

1 Mary Kenney (DC #1044695)*
2 Leslie K. Dellon (DC #250316)*
3 American Immigration Council
4 1331 G Street NW, Suite 200
5 Washington, DC 20005
6 Telephone: (202) 507-7512 (Kenney)
7 Telephone: (202) 507-7530 (Dellon)
8 Facsimile: (202) 742-5619
9 Email: mkenney@immcouncil.org
10 ldellon@immcouncil.org

11 Zachary Nightingale (CA #184501)
12 Van Der Hout LLP
13 180 Sutter Street, Suite 500
14 San Francisco, CA 94104
15 Telephone: (415) 981-3000
16 Facsimile: (415) 981-3003
17 Email: ndca@vblaw.com

18 Counsel for Plaintiffs MadKudu Inc. and Quick Fitting, Inc.
19 *Admitted pro hac vice

20 **UNITED STATES DISTRICT COURT**
21 **NORTHERN DISTRICT OF CALIFORNIA**
22 **SAN JOSE DIVISION**

23 MADUKUDU INC.; QUICK FITTING,
24 INC.,
25 Individually and On Behalf of
26 All Others Similarly Situated,
27 Plaintiffs,

28 v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES; Kenneth T. CUCCINELLI,
Senior Official Performing Duties of the
Director, U.S. Citizenship and Immigration
Services, in his official capacity,

Defendants.

Case No. 5:20-cv-02653-SVK

MOTION FOR CLASS CERTIFICATION
AND MEMORANDUM OF POINTS
AND AUTHORITIES

June 23, 2020, 10:00 a.m.
Magistrate Judge Susan van Keulen

1 Plaintiffs’ counsel, continued from first page:

2 Jesse M. Bless (MA #660713)*
3 American Immigration Lawyers Association
4 1331 G Street NW, Suite 300
5 Washington, DC 20005
6 Telephone: (781) 704-3897
7 Email: jbleess@aila.org

8 Jeff Joseph (CO #28695)*
9 Joseph & Hall, P.C.
10 12203 East Second Avenue
11 Aurora, CO 80011
12 Telephone: (303) 297-9171
13 Email: jeff@immigrationissues.com

14 Charles H. Kuck (GA #429940)*
15 Kuck Baxter Immigration LLC
16 365 Northridge Road, Suite 300
17 Atlanta, GA 30350
18 Telephone: (404) 816-8611
19 Email: CKuck@immigration.net

20 Counsel for Plaintiffs MadKudu Inc. and Quick Fitting, Inc.

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**Admitted pro hac vice*

1 **NOTICE OF MOTION FOR CLASS CERTIFICATION**

2 **PLEASE TAKE NOTICE** that on June 23, 2020 at 10:00 a.m. or as soon thereafter as
3 the matter may be heard at the San Jose Federal Courthouse, Courtroom 6, 4th Floor, 280 S. 1st
4 St., San Jose, CA 95113, with the Honorable Magistrate Judge Susan van Keulen, Plaintiffs
5 MadKudu Inc. and Quick Fitting, Inc. will, and hereby do, move this Court for class certification
6 pursuant to Federal Rule of Civil Procedure 23.
7

8 Plaintiffs seek certification of the following class under Federal Rules of Civil
9 Procedure 23(a) and 23(b)(2):

10 All U.S. employers who in 2019 filed, or in the future will file, a petition (Form
11 I-129 or any successor) with USCIS for an H-1B classification under 8 U.S.C.
12 § 1101(a)(15)(H)(i)(b) for a market research analyst where:

- 13 • USCIS denied or will deny the petition solely or in part based on a
14 finding that the OOH entry for market research analyst does not establish
15 that the occupation is a specialty occupation, and thus does not satisfy
16 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); and
- 17 • But for this finding, the petition would be approved.

18 This motion is based on the Memorandum of Points and Authorities, *infra*, the
19 pleadings, records and files in this action, and such other evidence and argument as may
20 be presented at the time of hearing. A proposed order accompanies this filing.

21 Respectfully submitted,

22 *s/ Mary Kenney*
23 Mary Kenney (DC #1044695)*
24 American Immigration Council
25 1331 G Street NW, Suite 200
26 Washington, DC 20005
27 Telephone: (202) 507-7512
28 Facsimile: (202) 742-5619
Email: mkenney@immcouncil.org

*Admitted pro hac vice

Dated: May 4, 2020

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

Plaintiffs MadKudu Inc. and Quick Fitting, Inc. are U.S. employers who challenge Defendants' policy and practice of arbitrarily and unlawfully denying H-1B nonimmigrant worker petitions for the specialty occupation of market research analyst. Employing boilerplate language and faulty reasoning, Defendant U.S. Citizenship and Immigration Services (USCIS) violated the Administrative Procedure Act (APA), the Immigration and Nationality Act (INA) and its implementing regulations when it denied Plaintiffs' H-1B petitions on the sole ground that a market research analyst was not a specialty occupation. *See* Dkt. 1 ¶¶ 31-42, 57-65. Because Defendants engage in a pattern and practice of denying H-1B petitions for market research analysts on the same basis—and employing the same reasoning—as in Plaintiffs' cases, Plaintiffs brought this lawsuit on behalf of themselves and similarly aggrieved U.S. employers. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and proposed class members to remedy Defendants' legal errors.

The H-1B nonimmigrant visa classification allows highly educated noncitizens to work for U.S. employers in “specialty occupation[s].” 8 U.S.C. § 1101(a)(15)(H)(i)(b). A position falls within a specialty occupation if “[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position” 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020). In analyzing this test for specialty occupation, Defendant USCIS relies upon the Occupational Outlook Handbook (OOH), a publication of the Bureau of Labor Statistics of the Department of Labor. *See, e.g., Stellar IT Sols. v. United States Citizenship and Immigration Servs.*, No. 18-2015 (RC), 2018 WL 6047413, at *10 (D.D.C. Nov. 19, 2018); *Raj & Co. v. U.S. Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1241, 1247 (W.D. Wash. 2015).

1 The OOH profile for market research analysts conclusively demonstrates that this occupation is a
 2 specialty occupation. Although Defendant USCIS relied on the OOH profile for market research
 3 analyst in deciding Plaintiffs’ petitions, it misinterpreted the governing statute and regulations as
 4 well as the OOH itself.

5
 6 Because Defendant USCIS engages in a pattern and practice of denying petitions for
 7 market research analysts on the same basis followed in Plaintiffs’ cases, Plaintiffs respectfully
 8 request that this Court certify the following proposed class under Federal Rules of Civil
 9 Procedure 23(a) and 23(b)(2):

10 All U.S. employers who in 2019 filed, or in the future will file, a petition (Form
 11 I-129 or any successor) with USCIS for an H-1B classification under 8 U.S.C.
 12 § 1101(a)(15)(H)(i)(b) for a market research analyst where:

- 13 • USCIS denied or will deny the petition solely or in part based on a
 14 finding that the OOH entry for market research analyst does not establish
 15 that the occupation is a specialty occupation, and thus does not satisfy
 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); and
- But for this finding, the petition would be approved.

