

1 Mary Kenney (DC #1044695)*
2 c/o American Immigration Council
3 1331 G Street NW, Suite 200
4 Washington, DC 20005
5 Telephone: (617) 819-4681
6 Facsimile: (202) 742-5619
7 Email: mary@immigrationlitigation.org

8 Zachary Nightingale (CA #184501)
9 Van Der Hout LLP
10 180 Sutter Street, Suite 500
11 San Francisco, CA 94104
12 Telephone: (415) 981-3000
13 Facsimile: (415) 981-3003
14 Email: ndca@vblaw.com

15 Counsel for Plaintiffs MadKudu Inc., Quick Fitting, Inc., 2nd Street USA, Inc., and Hanguang International Inc.

16 **Admitted pro hac vice*

17 *(Additional counsel for Plaintiffs listed on following page)*

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN JOSE DIVISION**

21 MADUKUDU INC.; QUICK FITTING,
22 INC.; 2nd STREET USA, INC.; AND
23 HANGUANG INTERNATIONAL INC.,
24 Individually and On Behalf of
25 All Others Similarly Situated,

26 Plaintiffs,

27 v.

28 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

AMENDED MOTION FOR CLASS
CERTIFICATION
AND MEMORANDUM OF POINTS
AND AUTHORITIES

September 22, 2020, 10 A.M.
Magistrate Judge Susan van Keulen

1 Plaintiffs' counsel, continued from first page:

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

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

15 Jeff Joseph (CO #28695)*
16 Joseph & Hall, P.C.
17 12203 East Second Avenue
18 Aurora, CO 80011
19 Telephone: (303) 297-9171
20 Email: jeff@immigrationissues.com

21 Charles H. Kuck (GA #429940)*
22 Kuck Baxter Immigration LLC
23 365 Northridge Road, Suite 300
24 Atlanta, GA 30350
25 Telephone: (404) 816-8611
26 Email: CKuck@immigration.net

27 Counsel for Plaintiffs MadKudu Inc., Quick Fitting, Inc., 2nd Street USA Inc., and Hanguang
28 International Inc.

**Admitted pro hac vice*

1 **NOTICE OF AMENDED MOTION FOR CLASS CERTIFICATION**

2 **PLEASE TAKE NOTICE** that on September 22, 2020 at 10:00 a.m.¹ or as soon
3 thereafter as the matter may be heard at the San Jose Federal Courthouse, Courtroom 6, 4th Floor,
4 280 S. 1st St., San Jose, CA 95113, with the Honorable Magistrate Judge Susan van Keulen,
5 Plaintiffs MadKudu Inc., Quick Fitting, Inc., 2nd Street USA, Inc., and Hanguang International
6 Inc. will, and hereby do, move this Court for class certification pursuant to Federal Rule of Civil
7 Procedure 23. Plaintiffs seek certification of the following class under Federal Rules of Civil
8 Procedure 23(a) and 23(b)(2):
9

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 c/o American Immigration Council
25 1331 G Street NW, Suite 200
26 Washington, DC 20005
27 Telephone: (617) 819-4681
28 Email: mary@immigrationlitigation.org

*Admitted *pro hac vice*

Dated: July 20, 2020

¹ This is the date that the Court set for a hearing on Plaintiffs' original motion for class certification. Dkt. 35.

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TABLE OF CONTENTS

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

- I. INTRODUCTION AND PROPOSED CLASS DEFINITION 1
- II. BACKGROUND 2
 - A. H-1B Visa Classification 2
 - B. Plaintiffs’ Factual Backgrounds..... 5
 - 1. Plaintiff MadKudu Inc..... 5
 - 2. Plaintiff Quick Fitting, Inc. 7
 - 3. Plaintiff 2nd Street USA, Inc. 8
 - 4. Plaintiff Hanguang International, Inc..... 9
 - C. Procedural History 11
- III. ARGUMENT 11
 - A. The Proposed Class Satisfies Rule 23(a)’s Requirements 13
 - 1. Plaintiffs’ Class Is So Numerous that Joinder of all Members Is Impracticable 13
 - 2. Plaintiffs’ Claims Raise Legal and Factual Questions Common to the Class 18
 - 3. Plaintiffs’ Claims Are Typical of Those of the Proposed Class..... 21
 - 4. The Representative Parties Will Fairly and Adequately Protect the Interests of the Proposed Class 22
 - a. Class Representatives 22
 - b. Class Counsel 23
 - B. The Action Satisfies the Requirements of Rule 23(b)(2)..... 24
- IV. CONCLUSION..... 25

TABLE OF AUTHORITIES

Page

Cases

Alfaro Garcia v. Johnson,

No. 14-cv-01775-YGR, 2014 WL 6657591 (N.D. Cal. Nov. 21, 2014) 12

Ark. Educ. Ass'n v. Bd. of Educ., 446 F.2d 763 (8th Cir. 1971) 13

Arnott v. U.S. Citizenship & Immigration Servs., 290 F.R.D. 579 (C.D. Cal. 2012) 12

Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999)..... 14

Califano v. Yamasaki, 442 U.S. 682 (1979) 12, 13

Clark v. Astrue, 274 F.R.D. 462 (S.D.N.Y. 2011)..... 12

Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170 (9th Cir. 2011)..... 11

Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967) 13

Doe v. Trump, No. 3:19-cv-1743-SI, 2020 WL 1689727 (D. Or. Apr. 7, 2020)..... 12

Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011) 21, 22

Franco-Gonzales v. Napolitano,

No. CV 10-02211 DMG (DTBx), 2011 WL 11705815 (C.D. Cal. Nov. 21, 2011)..... 13

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982) 18, 20, 21

Hanlon v. Chrysler Corp., 150 F.3d 1101 (9th Cir. 1998) 19, 21

Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992)..... 21

Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (9th Cir. 1964) 13

In re Rubber Chemicals Antitrust Litig., 232 F.R.D. 346 (N.D. Cal. 2005)..... 13

In re Yahoo Mail Lit., 308 F.R.D. 577 (N.D. Cal. 2015)..... 24

Info Labs, Inc. v. U.S. Citizenship and Immigration Servs.,

No. 19-684 (RC), 2020 WL 1536251 (D.D.C. Mar. 31, 2020) 4

Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson,

102 F.R.D. 457 (N.D. Cal. 1983)..... 18

Jimenez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014)..... 19

Jordan v. Cty. Of L.A., 669 F.2d 1311 (9th Cir. 1982)..... 17

1 *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985)..... 22

2 *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*,

3 244 F.3d 1152 (9th Cir. 2001) 22

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6 *McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Trust*,

