UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MADKUDU INC., et al.,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants.

Case No. 20-cv-02653-SVK

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Re: Dkt. Nos. 40, 54, 55, 57

I. INTRODUCTION

Plaintiffs MadKudu Inc., Quick Fitting, Inc., 2nd Street USA, Inc., and Hanguang International Inc. (collectively, "Plaintiffs") bring this lawsuit on behalf of themselves and similarly aggrieved U.S. employers against Defendants U.S. Citizenship and Immigration Services ("USCIS") and Kenneth T. Cuccinelli in his official capacity (collectively, "Defendants"). Dkt. 39 ("First Amended Complaint"). Before the Court is Plaintiffs' motion for class certification. Dkt. 40 ("Motion").

All parties have consented to the jurisdiction of a magistrate judge. Dkts. 13, 33, 34, 43. The Court held a hearing on October 27, 2020. Dkt. 58. After considering the Parties' submissions, arguments at the hearing, the case file, and relevant law, the Court **GRANTS IN PART** Plaintiffs' motion for class certification for the reasons discussed below.

II. BACKGROUND

A. The H-1B Visa

The Immigration and Nationality Act allows employers to petition for foreign workers in specialty occupations to come to the United States to perform services or labor. 8 U.S.C. § 1101(a)(15)(H)(i)(b1); 8 C.F.R. § 214.2(h)(1)(i). The purpose of the H-1B provisions is to help

employers who cannot otherwise obtain needed business skills and abilities from the U.S. workforce by authorizing the temporary employment of qualified individuals who are not otherwise authorized to work in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b1); 8 C.F.R. § 214.2(h)(1)(i). A "specialty occupation" is an occupation that requires theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in the specific specialty (or its equivalent). 8 U.S.C. § 1184(i)(1); 8 C.F.R. § 214.2(h)(4)(i)(A)(1). The position must meet one of the four criteria to constitute a specialty occupation position:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
> (3) The employer normally requires a degree or its equivalent for the position; or
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

B. Interim Final Rule ("IFR")

On October 8, 2020, while briefing on the Motion was in progress, the Department of Homeland Security ("DHS") issued an interim final rule amending the regulations for H-1B petitions. The IFR will take effect on December 7, 2020 for all H-1B petitions, including amended petitions or petition extensions, filed on or after that date. *See* Strengthening the H-1B Nonimmigrant Visa Classification Program, 85 Fed. Reg. 63,918 (Oct. 8, 2020). In relevant part, DHS is revising the regulatory definition and standards for a "specialty occupation" to align with the statutory definition of "specialty occupation." *Id.* at 63,924. Specifically, the rule "amends the definition of a 'specialty occupation' at 8 C.F.R. § 214.2(h)(4)(ii) to clarify that there must be a direct relationship between the required degree field(s) and the duties of the position" and "clarifies that a position would not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position." *Id.* at 63,924–25, 63,964 ("Specialty occupation means an occupation that requires . . . [t]he attainment of a U.S.

bachelor's degree or higher in a directly related specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."). Further, DHS is eliminating the term "normally" from 8 C.F.R. § 214.2(h)(4)(iii)(A), meaning "that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is always the requirement for the occupation as a whole . . ." *Id.* at 63,926.

C. Named Plaintiffs

Plaintiff MadKudu Inc. ("MadKudu") is a marketing analytics software corporation headquartered in Mountain View, California. Dkt. 40 at 12; Dkt. 40-2 ¶¶ 2–3. On or about April 2, 2019, MadKudu filed an H-1B petition for a market research analyst position. Dkt. 40 at 13; Dkt. 40-2 ¶¶ 4–6. USCIS denied the petition on February 24, 2020, stating that MadKudu failed to demonstrate that the position was a specialty occupation under any of the independent regulatory tests. Dkt. 40 at 13; Dkt. 40-2 ¶ 7; Dkt. 40-3. Specifically, USCIS determined that MadKudu's petition did not meet the first regulatory test because the Occupational Outlook Handbook ("OOH") did not show that market research analyst positions normally require a minimum of a bachelor's degree or its equivalent in a specific specialty at the entry level. Dkt. 40 at 13; Dkt. 40-3 at 4–5. On May 11, 2020, USCIS approved MadKudu's petition without explanation. Dkt. 40 at 13; Dkt. 40-11 at 2–3.

