrant workers, rather than being forced to leave the country and disrupt their employers due to a long-pending labor certification application or Form I–140 petition. *See* S. Rep. 260, at 23.

Id.

227. AC21 also improved a Cap H-1B Visa holder's ability to change employers but while maintaining Cap H-1B Visa status and "porting" an approved immigrant visa to a new employer. *Id.*; *see* AC21 § 104(c), P.L. 106-313, 114 Stat. 1253 (Oct. 17, 2000).

228. In light of the long backlogs for immigrant visas, based on the AC21 extensions, it is common for nationals of certain countries to be in Cap H-1B Visa Status for years.

229. As such, long-time United States residents, often with United States citizen children, must go to their home consulate when they travel international if they do not have a current "visa."

Proclamation 10052

230. On June 22, 2020, the President of the United States issued Proclamation 10052.

231. In it, the President, *inter alia*, ordered the Secretary of Homeland Security and the Secretary of State to prevent the "entry into the United States of any alien seeking entry pursuant to any hoof the following nonimmigrant visas . . . (a) an H-1B . . . and any alien accompanying or following to join such alien." Proclamation 10052 § 2(a).

232. The President applied this new rule to "any alien" who "is outside of the United States" on June 22, 2020 who "does not have a non-immigrant visa that is valid on" June 22, 2020 and who has no other type of travel authorization. *Id.* at § 3(a).

233. Proclamation 10052 orders the Secretary of State and the Secretary of Homeland Security to enforce its terms.

234. The Secretary of State is interpreting this Proclamation 10052 to refuse to issue H-1B and H-4 visas at its consulates in India. To this end, the Secretary is cancelling visa appointments, refusing to schedule new appointments, and refusing to make decisions on pending DS-160, Nonimmigrant Visa Applications that request H-1B visas and H-4 visas.

235. The Secretary of State is withholding all action on DS-160 requests for H-1B and H-4 visas at all of the consulates in India.

236. Upon information and belief, the Secretary of Homeland Security is interpreting Proclamation 10052 to refuse entry to any foreign national who has an H-1B or H-4 visa issued after June 22, 2020.

237. Proclamation 10052 contravenes duly enacted statues and regulations, and its enforcement therefore is unlawful.

PLAINTIFFS' FACTS

Plaintiffs [redacted]

238. Plaintiff [redacted] is the beneficiary of an approved H-1B visa petition with Receipt Number [redacted] that was approved on 9/26/2019.

239. The H-1B visa petition has a validity period from 2/29/2020 to 2/28/2023 to work in a position with standard occupation code 15-1132.

240. Plaintiff [redacted] also has an approved EB2 immigrant visa with Receipt Number [redacted] and a priority date of 5/22/2014.

241. This immigrant visa approval is based on an approved permanent labor certification application completed by Plaintiff's employer.

242. Plaintiff [redacted] is married to Plaintiff [redacted].

243. Plaintiff [redacted] has a 1-year-old child named [redacted].

244. [redacted] a citizen and national of United States.

245. [redacted] spouse is eligible for an H-4 visa because she is a derivative of [redacted]

246. [redacted] recently traveled from the United States to India.

247. While they were in India, they applied to the appropriate consulate for a non-immigrant visa, either an H-1B or an H-4, by electronically submitting a DS160.

248. The receipt number for [redacted] DS160 is [redacted]

249. The receipt number for [redacted] DS160 is [redacted]

250. As of June 22, 2020, no consular officer had made a final decision on any of these pending DS160s.

251. [redacted] have substantial ties to the United States.

252. Defendants refusal to make a decision on these pending DS160s is causing significant harm to [redacted].

253. Defendants refusal to make a decision on these pending DS160s is unlawful.

Plaintiffs [redacted]

254. Plaintiff [redacted] is the beneficiary of an approved H-1B visa petition with Receipt Number [redacted] that was approved on 9/5/2018.

