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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CHINTAN MEHTA, et al.,

No. C15-1543RSM

11 Plaintiffs,

ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING ORDER

12 v.

13 UNITED STATES DEPARTMENT OF
14 STATE, et al.,

15 Defendants.
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17 THIS MATTER comes before the Court on Plaintiffs' Emergency Motion for
18 Temporary Restraining Order ("TRO"). Dkt. #7. The Court has reviewed the briefing of the
19 parties. Having considered the briefing and determined that a hearing is not necessary, the
20 Court now DENIES Plaintiffs' Motion for the reasons set forth below.
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22 **A. Legal Standard**

23 In order to succeed on a motion for temporary restraining order, the moving party must
24 show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the
25 moving party in the absence of preliminary relief; (3) that a balance of equities tips in the favor
26 of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res.*
27 *Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Ninth Circuit
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ORDER
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1 employs a “sliding scale” approach, according to which these elements are balanced, “so that a
2 stronger showing of one element may offset a weaker showing of another.” *Alliance for the*
3 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

4 **B. Background**

5 Plaintiffs and potential class members are “the beneficiaries of approved employment-
6 based visa petitions for highly skilled workers.” Dkt. #6 at 3. On September 9, 2015, the U.S.
7 State Department published a monthly “Visa Bulletin” with “a date on which applicants may
8 submit adjustment of status applications... that comes before the projected date on which final
9 adjudicative action will occur.” Dkt. #6 at 3. Plaintiffs allege that they then spent significant
10 time and money assembling adjustment applications “based on their reasonable expectation—
11 created by over five decades of uniform practice—that the government would abide by the Visa
12 Bulletin it published on September 9, 2015.” *Id.* at 4. On September 25, 2015, the State
13 Department published another, revised Visa Bulletin withdrawing or changing the date on
14 which applicants may submit adjustment of status applications. *Id.* Plaintiffs brought this
15 lawsuit on September 28, 2015, and amended their Complaint on September 30, 2015. Dkt.
16 ##1; 6.

