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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MADUKUDU INC.; QUICK FITTING, INC., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Kenneth T. CUCCINELLI, Senior Official Performing Duties of the Director, U.S. Citizenship and Immigration Services, in his official capacity, Defendants.	Case No. 5:20-cv-02653-SVK MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND AUTHORITIES June 23, 2020, 10:00 a.m. Magistrate Judge Susan van Keulen

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NOTICE OF MOTION FOR CLASS CERTIFICATION

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

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

> 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.

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

Respectfully submitted,

s/ Mary Kenney
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Dated: May 4, 2020

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

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

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

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

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

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

> 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.

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

II. BACKGROUND

A. H-1B Visa Classification

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

mandates 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." 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020). USCIS reads this provision as requiring that the petitioner show that the degree is in a specific specialty, consistent with 8 U.S.C. § 1184(i).

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

> *Market research analysts typically need a bachelor's degree in market research or a related field*. Many have degrees in fields such as statistics, math, or computer science. Others have backgrounds in business administration, the social sciences or communications.
>
> *Courses in statistics, research methods, and marketing are essential* for these workers. Courses in communications and social sciences, such as economics or consumer behavior, are also important.
>
> Some market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics and marketing, and/or earn a master's degree in business administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

OOH, *How to Become a Market Research Analyst* (Sept. 4, 2019), https://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4 (emphasis added).

The central legal question in this case is whether the OOH profile for a market research 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 that the OOH establishes that a range of degrees or educational credentials may qualify an

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

Defendant USCIS also misreads the OOH, ignoring altogether its statements that "[m]arket research analysts typically need a bachelor's degree in market research or a related field" and that "[c]ourses in statistics, research methods, and marketing are essential for these workers," while "[c]ourses in communications and social sciences, such as economics or consumer behavior, are also important." OOH, *How to Become a Market Research Analyst*. Had USCIS properly interpreted and applied the statute and regulations and not ignored critical

information in the OOH profile, it would have found that market research analyst is a specialty occupation and approved Plaintiffs' and putative class members' petitions.[1]

B. Plaintiffs' Factual Backgrounds

1. Plaintiff MadKudu Inc.

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

On or about April 2, 2019, MadKudu filed a petition with USCIS seeking to employ Rafikah Binte Mohamed Halim in H-1B status in a market research analyst job with the title of product manager. Exh. A, MadKudu Dec. ¶4. Ms. Mohamed Halim, a national of Singapore, had worked for MadKudu in H-1B1[2] status since June 2018 as product manager. *Id*. at ¶5. MadKudu attached to its H-1B petition a Labor Condition Application certified by the Department of

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[1] Because each of the regulatory tests in 8 C.F.R. § 214.2(h)(4)(iii)(A) (2020) operates 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.

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

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

Defendant USCIS denied the petition on February 24, 2020, for failing to demonstrate that the position was a specialty occupation under any of the independent regulatory tests. Exh. A, MadKudu Dec. ¶7; Exh. B, MadKudu Petition Denial at 8; Dkt. 1 ¶34. Following its policy and practice, Defendant USCIS determined that Plaintiff MadKudu'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. Exh. B, MadKudu Petition Denial at 4-5. Defendant USCIS noted "a range of educational credentials may qualify an individual to perform the duties of a Market Research Analysts [sic]." *Id*. at 4. In doing so, Defendant USCIS ignored entirely the OOH's statements that "[m]arket research analysts typically need a bachelor's degree in market research or a related field" and that "[c]ourses in statistics, research methods, and marketing are essential for these workers." *Id*.

2. Plaintiff Quick Fitting, Inc.

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

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

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

Defendant USCIS denied the petition on January 23, 2020, for failing to demonstrate that the position was a specialty occupation under any of the independent regulatory tests. Exh. C, Quick Fitting Dec. ¶6; Exh. D, Quick Fitting Denial at 9; Dkt. 1 ¶40. Following its policy and practice, Defendant USCIS determined that Plaintiff 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. Exh. D, Quick Fitting Denial at 4. Defendant USCIS noted that "[a] range of educational credentials such as business administration and the social sciences may qualify an individual to perform the duties of a Market Research Analyst and Marketing Specialist." *Id*. Defendant USCIS concluded that the "requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility." *Id*. In so doing, Defendant USCIS ignored entirely the OOH's statements that "[m]arket research analysts typically need a bachelor's degree in market research or a related field" and that "[c]ourses in statistics, research methods, and marketing are essential for these workers." *Compare id*. *with* OOH, *How to Become a Market Research Analyst* (Sept. 4, 2019) *supra*.