16 As explained below, the proposed class satisfies the requirements of Rules 23(a)—numerosity,
 17 commonality, typicality, and adequacy—and 23(b)(2).

18 19 **II. BACKGROUND**

20 **A. H-1B Visa Classification**

21 The H-1B nonimmigrant visa classification allows highly educated noncitizens to work
 22 for U.S. employers in “specialty occupation[s]”: positions requiring the “theoretical and practical
 23 application of a body of highly specialized knowledge” for which “a bachelor’s or higher degree
 24 in a specific specialty (or its equivalent)” is required. 8 U.S.C. § 1184(i)(1). By regulation, a
 25 petitioner can establish that a position is within a specialty occupation through any one of four
 26 tests. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4) (2020). Plaintiffs challenge only the first test, which
 27
 28

1 mandates that a position will qualify as a specialty occupation if “[a] baccalaureate or higher
2 degree or its equivalent is normally the minimum requirement for entry into the particular
3 position.” 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020). USCIS reads this provision as requiring that
4 the petitioner show that the degree is in a specific specialty, consistent with 8 U.S.C. § 1184(i).
5

6 When deciding whether a petitioner has satisfied this dispositive test, USCIS routinely
7 relies upon the OOH, which includes a profile of the market research analyst occupation. USCIS
8 recognizes the OOH as an authoritative source for the duties and educational requirements of the
9 occupations profiled. The OOH profile for market research analyst reads, in relevant part:
10

11 *Market research analysts typically need a bachelor’s degree in market research or a*
12 *related field. Many have degrees in fields such as statistics, math, or computer science.*
13 *Others have backgrounds in business administration, the social sciences or*
14 *communications.*

15 *Courses in statistics, research methods, and marketing are essential for these workers.*
16 *Courses in communications and social sciences, such as economics or consumer behavior,*
17 *are also important.*

18 Some market research analyst jobs require a master’s degree. Several schools offer
19 graduate programs in marketing research, but many analysts complete degrees in other
20 fields, such as statistics and marketing, and/or earn a master’s degree in business
21 administration (MBA). A master’s degree is often required for leadership positions or
22 positions that perform more technical research.

23 OOH, *How to Become a Market Research Analyst* (Sept. 4, 2019),

24 <https://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (emphasis
25 added).

26 The central legal question in this case is whether the OOH profile for a market research
27 analyst satisfies the first regulatory test, that is, whether it demonstrates that a bachelor’s or
28 higher degree in a specific specialty or its equivalent is “normally” the minimum requirement for
entry into the occupation. In finding that it does not, Defendant USCIS erroneously concludes
that the OOH establishes that a range of degrees or educational credentials may qualify an

1 individual to work as a market research analyst, and thus it fails to establish that a degree in a
2 specific specialty is required. Exh. B, Denial of Plaintiff MadKudu’s petition (“MadKudu
3 Petition Denial”) at 4; Exh. D, Denial of Plaintiff Quick Fitting’s petition (“Quick Fitting
4 Petition Denial”) at 4; *see also* Dkt. 1 ¶¶ 35, 41. In so finding, Defendant USCIS misinterprets
5 the meaning of the statutory phrase “baccalaureate degree or higher in the specific specialty (or
6 its equivalent).” *See Raj*, 85 F. Supp. 3d at 1247 (holding that USCIS’ interpretation of the OOH
7 entry for market research analysts “impermissibly narrows the plain language of the statute”);
8 *see also Residential Finance Corp. v. U.S. Citizenship and Immigration Servs.*, 839 F. Supp. 2d
9 985, 996-97 (S.D. Ohio 2012) (“Defendant’s implicit premise that the title of a field of study
10 controls ignores the realities of the statutory language involved and the obvious intent behind
11 them. The knowledge and not the title of the degree is what is important.”). Similarly, Defendant
12 USCIS fails to give meaning to the term “normally” in the first regulatory test. *See, e.g., Info
13 Labs, Inc. v. U.S. Citizenship and Immigration Servs.*, No. 19-684 (RC), 2020 WL 1536251, at
14 *4 (D.D.C. Mar. 31, 2020) (rejecting USCIS reading of the OOH profile for computer systems
15 analysts and explaining that “[t]he fact that such a degree is not ‘always’ required—or that ‘some
16 firms’ hire analysts with general business or liberal arts degrees—does not suggest a specialty
17 degree is not ‘normally’ required”).

18
19 Defendant USCIS also misreads the OOH, ignoring altogether its statements that
20 “[m]arket research analysts typically need a bachelor’s degree in market research or a related
21 field” and that “[c]ourses in statistics, research methods, and marketing are essential for these
22 workers,” while “[c]ourses in communications and social sciences, such as economics or
23 consumer behavior, are also important.” OOH, *How to Become a Market Research Analyst*. Had
24 USCIS properly interpreted and applied the statute and regulations and not ignored critical
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1 information in the OOH profile, it would have found that market research analyst is a specialty
 2 occupation and approved Plaintiffs' and putative class members' petitions.¹

3 **B. Plaintiffs' Factual Backgrounds**

4 **1. Plaintiff MadKudu Inc.**

5 Plaintiff MadKudu Inc. is a marketing analytics software company headquartered in
 6 Mountain View, California. Exh. A, Declaration of Francis Brero, Cofounder and Chief Revenue
 7 Officer, MadKudu ("MadKudu Dec.") ¶¶2-3. Established in 2014, its clients are business-to-
 8 business software as a service (SaaS) companies who want an alternative to the incomplete, yet
 9 time-intensive manual development of sales leads. *Id.* MadKudu analyzes a client's customers
 10 and segments sales leads based on relevant demographic data, such as the lead's title, industry
 11 and business size. *Id.* at ¶3. Its data analysis determines which customers are ready to buy from
 12 the client. *Id.* MadKudu's predictive models adapt automatically based on data, accounting for
 13 changes in its clients' products, and markets for new customers. *Id.*

14 On or about April 2, 2019, MadKudu filed a petition with USCIS seeking to employ
 15 Rafikah Binte Mohamed Halim in H-1B status in a market research analyst job with the title of
 16 product manager. Exh. A, MadKudu Dec. ¶4. Ms. Mohamed Halim, a national of Singapore, had
 17 worked for MadKudu in H-1B² status since June 2018 as product manager. *Id.* at ¶5. MadKudu
 18 attached to its H-1B petition a Labor Condition Application certified by the Department of
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 20
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24
 25 ¹ Because each of the regulatory tests in 8 C.F.R. § 214.2(h)(4)(iii)(A) (2020) operates
 26 independently, it is immaterial that USCIS denied the petitions under multiple regulatory tests.
 27 Had USCIS found that Plaintiffs satisfied the first regulatory test, it would have found that the
 28 occupation was a specialty occupation.