17 **C. Likelihood of Success on the Merits**

18 In their Motion for TRO, Plaintiffs argue that “Defendants’ abrupt and unexplained
19 change in visa bulletin policy constitutes arbitrary and capricious action in violation of the
20 Administrative Procedure Act (“APA”) and the Immigrant and National Act (“INA”).” Dkt. #7
21 at 2. Plaintiffs argue that the State Department’s “rescission of the original [September 9] Visa
22 Bulletin and replacement of it with a Revised Visa Bulletin, constitutes final agency action, and
23 thus [it] is subject to the APA’s judicial review provisions,” citing to 4 U.S.C. § 704 and
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1 *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Dkt. # 7 at 4. However, the cited law does not
2 reference State Department Visa Bulletins specifically, but the standard for final agency action
3 itself. §704 states “Agency action made reviewable by statute and final agency action for
4 which there is no other adequate remedy in a court are subject to judicial review. A
5 preliminary, procedural, or intermediate agency action or ruling not directly reviewable is
6 subject to review on the review of the final agency action.” *Bennett* states, “[f]irst, the action
7 must mark the consummation of the agency's decisionmaking process... it must not be of a
8 merely tentative or interlocutory nature.... second, the action must be one by which rights or
9 obligations have been determined, or from which legal consequences will flow.” *Bennett* 520
10 U.S. at 178 (internal citation and quotation marks omitted). *Bennett* involved a challenge to a
11 biological opinion issued by the Fish and Wildlife Service in accordance with the Endangered
12 Species Act of 1973, not a State Department Visa Bulletin. *Id.* at 157. Plaintiffs argue, without
13 citation to law, that the September Visa Bulletins “represented the culmination of the
14 Department of State[]’s decision-making process” and that that these bulletins “determined the
15 rights of adjustment applicants, the obligations of [Citizenship and Immigration Services] to
16 those applicants, and the legal consequences that flow from [the State Department’s]
17 calculation of filing dates.” Dkt. #7 at 4-5. Plaintiff’s only support for this argument is
18 declarations of other immigration attorneys opining on the matter. *See* Dkt. ## 7-2; 7-3; and 7-
19 4. Plaintiffs thus appear to be presenting the question of whether the State Department’s Visa
20 Bulletins constitute final agency action as an issue of first impression. Although it is possible
21 that Plaintiffs may be able to establish that these Visa Bulletins constituted final agency action,
22 it is not clear to the Court that Plaintiffs have met the stringent standard for likelihood of
23 success on the merits used on a TRO motion.
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1 Plaintiffs further argue that, as a final agency action, the revised Visa Bulletin
2 “provided no contemporaneous justification... other than an ambiguous and puzzling reference
3 to consultation with [the Department of Homeland Security]...” for a “departure from its
4 practice of issue (sic) a single, definitive Visa Bulletin each month” and that this “substantially
5 alter[ed] and diminish[ed] the rights of Plaintiffs and potential class members, constitut[ing]
6 arbitrary and capricious agency action.” Dkt. #7 at 5. In their Response, Defendants attempt to
7 clarify any ambiguity created by their Visa Bulletins by first pointing to what they believe was
8 clear language in the September 25, 2015, Visa Bulletin: “Dates for Filing Applications for
9 some categories... have been adjusted to better reflect a timeframe justifying immediate action
10 in the application process.” Dkt. #13 at 9 (quoting Dkt. #1-5 at 2). Defendants expand on this
11 language by arguing that the September 9, 2015, Visa Bulletin “did not accurately reflect visa
12 availability as required for [Citizenship and Immigration Services] to accept adjustment of
13 status applications,” citing to 8 U.S.C. § 1255(a)(3). Dkt. #13 at 9. Defendants argue that the
14 initial Visa Bulletin erroneously implied that visas were immediately available to certain
15 individuals, and that the Revised Visa Bulletin was necessary to prevent the State Department
16 from exceeding its statutory authority. Dkt. #13 at 11. From the limited briefing provided by
17 the Parties, the Court finds that, even if the Visa Bulletins constituted final agency action, the
18 Plaintiffs have failed to show a likelihood of success on their APA claim because the State
19 Department’s Revised Visa Bulletin included a plausible explanation for its action, and it
20 appears that the Revised Visa Bulletin did not in fact substantially alter or diminish the rights of
21 Plaintiffs and potential class members, rather it clarified an erroneous prior statement of their
22 rights.
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1 Plaintiffs also argue that Defendants' failure to give Plaintiffs adequate notice violated
2 the Due Process Clause of the Fifth Amendment. *Id.* at 2-3. Plaintiffs provide no legal citation
3 to their assertion that a change in a State Department bulletin can trigger a violation of the Due
4 Process Clause. *See* Dkt. #7 at 6.¹ In Response, Defendants question whether "Plaintiffs had
5 any reasonable expectation that they would be able to file their adjustment applications in the
6 foreseeable future" because the priority dates held by Plaintiffs are several years after the
7 priority date issued on August 11, 2015. Dkt. #13 at 12. Defendants cite to *Bd. of Regents v.*
8 *Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) for the proposition that, in a
9 due process claim, "to have a property interest in a benefit, a person clearly must have more
10 than an abstract need or desire for it. He must have more than a unilateral expectation of it. He
11 must, instead, have a legitimate claim of entitlement to it." Defendants also assert, without
12 citation, that the "issuance of the Visa Bulletin prior to its effective date is a courtesy that is not
13 required by statute." Dkt. #13 at 12. The Court simply cannot find Plaintiffs are likely to
14 succeed on a due process claim when they cannot point to any law establishing that a Visa
15 Bulletin can create a constitutional right to due process, and Defendants present evidence
16 clearly calling into question the reasonableness of Plaintiffs relying on these Visa Bulletins to
17 create "a legitimate claim of entitlement." Plaintiffs thus fail to demonstrate a likelihood of
18 success on the merits at this time.

22 **D. Likelihood of Irreparable Harm**

23 Likewise, Plaintiffs fail to show irreparable harm under these circumstances. Plaintiffs'
24 Motion first argues, without citation, that "allowing [Citizenship and Immigration Services] to
25 enforce the Revised Visa Bulletin at the beginning of the Application Period on October 1,
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27 ¹ Instead, Plaintiffs cite to cases involving applications for a Special Agricultural Worker program and applications
28 for asylum. Dkt. #7 at 6 (citing *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990)).