255. The H-1B visa petition has a validity period from 8/27/2021 to 6/14/2021 to work in a position with standard occupation code 15-113.

256. Plaintiff [redacted] also has an approved EB2 immigrant visa with Receipt Number [redacted] and a priority date of October 24, 2017.

257. This immigrant visa approval is based on an approved permanent labor certification application completed by Plaintiff's employer. The Department Labor approved this labor certification on April 5, 2018 and assigned it Receipt Number [redacted]

258. Plaintiff [redacted] is married to Plaintiff [redacted].

259. [redacted] spouse is eligible for an H-4 visa because they are derivatives of [redacted]

260. [redacted] recently traveled from the United States to India.

261. While they were in India, they applied to the appropriate consulate for a non-immigrant visa, either an H-1B or an H-4, by electronically submitting a DS160.

262. The receipt number for [redacted] DS160 is [redacted].

263. The receipt number for [redacted] DS160 is [redacted]

264. As of June 22, 2020, no consular officer had made a final decision on any of these pending DS160s.

265. [redacted] have substantial ties to the United States.

266. Defendants refusal to make a decision on these pending DS160s is causing significant harm to [redacted] and [redacted].

267. Defendants refusal to make a decision on these pending DS160s is unlawful.

[redacted]

1950. [redacted]

1953. Defendants refusal to make a decision on this DS160 is unlawful.

[redacted]

1962. Defendants refusal to make a decision on this DS160 is unlawful.

FIRST CAUSE OF ACTION
(Non-Statutory Action for *Ultra Vires* Conduct)

1963. Plaintiffs reallege all allegations above as though restated here.

1964. Proclamation 10052 was issued outside the jurisdictional limitations of the INA.

1965. The Proclamation's suspension of the entry of foreign nationals returning to the United States to resume employment under approved H-1B petitions constitutes an *ultra vires* attempt to regulate the domestic economy.

1966. The Proclamation's suspension of the entry of foreign nationals returning to the United States to resume employment under approved H-1B petitions subverts Congress's careful balance of interests reflected in the text and purpose of 8 U.S.C. 1182(a)(5)(A) and 8 U.S.C. 1184(n).

1967. The application of the Proclamation's suspension of entry of foreign nationals returning to resume H-1B status by the Secretary of State and the Secretary of Homeland Security is *ultra vires* and contrary to the INA.

1968. As such, this Court should order the Defendants to issue H-1B and H-4 visas without regard to Proclamation 10052 and to consider applications for admission to the United States without regard to Proclamation 10052.

SECOND CAUSE OF ACTION
(APA – Agency Action Unlawfully Withheld)

1969. Plaintiffs reallege all allegations above as though restated here.

1970. Proclamation 10052 was issued outside the jurisdictional limitations of the INA.

1971. The Proclamations' suspension of the entry of foreign nationals returning to the United States to resume employment under approved H-1B petitions constitutes an *ultra vires* attempt to regulate the domestic economy.

1972. The Proclamation's suspension of the entry of foreign nationals returning to the United States to resume employment under approved H-1B petitions subverts Congress's careful balance of interests reflected in the text and purpose of 8 U.S.C. 1182(a)(5)(A) and 8 U.S.C. 1184(n).

1973. The application of the Proclamation's suspension of entry of foreign nationals returning to resume H-1B status by the Secretary of State and the Secretary of Homeland Security is *ultra vires* and contrary to the INA.

1974. Proclamation 10052 and the Defendants' refusal to act based thereon are actions in excess of "statutory jurisdiction, authority, or limitations" and, therefore, violate the Administrative Procedure Act." 5 U.S.C. §706(2)(C).

1975. Because Proclamation 10052 is *ultra vires*, the Defendants refusal to issue H-1B or H-4 visas or to allow entry to the United States based solely on the terms of Proclamation 10052 constitutes unlawfully withheld action and this Court can compel "agency action unlawfully withheld" under the APA. 5 U.S.C. § 706(1).