Plaintiff Quick Fitting, Inc. ("Quick Fitting"), a plumbing fittings supplier headquartered in Warwick, Rhode Island, also filed an H-1B petition for a market research analyst position on or about August 20, 2019. Dkt. 40 at 14; Dkt. 40-4 ¶¶ 2–5. On January 23, 2020, USCIS denied the petition, stating Quick Fitting failed to demonstrate that the position was a specialty occupation under any of the independent regulatory tests. Dkt. 40 at 14; Dkt. 40-4 ¶¶ 6–7; Dkt. 40-5. Specifically, USCIS determined that Quick Fitting's petition did not meet the first regulatory test because the OOH did not show that market research analyst positions normally require a minimum of a bachelor's degree or its equivalent in a specific specialty at the entry level. Dkt. 40 at 14; Dkt. 40-5 ¶¶ 4–5. On May 11, 2020, USCIS approved Quick Fitting's H-1B petition without explanation. Dkt. 40 at 15; Dkt. 40-11 at 4–5.

Plaintiff 2nd Street USA, Inc. ("2nd Street"), a clothing corporation headquartered in Los Angeles, California, filed an H-1B petition for a market research analyst position on or about April 11, 2019. Dkt. 40 at 15–16; Dkt. 40-12 ¶¶ 2–5. On September 12, 2019, USCIS denied 2nd Street's H-1B petition under each of the independent regulatory tests and stated that the petition did not meet the first regulatory test because the OOH did not show that market research analyst positions normally require a minimum of a bachelor's degree or its equivalent in a specific specialty at the entry level. Dkt. 40 at 16; Dkt. 40-12 ¶ 6; Dkt. 40-13 at 5–6. On September 16, 2020, USCIS reopened and approved 2nd Street's H-1B petition. Dkt. 54 at 8; Dkt. 54-1 at 7–11.

Hanguang International, Inc. ("Hanguang International") is an educational consulting services corporation with its principal place of business in New York, New York. Dkt. 40 at 16; Dkt. 40-14 ¶¶ 2–4. On or about April 2, 2019, Hanguang International filed an H-1B petition for a market research position. Dkt. 40 at 16; Dkt. 40-14 ¶ 5. USCIS denied the petition on November 1, 2019 for failing to demonstrate that the position was a specialty occupation and stated that the OOH did not show that market research analyst positions normally require a minimum of a bachelor's degree or its equivalent in a specific specialty at the entry level. Dkt. 40 at 16; Dkt. 40-14 ¶ 6; Dkt. 40-15 at 5–6.

D. Market Research Analyst Position

Plaintiffs allege that Defendants have a "policy and practice of arbitrarily and unlawfully denying H-1B nonimmigrant worker petitions for the specialty occupation of market research analyst." Dkt. 40 at 8. Plaintiffs are only challenging the first test, which currently states that a position will qualify as a specialty occupation if "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position." Dkt. 40 at 10; 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Plaintiffs allege that USCIS routinely relies on the OOH, which includes a profile of the market research analyst occupation and states that market research analysts typically need a bachelor's degree in market research or a related field and courses in statistics, research methods, and marketing. Dkt. 40 at 10–12. Further, Plaintiffs allege that USCIS erroneously concludes that the OOH does not establish that the occupation requires a bachelor's degree or higher in a specific specialty or its equivalent and "fails to give meaning to

the term 'normally' in the first regulatory test." *Id.* at 10–11. Plaintiffs allege that had USCIS properly interpreted and applied the statute, the regulations, and the OOH profile, it would have found that the market research analyst occupation is a specific occupation and would have approved Plaintiffs' and putative class members' H-1B petitions. *Id.* at 12.