7 268 F.R.D. 670 (W.D. Wash. 2010) 13

8 *Nat’l Ass’n of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986) 17

9 *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) *passim*

10 *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011) 23

11 *Raj & Co. v. U.S. Citizenship & Immigration Servs.*,

12 85 F. Supp. 3d 1241 (W.D. Wash. 2015)..... 2, 4, 20

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15 839 F. Supp. 2d 985 (S.D. Ohio 2012) 4

16 *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) 24

17 *Rosas v. Baca*, No. CV 12–00428 DDP, 2012 WL 2061694 (C.D. Cal. June 7, 2012) 19

18 *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018)..... 22

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20 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) 11

21 *Smith v. Heckler*, 595 F. Supp. 1173 (E.D. Cal. 1984)..... 18

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23 No. 18-2015 (RC), 2018 WL 6047413 (D.D.C. Nov. 19, 2018) 1

24 *Sueoka v. United States*, 101 F. App’x 649 (9th Cir. 2004) 14

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2 **Statutes**

3 8 U.S.C. § 1101(a)(15)(H)(i)(b)..... 1, 2

4 8 U.S.C. § 1184(g)(8) 6

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17 **Regulations**

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19 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020)..... *passim*

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

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

Plaintiffs MadKudu Inc., Quick Fitting, Inc., 2nd Street USA, Inc. and Hanguang International 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 ground that a market research analyst was not a specialty occupation. *See* Dkt. 39 ¶¶12-15. 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. Dkt. 39 ¶¶ 6-7, 59-67, 74-78, 80-82. 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*

1 & Co. v. U.S. Citizenship & Immigration Servs., 85 F. Supp. 3d 1241, 1247 (W.D. Wash. 2015).

2 The OOH profile for market research analysts conclusively demonstrates that this occupation is a
3 specialty occupation. Although Defendant USCIS relied on the OOH profile for market research
4 analyst in deciding Plaintiffs' petitions, it misinterpreted the governing statute and regulations as
5 well as the OOH itself.
6

7 Because Defendant USCIS engages in a pattern and practice of denying petitions for
8 market research analysts on the same basis followed in Plaintiffs' cases, Plaintiffs respectfully
9 request that this Court certify the following proposed class under Federal Rules of Civil
10 Procedure 23(a) and 23(b)(2):
11

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

- 14 • USCIS denied or will deny the petition solely or in part based on a
15 finding that the OOH entry for market research analyst does not establish
16 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.

17 As explained below, the proposed class satisfies the requirements of Rules 23(a)—numerosity,
18 commonality, typicality, and adequacy—and 23(b)(2).
19

20 **II. BACKGROUND**

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

22 The H-1B nonimmigrant visa classification allows highly educated noncitizens to work
23 for U.S. employers in “specialty occupation[s]”: positions requiring the “theoretical and practical
24 application of a body of highly specialized knowledge” for which “a bachelor’s or higher degree
25 in a specific specialty (or its equivalent)” is required. 8 U.S.C. § 1184(i)(1). By regulation, a
26 petitioner can establish that a position is within a specialty occupation through any one of four
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1 tests. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4) (2020). Plaintiffs challenge only the first test, which
2 mandates that a position will qualify as a specialty occupation if “[a] baccalaureate or higher
3 degree or its equivalent is normally the minimum requirement for entry into the particular
4 position.” 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020). USCIS reads this provision as requiring that
5 the petitioner show that the degree is in a specific specialty, consistent with 8 U.S.C. § 1184(i).
6

7 When deciding whether a petitioner has satisfied this dispositive test, USCIS routinely
8 relies upon the OOH, which includes a profile of the market research analyst occupation. USCIS
9 recognizes the OOH as an authoritative source for the duties and educational requirements of the
10 occupations profiled. The OOH profile for market research analyst reads, in relevant part:
11

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

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

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

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

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

27 The central legal question in this case is whether the OOH profile for a market research
28 analyst satisfies the first regulatory test; that is, whether it demonstrates that a bachelor’s or
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

1 that the OOH does not establish that the occupation requires a bachelor’s degree or higher in a
2 specific specialty or its equivalent. Exh. B, Denial of Plaintiff MadKudu’s petition (“MadKudu
3 Petition Denial”) at 4-5; Exh. D, Denial of Plaintiff Quick Fitting’s petition (“Quick Fitting
4 Petition Denial”) at 4; Exh. L, Denial of Plaintiff 2nd Street’s petition at 4 (“2nd Street Petition
5 Denial”); Exh. N, Denial of Hanguang International’s petition at 4 (“Hanguang International
6 Petition Denial”). USCIS generally interprets the OOH as stating that a range of degrees or
7 educational credentials may qualify an individual to work as a market research analyst, and thus
8 fails to establish that a degree in a specific specialty is required. Exh. B, *id.*; Exh. D, *id.*; Exh. N,
9 *id.*; *see also* Dkt. 39 ¶ 29, 32.
10