² Congress established the H-1B1 classification for nationals of Chile and Singapore under
 Fair Trade Agreements with each country. *See* 8 U.S.C. § 1184(g)(8)(A)(i)-(ii), (g)(8)(B)(ii)(I)-
 (II). As with the H-1B classification, the job must be in an identically defined "specialty
 occupation." 8 U.S.C. § 1184(i)(3).

1 Labor, which identified the position by SOC Code 13-1161, an occupation entitled Market
2 Research Analysts and Marketing Specialists. *Id.* at ¶6.

3 Defendant USCIS denied the petition on February 24, 2020, for failing to demonstrate that
4 the position was a specialty occupation under any of the independent regulatory tests. Exh. A,
5 MadKudu Dec. ¶7; Exh. B, MadKudu Petition Denial at 8; Dkt. 1 ¶34. Following its policy and
6 practice, Defendant USCIS determined that Plaintiff MadKudu's petition did not meet the first
7 regulatory test because the OOH did not show that market research analyst positions normally
8 require a minimum of a bachelor's degree or its equivalent in a specific specialty at the entry
9 level. Exh. B, MadKudu Petition Denial at 4-5. Defendant USCIS noted "a range of educational
10 credentials may qualify an individual to perform the duties of a Market Research Analysts [sic]." *Id.*
11 at 4. In doing so, Defendant USCIS ignored entirely the OOH's statements that "[m]arket
12 research analysts typically need a bachelor's degree in market research or a related field" and
13 that "[c]ourses in statistics, research methods, and marketing are essential for these workers." *Id.*
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16 **2. Plaintiff Quick Fitting, Inc.**

17
18 Established in 2004, Plaintiff Quick Fitting, Inc. is a corporation headquartered in
19 Warwick, Rhode Island. It is the supplier of repairable quick connection fittings for retail,
20 industrial, original equipment manufacturing (OEM) and plumbing and electrical markets. Its
21 quick connection technologies can be used in such areas as plumbing, electrical, air-
22 conditioning, fire suppression and oil and gas applications. Exh. C, Declaration of Francis G.
23 Kosky, Executive VP and CFO, Quick Fitting ("Quick Fitting Dec.") ¶2.
24

25 On or about August 20, 2019, Quick Fitting filed a petition with USCIS seeking an
26 extension of Xiaomeng Liu's H-1B status based on her employment as a market research analyst.
27 It sought to continue to employ Ms. Liu in this position for an additional period with no change
28

1 in job duties from the H-1B petition previously approved by Defendant USCIS. Exh. C, Quick
2 Fitting Dec. ¶3. Ms. Liu had been working with Quick Fitting in H-1B status since December
3 2012. *Id.* at ¶4. Quick Fitting attached to its H-1B petition a Labor Condition Application
4 certified by the Department of Labor, which identified the position by SOC Code 13-1161, an
5 occupation entitled Market Research Analysts and Marketing Specialists. *Id.* at ¶5.

7 Defendant USCIS denied the petition on January 23, 2020, for failing to demonstrate that
8 the position was a specialty occupation under any of the independent regulatory tests. Exh. C,
9 Quick Fitting Dec. ¶6; Exh. D, Quick Fitting Denial at 9; Dkt. 1 ¶40. Following its policy and
10 practice, Defendant USCIS determined that Plaintiff Quick Fitting’s petition did not meet the
11 first regulatory test because the OOH did not show that market research analyst positions
12 normally require a minimum of a bachelor’s degree or its equivalent in a specific specialty at the
13 entry level. Exh. D, Quick Fitting Denial at 4. Defendant USCIS noted that “[a] range of
14 educational credentials such as business administration and the social sciences may qualify an
15 individual to perform the duties of a Market Research Analyst and Marketing Specialist.” *Id.*
16 Defendant USCIS concluded that the “requirement of a degree with a generalized title, such as
17 business administration or liberal arts, without further specification, does not establish
18 eligibility.” *Id.* In so doing, Defendant USCIS ignored entirely the OOH’s statements that
19 “[m]arket research analysts typically need a bachelor’s degree in market research or a related
20 field” and that “[c]ourses in statistics, research methods, and marketing are essential for these
21 workers.” *Compare id. with* OOH, *How to Become a Market Research Analyst* (Sept. 4, 2019)
22 *supra.*
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1 **C. Procedural History**

2 On April 16, 2020, Plaintiffs filed a class action complaint in the United States District
3 Court for the Northern District of California. The complaint asserted causes of action based on
4 the Defendants’ violations of the INA and implementing regulations and the APA. Dkt. 1 ¶¶ 57-
5 65. Plaintiffs are now filing this Motion for Class Certification with supporting Memorandum of
6 Points and Authorities.
7

8 **III. ARGUMENT**

9 A plaintiff whose suit meets the requirements of Fed. R. Civ. P. 23 has a “categorical”
10 right “to pursue his claim as a class action.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate*
11 *Ins. Co.*, 559 U.S. 393, 398 (2010). The plaintiff must satisfy Rule 23(a) criteria—numerosity,
12 commonality, typicality, and adequacy of representation—and fall within one of the three
13 categories found in Rule 23(b). *Id*; see also *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581,
14 588 (9th Cir. 2012) (discussing criteria under Rule 23(a)). The party seeking certification has the
15 burden to show, by a preponderance of the evidence, that these prerequisites are met. See *Conn.*
16 *Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011); see also *Wal-Mart*
17 *Stores, Inc. v. Dukes*, 564 U.S. 338, 349-52 (2011).
18

19 Plaintiffs’ proposed class satisfies all four Rule 23(a) prerequisites as well as Rule
20 23(b)(2). Courts within the Ninth Circuit, including this Court, have granted nationwide class
21 certification to plaintiffs seeking declaratory or injunctive relief in challenges to immigration
22 policies and practices. See, e.g., *Walters v. Reno*, 145 F.3d 1032, 1045-47 (9th Cir. 1998)
23 (affirming certification of nationwide class of individuals challenging adequacy of notice in
24 document fraud cases); *Nightingale v. U.S. Citizenship & Immigration Servs.*, 333 F.R.D. 449,
25 456, 463 (N.D. Cal. 2019) (certifying two nationwide classes in case challenging immigration
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1 agencies' failure to timely process FOIA requests); *Alfaro Garcia v. Johnson*, No. 14-cv-01775-
2 YGR, 2014 WL 6657591, at *16 (N.D. Cal. Nov. 21, 2014) (certifying nationwide class in case
3 challenging government's failure to provide timely reasonable fear interviews); *Santillan v.*
4 *Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying
5 nationwide class of lawful permanent residents challenging USCIS' delays in issuing
6 documentation of their status); *Doe v. Trump*, No. 3:19-cv-1743-SI, 2020 WL 1689727, at *16-
7 17 (D. Or. Apr. 7, 2020) (certifying class of individuals with approved or pending immigration
8 petitions and a subclass of visa applicants challenging the President's Proclamation on healthcare
9 insurance); *Inland Empire—Immigrant Youth Collective v. Nielsen*, No. EDCV 17–2048 PSG
10 (SHKx), 2018 WL 1061408, at *4, 12, 14 (C.D. Cal. Feb. 26, 2018) (certifying nationwide class
11 of Deferred Action for Childhood Arrivals recipients whose benefits were terminated without
12 notice or cause); *Rojas v. Johnson*, No. C16-1024 RSM, 2017 WL 1397749, at *7 (W.D. Wash.
13 Jan. 10, 2017) (certifying two nationwide classes with two subclasses each of asylum seekers
14 challenging defective asylum application procedures); *A.B.T. v. U.S. Citizenship & Immigration*
15 *Servs.*, No. C11–2108 RAJ, 2013 WL 5913323, at *1-2 (W.D. Wash. Nov. 4, 2013) (certifying
16 nationwide class and approving a settlement amending practices by EOIR and USCIS that
17 precluded asylum applicants from receiving employment authorization).