E. Procedural Background

On April 16, 2020, Plaintiffs MadKudu and Quick Fitting filed a class action complaint. Dkt. 1. These initial Plaintiffs filed a motion for class certification on May 4, 2020. Dkt. 26. On June 29, 2020, Defendants filed a motion to dismiss for lack of jurisdiction, asserting that Plaintiffs lack standing because USCIS approved MadKudu and Quick Fitting's H-1B petitions. Dkt. 36. On July 20, 2020, Plaintiffs filed an amended complaint, adding Plaintiffs 2nd Street and Hanguang International, and the instant motion for class certification. Dkts. 39, 40. In the instant motion, Plaintiffs move for this Court to certify the following proposed class under Rule 23 of the Federal Rules of Civil Procedure:

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

Pursuant to the Court's briefing schedule (Dkt. 44), on August 4, 2020, Defendants filed a motion to dismiss and a motion to sever, which the Court subsequently denied. Dkts. 47–49, 51. In opposition to the motion for class certification, Defendants argue that Plaintiffs have failed to meet their burden under Rule 23. Dkt. 54. After the IFR was published, the Court allowed Defendants to file a sur-reply in light of this recent development, which is discussed in further detail below. Dkts. 56–57.

III. LEGAL STANDARD

The Court has the discretion to grant or deny class certification under Federal Rule of Civil Procedure 23. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

"Where appropriate, the district court may redefine the class, *see Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 467 (9th Cir.1987), may excise portions of a plaintiffs [sic] class allegations, and may even decertify the class." *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), *as recognized in B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 974 (9th Cir. 2019).

Rule 23 is a two-prong test. First, Rule 23(a) provides that a class may only be certified if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These four requirements are commonly referred to as "numerosity," "commonality," "typicality," and "adequacy." If all four prerequisites of Rule 23(a) are satisfied, the Court must then turn to the requirements of Rule 23(b). Rule 23(b) requires the plaintiff to "satisfy through evidentiary proof at least one of Rule 23(b)'s provisions." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). In this case, Plaintiffs seek certification pursuant to Rule 23(b)(2), which permits certification of cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The party seeking class certification bears the burden of proof in demonstrating that it has satisfied all four Rule 23(a) prerequisites and that their class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Zinser*, 253 F.3d at 1186. The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). Consequently, when considering whether to certify a class under Rule 23, district courts must perform "a rigorous analysis" to ensure that Rule 23(a) has been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). This "rigorous analysis" may require a court "to probe behind the pleadings before coming to rest on the certification question." *Sandoval v. M1 Auto Collisions Ctrs.*, 309 F.R.D. 549, 560 (N.D. Cal.

2015) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)). A court's analysis of the certification question "will entail some overlap with the merits of the plaintiff's underlying claim," and "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Wal-Mart*, 564 U.S. at 351; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). The Court must resolve factual disputes as "necessary to determine whether there was a common pattern and practice that could affect the class *as a whole*." *Ellis*, 657 F.3d at 983. When resolving such factual disputes in the context of a motion for class certification, district courts must consider "the persuasiveness of the evidence presented." *Id.* at 982. "Because the early resolution of the class certification question requires some degree of speculation, however, all that is required is that the Court form a 'reasonable judgment' on each certification requirement. In formulating this judgment, the Court may properly consider both the allegations of the class action complaint and the supplemental evidentiary submissions of the parties." *In re Citric Acid Antitrust Litig.*, No. 95–1092, C–95–2963 FMS, 1996 WL 655791, at *2 (N.D. Cal. 1996) (citing *Blackie v. Barrack*, 524 F.2d 891, 900–01 (9th Cir. 1975)).

IV. ANALYSIS

A. Impact of IFR on Proposed Class

As an initial matter, the Court addresses the impact on class certification of the IFR, which takes effect on December 7, 2020, and presents regulatory changes as outlined in Section II.B. As structured by Plaintiffs, members of the proposed class would be evaluated under two different regulations — the current version of 8 C.F.R. § 214.2(h)(4)(iii)(A) for employers who filed H-1B petitions before December 7, 2020 and the IFR for those who filed H-1B petitions on or after December 7, 2020. Nevertheless, Plaintiffs contend that the IFR does not impact Plaintiffs' motion for class certification because the OOH entry for market research analysts satisfies both the current regulatory test as well as the amended regulatory test. Dkt. 55 at 7. Plaintiffs further argue that the question of whether the OOH entry for market research analyst satisfies the amended regulatory test is a question to be resolved on the merits, rather than at the class certification stage. *Id.* Plaintiffs also urge that at most, this new regulation would warrant two

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subclasses, those who are subject to the current regulation and those who are subject to the IFR. *Id.*