C. Procedural History

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

III. ARGUMENT

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

Plaintiffs' proposed class satisfies all four Rule 23(a) prerequisites as well as Rule 23(b)(2). Courts within the Ninth Circuit, including this Court, have granted nationwide class certification to plaintiffs seeking declaratory or injunctive relief in challenges to immigration policies and practices. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1045-47 (9th Cir. 1998) (affirming certification of nationwide class of individuals challenging adequacy of notice in document fraud cases); *Nightingale v. U.S. Citizenship & Immigration Servs.*, 333 F.R.D. 449, 456, 463 (N.D. Cal. 2019) (certifying two nationwide classes in case challenging immigration

agencies' failure to timely process FOIA requests); *Alfaro Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *16 (N.D. Cal. Nov. 21, 2014) (certifying nationwide class in case challenging government's failure to provide timely reasonable fear interviews); *Santillan v. Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging USCIS' delays in issuing documentation of their status); *Doe v. Trump*, No. 3:19-cv-1743-SI, 2020 WL 1689727, at *16-17 (D. Or. Apr. 7, 2020) (certifying class of individuals with approved or pending immigration petitions and a subclass of visa applicants challenging the President's Proclamation on healthcare insurance); *Inland Empire—Immigrant Youth Collective v. Nielsen*, No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408, at *4, 12, 14 (C.D. Cal. Feb. 26, 2018) (certifying nationwide class of Deferred Action for Childhood Arrivals recipients whose benefits were terminated without notice or cause); *Rojas v. Johnson*, No. C16-1024 RSM, 2017 WL 1397749, at *7 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes with two subclasses each of asylum seekers challenging defective asylum application procedures); *A.B.T. v. U.S. Citizenship & Immigration Servs.*, No. C11–2108 RAJ, 2013 WL 5913323, at *1-2 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving a settlement amending practices by EOIR and USCIS that precluded asylum applicants from receiving employment authorization).

Here, as in the cases cited above, a nationwide class is "[]consistent with principles of equity jurisprudence" since the challenged adjudicatory policy and practice is national and "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In reviewing whether to certify a nationwide class, courts consider whether (1) there are similar cases currently pending in other jurisdictions, and (2) the plaintiffs are challenging a nationwide

policy or practice. *Id.*; *see, e.g.*, *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 589 (C.D. Cal. 2012); *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011).

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

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

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

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Franco-Gonzales v. Napolitano*, No. CV 10-02211 DMG (DTBx), 2011 WL 11705815, at *6 (C.D. Cal. Nov. 21, 2011) (quoting *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909, 913-14 (9th Cir. 1964)). The party seeking certification "do[es] not need to state the exact number of potential class members, nor is a specific number of class members required for numerosity." *In re Rubber Chemicals Antitrust Litig.,* 232 F.R.D. 346, 350 (N.D. Cal. 2005). The Ninth Circuit has upheld certification involving a class of twenty. *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (citing *Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (upholding

class of twenty) and *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (upholding class of eighteen)); *see also McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673-76 (W.D. Wash. 2010) (certifying class with twenty-seven known members). Courts generally find that numerosity is satisfied if the class includes forty or more members. *Rannis*, 380 F. App'x at 651.

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

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

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

analysts.[3] In each such year, USCIS AAO issued between seventeen and twenty-two such decisions, or an average of twenty per year. Moreover, USCIS is on track to continue this