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21 Here, as in the cases cited above, a nationwide class is “[]consistent with principles of
22 equity jurisprudence” since the challenged adjudicatory policy and practice is national and “the
23 scope of injunctive relief is dictated by the extent of the violation established, not by the
24 geographical extent of the plaintiff class.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In
25 reviewing whether to certify a nationwide class, courts consider whether (1) there are similar
26 cases currently pending in other jurisdictions, and (2) the plaintiffs are challenging a nationwide
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1 policy or practice. *Id.*; see, e.g., *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579,
2 589 (C.D. Cal. 2012); *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011).

3 To the best of counsel's knowledge, there is no other case challenging USCIS' systemic
4 policy or practice of denying H-1B petitions based upon a misinterpretation of the statute,
5 regulations and OOH. Instead, the only pending cases are those brought by individual plaintiffs
6 to remedy denials of their own H-1B petitions. Moreover, this issue can be fully resolved only on
7 a nationwide level. USCIS employs the same or similar boilerplate templates to deny multiple
8 dozens of H-1B petitions for market research analysts each year throughout the United States, on
9 the same grounds asserted in Plaintiffs' cases, and will continue to do so without a class-wide
10 court order. Individual lawsuits will not change USCIS policy or halt its practice. For that reason,
11 this issue is particularly amenable to class-wide treatment. See *Yamasaki*, 442 U.S. at 702.

14 **A. The Proposed Class Satisfies Rule 23(a)'s Requirements**

15 **1. Plaintiffs' Class Is So Numerous that Joinder of all Members Is**
16 **Impracticable**

17 Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is
18 impracticable." Fed. R. Civ. P. 23(a)(1). "[I]mpracticability' does not mean 'impossibility,' but
19 only the difficulty or inconvenience of joining all members of the class." *Franco-Gonzales v.*
20 *Napolitano*, No. CV 10-02211 DMG (DTBx), 2011 WL 11705815, at *6 (C.D. Cal. Nov. 21,
21 2011) (quoting *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909, 913-14 (9th Cir.
22 1964)). The party seeking certification "do[es] not need to state the exact number of potential
23 class members, nor is a specific number of class members required for numerosity." *In re Rubber*
24 *Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). The Ninth Circuit has upheld
25 certification involving a class of twenty. *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir.
26 2010) (citing *Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (upholding
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1 class of twenty) and *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648,
2 653 (4th Cir. 1967) (upholding class of eighteen); *see also McCluskey v. Trs. of Red Dot Corp.*
3 *Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673-76 (W.D. Wash. 2010) (certifying
4 class with twenty-seven known members). Courts generally find that numerosity is satisfied if
5 the class includes forty or more members. *Rannis*, 380 F. App'x at 651.

7 Where, as here, “plaintiffs seek injunctive and declaratory relief, ‘the numerosity
8 requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs’
9 other evidence that the number of unknown and future members of [the] proposed subclass ... is
10 sufficient to make joinder impracticable.’” *Nightingale*, 333 F.R.D. at 457 (quoting *Sueoka v.*
11 *United States*, 101 F. App'x 649, 653 (9th Cir. 2004)). Similarly, “a court may draw a reasonable
12 inference of class size from the facts before it.” *Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal.
13 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984), *opinion amended on reh'g*, 763 F.2d 1098 (9th Cir.
14 1985).

16 While Plaintiffs do not have an exact number, the number of current class members is
17 known to and easily ascertainable by the government. *Cf. Barahona-Gomez v. Reno*, 167 F.3d
18 1228, 1237 (9th Cir. 1999) (“[Immigration officials are] uniquely positioned to ascertain class
19 membership.”). Nevertheless, Plaintiffs reasonably estimate that there are multiple dozens—
20 easily more than forty—of U.S. employers who *currently* are members of the class with an
21 untold number of unknown, future members, thus satisfying the numerosity requirement.