11
12 In so finding, Defendant USCIS misinterprets the meaning of the statutory phrase
13 “baccalaureate degree or higher in the specific specialty (or its equivalent).” *See Raj*, 85 F. Supp.
14 3d at 1247 (holding that USCIS’ interpretation of the OOH entry for market research analysts
15 “impermissibly narrows the plain language of the statute”); *see also Residential Finance Corp. v.*
16 *U.S. Citizenship and Immigration Servs.*, 839 F. Supp. 2d 985, 996-97 (S.D. Ohio 2012)
17 (“Defendant’s implicit premise that the title of a field of study controls ignores the realities of the
18 statutory language involved and the obvious intent behind them. The knowledge and not the title
19 of the degree is what is important.”). Similarly, Defendant USCIS fails to give meaning to the
20 term “normally” in the first regulatory test. *See, e.g., Info Labs, Inc. v. U.S. Citizenship and*
21 *Immigration Servs.*, No. 19-684 (RC), 2020 WL 1536251, at *4 (D.D.C. Mar. 31, 2020)
22 (rejecting USCIS reading of the OOH profile for computer systems analysts and explaining that
23 “[t]he fact that such a degree is not ‘always’ required—or that ‘some firms’ hire analysts with
24 general business or liberal arts degrees—does not suggest a specialty degree is not ‘normally’
25 required”).
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1 Defendant USCIS also misreads the OOH, ignoring altogether its statements that
 2 “[m]arket research analysts typically need a bachelor’s degree in market research or a related
 3 field” and that “[c]ourses in statistics, research methods, and marketing are essential for these
 4 workers,” while “[c]ourses in communications and social sciences, such as economics or
 5 consumer behavior, are also important.” OOH, *How to Become a Market Research Analyst*. Had
 6 USCIS properly interpreted and applied the statute and regulations and not ignored critical
 7 information in the OOH profile, it would have found that market research analyst is a specialty
 8 occupation and approved Plaintiffs’ and putative class members’ petitions without litigation.²

11 **B. Plaintiffs’ Factual Backgrounds**

12 **1. Plaintiff MadKudu Inc.**

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

27 ² Because each of the regulatory tests in 8 C.F.R. § 214.2(h)(4)(iii)(A) (2020) operates
 28 independently, it is immaterial that USCIS denied the petitions under multiple regulatory tests.
 Had USCIS found that Plaintiffs satisfied the first regulatory test, it would have found that the
 occupation was a specialty occupation.

1 On or about April 2, 2019, MadKudu filed a petition with USCIS seeking to employ
2 Rafikah Binte Mohamed Halim in H-1B status in a market research analyst job with the title of
3 product manager. Exh. A, MadKudu Dec. ¶4. Ms. Mohamed Halim, a national of Singapore, had
4 worked for MadKudu in H-1B³ status since June 2018 as product manager. *Id.* at ¶5. MadKudu
5 attached to its H-1B petition a Labor Condition Application certified by the Department of
6 Labor, which identified the position by SOC Code 13-1161, an occupation entitled Market
7 Research Analysts and Marketing Specialists. *Id.* at ¶6.

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

22 On May 11, 2020, shortly after this suit was filed, Defendant USCIS approved Plaintiff
23 MadKudu Inc.'s petition without explanation. Exh. J, MadKudu Petition Approval.

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

1 **2. Plaintiff Quick Fitting, Inc.**

2 Established in 2004, Plaintiff Quick Fitting, Inc. is a corporation headquartered in
3 Warwick, Rhode Island. It supplies repairable quick connection fittings to retail, industrial,
4 original equipment manufacturing (OEM) and plumbing and electrical markets. Its quick
5 connection technologies can be used in such areas as plumbing, electrical, air-conditioning, fire
6 suppression and oil and gas applications. Exh. C, Declaration of Francis G. Kosky, Executive VP
7 and CFO, Quick Fitting (“Quick Fitting Dec.”) ¶2.
8

9 On or about August 20, 2019, Quick Fitting filed a petition with USCIS seeking an
10 extension of Xiaomeng Liu’s H-1B status based on her employment as a market research analyst.
11 It sought to continue to employ Ms. Liu in this position for an additional period with no change
12 in job duties from the H-1B petition previously approved by Defendant USCIS. Exh. C, Quick
13 Fitting Dec. ¶3. Ms. Liu had been working with Quick Fitting in H-1B status since December
14 2012. *Id.* at ¶4. Quick Fitting attached to its H-1B petition a Labor Condition Application
15 certified by the Department of Labor, which identified the position by SOC Code 13-1161, an
16 occupation entitled Market Research Analysts and Marketing Specialists. *Id.* at ¶5.
17
18

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

8
9 On May 11, 2020, Defendant USCIS approved Plaintiff Quick Fitting, Inc.’s H-1B
10 petition without explanation. Exh. J, Quick Fitting Petition Approval.

11 12 **3. Plaintiff 2nd Street USA, Inc.**

13 Established in 2015, Plaintiff 2nd Street USA, Inc. operates and manages six retail
14 clothing stores, with one in New York and the rest in Southern California. Exh. K, Declaration of
15 Seiya Magori, Business Operations Manager, 2nd Street (“2nd Street Dec.”) ¶3. It is part of the
16 Geo Group, which is known in Japan for rebranding the Japanese reusing, recycling, and
17 refurbishing culture. *Id.* Plaintiff 2nd Street USA’s retail stores offer name-brand merchandise
18 from many in-demand brands, such as Diesel and Theory, as well as a large variety of special
19 and limited-edition name-brand sneakers. *Id.* 2nd Street USA is unusual in the types of items it
20 will accept in-store from customers for resale in its stores or to a third party as recyclable
21 material. Customers also can shop online. *Id.*

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23
24 On or about April 11, 2019, 2nd Street USA filed an H-1B petition with USCIS seeking to
25 employ Kankan Yang in H-1B status as a market research analyst. *Id.* ¶4. Ms. Yang works for
26 the company as a market research analyst through Optional Practical Training (OPT). *Id.* ¶¶4-5.
27 OPT is authorized by USCIS to permit international students to gain work experience related to
28

1 their field of study. Ms. Yang holds a Master of Business Administration from Brandeis
2 University in Waltham, Massachusetts, where she completed the MBA International Business
3 program with specializations in Data Analytics and in Marketing. *Id.* ¶5. 2nd Street USA
4 submitted to USCIS a certified Labor Condition Application which identified the position as an
5 occupation entitled Market Research Analysts and Marketing Specialists. Exh. L, 2nd Street
6 Petition Denial at 4.