1 2015 will deprive Plaintiffs of due process under the Fifth Amendment.” Dkt. #7 at 7. This
2 claim is addressed above. Plaintiffs cite to cases with inapplicable fact patterns for the premise
3 that “a threatened deprivation of a Plaintiff’s constitutional right presumptively demonstrates
4 irreparable harm.” *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Fyock v. City of*
5 *Sunnyvale*, 25 F. Supp. 3d 1267, 1282 (N.D. Cal. 2014)). Plaintiffs also argue, without citation
6 to a declaration of an injured Plaintiff or other evidence, that this TRO is necessary to prevent
7 economic losses including non-refundable monies paid to “civil surgeons for medical
8 examinations” and for “certifications.” Dkt. #7 at 8. Plaintiffs also argue, again without
9 citation, that “at least one Plaintiff whose parent is currently suffering from cancer in China,
10 will be unable to take advantage of the benefits conferred by accepting adjustment
11 applications...” *Id.*

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14 Defendants argue that “Plaintiffs must demonstrate with specificity an irreparable harm
15 that is likely and immediate in the absence of an injunction,” citing to *Winter, supra*, at 22
16 (“Issuing a preliminary injunction based only on a possibility of irreparable harm is
17 inconsistent with our characterization of injunctive relief as an extraordinary remedy that may
18 only be awarded upon a clear showing that the plaintiff is entitled to such relief.”). Dkt. #13 at
19 13. Defendants also highlight the necessity of the harm to be *irreparable*, citing to *Sampson v.*
20 *Murray*, 415 U.S. 61, 90, (1974) (“The possibility that adequate compensatory or other
21 corrective relief will be available at a later date... weighs heavily against a claim of irreparable
22 harm.”). Dkt. #13 at 13. Defendants argue that the injuries listed by Plaintiffs in their Motion
23 “are capable of redress at the conclusion of this case in the same manner as they would be if the
24 TRO is granted” because if the Court grants the relief requested by Plaintiffs and reinstates the
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1 September 9, 2015, Visa Bulletin, “the actions Plaintiffs took in support of their applications
2 would not be losses, but necessary steps in filing their applications.” *Id.*

3 Considering the failure of Plaintiff to provide any citation to its claims of harm, the fact
4 that most if not all of the harm cited has already occurred, and the apparent reparability of
5 Plaintiffs economic damages should they ultimately prevail at trial, the Court finds that
6 Plaintiffs fail to meet their burden on this element.

8 **E. Balance of Equities/Public Interest**

9 When considering the balance of equities and the public interest in this matter, the
10 Court finds Defendants’ arguments the more persuasive. Plaintiffs essentially reiterate their
11 case, arguing that Defendants actions were abrupt and unlawful, that “the government cannot
12 claim to suffer any hardship,” and that “the government’s actions in this case threaten to
13 permanently undermine the regulated community’s ability to rely on the Visa Bulletin.” Dkt.
14 #7 at 8-9. In Response, Defendants argue “[t]he public interest favors applying federal law
15 correctly,” that “it is contrary to the public interest and the law to require an executive agency
16 to act in a manner that exceeds its statutory authority,” and that “should a temporary restraining
17 order be granted and should the Government then succeed in litigation, it would have to incur
18 the substantial cost and burden returning applications.” Dkt. #13 at 15. Most persuasively,
19 however, is Defendants’ argument that “it is in the public’s interest that the agency has the
20 authority to update its guidance when necessary.” *Id.* Given the claim that the Revised Visa
21 Bulletin corrected a statement contrary to statutory authority, the Court finds that the public
22 interest lies in denying this Motion and that Plaintiffs fail to meet their burden on this element.
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F. Conclusion

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2 While the Court appreciates the confusion caused by the two Visa Bulletins published
3 in September and the potentially wasted expenses Plaintiffs incurred as a result, because
4 Plaintiffs fail to meet the critical elements for a temporary restraining order at this time, the
5 Court cannot issue injunctive relief.

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7 Accordingly, the Court hereby finds and ORDERS that Plaintiffs' Motion for
8 Temporary Restraining Order (Dkt. #7) is DENIED.

9 DATED this 6th day of October, 2015.

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12 RICARDO S. MARTINEZ
13 UNITED STATES DISTRICT JUDGE
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