The Court does not agree with Plaintiffs' construct. Certifying the class as proposed by Plaintiffs would require the Court to evaluate claims under two different regulatory schemes, depending on the timing of the submission of the H-1B petition. Further, subclasses are not appropriate here. While Rule 23(c)(5) provides that "a class may be divided into subclasses that are each treated as a class," each subclass "must independently meet the requirements of Rule 23 for the maintenance of a class action." *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981). Plaintiffs' proposed subclass for employers who are subject to the IFR do not satisfy the requirements of Rule 23(a). For instance, Plaintiffs would not be able to satisfy the numerosity requirement for this subclass, as there are currently no class members in this class. Further, "[o]f particular importance is that the court be certain that each subclass is adequately represented." *Id.* Indeed, "[c]ertification of a subclass fails where a subclass representative is not a member of the subclass he or she seeks to represent." *Sueoka v. U.S.*, 101 F. App'x. 649, 654 (9th Cir. 2004); *see also Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001) (determining that the class certified was defective because Plaintiff could not represent a class alleging constitutional claims that he does not have standing to raise). Plaintiffs do not argue that they can adequately represent this proposed subclass, nor could they since the IFR has not yet taken effect and no employers currently have standing to assert claims under the IFR. Accordingly, the Court restricts the proposed class to U.S. employers who filed or will file H-1B applications for an H-1B classification under 8 U.S.C. § 1101(a)(15)(H)(i)(b) for a market research analyst from January 1, 2019 through December 6, 2020. With this adjustment to the proposed class, the Court addresses the Rule 23 factors below.

B. Ascertainability and Standing of H-1B Petitioners

Defendants argue that Plaintiffs' proposed class should not be certified because it is not ascertainable. Specifically, Defendants contend that the proposed class is not ascertainable because it includes H-1B petitioners that lack Article III standing. Dkt. 54 at 13–16. Further, Defendants argue that three of the named Plaintiffs cannot be members of the proposed class

because they no longer suffer any injury. *Id.* at 16–17.

The Ninth Circuit held that "the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017). Indeed, the Ninth Circuit reasoned that "ascertainability" is not a threshold requirement for class certification and rather, it is relevant only to the extent it is implicated by Rule 23's enumerated requirements. *Id.* at 1124 n.4 (citations omitted). "The inclusion of future class members in a class is not itself unusual or objectionable" and is not a barrier to ascertainability. *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010). The proposed class is sufficient if "plaintiffs' class definitions provide objective criteria that allow class members to determine whether they are included in the proposed class." *Farar v. Bayer AG*, No. 14-cv-04601-WHO, 2017 WL 5952876, at *14 (N.D. Cal. Nov. 15, 2017).

Here, the Court finds that the class can be ascertained based on objective criteria. The class, as adjusted by the Court in Section IV.A. above, requires a class member: (a) to have filed a petition with USCIS for an H-1B classification under 8 U.S.C. § 1101(a)(15)H)(i)(b); (b) to have filed the petition for a market research analyst position; (c) to have filed this between January 1, 2019 through December 6, 2020; (d) to have the petition denied; (e) to be denied based on a finding that the OOH entry for market research analyst does not establish that the occupation is a specialty occupation and thus does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); and finally (f) but for this finding, the petition would have been approved. Based on the objective criteria, Plaintiffs' proposed class is ascertainable.

Article III standing requires that (1) the plaintiff suffered "concrete and particularized" and "actual or imminent, not conjectural or hypothetical" injury, (2) the injury is "fairly traceable to the challenged action" and (3) the injury is likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted).

Defendants' standing arguments fail for several reasons. First, "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citation omitted). Here, while Defendants

point out that MadKudu, Quick Fitting, and 2nd Street no longer have H-1B petitions denied by USCIS, Defendants all but concede that at least one named plaintiff, Hanguang International, has standing. Dkt. 54 at 16. Further, the Court has previously reasoned that Defendants' argument regarding the named Plaintiffs who later had their H-1B petitions approved "ignores the requests for relief and Plaintiffs' assertions that they are challenging USCIS' denial of H-1B petitions on behalf of themselves *and all others who are similarly situated*." Dkt. 51 at 11.