7
8 Defendant USCIS denied the petition on September 12, 2019 under each of the
9 independent regulatory tests. Exh. L, 2nd Street Petition Denial at 9. Defendant USCIS
10 determined that “The petitioner has clearly defined that the proffered position falls under the
11 Market Research Analyst as described in the OOH.” *Id.* at 4. Despite this finding, USCIS
12 claimed that the company’s job duties were too generalized to determine if the job was in a
13 specialty occupation. *Id.* at 5. Moreover, following its pattern and practice, Defendant USCIS
14 determined that Plaintiff 2nd Street USA’s petition did not meet the first regulatory test because
15 the OOH did not show that market research analyst positions normally require a minimum of a
16 bachelor’s degree or its equivalent in a specific specialty at the entry level. *Id.* at 4. In so finding,
17 Defendant USCIS ignored entirely the OOH’s statements that “[m]arket research analysts
18 typically need a bachelor’s degree in market research or a related field” and that “[c]ourses in
19 statistics, research methods, and marketing are essential for these workers.” *Compare id. with*
20 *OOH, How to Become a Market Research Analyst* (Sept. 4, 2019) *supra*.

24 **4. Plaintiff Hanguang International, Inc.**

25 Plaintiff Hanguang International Inc., established in 2016, provides educational consulting
26 services to Chinese students who either already study in the United States or who want to study
27 in the United States. Exh. M. Declaration of Dariusz Baran, Sr. HR Manager, Hanguang
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1 (“Hanguang Dec.) ¶4. Hanguang has partnered with top Chinese universities where students can
2 take for-credit courses in English taught by top U.S, and other professors. *Id.*. Hanguang is the
3 consulting, business development, and education provider arm of its affiliate,
4 Hanshengguanghua Culture & Education Co., Ltd., a leading Chinese education consulting
5 organization. *Id.*

7 On or about April 2, 2019, Plaintiff Hanguang International Inc. filed a petition with
8 Defendant USCIS seeking to employ Xianglun Meng in H-1B status as a market research
9 analyst. *Id.* ¶5. Mr. Meng has a bachelor’s degree in Business Administration from the
10 University of Cincinnati, in Ohio and a Master of Business Administration from the University
11 of LaVerne, in California. *Id.* Plaintiff Hanguang International Inc. submitted to USCIS a
12 certified Labor Condition Application which identified the position as within the Market
13 Research Analysts and Marketing Specialists occupation. Exh. N, Hanguang Petition Denial at 4.

15 Defendant USCIS denied the petition on November 1, 2019 for failing to demonstrate that
16 the position was a specialty occupation. *Id.* at 9. Following its pattern and practice, Defendant
17 USCIS determined that the petition did not meet the first regulatory test because the OOH did
18 not show that market research analyst positions normally require a minimum of a bachelor’s
19 degree or its equivalent in a specific specialty at the entry level. *Id.* at 4. Defendant USCIS noted
20 that “a range of educational credentials may qualify an individual to perform the duties of a
21 Market Research Analyst.” *Id.* It ignored entirely the OOH’s statements that “[m]arket research
22 analysts typically need a bachelor’s degree in market research or a related field” and that
23 “[c]ourses in statistics, research methods, and marketing are essential for these workers.”
24
25 *Compare id. with* OOH, *How to Become a Market Research Analyst* (Sept. 4, 2019) *supra*.

1 **C. Procedural History**

2 On April 16, 2020, Plaintiffs MadKudu Inc. and Quick Fitting, Inc. filed a class action
3 complaint in this Court, asserting causes of action based on the Defendants' violations of the
4 INA and implementing regulations and the APA. Dkt. 1 ¶¶ 57-65. The two initial Plaintiffs filed
5 their initial Motion for Class Certification and Memorandum on May 4, 2020. Dkt. 26.
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7 On May 11, 2020, Defendant USCIS reopened and approved the H-1B petitions of
8 Plaintiffs MadKudu Inc. and Quick Fitting, Inc. Exh. J, MadKudu and Quick Fitting Petition
9 Approvals. On June 29, 2020, Defendants moved to dismiss the case based upon these approvals.
10 Dkt. 36. On July 13, Plaintiffs filed an abbreviated opposition which advised the Court that they
11 would be amending the complaint. Dkt. 37. On July 20, 2020, Plaintiffs filed an amended
12 complaint under Fed. R. Civ. P. 15(a)(1)(B), adding Plaintiffs 2d Street USA, Inc. and Hanguang
13 International, Inc. and facts regarding the approval of the initial Plaintiffs' petitions. Dkt. 39.
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16 **III. ARGUMENT**

17 A plaintiff whose suit meets Fed. R. Civ. P. 23 has a "categorical" right "to pursue his
18 claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393,
19 398 (2010). The plaintiff must satisfy Rule 23(a) criteria and fall within one of the three
20 categories found in Rule 23(b). *Id*; *see also Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581,
21 588 (9th Cir. 2012) (discussing criteria under Rule 23(a)). The party seeking certification has the
22 burden to show, by a preponderance of the evidence, that these prerequisites are met. *See Conn.*
23 *Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011); *see also Wal-Mart*
24 *Stores, Inc. v. Dukes*, 564 U.S. 338, 349-52 (2011).
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27 Plaintiffs' proposed class satisfies all four Rule 23(a) prerequisites as well as Rule
28 23(b)(2). Courts within the Ninth Circuit, including this Court, have granted nationwide class

1 certification to plaintiffs seeking declaratory or injunctive relief in challenges to immigration
2 policies and practices. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1045-47 (9th Cir. 1998)
3 (affirming certification of nationwide class of individuals challenging adequacy of notice in
4 document fraud cases); *Nightingale v. U.S. Citizenship & Immigration Servs.*, 333 F.R.D. 449,
5 456, 463 (N.D. Cal. 2019) (certifying two nationwide classes in case challenging immigration
6 agencies' failure to timely process FOIA requests); *Alfaro Garcia v. Johnson*, No. 14-cv-01775-
7 YGR, 2014 WL 6657591, at *16 (N.D. Cal. Nov. 21, 2014) (certifying nationwide class in case
8 challenging government's failure to provide timely reasonable fear interviews); *Santillan v.*
9 *Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying
10 nationwide class of lawful permanent residents challenging USCIS' delays in issuing
11 documentation of their status); *Doe v. Trump*, No. 3:19-cv-1743-SI, 2020 WL 1689727, at *16-
12 17 (D. Or. Apr. 7, 2020) (certifying class of individuals with approved or pending immigration
13 petitions and a subclass of visa applicants challenging the President's Proclamation on healthcare
14 insurance).