[3] *See In re 5394964*, 2019 WL 7498547, at *2-4 (AAO Dec. 23, 2019); *In re 5150108*, 2019 WL 7492915, at *2-3 (AAO Dec. 19, 2019); *Matter of Q- Inc.*, 2019 WL 6827401, at *1 (AAO Nov. 8, 2019); *Matter of C-C-M-S-, LLC*, 2019 WL 6827398, at *4-5 (AAO Nov. 7, 2019); *Matter of F-L-, LLC*, 2019 WL 5889138, at *2-3 (AAO Oct. 24, 2019); *Matter of S-R-R- & 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-*, 2019 WL 2903297, at *5 (June 19, 2019); *Matter of U-T-, Inc.*, 2019 WL 2725583, at *2-3 (AAO June 6, 2019); *Matter of C-S-, Inc.*, 2019 WL 1903321, at *2-3 (AAO Apr. 10, 2019); *Matter of P- LLC*, 2019 WL 1556937, at *2-3 (AAO Mar. 19, 2019); *Matter of E-F- II, LLC*, 2019 WL 1470014, at *2-3 (Mar. 12, 2019); *Matter of I-L-T-G-*, 2019 WL 858072, at *4-5 (AAO Jan. 31, 2019); *Matter of B.O.C., Co. Ltd*, 2018 WL 6982195, at *1 (AAO Dec. 7, 2018); *Matter of C- USA Inc.,* 2018 WL 6735429, at *3-4 (AAO Nov. 29, 2018); *Matter of F-C-, Inc.*, 2018 WL 6242755, at *2-3 (AAO Nov. 18, 2018); *Matter of B-G- Inc.*, 2018 WL 6242737, at *2-3 (AAO Nov. 7, 2018); *Matter of C-C- Inc.*, 2018 WL 6124735. At *3-4 (AAO Nov. 1, 2018); *Matter of W-T- LLC*, 2018 WL 6075471, at *3-4 (AAO Oct. 31, 2018); *Matter of 3JD-A-, LLC*, 2018 WL 5222384, at *3 (AAO Oct. 4, 2018); *Matter of D-T-I-A-, Inc.*, 2018 WL 4963323, at *3-4 (AAO Sept. 27, 2018); *Matter of Q-C-, Inc*., 2018 WL 4537322, at *3-4 (Sept. 12, 2018); Matter of E-I-A-, 2018 WL 4510760, at *3-4 (AAO Sept. 6, 2018); *Matter of P-P-, LLC*, 2018 WL 4510759, at *4-5 (AAO Sept. 6, 2018); *Matter of C- Inc.*, 2018 WL 4092283, at *5 (AAO Aug. 20, 2018); *Matter of F-P- LLC*, 2018 WL 3609583, at *2-3 (AAO July 12, 2018); *Matter of S-D-M-, LLC*, 2018 WL 3609325, at *3 (AAO July 6, 2018); *Matter of [identifying information withheld by agency]*, 2018 WL 3475688, at 2-3 (AAO June 28, 2018); *Matter of P-P-E- Corp.*, 2018 WL 3392931, at *3-4 (AAO June 27, 2018); *Matter of H-C-M-I-*, 2018 WL 3167294, at *3 (AAO June 7, 2018); *Matter of C- LLC*, 2018 WL 3036126, at *5 (AAO May 31, 2018); *Matter of M-, Inc.*, 2018 WL 1709387, at *2-3 (AAO Mar. 16, 2018); *Matter of U-, LLC*, 2018 WL 1635137, at *4 (Mar. 15, 2018); *Matter of R-S-, Inc*., 2018 WL 1565938, at *3 (AAO Mar. 7, 2018); *Matter of T- LLC*, 2018 WL 1137751, at *3 (AAO Feb. 9, 2018); *Matter of E-A-, LLC*, 2017 WL 6988245, at *3-4 (AAO Dec. 27, 2017); *Matter of I- Inc.*, 2017 WL 5593016, at *1 (AAO Oct. 25, 2017); *Matter of N Inc.*, 2017 WL 5068246, at *3-4 (AAO Oct. 12, 2017); *Matter of E-ZS- Inc.,* 2017 WL 4550952, at *4-5 (AAO Sept. 15, 2017); *Matter of C-H-I-A-F-S-, Inc.*, 2017 WL 3843371, at *5-6 (AAO Aug. 4, 2017); *Matter of W-F- Inc.*, 2017 WL 3034819, at *4-5 (AAO June 29, 2017); *Matter of S-A-M-, Inc.*, 2017 WL 2844782, at *3-5 (AAO June 22, 2017); *Matter of A-D-, LLC*, 2018 WL 2844750, at *2-4 (AAO June 21, 2017); *Matter of D-A-, Inc*., 2017 WL 2844749, at *3-4 (AAO June 21, 2017); *Matter of A-C- Inc.*, 2017 WL 2844714, at *4-5 (AAO June 20, 2017); *Matter of [identifying information withheld by agency]*, 2017 WL 2342279, at *3-4 (AAO May 10, 2017); *Matter of C-H-T-, LLC*, 2017 WL 1508839, at *4-5 (AAO Apr. 16, 2017); *Matter of O-T-I-S-I-, LP*, 2017 WL 1409144, at * 3-4 (AAO Mar. 30, 2017); *Matter of C-I- & E-Inc.*, 2017 WL 1383986, at *3-4 (AAO Mar. 24, 2017); *Matter of V-*

