

**NOTICE OF PROPOSED SETTLEMENT AND HEARING IN CLASS ACTION
LAWSUIT ABOUT H-1B PETITIONS FOR MARKET RESEARCH ANALYST
POSITIONS FILED ON OR AFTER JANUARY 1, 2019 WHICH U.S. CITIZENSHIP
AND IMMIGRATION SERVICES DENIED BASED ON A FINDING THAT THE
OCCUPATIONAL OUTLOOK HANDBOOK DOES NOT ESTABLISH THAT MARKET
RESEARCH ANALYST IS A “SPECIALTY OCCUPATION” UNDER 8 C.F.R.
§ 214.2(h)(4)(iii)(A)(1) AND, BUT FOR THIS FINDING,
USCIS WOULD HAVE APPROVED THE PETITION**

MADKUDU INC. ET AL. v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.,
Case No. 5:20-CV-02653-SVK
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TO ALL CLASS MEMBERS: You are hereby notified that a hearing (the “Fairness Hearing”) has been scheduled for October 19, 2021, at 10:00 am Pacific Time at the San Jose Federal Courthouse, Courtroom 6, 4th Floor, 280 S. 1st St., San Jose, CA 95113, before the Honorable Magistrate Judge Susan van Keulen of the United States District Court for the Northern District of California, for consideration of a proposed settlement of the claims that have been brought on your behalf in this lawsuit. Please note that the Fairness Hearing date may change without further notice. To confirm that the date has not been changed, you should check the Magistrate Judge’s weekly calendar, at <https://apps.cand.uscourts.gov/CEO/cfd.aspx?71bw> or the Court docket in this case, available through the electronic filing system via the Public Access to Court Electronic Records (PACER) system (instructions available at <https://cand.uscourts.gov/cases-e-filing/cm-ecf/>).

Purposes of this Notice

This notice has four purposes. The notice:

- A. Tells you who is a class member entitled to relief under the settlement agreement (*see* Section A.1. below for the class definition);
- B. Tells you about the proposed settlement and the fairness hearing;
- C. Tells you how to obtain more information; and
- D. Explains how you may object if you disagree with the proposed settlement terms.

Background

This class action lawsuit was filed on April 16, 2020 by two U.S. employers whose H-1B petitions for market research analyst positions had been denied by U.S. Citizenship and

Immigration Services (USCIS). Two other U.S. employers with denied market research analyst H-1B petitions later joined the lawsuit as plaintiffs. These employers brought the lawsuit on their own behalf and on behalf of similarly-situated U.S. employers. The lawsuit claims that USCIS unlawfully denies H-1B petitions for market research analyst positions when it wrongly finds that the Occupational Outlook Handbook (OOH) entry for market research analysts does not establish that this occupation is a “specialty occupation” and thus also finds that these H-1B petitions do not satisfy the first regulatory criterion as found in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The lawsuit seeks relief for U.S. employers whose petitions were denied on this basis and, but for USCIS’ finding regarding the OOH entry for market research analyst, the H-1B petitions would have been approved.

On November 17, 2020, the Court ruled that Plaintiffs’ claims could go forward as a class action. On February 18, 2021, the Defendants provided the certified administrative record to Plaintiffs and on March 15, 2021, Plaintiffs filed a motion for summary judgment asking the Court to decide as a matter of law that USCIS unlawfully engaged in a pattern and practice of denying H-1B market research analyst petitions under the first regulatory criterion as found in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and to stop USCIS from denying class members’ H-1B petitions on the ground that the OOH entry for market research analysts does not meet the first regulatory criterion. The Court stayed completion of briefing on this motion because the parties entered into negotiations and reached a settlement agreement which the Court has preliminarily approved.

A. Description of the Proposed Settlement Agreement

The following description summarizes the key points in the proposed settlement agreement. Information on how to obtain a copy of the entire proposed agreement is provided in **section B**.

Class Definition

1. Class members include:

All U.S. employers who, from January 1, 2019 through the date that the Court approves the settlement, filed a petition (Form I-129 or any successor form) 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 the petition based on a finding that the OOH entry for market research analyst, as it exists on the date of the settlement agreement, 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), as it exists on the date the Court approves the settlement; and
- But for this finding, the petition would be approved.

Overview of procedures for determining class membership and reopening class members petitions

2. All class members are eligible to move to reopen their denied H-1B petitions, without a filing fee, and for USCIS to readjudicate their petitions under new guidance outlined in the Settlement Agreement at Sections II.C and D.

3. Within ten (10) business days from the date the Court approves the settlement, USCIS will announce on its website the directions for class members to file a request to reopen. The website address is <https://www.uscis.gov/>.

4. Class members will have 180 days, beginning on the day that USCIS posts the announcement, in which to file the request to reopen.

5. Upon receipt of the reopening request, USCIS first will decide if the petitioner is a class member and if, at the time the reopening request is filed, there is any amount of time remaining on the period specified in the certified Labor Condition Application filed with the original H-1B petition. See ¶ 10, below. For all timely-filed reopening requests of class members in which there is time remaining on the period specified in the previously filed Labor Condition Application, USCIS will decide the reopening request within 90 days of the agency's receipt of the physical file at the adjudicating office. USCIS will attempt to prioritize reopening requests for petitions with LCAs expiring in less than 90 days after the reopening request is properly filed with USCIS. If USCIS intends to deny the class member's reopening request, USCIS will first send a Notice of Intent to Deny (NOID) that identifies the ground for denial of the reopening request and gives 30 days from the notice date for a response. USCIS will decide the reopening request within 60 days of receiving a response to the NOID.