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

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28 To the best of counsel's knowledge, there is no other case challenging USCIS' systemic

1 policy or practice of denying H-1B petitions based upon a misinterpretation of the statute,
2 regulations and OOH. Instead, the only pending cases are those brought by individual plaintiffs
3 to remedy denials of their own H-1B petitions. Moreover, this issue can be fully resolved only on
4 a nationwide level. USCIS employs the same or similar boilerplate templates to deny multiple
5 dozens of H-1B petitions for market research analysts each year throughout the United States, on
6 the same grounds asserted in Plaintiffs' cases, and will continue to do so without a class-wide
7 court order. Individual lawsuits will not change USCIS policy or halt its practice. For that reason,
8 this issue is particularly amenable to class-wide treatment. *See Yamasaki*, 442 U.S. at 702.

9
10 **A. The Proposed Class Satisfies Rule 23(a)'s Requirements**

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

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

3 Where, as here, “plaintiffs seek injunctive and declaratory relief, ‘the numerosity
4 requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs’
5 other evidence that the number of unknown and future members of [the] proposed subclass ... is
6 sufficient to make joinder impracticable.’” *Nightingale*, 333 F.R.D. at 457 (internal citations
7 omitted). Similarly, “a court may draw a reasonable inference of class size from the facts before
8 it.” *Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal. 1984), *aff’d*, 747 F.2d 528 (9th Cir. 1984),
9 *opinion amended on reh’g*, 763 F.2d 1098 (9th Cir. 1985).

10 While Plaintiffs do not have an exact number, the number of current class members is
11 known to and easily ascertainable by the government. *Cf. Barahona-Gomez v. Reno*, 167 F.3d
12 1228, 1237 (9th Cir. 1999) (“[Immigration officials are] uniquely positioned to ascertain class
13 membership.”). Nevertheless, Plaintiffs reasonably estimate that there are multiple dozens—
14 easily more than forty—of U.S. employers who *currently* are members of the class with an
15 untold number of unknown, future members, thus satisfying the numerosity requirement.

16 Decisions of USCIS’ administrative appellate body, the Administrative Appeals Office
17 (USCIS AAO), support Plaintiffs’ estimate. In the past three calendar years, USCIS AAO
18 sustained USCIS’ denials of at least sixty H-1B petitions for market research analysts.⁴ In each

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24 ⁴ See *In re 5394964*, 2019 WL 7498547, at *2-4 (AAO Dec. 23, 2019); *In re 5150108*,
25 2019 WL 7492915, at *2-3 (AAO Dec. 19, 2019); *Matter of Q- Inc.*, 2019 WL 6827401, at *1
26 (AAO Nov. 8, 2019); *Matter of C-C-M-S-, LLC*, 2019 WL 6827398, at *4-5 (AAO Nov. 7,
27 2019); *Matter of F-L-, LLC*, 2019 WL 5889138, at *2-3 (AAO Oct. 24, 2019); *Matter of S-R-R-
28 & H-C-C-, LLC*, 2019 WL 5495911, at * 4-5 (AAO Oct. 17, 2019); *Matter of N-T-, Inc.*, 2019
WL 5086930, at *2-3 (AAO Oct. 2, 2019); *Matter of H-T-U-C- Inc.*, 2019 WL 3945026, at *3-4
(AAO July 25, 2019); *Matter of H-G-C-, LP*, 2019 WL 3386161, at *2-3 (AAO July 5, 2019);
Matter of MGMR-R-O- LLC, 2019 WL 3386164, at *3-4 (AAO June 26, 2019); *Matter of C-J-A-*