23 Decisions of the USCIS’ administrative appellate body, the Administrative Appeals
24 Office (USCIS AAO), support Plaintiffs’ estimate. In the past three calendar years, USCIS AAO
25 sustained USCIS adjudicators’ denials of at least sixty H-1B petitions for market research
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1 analysts.³ In each such year, USCIS AAO issued between seventeen and twenty-two such
 2 decisions, or an average of twenty per year. Moreover, USCIS is on track to continue this
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 5 ³ See *In re 5394964*, 2019 WL 7498547, at *2-4 (AAO Dec. 23, 2019); *In re 5150108*,
 6 2019 WL 7492915, at *2-3 (AAO Dec. 19, 2019); *Matter of Q- Inc.*, 2019 WL 6827401, at *1
 7 (AAO Nov. 8, 2019); *Matter of C-C-M-S-, LLC*, 2019 WL 6827398, at *4-5 (AAO Nov. 7,
 8 2019); *Matter of F-L-, LLC*, 2019 WL 5889138, at *2-3 (AAO Oct. 24, 2019); *Matter of S-R-R-
 9 & H-C-C-, LLC*, 2019 WL 5495911, at * 4-5 (AAO Oct. 17, 2019); *Matter of N-T-, Inc.*, 2019
 10 WL 5086930, at *2-3 (AAO Oct. 2, 2019); *Matter of H-T-U-C- Inc.*, 2019 WL 3945026, at *3-4
 11 (AAO July 25, 2019); *Matter of H-G-C-, LP*, 2019 WL 3386161, at *2-3 (AAO July 5, 2019);
 12 *Matter of MGMR-R-O- LLC*, 2019 WL 3386164, at *3-4 (AAO June 26, 2019); *Matter of C-J-A-
 13 , 2019 WL 2903297*, at *5 (June 19, 2019); *Matter of U-T-, Inc.*, 2019 WL 2725583, at *2-3
 14 (AAO June 6, 2019); *Matter of C-S-, Inc.*, 2019 WL 1903321, at *2-3 (AAO Apr. 10, 2019);
 15 *Matter of P- LLC*, 2019 WL 1556937, at *2-3 (AAO Mar. 19, 2019); *Matter of E-F- II, LLC*,
 16 2019 WL 1470014, at *2-3 (Mar. 12, 2019); *Matter of I-L-T-G-*, 2019 WL 858072, at *4-5
 17 (AAO Jan. 31, 2019); *Matter of B.O.C., Co. Ltd*, 2018 WL 6982195, at *1 (AAO Dec. 7, 2018);
 18 *Matter of C- USA Inc.*, 2018 WL 6735429, at *3-4 (AAO Nov. 29, 2018); *Matter of F-C-, Inc.*,
 19 2018 WL 6242755, at *2-3 (AAO Nov. 18, 2018); *Matter of B-G- Inc.*, 2018 WL 6242737, at
 20 *2-3 (AAO Nov. 7, 2018); *Matter of C-C- Inc.*, 2018 WL 6124735. At *3-4 (AAO Nov. 1,
 21 2018); *Matter of W-T- LLC*, 2018 WL 6075471, at *3-4 (AAO Oct. 31, 2018); *Matter of 3JD-A-
 22 LLC*, 2018 WL 5222384, at *3 (AAO Oct. 4, 2018); *Matter of D-T-I-A-, Inc.*, 2018 WL 4963323,
 23 at *3-4 (AAO Sept. 27, 2018); *Matter of Q-C-, Inc.*, 2018 WL 4537322, at *3-4 (Sept. 12, 2018);
 24 *Matter of E-I-A-*, 2018 WL 4510760, at *3-4 (AAO Sept. 6, 2018); *Matter of P-P-, LLC*, 2018
 25 WL 4510759, at *4-5 (AAO Sept. 6, 2018); *Matter of C- Inc.*, 2018 WL 4092283, at *5 (AAO
 26 Aug. 20, 2018); *Matter of F-P- LLC*, 2018 WL 3609583, at *2-3 (AAO July 12, 2018); *Matter of
 27 S-D-M-, LLC*, 2018 WL 3609325, at *3 (AAO July 6, 2018); *Matter of [identifying information
 28 withheld by agency]*, 2018 WL 3475688, at 2-3 (AAO June 28, 2018); *Matter of P-P-E- Corp.*,
 2018 WL 3392931, at *3-4 (AAO June 27, 2018); *Matter of H-C-M-I-*, 2018 WL 3167294, at *3
 (AAO June 7, 2018); *Matter of C- LLC*, 2018 WL 3036126, at *5 (AAO May 31, 2018); *Matter
 of M-, Inc.*, 2018 WL 1709387, at *2-3 (AAO Mar. 16, 2018); *Matter of U-, LLC*, 2018 WL
 1635137, at *4 (Mar. 15, 2018); *Matter of R-S-, Inc.*, 2018 WL 1565938, at *3 (AAO Mar. 7,
 2018); *Matter of T- LLC*, 2018 WL 1137751, at *3 (AAO Feb. 9, 2018); *Matter of E-A-, LLC*,
 2017 WL 6988245, at *3-4 (AAO Dec. 27, 2017); *Matter of I- Inc.*, 2017 WL 5593016, at *1
 (AAO Oct. 25, 2017); *Matter of N Inc.*, 2017 WL 5068246, at *3-4 (AAO Oct. 12, 2017); *Matter
 of E-ZS- Inc.*, 2017 WL 4550952, at *4-5 (AAO Sept. 15, 2017); *Matter of C-H-I-A-F-S-, Inc.*,
 2017 WL 3843371, at *5-6 (AAO Aug. 4, 2017); *Matter of W-F- Inc.*, 2017 WL 3034819, at *4-
 5 (AAO June 29, 2017); *Matter of S-A-M-, Inc.*, 2017 WL 2844782, at *3-5 (AAO June 22,
 2017); *Matter of A-D-, LLC*, 2018 WL 2844750, at *2-4 (AAO June 21, 2017); *Matter of D-A-
 Inc.*, 2017 WL 2844749, at *3-4 (AAO June 21, 2017); *Matter of A-C- Inc.*, 2017 WL 2844714,
 at *4-5 (AAO June 20, 2017); *Matter of [identifying information withheld by agency]*, 2017 WL
 2342279, at *3-4 (AAO May 10, 2017); *Matter of C-H-T-, LLC*, 2017 WL 1508839, at *4-5
 (AAO Apr. 16, 2017); *Matter of O-T-I-S-I-, LP*, 2017 WL 1409144, at * 3-4 (AAO Mar. 30,
 2017); *Matter of C-I- & E-Inc.*, 2017 WL 1383986, at *3-4 (AAO Mar. 24, 2017); *Matter of V-*

1 practice in 2020; in addition to the decisions in Plaintiffs' cases, USCIS AAO issued four such
2 decisions in the first two months of the year. *See In Re: 6411951*, 2020 WL 1133241, at *1
3 (AAO Feb. 27, 2020); *In Re: 6110184*, 2020 WL 1133239, at *1-2 (AAO Feb. 27, 2020); *In Re:*
4 *4377281*, 2020 WL 730104, at *1 (AAO Jan. 16, 2020); *In Re: 6015282*, 2020 WL 730096, at *1
5 (AAO Jan. 15, 2020).
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7 In all such decisions, USCIS employs the same reasoning and the same or similar
8 language in concluding that the OOH profile for a market research analyst does not demonstrate
9 that a bachelor's degree in a "specific specialty" is normally required for entry into the
10 profession, and thus does not satisfy the first regulatory test. To reach its conclusion that the
11 educational prerequisite for a market research analyst is too varied to constitute a specific
12 specialty, Defendant USCIS erroneously characterizes the OOH profile as listing "a range of
13 educational credentials," *see, e.g.*, Exh. B, MadKudu Petition Denial at 4; Exh. D, Quick Fitting
14 Petition Denial at 4; "degrees and backgrounds in various fields," *see, e.g.*, *In Re 4377281*, 2020
15 WL 730104, at *3 (AAO Jan. 16, 2020); "disparate fields of study," *see, e.g.*, *Matter of Q- Inc.*,
16 2019 WL 6827401, at *2 (AAO Nov. 8, 2019); and "degrees and backgrounds in a wide-variety
17 of disparate fields," *See, e.g.*, *Matter of B.O.C. Co., Ltd*, 2018 WL 6982195, at *3 (AAO Dec. 7,
18 2018). Just as in Plaintiffs' cases, USCIS ignores the OOH's critical statement that market
19 research analysts "typically" need a bachelor's degree in market research or a related field.
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24 *Inc.*, 2017 WL 1160864, at *4-5 (AAO Mar. 2, 2017); *Matter of R-J-H- LLC*, 2017 WL
25 1133235, at *3-5 (AAO Mar. 1, 2017); *Matter of L-L-NA, LLC*, 2017 WL 1021715, at *4-5
26 (AAO Feb. 28, 2017); *Matter of B-C- Inc.*, 2017 WL 1021578, at *4-5 (AAO Feb. 27, 2017);
27 *Matter of L-O-O-K-V.W-, E- P.C.*, 2017 WL 959649, at *3 (AAO Feb. 16, 2017); *Matter of M-A-*
28 *Inc.*, 2017 WL 770563, at *4-6 (AAO Jan. 31, 2017); *Matter of Q-C-, Inc.*, 2017 WL 770541, at
*5-6 (AAO Jan. 26, 2017).