6. USCIS has agreed to issue guidance to all H-1B adjudicators that shall be the standard for adjudicating all timely requests for reopening filed by class members. This standard is described in ¶¶ 10-13, below and in the Settlement Agreement at Section II.D.3.

7. USCIS also will follow this guidance when adjudicating all currently pending and future H-1B petitions for market research analyst positions for a period of five years from the date of the court approval of the settlement agreement, so long as the version of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and of the OOH, as they exist on the date the Court approves the settlement remains in effect. Petitioners with H-1B petitions pending after the Court approves the Settlement or filed in the future are not class members, however.

8. The USCIS announcement will identify the information to be included in the motion to reopen. The petitioner must: request reopening; provide the receipt number for the H-1B petition; confirm that the employment offer remains valid; indicate if the U.S. employer (the H-1B petitioner) wants a new start date and/or a new end date for the H-1B employment validity period (but only if the new date(s) falls within the period in the certified Labor Condition Application submitted with the H-1B petition); and demonstrate that the U.S. employer is a class member.

9. The USCIS announcement will include a standard procedure for a U.S. employer to demonstrate that it is a member of the class. The procedure is included in the Settlement Agreement at Section II.D.2. Among other requirements, a U.S. employer must include a copy of the USCIS's denial of their H-1B petition. If a U.S. employer appealed to and had their appeal dismissed by the Administrative Appeals Office (AAO), then the AAO denial must be submitted instead of the Service Center denial.

10. USCIS will follow the procedures identified in the Settlement Agreement at Section II.D.3 to determine whether to reopen and approve an H-1B petition in response to a U.S. employer filing a request to reopen. USCIS will determine whether the U.S. employer or agency (referred to as the "petitioner") established that it is a class member, by following the series of steps listed in the Settlement Agreement. USCIS may reject the reopening request if it finds that the petitioner is not a class member. If the petitioner is a class member, then USCIS will next determine if there is any amount of time remaining in the validity period specified by the certified Labor Condition Application submitted with the H-1B petition. If both of these conditions are met, then USCIS must reopen and re-adjudicate the H-1B petition under the standard found in the Settlement Agreement at Section II.D.3. If USCIS identifies an issue of fraud or willful misrepresentation, USCIS will reopen and send either a Request for Evidence (RFE) or a NOID.

11. If USCIS reopens and approves an H-1B petition, USCIS also must grant the petitioner's request for a different start and/or end date if the date(s) requested fall within the validity period specified in the Labor Condition Application filed with the H-1B petition.

12. In adjudicating a reopened H-1B petition involving the same parties and facts as in a prior H-1B approval, USCIS shall follow the recent deference guidance the agency issued on April 27, 2021, and should defer to the prior approval unless USCIS finds a material error, material change, or a new material fact(s).

Overview of guidance for adjudicating market research analyst H-1B petitions

13. USCIS will issue guidance to H-1B adjudicators stating that:
 - a. a bachelor's or higher degree in business administration with an official minor, major, concentration, or specialization in market research, marketing, or research methods is not a generalized degree;
 - b. a petitioner that will accept such a degree may demonstrate that its position qualifies as a specialty occupation as described in the Settlement Agreement at Section II.C.1.b; and
 - c. A petitioner that will accept a bachelor's or higher degree in communications, statistics, computer and information technology, and/or social science may demonstrate that its position qualifies as a specialty occupation if an official minor, major, concentration, or specialization in market research, marketing, or research methods is necessary to perform the job duties as described in the Settlement Agreement at Section II.C.1.c.

B. For Further Information

THIS IS A SUMMARY OF THE PROPOSED AGREEMENT. YOU SHOULD READ THE ENTIRE AGREEMENT. You may obtain a copy of the proposed settlement from: (1) USCIS website at <https://www.uscis.gov> or the Council's litigation page for the lawsuit at <https://www.americanimmigrationcouncil.org/litigation/uscis-unlawful-denial-h-1b-petitions-filed-american-businesses-spurs-class-action>, or (2) writing to Class Counsel at either of the addresses listed below:

Leslie K. Dellon
MadKudu Class Counsel
American Immigration Council
1331 G St. NW
Suite 200
Washington DC 20005

Clearinghouse@immcouncil.org

C. Procedures for Objection

You can ask the Court to reject the proposed settlement by filing an objection. You cannot ask the Court to order a different settlement. The Court can only approve or reject the settlement. If the Court rejects the settlement, the lawsuit will continue. If that is what you want to happen, then you must object.

You may object to the proposed settlement in writing. You also may appear at the Final Approval Hearing, either in-person or through your own attorney or in whatever other manner the Court permits. If you appear through your own attorney, you are responsible for paying your attorney, if required.

All written objections and supporting papers must:

- 1) Clearly identify the case name and number, which is *MADKUDU INC. ET AL. v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.*, Case No. 5:20-CV-02653-SVK
- 2) Be submitted to the Court either:
 - a. By mailing to: Clerk, U.S. District Court for the Northern District of California, 280 S. 1st St., 2nd Fl., San Jose, CA 95113. Both the envelope and cover letter shall state: “Attention: *MadKudu Inc. et al. v. U.S. Citizenship and Immigration Services, et al.*, Case No. 5:20-CV-02653-SVK (N.D. Cal.)
 - b. By filing in person at any location of the U.S. District Court for the Northern District of California. Consult the Court’s website at <https://www.cand.uscourts.gov/> prior to coming to find out about any COVID-19 restrictions in place.
- 3) **Be filed in person or received by the Clerk on or before October 4, 2021.**