1 such year, USCIS AAO issued between seventeen and twenty-two such decisions, or an annual
 2 average of twenty. Moreover, USCIS is on track to continue this practice in 2020; in addition to
 3 Plaintiffs MadKudu Inc.'s and Quick Fitting, Inc.'s decisions, USCIS AAO issued six such
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 6 , 2019 WL 2903297, at *5 (June 19, 2019); *Matter of U-T-, Inc.*, 2019 WL 2725583, at *2-3
 7 (AAO June 6, 2019); *Matter of C-S-, Inc.*, 2019 WL 1903321, at *2-3 (AAO Apr. 10, 2019);
 8 *Matter of P- LLC*, 2019 WL 1556937, at *2-3 (AAO Mar. 19, 2019); *Matter of E-F- II, LLC*,
 9 2019 WL 1470014, at *2-3 (Mar. 12, 2019); *Matter of I-L-T-G-*, 2019 WL 858072, at *4-5
 10 (AAO Jan. 31, 2019); *Matter of B.O.C., Co. Ltd.*, 2018 WL 6982195, at *1 (AAO Dec. 7, 2018);
 11 *Matter of C- USA Inc.*, 2018 WL 6735429, at *3-4 (AAO Nov. 29, 2018); *Matter of F-C-, Inc.*,
 12 2018 WL 6242755, at *2-3 (AAO Nov. 18, 2018); *Matter of B-G- Inc.*, 2018 WL 6242737, at
 13 *2-3 (AAO Nov. 7, 2018); *Matter of C-C- Inc.*, 2018 WL 6124735. At *3-4 (AAO Nov. 1,
 14 2018); *Matter of W-T- LLC*, 2018 WL 6075471, at *3-4 (AAO Oct. 31, 2018); *Matter of 3JD-A-*
 15 *LLC*, 2018 WL 5222384, at *3 (AAO Oct. 4, 2018); *Matter of D-T-I-A-, Inc.*, 2018 WL 4963323,
 16 at *3-4 (AAO Sept. 27, 2018); *Matter of Q-C-, Inc.*, 2018 WL 4537322, at *3-4 (Sept. 12, 2018);
 17 *Matter of E-I-A-*, 2018 WL 4510760, at *3-4 (AAO Sept. 6, 2018); *Matter of P-P-, LLC*, 2018
 18 WL 4510759, at *4-5 (AAO Sept. 6, 2018); *Matter of C- Inc.*, 2018 WL 4092283, at *5 (AAO
 19 Aug. 20, 2018); *Matter of F-P- LLC*, 2018 WL 3609583, at *2-3 (AAO July 12, 2018); *Matter of*
 20 *S-D-M-, LLC*, 2018 WL 3609325, at *3 (AAO July 6, 2018); *Matter of [identifying information*
 21 *withheld by agency]*, 2018 WL 3475688, at 2-3 (AAO June 28, 2018); *Matter of P-P-E- Corp.*,
 22 2018 WL 3392931, at *3-4 (AAO June 27, 2018); *Matter of H-C-M-I-*, 2018 WL 3167294, at *3
 23 (AAO June 7, 2018); *Matter of C- LLC*, 2018 WL 3036126, at *5 (AAO May 31, 2018); *Matter*
 24 *of M-, Inc.*, 2018 WL 1709387, at *2-3 (AAO Mar. 16, 2018); *Matter of U-, LLC*, 2018 WL
 25 1635137, at *4 (Mar. 15, 2018); *Matter of R-S-, Inc.*, 2018 WL 1565938, at *3 (AAO Mar. 7,
 26 2018); *Matter of T- LLC*, 2018 WL 1137751, at *3 (AAO Feb. 9, 2018); *Matter of E-A-, LLC*,
 27 2017 WL 6988245, at *3-4 (AAO Dec. 27, 2017); *Matter of I- Inc.*, 2017 WL 5593016, at *1
 28 (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-*
Inc., 2017 WL 1160864, at *4-5 (AAO Mar. 2, 2017); *Matter of R-J-H- LLC*, 2017 WL
 1133235, at *3-5 (AAO Mar. 1, 2017); *Matter of L-L-NA, LLC*, 2017 WL 1021715, at *4-5
 (AAO Feb. 28, 2017); *Matter of B-C- Inc.*, 2017 WL 1021578, at *4-5 (AAO Feb. 27, 2017);
Matter of L-O-O-K-V.W-, E- P.C., 2017 WL 959649, at *3 (AAO Feb. 16, 2017); *Matter of M-A-*
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 decisions in the first three months of the year. *See In re: 8190679*, 2020 WL 1675588 at *2-3
2 (AAO Mar. 25, 2020); *In Re: 6411951*, 2020 WL 1133241, at *1 (AAO Feb. 27, 2020); *In Re:*
3 *6110184*, 2020 WL 1133239, at *1-2 (AAO Feb. 27, 2020); *In re:4811619*, 2020 Immig. Rptr.
4 LEXIS 5327, at *8-11 (AAO Feb. 20, 2020); *In Re: 4377281*, 2020 WL 730104, at *1 (AAO
5 Jan. 16, 2020); *In Re: 6015282*, 2020 WL 730096, at *1 (AAO Jan. 15, 2020).
6

7 In each, USCIS employs the same reasoning and the same or similar language to
8 conclude that the OOH profile does not demonstrate that a bachelor’s degree in a “specific
9 specialty” is normally required for entry into the profession, and thus does not satisfy the first
10 regulatory test. To reach this conclusion, Defendant USCIS erroneously characterizes the OOH
11 profile as listing “a range of educational credentials,” *see, e.g.*, Exh. B, MadKudu Petition Denial
12 at 4; Exh. D, Quick Fitting Petition Denial at 4; Exh. N, Hanguang Petition Denial at 4; “degrees
13 and backgrounds in various fields,” *see, e.g.*, *In Re 4377281*, 2020 WL 730104, at *3 (AAO Jan.
14 16, 2020); “disparate fields of study,” *see, e.g.*, *Matter of Q- Inc.*, 2019 WL 6827401, at *2
15 (AAO Nov. 8, 2019); and “degrees and backgrounds in a wide-variety of disparate fields,” *See,*
16 *e.g.*, *Matter of B.O.C. Co., Ltd*, 2018 WL 6982195, at *3 (AAO Dec. 7, 2018). Just as in
17 Plaintiffs’ cases, USCIS ignores the OOH’s critical statement that market research analysts
18 “typically” need a bachelor’s degree in market research or a related field.
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21 Although not all of the petitioners in these cases are class members, as many of their
22 petitions were filed earlier than 2019, the consistency in the number of such decisions over at
23 least a three-year period supports a reasonable inference that there will be an equal number of
24 such USCIS AAO denials for cases filed in 2020 and subsequent years.
25

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

14 These statistics support a reasonable estimate that the number of *current* putative class
15 members in the class is at least forty—double the annual average of the AAO decisions—and
16 likely much higher. Moreover, Plaintiffs’ proposed class also includes an unknown number of
17 future class members, which renders “joinder ... inherently impracticable.” *Jordan v. Cty. Of*
18 *L.A.*, 669 F.2d 1311, 1320 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)); *see*
19 *also Nat’l Ass’n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986)
20 (“[W]here the class includes unnamed, unknown future members, joinder of such unknown
21 individuals is impracticable and the numerosity requirement is therefore met,’ regardless of class
22 size.”) (quoting *Int’l Molders’ & Allied Workers’ Local Union No. 164 v. Nelson*, 102 F.R.D.
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27 ⁵ Other options include dropping the case altogether, re-filing the petition, moving to
28 reopen or reconsider the decision or filing a federal court action. *See* Cyrus Mehta & Sophia
Genovese, *Administrative Review Versus Judicial Review When an Employment-Based Petition*
Is Denied, The Insightful Immigration Blog (July 30, 2018), <https://rb.gy/fiqxy4>.