1 Although not all of the petitioners in these cases are class members, as many of their
2 petitions were filed earlier than 2019, the consistency in the number of such decisions over at
3 least a three-year period supports a reasonable inference that there will be an equal number of
4 such USCIS AAO denials for cases filed in 2020 and subsequent years.

5
6 Significantly, H-1B petitioners appeal only a small fraction of denied cases to USCIS
7 AAO each year. An administrative agency appeal of a denied H-1B petition is only one option
8 available to unsuccessful petitioning employers and not all choose this route.⁴ According to one
9 USCIS spokesperson, only one percent of H-1B denials are appealed to USCIS AAO. *See*
10 Sinduja Rangarajan, *The Trump Administration Is Denying H-1B Visas at a Dizzying Rate, But*
11 *It's Hit a Snag*, Mother Jones (Oct. 17, 2019), <https://bit.ly/3cy80BS> (reporting on an email from
12 a “USCIS spokesperson”). Thus, it is reasonable to infer that the approximately twenty USCIS
13 AAO denials of H-1B petitions for market research analysts issued each year are a small
14 fraction—likely less than half—of the total number of such denials, and that the true number is
15 much higher. This reasonable inference is bolstered by the high numbers of denials of H-1B
16 petitions in recent years. *See, e.g.*, Stuart Anderson, *Latest Data Show H-1B Visas Being Denied*
17 *At High Rates*, Forbes (Oct. 28, 2019, 12:08 AM), <https://bit.ly/2VQ8qwG> (reporting that
18 government statistics show that 27,707 H-1B petitions were denied in fiscal year 2019).

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21 These statistics support a reasonable estimate that the number of *current* putative class
22 members in the class is at least forty—double the annual average of the AAO decisions—and
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26 ⁴ Other options include dropping the case altogether, re-filing the petition, moving to
27 reopen or reconsider the decision or filing a federal court action. *See* Cyrus Mehta & Sophia
28 Genovese, *Administrative Review Versus Judicial Review When an Employment-Based Petition*
Is Denied, The Insightful Immigration Blog (July 30, 2018),
<http://blog.cyrusmehta.com/2018/07/administrative-review-versus-judicial-review-when-an-employment-based-petition-is-denied.html>.

1 likely much higher. In addition, however, Plaintiffs’ proposed class includes an unknown
2 number of future class members. The inclusion of unknown future members renders “joinder ...
3 inherently impracticable.” *Jordan v. Cty. Of L.A.*, 669 F.2d 1311, 1320 (9th Cir. 1982), *vacated*
4 *on other grounds*, 459 U.S. 810 (1982)); *see also Nat’l Ass’n of Radiation Survivors v. Walters*,
5 111 F.R.D. 595, 599 (N.D. Cal. 1986) (“[W]here the class includes unnamed, unknown future
6 members, joinder of such unknown individuals is impracticable and the numerosity requirement
7 is therefore met,’ regardless of class size.”) (quoting *Int’l Molders’ & Allied Workers’ Local*
8 *Union No. 164 v. Nelson*, 102 F.R.D. 457, 461 (N.D. Cal. 1983)); *Smith v. Heckler*, 595 F. Supp.
9 1173, 1186 (E.D. Cal. 1984) (in injunctive relief cases, “[j]oinder in the class of persons who
10 may be injured in the future has been held impracticable, without regard to the number of
11 persons already injured”).

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14 Accordingly, the evidence sufficiently demonstrates that the class remains sufficiently
15 numerous for purposes of certification.

16 **2. Plaintiffs’ Claims Raise Legal and Factual Questions Common to the** 17 **Class**

18 Plaintiffs satisfy Rule 23(a)(2) because there are questions of law or fact common to the
19 class. Fed. R. Civ. P. 23(a)(2). Commonality requires that the “class members ‘have suffered the
20 same injury.’” *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,
21 157 (1982)). Further, the plaintiffs’ claims “must depend upon a common contention . . . of such
22 a nature that it is capable of class-wide resolution—which means that determination of its truth
23 or falsity will resolve an issue that is central to the validity of each one of the claims in one
24 stroke.” *Wal-Mart*, 564 U.S. at 350. However, the plaintiffs need not show that all questions, “or
25 even a preponderance of questions,” meet this standard; instead, “[s]o long as there is ‘even a
26 single common question,’ a would-be class can satisfy the commonality requirement.” *Wang v.*
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1 *Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at
2 359); *see also*, *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (explaining that a plaintiff
3 “need not show . . . that every question in the case, or even a preponderance of questions, is
4 capable of class wide resolution”) (quotation marks omitted); *Mazza*, 666 F.3d at 589 (noting
5 that “commonality only requires a single significant question of law or fact”).
6

7 Class members need not be identical in all respects, and commonality may be satisfied,
8 notwithstanding some “variation[]” among the facts of their cases, where the harm alleged is
9 common to all class members. *Wit v. United Behavioral Health*, 317 F.R.D. 106, 127 (N.D. Cal.
10 2016). Accordingly, the existence of “shared legal issues with divergent factual predicates”
11 satisfies Rule 23. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting
12 *Hanlon v. Chrysler Corp.*, 150 F.3d 1101, 1019 (9th Cir. 1998)). In suits such as this one,
13 commonality is satisfied where “the lawsuit challenges a system-wide practice or policy that
14 affects all of the putative class members. Under such circumstances, individual factual
15 differences among class members pose no obstacle to commonality.” *Parsons*, 754 F.3d at 682
16 (quoting *Rosas v. Baca*, No. CV 12–00428 DDP, 2012 WL 2061694, at *3 (C.D. Cal. June 7,
17 2012)).
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20 The proposed class readily satisfies Rule 23(a)(2)’s commonality requirement. First, the
21 class is narrowly tailored to include only those sharing the same relevant facts. The class is
22 limited by: the occupation at issue—market research analysts; the date that the petition was
23 filed—2019 or thereafter; the reason for the denial—solely or partly based upon the first
24 regulatory test; and finally, the impact of the denial—only those cases that otherwise would have
25 been approved but for Defendants’ misapplication of the first regulatory test. This latter
26 limitation ensures that the class will not include U.S. employer petitioners whose H-1B petitions
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1 are denied on a ground other than the question of whether the job is within a specialty
2 occupation. Moreover, because all putative class members' petitions have been or will be denied
3 due to the same legal error, the correction of which would lead to an approval, any individual
4 differences in their cases are immaterial. *See Parsons*, 754 F.3d at 678 (finding commonality
5 notwithstanding individual variations in harm suffered by class members in a challenge to
6 conditions in Arizona prisons).