Second, Defendants' standing argument as to other H-1B petitioners is based in part on an overbroad reading of Plaintiffs' proposed class definition. Defendants contend that Plaintiffs' "overly broad definition encompasses companies who have not even filed H-1B petitions." *Id.* at 14. This is not the case here, as employers do not become part of the proposed class until they file a petition *and* receive a denial based on a finding that the OOH entry for market research analyst does not establish that the occupation is a specialty occupation. Dkt. 40 at 9. Similarly, the Court disagrees with Defendants' argument that Plaintiffs' proposed definition "sweeps in companies who may file an H-1B petition but suffer no injury from the allegation Plaintiffs focus upon." Dkt. 54 at 15. Accordingly, Plaintiffs' proposed class is ascertainable and Defendants' standing arguments fail.

C. Geographic Scope

Defendants also contend that this Court should refuse to certify Plaintiffs' proposed class because the definition is not limited in geographic scope. The Supreme Court has cautioned that nationwide class actions "may have a detrimental effect by foreclosing adjudication by a number of different courts and judges." *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). Accordingly, "a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Id.* However, the Supreme Court "decline[d] to adopt the extreme position that such a class may never be certified" and recognized that certification of a nationwide class "is committed in the first instance to the discretion of the district court." *Id.* at 702–03.

Keeping the Supreme Court's instructions in mind, the Court finds that certification of a

nationwide class is appropriate in this context. Plaintiffs contend that "Defendant USCIS has a pattern and practice of misinterpreting the OOH's profile of a market research analyst, mistakenly finding that it does not demonstrate that this occupation satisfies the first regulatory test." Dkt. 39 at 4. In this context, "the practical consequences of not certifying a geographically limited class weigh in favor of nationwide certification." *Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657592, at *16 (N.D. Cal. Nov. 21, 2014). Indeed, "courts have certified nationwide classes that challenge the government's actions in enforcing the country's immigration laws." *Id.* (citing cases where courts have certified nationwide classes challenging the government's actions in enforcing immigration laws). Thus, a nationwide class is appropriate here.

D. Rule 23(a) Requirements

The Court next addresses whether Plaintiffs have satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy.

1. Numerosity

Rule 23(a) requires each proposed class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not state an exact number to meet the threshold requirements of Rule 23. Rather, the rule "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 330 (1980). A class or subclass with more than forty members "raises a presumption of impracticability [of joinder] based on numbers alone." *Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 152–53 (N.D. Cal. 2015). Conversely, fewer than twenty proposed class members generally does not show impracticability of joinder. *See Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 890 (N.D. Cal. 2015).

For proposed classes that fall into the "gray area" between twenty and forty class members, "courts must consider factors other than class size," including: "(1) the judicial economy that will arise from avoiding multiple actions; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an effect on future class members." *Sandoval v. M1 Auto Collisions Centers*, 309 F.R.D. 549, 562 (N.D. Cal. 2015). The third and

fourth factors, which are often analyzed together, include consideration of "the economic status of the class members; the size of their claims; and other relevant factors, such as confinement and mental handicaps." *Lil' Man in Boat, Inc. v. City and Cty. of San Francisco*, No. 17-cv-00904-JST, 2019 WL 125905, at *5 (N.D. Cal. 2019) (citing 32B Am. Jur. 2d Federal Courts § 1506). "In analyzing these factors, a court may make common-sense assumptions and reasonable inferences." *The Civil Rights Educ. & Enforcement Ctr. v. RLJ Lodging Trust*, No. 15–cv–0224–YGR, 2016 WL 314400, at *6 (N.D. Cal. Jan. 25, 2016) (citations omitted).

Here, Plaintiffs offer evidence that USCIS' administrative appellate body, the Administrative Appeals Office ("AAO") sustained USCIS' denials of at least sixty H-1B petitions for market research analysts in the past three calendar years. Dkt. 40 at 21 n.4. Specifically, in each such year, AAO issued between seventeen and twenty-two such decisions, averaging twenty per year. *Id.* at 21–22. Plaintiffs also proffer that AAO has issued six denials in the first three months of 2020. *Id.* at 22–23. Further, Plaintiffs contend that these numbers represent only a small fraction of denied cases and one USCIS spokesperson stated that only one percent of H-1B denials are actually appealed to AAO. *Id.* at 23–24. Plaintiffs reasoned that these statistics support a reasonable estimate that the number of current putative class members as of the filing of their motion for class certification in the class is at least forty members, and likely much higher. *Id.* at 24. Finally, Plaintiffs argue that joinder is impracticable here because it includes an unknown number of future class members. *Id.* at 24–25.