practice in 2020; in addition to the decisions in Plaintiffs' cases, USCIS AAO issued four such decisions in the first two months of the year. *See In Re: 6411951*, 2020 WL 1133241, at *1 (AAO Feb. 27, 2020); *In Re: 6110184*, 2020 WL 1133239, at *1-2 (AAO Feb. 27, 2020); *In Re: 4377281*, 2020 WL 730104, at *1 (AAO Jan. 16, 2020); *In Re: 6015282*, 2020 WL 730096, at *1 (AAO Jan. 15, 2020).

In all such decisions, USCIS employs the same reasoning and the same or similar language in concluding that the OOH profile for a market research analyst does not demonstrate that a bachelor's degree in a "specific specialty" is normally required for entry into the profession, and thus does not satisfy the first regulatory test. To reach its conclusion that the educational prerequisite for a market research analyst is too varied to constitute a specific specialty, Defendant USCIS erroneously characterizes the OOH profile as listing "a range of educational credentials," *see*, *e.g.*, Exh. B, MadKudu Petition Denial at 4; Exh. D, Quick Fitting Petition Denial at 4; "degrees and backgrounds in various fields," *see*, *e.g.*, *In Re 4377281*, 2020 WL 730104, at *3 (AAO Jan. 16, 2020); "disparate fields of study," *see*, *e.g.*, *Matter of Q- Inc.*, 2019 WL 6827401, at *2 (AAO Nov. 8, 2019); and "degrees and backgrounds in a wide-variety of disparate fields," *See*, *e.g.*, *Matter of B.O.C. Co., Ltd*, 2018 WL 6982195, at *3 (AAO Dec. 7, 2018). Just as in Plaintiffs' cases, USCIS ignores the OOH's critical statement that market research analysts "typically" need a bachelor's degree in market research or a related field.

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).

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

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

These statistics support a reasonable estimate that the number of *current* putative class members in the class is at least forty—double the annual average of the AAO decisions—and

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[4] Other options include dropping the case altogether, re-filing the petition, moving to 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), http://blog.cyrusmehta.com/2018/07/administrative-review-versus-judicial-review-when-an-employment-based-petition-is-denied.html.

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

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

2. Plaintiffs' Claims Raise Legal and Factual Questions Common to the Class

Plaintiffs satisfy Rule 23(a)(2) because there are questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Commonality requires that the "class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Further, the plaintiffs' claims "must depend upon a common contention . . . of such a nature that it is capable of class-wide 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. However, the plaintiffs need not show that all questions, "or even a preponderance of questions," meet this standard; instead, "[s]o long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement." *Wang v.*

Chinese Daily News, Inc., 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at 359); *see also*, *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (explaining that a plaintiff "need not show . . . that every question in the case, or even a preponderance of questions, is capable of class wide resolution") (quotation marks omitted); *Mazza*, 666 F.3d at 589 (noting that "commonality only requires a single significant question of law or fact").

Class members need not be identical in all respects, and commonality may be satisfied, notwithstanding some "variation[]" among the facts of their cases, where the harm alleged is common to all class members. *Wit v. United Behavioral Health*, 317 F.R.D. 106, 127 (N.D. Cal. 2016). Accordingly, the existence of "shared legal issues with divergent factual predicates" satisfies Rule 23. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1101, 1019 (9th Cir. 1998)). In suits such as this one, commonality is satisfied where "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. Under such circumstances, individual factual differences among class members pose no obstacle to commonality." *Parsons*, 754 F.3d at 682 (quoting *Rosas v. Baca*, No. CV 12–00428 DDP, 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012)).

The proposed class readily satisfies Rule 23(a)(2)'s commonality requirement. First, the class is narrowly tailored to include only those sharing the same relevant facts. The class is limited by: the occupation at issue—market research analysts; the date that the petition was filed—2019 or thereafter; the reason for the denial—solely or partly based upon the first regulatory test; and finally, the impact of the denial—only those cases that otherwise would have been approved but for Defendants' misapplication of the first regulatory test. This latter limitation ensures that the class will not include U.S. employer petitioners whose H-1B petitions

are denied on a ground other than the question of whether the job is within a specialty occupation. Moreover, because all putative class members' petitions have been or will be denied due to the same legal error, the correction of which would lead to an approval, any individual differences in their cases are immaterial. *See Parsons,* 754 F.3d at 678 (finding commonality notwithstanding individual variations in harm suffered by class members in a challenge to conditions in Arizona prisons).