1976. As such, this Court should set aside Proclamation and order the Defendants to issue H-1B and H-4 visas without regard to Proclamation 10052 and to consider applications for admission to the United States without regard to Proclamation 10052.

THIRD CAUSE OF ACTION
(APA – Suspension of Licenses Contrary to Required Procedure)

1977. Plaintiffs reallege all allegations above as though restated here.

1978. Proclamation 10052 violates the APA because it was issued without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

1979. Under the APA, the executive may not withdraw, suspend, revoke or annul a license unless it gives notice and provides an opportunity to comment. 5 U.S.C. § 558(c).

1980. USCIS's granting of a petition to classifying a foreign national as H-1B non-immigrant or an H-4 non-immigrant constitutes the granting of a license within the meaning of the APA. 5 U.S.C. 551(8).

1981. USCIS's granting of a petition to classify a foreign national as an H-1B non-immigrant allows the foreign national to reside and work in the United States for the foreign national's sponsoring employer.

1982. USCIS's granting of a petition to classify a foreign national as an H-1B non-immigrant allows the foreign national to apply for an H-1B visa for entry into the United States. And it allows the H-1B non-immigrant's spouse and unmarried children under twenty-one to apply for an H-4 visa.

1983. Each Plaintiff has a valid, approved, and unexpired H-1B petition, or is a derivative beneficiary qualifying for H-4 status.

1984. Proclamation 10052 suspended each Plaintiff's approved H-1B petition.

1985. The Secretary of Homeland Security's and the Secretary of State's application of Proclamation 10052 to each Plaintiff constitutes a suspension of their approved H-1B petitions.

1986. The Secretary of Homeland Security and the Secretary of State failed to provide each Plaintiff with notice in writing of the facts or conduct which warranted the suspension of their petitions.

1987. The Secretary of Homeland Security and the Secretary of State failed to provide each Plaintiff with an opportunity to demonstrate or achieve compliance with all requirements for maintaining a valid H-1B petition.

1988. In applying Proclamation 10052, the Secretary of Homeland Security and the Secretary of State violated 5 U.S.C. § 558(c).

1989. The Defendants' refusal to issue visas or admit foreign nationals is unlawful.

1990. Under the APA, this court has authority to compel unlawfully withheld action. 5 U.S.C. § 706(1).

1991. Defendant Department of State does not have discretion to refuse to make decisions on pending DS160 visa applications.

FOURTH CAUSE OF ACTION
(APA – Arbitrary and Capricious Action)

1992. Plaintiffs reallege all allegations above as though restated here.

1993. Defendants refusals to issue visas or consider applications for admission based on the application of Proclamation 10052 are arbitrary and capricious. 5 U.S.C. § 706(2)(A).

1994. Defendants' unlawful refusals have aggrieved Plaintiffs.

1995. An agency action is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

1996. Defendants' refusals to issue visas or consider applications for admission entirely fail to consider an important aspect of the problem, primarily the legislative and executive findings that indicate the importation of H-1B workers and their derivatives is good for the economy and promotes domestic job growth.

1997. Defendants' refusals to issue visas or consider applications for admission entirely fail to consider an important aspect of the problem, primarily that these non-immigrants are not taking jobs from American workers because they are returning to jobs they already had. There is no net loss in jobs.

1998. Defendants' refusals to issue visas or consider application for admission ignores pertinent facts relating to the Department of Labor's approved permanent labor certifications showing that there are no available and qualified United States workers to fill the jobs in which Plaintiffs are or will be employed.

1999. Defendants' refusals to issue visas or consider applications for admission is based on irrational decision making because Plaintiffs are not competing with United States workers who lack bachelor's degrees.

2000. Defendants' refusals to issue visas or consider applications for admission entirely fail to consider an important aspect of the problem, primarily that H-4 minor children do not work.

2001. Defendants' refusals to issue visas or consider applications for admission entirely fail to consider an important aspect of the problem, primarily that the executive determined that H-4 derivatives who are eligible for employment are good for the economy and promote domestic job growth.