8 Second, Plaintiffs and putative class members share the same legal issues: whether
9 Defendant USCIS: 1) misinterprets the meaning of the phrase “specific specialty,” 8 U.S.C.
10 § 1184(i); 2) misinterprets the first regulatory test for a specialty occupation; and 3) misapplies
11 both provisions to its interpretation of the OOH profile of a market research analyst. In
12 evaluating the first regulatory test for specialty occupation, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1),
13 USCIS erroneously finds in all putative class members' cases that the OOH profile does not
14 demonstrate that the educational prerequisite for the particular occupation is a bachelor's degree
15 or higher in a specific specialty or its equivalent. In so doing, USCIS interprets the statutory term
16 “specialty occupation” too narrowly, altogether fails to consider what the first regulatory test
17 means by the phrase “normally the minimum requirement,” and misapplies the relevant language
18 in the OOH profile that demonstrates that this test has been met. *See* Dkt. 1 ¶¶ 60, 64; *Raj*, 85 F.
19 Supp. 3d at 1247. But for these legal errors, USCIS would approve the petitions of all putative
20 class members.
21

22 A further common question is whether USCIS engages in a pattern or practice of such
23 erroneous decision-making, as Plaintiffs allege. Dkt. 1 ¶¶ 6, 27, 30, 48, 59, 63. Were this Court
24 to find that it does, it also must find that the Plaintiffs and the proposed class members “have
25 suffered the same injury”—an injury which is “capable of classwide resolution.” *Wal-Mart*,
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1 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157). Determination of the legal issue in this case
2 “will resolve an issue that is central to the validity of each one of the [class members’] claims in
3 one stroke”—that is, whether USCIS misinterprets the statute and regulation and misreads the
4 OOH, leading to erroneous denials of H-1B petitions for market research analysts. *Wal-Mart*,
5 564 U.S. at 350. Defendants’ practices are either “unlawful as to every [putative class member]
6 or [they are] not. The inquiry does not require [the Court] to determine the effect of those
7 policies and practices upon any individual class member . . . or to undertake any other kind of
8 individualized determination.” *Parsons*, 754 F.3d at 678.
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11 Should the Court agree that Defendants have misinterpreted the law and regulations
12 under the INA and violated the APA, all who fall within the class will benefit from the uniform
13 request for relief: 1) a declaration that the OOH profile for market research analyst demonstrates
14 that a bachelor’s or higher degree is normally the minimum requirement for entry into the
15 occupation and thus, that the OOH demonstrates that a market research analyst satisfies the first
16 regulatory test for specialty occupation; and 2) an order that USCIS correctly apply the statutory
17 phrase “specific specialty” and the first regulatory test for specialty occupation to the petitions of
18 all class members. Dkt. 1 at 20-21. Accordingly, a common answer as to this issue will “drive
19 the resolution of the litigation.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir.
20 2011) (quoting *Wal-Mart*, 564 U.S. at 350).
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23 **3. Plaintiffs’ Claims Are Typical of Those of the Proposed Class**

24 Plaintiffs’ claims are typical of the proposed class. Fed. R. Civ. P. 23(a)(3). Commonality
25 and typicality “tend to merge.” *Falcon*, 457 U.S. at 157 n.13. The test for typicality is “whether
26 other members have the same or similar injury, whether the action is based on conduct which is
27 not unique to the named plaintiffs, and whether other class members have been injured by the
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1 same course of conduct.” *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d
2 497, 508 (9th Cir. 1992)). “Typicality refers to the nature of the claim or defense of the class
3 representative, and not to the specific facts from which it arose, or the relief sought.” *Id.* The
4 typicality standard is also “permissive” in that the claims of the individual plaintiffs are “typical”
5 if “they are reasonably co-extensive with those of absent class members; [the claims] need not be
6 substantially identical.” *Hanlon*, 150 F.3d at 1020.

8 In this case, Plaintiffs’ claims arise from the unlawful policy and practice of Defendants’
9 denying H-1B petitions for market research analysts under 8 C.F.R. § 214.2(h)(4)(iii)(A) (1)
10 based on a misinterpretation of the statutory term “specific specialty” and the first regulatory test
11 and an erroneous reading of the OOH profile for market research analysts. *See* Dkt. 1 ¶¶ 60, 64.
12 Defendants’ policy and practice of denying H-1B petitions on this basis causes the same harm to
13 the named Plaintiffs as it does to every putative class member. *See, e.g., LaDuke v. Nelson*,
14 762 F.2d 1318, 1332 (9th Cir. 1985) (“The minor differences in the manner in which the
15 representative’s Fourth Amendment rights were violated does not render their claims atypical of
16 those of the class.”).

19 **4. The Representative Parties Will Fairly and Adequately Protect the** 20 **Interests of the Proposed Class**

21 The representative parties will fairly and adequately protect the interests of the proposed
22 class. Fed. R. Civ. P. 23(a)(4). “To determine whether named plaintiffs will adequately represent
23 a class, courts must resolve two questions: (1) do the named plaintiffs and their counsel have any
24 conflicts of interest with other class members and (2) will the named plaintiffs and their counsel
25 prosecute the action vigorously on behalf of the class?” *Ellis*, 657 F.3d at 985 (quotation
26 omitted); *accord Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018). Plaintiffs’
27 counsel are deemed qualified when they possess experience in previous class actions and cases
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1 involving the same area of law. *See Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las*
2 *Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Lynch*, 604 F. Supp. at 37.

3 **a. Class Representatives**

4 Plaintiffs do not have any conflicts of interest because they share with putative class
5 members the “mutual goal” of overturning Defendants' unlawful policy and practices. Plaintiffs
6 seek declaratory and injunctive relief that would not only cure this illegality but remedy the
7 injury suffered by all current and future class members. Plaintiffs do not seek any unique or
8 additional benefit from this litigation that may make their interests different from or adverse to
9 those of absent class members. Instead, Plaintiffs’ aim is to secure injunctive relief that will
10 protect themselves and the entire class from Defendants’ challenged practices. Accordingly,
11 Plaintiffs lack any antagonism with the class, and their interests align squarely with the other
12 proposed class members. *See* Exh. A, MadKudu Dec. ¶12 (“On behalf of MaKudu, I know of no
13 conflict which would prevent it from being a representative of other U.S. employers in the same
14 situation. I have the authority to state on behalf of MadKudu that it is willing to accept this
15 role.”); Exh. C, Quick Fitting Dec. ¶11 (“On behalf of Quick Fitting, I know of no conflict which
16 would prevent it from being a representative of other U.S. employers in the same situation. I
17 have the authority to state on behalf of Quick Fitting that it is willing to accept this role.”)