As stated previously, the Court is closing the class on December 6, 2020, in light of the IFR which takes effect on December 7, 2020. Even with the class being restricted from January 1, 2019 through December 6, 2020, Plaintiffs' statistics support a reasonable estimate that the number of putative class members would exceed forty members, given that the rough estimate of twenty decisions per year from the AAO represent only a fraction of actual denials. In addition, the class is geographically dispersed, stretching across the nation. For these reasons, the Court finds that the class satisfies Rule 23(a)(1).

2. Commonality

Rule 23(a) requires "questions of law or fact common to the class." Fed. R. Civ. P.

23(a)(2). To satisfy this requirement, a common question "must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. "What matters to class certification is not the raising of common questions . . . but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. *Id.* (citation omitted). "In other words, Plaintiffs must have a common question that will connect many individual [] decisions to their claim for class relief." *Ellis*, 657 F.3d at 981.

Commonality is satisfied where a plaintiff challenges a system-wide practice or policy that affects all putative class members. *Armstrong*, 275 F.3d at 868. If there is no evidence that the entire class was subject to the same practice or policy, however, there is no question common to the class. *Ellis*, 657 F.3d at 983. Additionally, if a class action can only proceed to trial in the form of a myriad of mini-trials, class certification must be denied. *See, e.g.*, *Soares v. Flowers Foods, Inc.*, 320 F.R.D. 464, 484 (N.D. Cal. 2017).

The gravamen of Defendants' opposition to the motion for class certification is that commonality does not exist because USCIS considers the issue of whether an employer's proffered position satisfies the first criteria of the H-1B specialty occupation requirement on a case-by-case basis based on the unique facts of the case and the specific evidence presented by the employer. Dkt. 54 at 19–21. In response, Plaintiffs argue that "individual differences in the underlying facts of each petition, such as the petitioner's business, are not relevant to a determination of class membership." Dkt. 55 at 10. The common question of whether Defendants have a pattern and practice of erroneously denying H-1B petitions for market research analysts based on its misapplication of the first regulatory test and misinterpretation of the statutory term "specific specialty" and the OOH profile for market research analysts is precisely what is at issue in Plaintiffs' claims. The Court agrees that the underlying facts of each petition is not relevant to a determination of class membership and "individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." *Armstrong*, 275 F.3d at 868. "The existence of even one significant issue common to the class is sufficient to warrant

certification." *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008). Accordingly, the Court finds that the commonality requirement of Rule 23(a) has been met.

3. Typicality

To satisfy typicality, plaintiffs must establish that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (quoting *Hanon*, 976 F.2d at 508).

Typicality and commonality have similar requirements and often tend to merge. *See Californians for Disability Rights*, 249 F.R.D. at 346. As such, in citing to the same arguments made regarding commonality, Defendants argue that Plaintiffs fail the typicality requirement. Dkt. 54 at 21. Further, Defendants again point out that Plaintiffs MadKudu, Quick Fitting, and 2nd Street have approved H-1B petitions and thus do not have the same or similar injury as the putative class members. *Id.*

As the Court explained above, however, Plaintiffs are challenging the lawfulness of Defendants' pattern and practice of erroneously denying H-1B petitions for market research analysts. The named Plaintiffs' claims are typical of those of the class because their H-1B petitions were allegedly denied because of Defendants' unlawful policy and practice of misinterpreting the statutory term "specific specialty" and the first regulatory test and an erroneous reading of the OOH profile for market research analysts. Dkt. 40 at 28–29. Accordingly, the Court finds that the typicality requirement has been met.

4. Adequacy

To satisfy Rule 23(a)(4), Plaintiffs must demonstrate that they will "fairly and adequately

protect the interests of the class." When considering the adequacy of proposed class representatives, courts must examine "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995) (citation omitted). The Supreme Court has "repeatedly held that a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co.*, 457 U.S. at 156 (citations omitted). However, "[a]s a general rule, disapproval of the action by some class members should not be sufficient to preclude a class action on the ground of inadequate representation." *Californians for Disability Rights*, 249 F.R.D. at 348 (quoting 1 Newberg on Class Actions § 3:30).