2002. Defendants' refusals to issue visas or consider applications for admission entirely fail to consider an important aspect of the problem, primarily because it did not restrict the issuance or entry of other specialty occupation workers on visas under 8 U.S.C. § 1101(a)(15)(e)(3) or 8 U.S.C. § 1101(a)(15)(h)(1)(B)(1).

2003. Defendants' refusals to issue visas or consider applications for admission lack reasoned decisionmaking.

2004. Defendants refusals to issue visas or consider applications for admission lack a factual basis, and to the extent there is one, the refusals run counter to the evidence.

2005. This Court should compel the Defendants to adjudicate H-1B and H-4 visas and consider their applications for admission regardless of Proclamation 10052.

FIFTH CAUSE OF ACTION
(Denial of Equal Protection)

2006. Plaintiffs reallege all allegations above as though restated here.

2007. Defendants' refusals to issue visas or consider applications for admission violate the Equal Protection Clause of the United States because their decisions disparately impact Indian nationals.

2008. In Fiscal Year 2018, Indian nationals comprised 73.9% of all H-1B visa holders. *See* H-1B Petitions by Gender and Country of Birth for Fiscal Year 2018 (available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1b-petitions-by-gender-country-of-birth-fy2018.pdf (last visited Jul. 14, 2020).

2009. Because USCIS publishes these statistics, Defendants are aware that a ban on all H-1B and H-4 visas would disparately impact Indian nationals.

2010. Such knowledge is probative of purposeful discrimination.

2011. Proclamation 10052 treats Indian nationals differently on the basis of their nationality on the basis of arbitrary and irrational classifications.

2012. Upon information and belief, Proclamation 10052 is intended to have adverse effects on Indian nationals.

2013. Thus, this Court should declare as unconstitutional Proclamation 10052 as a violation of the equal protection clause.

SIXTH CAUSE OF ACTION
(Denial of Due Process)

2014. Plaintiffs reallege all allegations above as though restated here.

2015. Plaintiffs have a legitimate claim of entitlement to a decision on their DS160 visa requests.

2016. Plaintiffs also have a legitimate claim of entitlement to their approved H-1B or H-4 visa petitions.

2017. Plaintiffs have a cognizable due process right.

2018. Defendants are depriving them of these interests without process required by law as they are providing no notice or meaningful opportunity to comment on Proclamation 10052, the Defendants' refusal to issue H-1B or H-4 visas or accept applications for admission from such visa holders.

2019. Thus, this Court should declare as unconstitutional Proclamation 10052 as a violation of the due process clause.

RESERVATION OF RIGHTS

Plaintiffs reserve the right to add additional allegations of agency error and related causes of action under common law or the APA after receiving the certified administrative record.

PRAYER FOR RELIEF

Plaintiffs pray that this Court will do the following:

2020. Take jurisdiction over this case.

2021. Declare Proclamation 10052 unlawful.

2022. Declare the Defendants' application of Proclamation 10052 unlawful.

2023. Enjoin the Department of State from applying Proclamation 10052 to Plaintiffs and order the Department of State to render decisions on all of Plaintiffs' pending non-immigrant visa applications within 14 days.

2024. Enjoin the Department of Homeland Security from refusing entry to Plaintiffs based on Proclamation 10052.

2025. Enjoin the Department of Homeland Security from rescinding, suspending, or abrogating any approved H-1B petition based on Proclamation 10052.

2026. Enjoin the Department of Labor from rescinding, suspending, or abrogating any approved Labor Condition Applications or Permanent Labor Certification Applications based on Proclamation 10052.

2027. Award attorneys' fees to each Plaintiff under the Equal Access to Judgment Act.

2028. Enter all necessary writs, injunctions, and orders as justice and equity require.

July 14, 2020

Respectfully submitted,

JONATHAN WASDEN
Wasden Banias LLC

GEOFFREY FORNEY
Wasden Banias LLC

s/Bradley B. Banias
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