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

A further common question is whether USCIS engages in a pattern or practice of such erroneous decision-making, as Plaintiffs allege. Dkt. 1 ¶¶ 6, 27, 30, 48, 59, 63. Were this Court to find that it does, it also must find that the Plaintiffs and the proposed class members "have suffered the same injury"—an injury which is "capable of classwide resolution." *Wal-Mart*,

564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157). Determination of the legal issue in this case "will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke"—that is, whether USCIS misinterprets the statute and regulation and misreads the OOH, leading to erroneous denials of H-1B petitions for market research analysts. *Wal-Mart*, 564 U.S. at 350. Defendants' practices are either "unlawful as to every [putative class member] or [they are] not. The inquiry does not require [the Court] to determine the effect of those policies and practices upon any individual class member . . . or to undertake any other kind of individualized determination." *Parsons*, 754 F.3d at 678.

Should the Court agree that Defendants have misinterpreted the law and regulations under the INA and violated the APA, all who fall within the class will benefit from the uniform request for relief: 1) a declaration that the OOH profile for market research analyst demonstrates that a bachelor's or higher degree is normally the minimum requirement for entry into the occupation and thus, that the OOH demonstrates that a market research analyst satisfies the first regulatory test for specialty occupation; and 2) an order that USCIS correctly apply the statutory phrase "specific specialty" and the first regulatory test for specialty occupation to the petitions of all class members. Dkt. 1 at 20-21. Accordingly, a common answer as to this issue will "drive the resolution of the litigation." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Wal-Mart*, 564 U.S. at 350).

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

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

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

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

The representative parties will fairly and adequately protect the interests of the proposed class. Fed. R. Civ. P. 23(a)(4). "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985 (quotation omitted); *accord Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018). Plaintiffs' counsel are deemed qualified when they possess experience in previous class actions and cases

involving the same area of law. *See Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Lynch*, 604 F. Supp. at 37.

a. Class Representatives

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

b. Class Counsel

The undersigned class counsel possess the necessary experience and competency to adequately and vigorously litigate this matter in a manner that protects the interests of the absent class members. Plaintiffs are represented by attorneys from the American Immigration Council, American Immigration Lawyers Association, Joseph and Hall, P.C., Kuck Baxter Immigration LLC, and Van Der Hout, LLP, who have significant experience litigating class actions and other

complex cases in federal court, including immigration cases on behalf of noncitizens and U.S. businesses. *See* Exhs. E (declaration of Mary Kenney); F (declaration of Zachary Nightingale); G (declaration of Jesse M. Bless); H (declaration of Jeff Joseph); and I (declaration of Charles H. Kuck). They also possess extensive knowledge of immigration law. *Id.* Consequently, they possess the necessary resources to litigate this matter vigorously.

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

In addition to satisfying Rule 23(a), the proposed class also satisfies Rule 23(b)(2) which requires that "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). While Rule 23(b)(2) "requires that the primary relief sought is declaratory or injunctive," *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quotation omitted), it "does not require an examination of the viability or bases of class members' claims for declaratory and injunctive relief," but rather, whether class members seek uniform relief from a practice applicable to all of them. *Parsons*, 754 F.3d at 688.

In the Ninth Circuit, "[i]t is sufficient" that "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047. "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360. In contrast to Rule 23(b)(3) classes, "the focus [in a Rule 23(b)(2) class] is not the claims of the individual class members, but rather whether [the Defendants] ha[ve] engaged in a 'common policy.'" *In re Yahoo Mail Lit.*, 308 F.R.D. 577, 599 (N.D. Cal. 2015) (quotation omitted). Thus, "[t]he fact that some class

members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez*, 591 F.3d at 1123.

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

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion and enter an order certifying the proposed class under Rule 23(b)(2); appoint Plaintiffs as class representatives; and appoint the Plaintiffs' counsel from the American Immigration Council, American Immigration Lawyers Association, Joseph and Hall, P.C., Kuck Baxter Immigration LLC.

Respectfully submitted this 4th day of May, 2020,

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CERTIFICATE OF SERVICE

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

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/s/ Mary Kenney
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