1 457, 461 (N.D. Cal. 1983)); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) (in
2 injunctive relief cases, “[j]oinder in the class of persons who may be injured in the future has
3 been held impracticable, without regard to the number of persons already injured”).

4 Accordingly, the evidence sufficiently demonstrates that the class remains sufficiently
5 numerous for purposes of certification.
6

7 **2. Plaintiffs’ Claims Raise Legal and Factual Questions Common to the**
8 **Class**

9 Plaintiffs satisfy Rule 23(a)(2) because there are questions of law or fact common to the
10 class. Fed. R. Civ. P. 23(a)(2). Commonality requires that the “class members ‘have suffered the
11 same injury.’” *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,
12 157 (1982)). Further, the plaintiffs’ claims “must depend upon a common contention . . . of such
13 a nature that it is capable of class-wide resolution—which means that determination of its truth
14 or falsity will resolve an issue that is central to the validity of each one of the claims in one
15 stroke.” *Wal-Mart*, 564 U.S. at 350. However, the plaintiffs need not show that all questions, “or
16 even a preponderance of questions,” meet this standard; instead, “[s]o long as there is ‘even a
17 single common question,’ a would-be class can satisfy the commonality requirement.” *Wang v.*
18 *Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at
19 359); *see also, Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (explaining that a plaintiff
20 “need not show . . . that every question in the case, or even a preponderance of questions, is
21 capable of class wide resolution”) (quotation marks omitted); *Mazza*, 666 F.3d at 589 (noting
22 that “commonality only requires a single significant question of law or fact”).
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26 Class members need not be identical in all respects, and commonality may be satisfied,
27 notwithstanding some “variation[.]” in their facts, where the harm alleged is common to all class
28 members. *Wit v. United Behavioral Health*, 317 F.R.D. 106, 127 (N.D. Cal. 2016). Accordingly,

1 the existence of “shared legal issues with divergent factual predicates” satisfies Rule 23. *Jimenez*
2 *v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Hanlon v. Chrysler Corp.*, 150
3 F.3d 1101, 1019 (9th Cir. 1998)). In suits such as this one, commonality is satisfied where “the
4 lawsuit challenges a system-wide practice or policy that affects all of the putative class members.
5 Under such circumstances, individual factual differences among class members pose no obstacle
6 to commonality.” *Parsons*, 754 F.3d at 682 (quoting *Rosas v. Baca*, No. CV 12–00428 DDP,
7 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012)).

8
9 The proposed class readily satisfies Rule 23(a)(2)’s commonality requirement. First, the
10 class is narrowly tailored to include only those sharing the same relevant facts. The class is
11 limited by: the occupation at issue—market research analysts; the date that the petition was
12 filed—2019 or thereafter; the reason for the denial—solely or partly based upon the first
13 regulatory test; and finally, the impact of the denial—only those cases that otherwise would have
14 been approved but for Defendants’ misapplication of the first regulatory test. This latter
15 limitation ensures that the class will not include U.S. employer petitioners whose H-1B petitions
16 are denied on a ground other than the question of whether the job is within a specialty
17 occupation. Moreover, because all putative class members’ petitions have been or will be denied
18 due to the same legal error, the correction of which would lead to an approval, any individual
19 differences in their cases are immaterial. *See Parsons*, 754 F.3d at 678 (finding commonality
20 notwithstanding individual variations in harm suffered by class members in a challenge to
21 conditions in Arizona prisons).

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25 Second, Plaintiffs and putative class members share the same legal issues: whether
26 Defendant USCIS: 1) misinterprets the meaning of the phrase “specific specialty,” 8 U.S.C.
27 § 1184(i); 2) misinterprets the first regulatory test for a specialty occupation; and 3) misapplies
28

1 both provisions to its interpretation of the OOH profile of a market research analyst. In
2 evaluating the first regulatory test for specialty occupation, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1),
3 USCIS erroneously finds in all putative class members' cases that the OOH profile does not
4 demonstrate that the educational prerequisite for the particular occupation is a bachelor's degree
5 or higher in a specific specialty or its equivalent. In so doing, USCIS interprets the statutory term
6 "specialty occupation" too narrowly, altogether fails to consider what the phrase "normally the
7 minimum requirement" means, and misapplies the relevant language in the OOH profile that
8 demonstrates that this test has been met. *See* Dkt. 1 ¶¶ 60, 64; *Raj*, 85 F. Supp. 3d at 1247. But
9 for these legal errors, USCIS would approve the petitions of all putative class members.
10

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

11 3. Plaintiffs' Claims Are Typical of Those of the Proposed Class

12 Plaintiffs' claims are typical of the proposed class. Fed. R. Civ. P. 23(a)(3). Commonality
13 and typicality "tend to merge." *Falcon*, 457 U.S. at 157 n.13. The test for typicality is "whether
14 other members have the same or similar injury, whether the action is based on conduct which is
15 not unique to the named plaintiffs, and whether other class members have been injured by the
16 same course of conduct." *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d
17 497, 508 (9th Cir. 1992)). "Typicality refers to the nature of the claim or defense of the class
18 representative, and not to the specific facts from which it arose, or the relief sought." *Id.* The
19 typicality standard is also "permissive" in that the claims of the individual plaintiffs are "typical"
20 if "they are reasonably co-extensive with those of absent class members; [the claims] need not be
21 substantially identical." *Hanlon*, 150 F.3d at 1020.

24 In this case, Plaintiffs' claims arise from the unlawful policy and practice of Defendants'
25 denying H-1B petitions for market research analysts under 8 C.F.R. § 214.2(h)(4)(iii)(A) (1)
26 based on a misinterpretation of the statutory term "specific specialty" and the first regulatory test
27 and an erroneous reading of the OOH profile for market research analysts. *See* Dkt. 1 ¶¶ 60, 64.