18 **b. Class Counsel**

19 The undersigned class counsel possess the necessary experience and competency to
20 adequately and vigorously litigate this matter in a manner that protects the interests of the absent
21 class members. Plaintiffs are represented by attorneys from the American Immigration Council,
22 American Immigration Lawyers Association, Joseph and Hall, P.C., Kuck Baxter Immigration
23 LLC, and Van Der Hout, LLP, who have significant experience litigating class actions and other
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1 complex cases in federal court, including immigration cases on behalf of noncitizens and U.S.
2 businesses. *See* Exhs. E (declaration of Mary Kenney); F (declaration of Zachary Nightingale); G
3 (declaration of Jesse M. Bless); H (declaration of Jeff Joseph); and I (declaration of Charles H.
4 Kuck). They also possess extensive knowledge of immigration law. *Id.* Consequently, they
5 possess the necessary resources to litigate this matter vigorously.
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7 **B. The Action Satisfies the Requirements of Rule 23(b)(2)**

8 In addition to satisfying Rule 23(a), the proposed class also satisfies Rule 23(b)(2) which
9 requires that “the party opposing the class has acted or refused to act on grounds that apply
10 generally to the class, so that final injunctive relief or corresponding declaratory relief is
11 appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). While Rule 23(b)(2)
12 “requires that the primary relief sought is declaratory or injunctive,” *Rodriguez v. Hayes*,
13 591 F.3d 1105, 1125 (9th Cir. 2010) (quotation omitted), it “does not require an examination of
14 the viability or bases of class members’ claims for declaratory and injunctive relief,” but rather,
15 whether class members seek uniform relief from a practice applicable to all of them. *Parsons*,
16 754 F.3d at 688.
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19 In the Ninth Circuit, “[i]t is sufficient” that “class members complain of a pattern or
20 practice that is generally applicable to the class as a whole.” *Walters*, 145 F.3d at 1047. “The key
21 to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the
22 notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the
23 class members or as to none of them.” *Wal-Mart*, 564 U.S. at 360. In contrast to Rule 23(b)(3)
24 classes, “the focus [in a Rule 23(b)(2) class] is not the claims of the individual class members,
25 but rather whether [the Defendants] ha[ve] engaged in a ‘common policy.’” *In re Yahoo Mail*
26 *Lit.*, 308 F.R.D. 577, 599 (N.D. Cal. 2015) (quotation omitted). Thus, “[t]he fact that some class
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1 members may have suffered no injury or different injuries from the challenged practice does not
2 prevent the class from meeting the requirements of Rule 23(b)(2).” *Rodriguez*, 591 F.3d at 1123.

3 Plaintiffs have met the requirements for class certification under Rule 23(b)(2). Plaintiffs
4 allege that Defendants engage in a pattern and practice of denying H-1B visa petitions on
5 grounds generally applicable to the proposed class and that declaratory and injunctive relief will
6 remedy the harm. *See* Dkt. 1 ¶¶ 6, 27, 30, 48, 59, 63. A permanent injunction finding
7 Defendants’ actions relative to the class as a whole would protect both Plaintiffs and putative
8 class members from the unlawful denial of H-1B visa petitions. Accordingly, the proposed class
9 warrants certification under Rule 23(b)(2). *See, e.g., Walters*, 145 F.3d at 1047 (certifying Rule
10 23(b)(2) class based on Defendants’ practice of providing deficient notice of deportation
11 procedures); *Parsons*, 754 F.3d at 689 (finding plaintiffs’ requested declaratory and injunctive
12 relief conformed to Rule 23(b)(2) where “every [member] in the proposed class is allegedly
13 suffering the same (or at least a similar) injury and that injury can be alleviated for every class
14 member by uniform changes in . . . policy and practice”). Accordingly, this Court should grant
15 certification under Rule 23(b)(2).
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19 **IV. CONCLUSION**

20 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion
21 and enter an order certifying the proposed class under Rule 23(b)(2); appoint Plaintiffs as class
22 representatives; and appoint the Plaintiffs’ counsel from the American Immigration Council,
23 American Immigration Lawyers Association, Joseph and Hall, P.C., Kuck Baxter
24 Immigration LLC.
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1 Respectfully submitted this 4th day of May, 2020,

2 /s/ Mary Kenney

3 Mary Kenney (DC 1044695)*
4 Leslie K. Dellon (DC 250316)*
5 American Immigration Council
6 1331 G Street NW, Suite 200
7 Washington, DC 20005
8 Telephone: (202) 507-7512 (Kenney)
9 Telephone: (202) 507-7530 (Dellon)
10 Facsimile: (202) 742-5619
11 Email: mkenney@immcouncil.org
12 ldellon@immcouncil.org

Zachary Nightingale (CA #184501)
Van Der Hout LLP
180 Sutter Street, Suite 500
San Francisco, CA 94104
Telephone: (415) 981-3000
Facsimile: (415) 981-3003
Email: ndca@vblaw.com

9 Jesse M. Bless (MA BBO # 660713)*
10 American Immigration Lawyers
11 Association
12 1331 G Street NW, Ste. 300
13 Washington, D.C. 20005
14 Telephone: (781) 704-3897
15 Email: jbless@aila.org

Jeff Joseph (CO 28695)*
Joseph & Hall, P.C.
12203 East Second Avenue
Aurora, CO 80011
Telephone: (303) 297-9171
Email: jeff@immigrationissues.com

14 Charles H. Kuck (GA 429940)*
15 Kuck Baxter Immigration LLC
16 365 Northridge Road, Suite 300
17 Atlanta, GA 30350
18 Telephone: (404) 816-8611
19 Email: CKuck@immigration.net

20 Counsel for Plaintiffs

21 **Admitted pro hac vice*
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CERTIFICATE OF SERVICE

I, Mary Kenney, hereby certify that, on May 4, 2020, I sent the above Motion for Class Certification and Points Authorities, along with Exhibits A-I and Proposed Order, by First Class U.S. mail, postage prepaid, to the following:

Office of the Clerk
Office of the U.S. Attorney
Heritage Bank Building
150 Almaden Blvd., Suite 900
San Jose, CA 95113

U.S. Citizenship and Immigration Services
Office of the Chief Counsel
20 Massachusetts Ave. NW, Room 4210
Washington, DC 20529

Kenneth T. Cuccinelli
Office of the Chief Counsel
20 Massachusetts Ave. NW, Room 4210
Washington, DC 20529

William P Barr
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530

Date: May 4, 2020

/s/ Mary Kenney
Mary Kenney

Counsel for Plaintiffs