Defendants again contend that some of the named Plaintiffs lack standing and that Hanguang International "has provided no evidence as to how its interest and proffered position in the niche of educational consulting will be adequate to set a nationwide standard for all H-1B petitioning companies." Dkt. 54 at 22. The Court has sufficiently addressed the standing issue previously. Further, the fact that Hanguang International is in the business of educational consulting is not relevant for the purposes of class representation. Named Plaintiffs' interest in Defendants properly applying the statutory term "specific specialty" and the first regulatory test as well as the OOH's explanation of the market research analyst position are aligned with the interests of the class because they face the same injury — denial of their H-1B petition for a market research analyst position. *See* Dkt. 40 at 29. Further, Plaintiffs have stated that they will fairly and adequately protect the interests of the proposed class and that they do not have any conflicts of interest. *Id.*

Finally, the Court determines Plaintiffs' attorneys are experienced class action attorneys and are adequate class counsel. Defendants do not challenge the adequacy of plaintiffs' counsel to serve as class counsel.

"Adequate representation is usually presumed in the absence of contrary evidence." *Californians for Disability Rights*, 249 F.R.D. at 349 (citation omitted). Defendants have not adequately rebut this presumption and thus, the Court finds that the adequacy of representation

requirement is met.

5. Conclusion

In sum, the Court finds that Plaintiffs have satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a). The Court also finds that class counsel is adequate.

E. Federal Rule of Civil Procedure 23(b)(2)

Class actions must also satisfy one of three enumerated categories. *See* Fed. R. Civ. P. 23(b)(1)-(3). Here, Plaintiffs seek to certify under Rule 23(b)(2). A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on the grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) requires that the primary relief sought is declaratory or injunctive." *Rodriguez*, 591 F.3d at 1125 (internal quotation marks and citation omitted). Rule 23(b)(2) only requires the Court "to look at whether class members seek uniform relief from a practice applicable to all of them." *Id.*

Here, Rule 23(b)(2) is satisfied. Plaintiffs challenge Defendants' pattern and practice of denying H-1B petitions for market research analysts based on a misinterpretation of the OOH and misinterpretation and misapplication of 8 U.S.C. § 1184(i)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Defendants contend that "there is no single declaratory relief that could apply to each H-1B petitioner who deals in a distinct and different 'market' for the purposes of the diverse putative class." However, again, the various markets that the employers may be in is irrelevant for these purposes. The challenged conduct applies generally to the whole class and declaratory relief and final injunctive relief enjoining Defendants from continuing this alleged pattern and practice is applicable to the class as a whole. Dkt. 54 at 23. Accordingly, the Court finds that Plaintiffs have met the requirements of Rule 23(b).

V. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART Plaintiffs' motion for class certification and CERTIFIES the following class:

> All U.S. employers who in 2019 through December 6, 2020 filed, or will file, a petition (Form I-129 or any successor) with USCIS for an H-1B classification under 8 U.S.C. § 1101(a)(15)(H)(i)(b) for a market research analyst where:
>
> - USCIS denied or will deny the petition solely or in part based on a finding that the OOH entry for market research analyst does not establish that the occupation is a specialty occupation, and thus does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); and
> - But for this finding, the petition would be approved.

The Court APPOINTS Plaintiffs MadKudu, Quick Fitting, 2nd Street, and Hanguang International as class representatives. The Court APPOINTS American Immigration Council, Van Der Hout, LLP, American Immigration Lawyers Association, Joseph and Hall, P.C., and Kuck Baxter Immigration LLC as class counsel.

The Court ORDERS the Parties to meet and confer on whether cross motions for summary judgment are appropriate and if so, a schedule for same to be filed by **January 15, 2021**. If the Parties cannot agree, they are to submit competing case management proposals to the Court by **January 15, 2021**.

SO ORDERED.

Dated: November 17, 2020

SUSAN VAN KEULEN
United States Magistrate Judge

United States District Court
Northern District of California