1 Defendants' policy and practice of denying H-1B petitions on this basis causes the same harm to
2 the named Plaintiffs as it does to every putative class member. *See, e.g., LaDuke v. Nelson*,
3 762 F.2d 1318, 1332 (9th Cir. 1985) ("The minor differences in the manner in which the
4 representative's Fourth Amendment rights were violated does not render their claims atypical of
5 those of the class.").

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

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

19 **a. Class Representatives**

20 Plaintiffs do not have any conflicts of interest because they share with putative class
21 members the "mutual goal" of overturning Defendants' unlawful policy and practices. Plaintiffs
22 seek declaratory and injunctive relief that would not only cure this illegality but remedy the
23 injury suffered by all current and future class members. Plaintiffs do not seek any unique or
24 additional benefit from this litigation that may make their interests different from or adverse to
25 those of absent class members. Instead, Plaintiffs' aim is to secure injunctive relief that will
26 protect themselves and the entire class from Defendants' challenged practices. Accordingly,
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1 Plaintiffs lack any antagonism with the class, and their interests align squarely with the other
2 proposed class members. *See* Exh. A, MadKudu Dec. ¶12; Exh. C, Quick Fitting Dec. ¶11; Exh,
3 K, 2d Street Dec. ¶11; Exh. M, Hanguang Dec. ¶10. Moreover, the fact that Plaintiff MadKudu
4 Inc.’s and Quick Fitting Inc.’s were reopened and approved shortly after the suit was filed does
5 not moot their claim to entitlement to represent the class. First, they have no assurance that
6 Defendant USCIS will approve an extension request for the beneficiaries of these petitions. Dkt.
7 39 at ¶60. To the contrary, Plaintiff Quick Fitting Inc. had to file this lawsuit to succeed with an
8 extension request even though the petition it filed was for another extension of H-1B status for
9 the same beneficiary and in the same job. Exh. C, Quick Fitting Dec. ¶3. Additionally, approval
10 of their petitions does not resolve the claim that they brought on behalf of the putative class. *See*
11 *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980). This is particularly true where,
12 as here, Defendants’ efforts to moot the case render their claims transitory and thus subject to the
13 “relation back” doctrine. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011).
14 Pursuant to this doctrine. Plaintiffs’ claims in their amended complaint relate back to the filing of
15 the original complaint—prior to Defendants’ approval of the petitions of the original Plaintiffs.
16 *See id.*

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20 **b. Class Counsel**

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

6 **B. The Action Satisfies the Requirements of Rule 23(b)(2)**

7 The proposed class also satisfies Rule 23(b)(2) which requires that “the party opposing
8 the class has acted or refused to act on grounds that apply generally to the class, so that final
9 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a
10 whole.” Fed. R. Civ. P. 23(b)(2). While the rule “requires that the primary relief sought is
11 declaratory or injunctive,” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quotation
12 omitted), it “does not require an examination of the viability or bases” of the claims, but whether
13 class members seek uniform relief from a practice applicable to all. *Parsons*, 754 F.3d at 688.
14

15 In the Ninth Circuit, “[i]t is sufficient” that “class members complain of a pattern or
16 practice that is generally applicable to the class as a whole.” *Walters*, 145 F.3d at 1047. “The key
17 to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the
18 notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the
19 class members or as to none of them.” *Wal-Mart*, 564 U.S. at 360. In contrast to Rule 23(b)(3)
20 classes, “the focus [in a Rule 23(b)(2) class] is not the claims of the individual class members,
21 but rather whether [the Defendants] ha[ve] engaged in a ‘common policy.’” *In re Yahoo Mail*
22 *Lit.*, 308 F.R.D. 577, 599 (N.D. Cal. 2015) (quotation omitted). Thus, “[t]he fact that some class
23 members may have suffered no injury or different injuries from the challenged practice does not
24 prevent the class from meeting the requirements of Rule 23(b)(2).” *Rodriguez*, 591 F.3d at 1123.
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1 Plaintiffs meet these requirements. They allege that Defendants engage in a pattern and
 2 practice of denying H-1B visa petitions on grounds generally applicable to the proposed class
 3 and that declaratory and injunctive relief will remedy the harm. *See* Dkt. 39 ¶¶ 6, 29, 30-32, 71,
 4 76-78. 80-82. A permanent injunction finding Defendants' actions unlawful relative to the class
 5 as a whole would protect both Plaintiffs and putative class members from the unlawful denial of
 6 H-1B visa petitions. Accordingly, the proposed class warrants certification under Rule 23(b)(2).
 7 *See, e.g., Walters*, 145 F.3d at 1047 (certifying Rule 23(b)(2) class based on Defendants' practice
 8 of providing deficient notice of deportation procedures); *Parsons*, 754 F.3d at 689 (finding
 9 plaintiffs' requested declaratory and injunctive relief conformed to Rule 23(b)(2) where "every
 10 [member] in the proposed class is allegedly suffering the same (or at least a similar) injury and
 11 that injury can be alleviated for every class member by uniform changes in . . . policy and
 12 practice"). Accordingly, this Court should grant certification under Rule 23(b)(2).
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16 **IV. CONCLUSION**

17 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion;
 18 certify the proposed class under Rule 23(b)(2); appoint Plaintiffs as class representatives; and
 19 appoint Plaintiffs' counsel as counsel for the class.
 20

21 Respectfully submitted this 20th day of July, 2020,

22 */s/ Mary Kenney*

23 Mary Kenney (DC 1044695)*
 24 c/o American Immigration Council
 1331 G Street NW, Suite 200
 Washington DC 20005
 Telephone: (617) 819-4681
 Email:
 mary@immigrationlitigation.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

27 *Additional counsel for Plaintiffs listed*
 28 *on following page*

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

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

6 Jesse M. Bless (MA BBO # 660713)*
7 American Immigration Lawyers
8 Association
9 1331 G Street NW, Ste. 300
10 Washington, D.C. 20005
11 Telephone: (781) 704-3897
12 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

11 Counsel for Plaintiffs

13 **Admitted pro hac vice*