Stephen Manning (SBN 013373)
stephen@innovationlawlab.org
Nadia Dahab (SBN 125630)
nadia@innovationlawlab.org
INNOVATION LAW LAB
333 SW Fifth Avenue #200
Portland, OR 97204
Telephone: +1 503 241-0035
Facsimile: +1 503 241-7733

Karen C. Tumlin (*pro hac vice* pending)
karen.tumlin@justiceactioncenter.org
Esther H. Sung (*pro hac vice* pending)
esther.sung@justiceactioncenter.org
JUSTICE ACTION CENTER
P.O. Box 27280
Los Angeles, CA 90027
Telephone: +1 323 316-0944

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN DOE #1; JUAN RAMON MORALES; JANE DOE #2; JANE DOE #3; IRIS ANGELINA CASTRO; BLAKE DOE; BRENDA VILLARRUEL; and LATINO NETWORK,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; KEVIN MCALEENAN, in his official capacity as Acting Secretary of the Department of Homeland Security; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of the Department of Health and Human Services; U.S. DEPARTMENT OF STATE; MICHAEL POMPEO, in his official capacity as Secretary of State; and UNITED STATES OF AMERICA,

Defendants.

Case No.: 3:19-cv-01743-SI

DECLARATION OF CHARLES WHEELER IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

I, Charles Wheeler, declare as follows:

1. I am an immigration attorney who has specialized in family-based immigration for 40 years. During this period, I have represented clients in their applications for adjustment of status and immigrant visas, I have trained practitioners, and have written articles and books on this subject including *Focus on the Child Status Protection Act* (AILA 3d ed. 2019); *Immigration Law and the Family* (AILA 5th ed. 2018); and *Affidavits of Support: A Practitioner's Guide* (AILA 2017), among others. I am considered a national expert in this issue.

2. I write to explain the practical implications of the immigrant visa allocation system and why it is important that children who are about to age out of their family preference category have access to emergency visa interviews. The practical implications of an individual aging out from an F-2A preference category to an F-2B preference category are profound, and for children from Mexico it could mean functionally extinguishing their opportunity to immigrate in that category.

3. Congress has placed a limit or a numerical cap on the number of foreign-born individuals who are allocated visas for admission to the United States annually as family-based immigrants. INA § 201(c)(1)(A)(i). A formula that imposes a cap on every family-based immigration category, with the exception of "immediate relatives" (spouses, minor unmarried children, and parents of U.S. citizens), governs family-based immigration. The formula allows unused employment-based immigration visas in one year to be dedicated to family-based immigration the following year, and unused family-based immigration visas in one year to be added to the cap the next year. This formula means that there are slight variations from year to year in family-based immigration. Because of the numerical cap, there are long waiting periods to obtain a visa in most of the family-based preference categories.

4. While visa allocation is complex, it is not a mystery, nor is predicting demand for visas in a particular category. One can see with some precision the backlog in each family-based category for each country and can predict with at least some degree of

accuracy when that category will become current for a petition filed today. In order to estimate when the priority date will become current, however, one must look at both the U.S. State Department's and U.S. Citizenship and Immigration Services' (USCIS) annual reports, since each agency maintains separate numbers on immigrant visa or adjustment of status applications, respectively, that are approved. The numbers contained in the State Department report, therefore, only indicate the family-based visa petitions, also known as Form I-130 petitions, that have been approved and forwarded to the National Visa Center and not applications for adjustment of status that are processed by the USCIS.

5. The State Department determines visa availability based on statutory limits for each preference category, per country caps, and current, past, and estimated demand. Applicants compete for visas primarily on a worldwide basis, and each country is subject to a 7 percent limit on the number of visas that are available in each preference category. The per-country limitation serves to avoid monopolization of the annual limitation by applicants from only a few countries. It publishes a monthly "Visa Bulletin" to notify preference applicants and regulate the visa allocation system by summarizing the availability of immigrant visa numbers each month.

6. It is impossible to gauge future visa availability by looking only at the Visa Bulletin for a specific month, however, because one must take into account the actual size of the backlog in each category; dates that determine visa availability can also "retrogress," that is they can go back in time from month to month. The backlog is best determined by looking at the Department of State's Annual Immigrant Visa Waiting List Report, as well as a history of visa advancement in that particular category. According to the November 1, 2019 version of the Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center, the family second preference category will receive 114,200 visa numbers and 23 percent of those will be allocated to the F-2B category, 26,260.[1] The F-2A category will be allocated 87,934 visas.

[1] Available at: https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2019.pdf (last visited 4/28/2020).

7. For example, looking only at the Visa Bulletin for April 2020 would reveal that applicants in the F-2A category, all countries are "current" – that means there are visas available and there is no backlog. In contrast, all countries are backlogged in the F-2B preference category. For all countries other than Mexico and Philippines, if an applicant has a priority date before January 15, 2015, that petition is said to have a visa available. But that approximately five-year period between that date and April 1, 2020 does not mean that applicants covered by petitions in the F-2B category filed today will become current in that same period of time. Similarly, priority dates prior to January 15, 1999 are now current for Mexicans in the F-2B category, but that does not mean that applicants covered by such petitions filed today will be current in 21 years. In other words, the backlog does not progress linearly. In fact, the actual time delays have remained astounding.

8. There are only 26,266 visas available each year in the F-2B category on a worldwide basis. There are currently four oversubscribed countries: China, India, Mexico, and Philippines. An oversubscribed country is one where there is sufficiently heavy demand in that particular preference to require a cutoff date substantially earlier than the worldwide date. In plain terms, it means that the country has reached its per-country limit.

9. Applying the 7 percent limit, then, the number of F-2B visas available to a country is 1,838. As of November 1, 2019, the number of pending F-2B applicants from Mexico was 124,170. The length of time it will take to clear up the current backlog for the Mexico F-2B category is approximately 67 years (124,170 divided by 1,838). A Mexican national who files a petition today in the F-2B category can expect it to become current at the end of 2087.

10. That the Visa Bulletin does not move in a linear fashion is further underscored by looking at past Visa Bulletins. For example, in October 1992, the F-2B preference category cutoff for Mexico was September 1, 1981. Now, 28 years later, the Visa Bulletin has cutoff date has advanced only 18 years. The rate of progression has decreased as well as the backlog built. In October 2006, the cutoff date for F-2B Mexico was December 1,

1991. In the 14 years since October 2006, the cutoff date has progressed approximately 7 years.

11. There are many individuals who are not protected by the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002).[2] The CSPA was not intended to address the normal backlog in the family– and employment-based preference system, nor to protect all applicants for immigration benefits from the consequences of aging out. Rather, it was meant to ensure that certain family members who turn 21 will not be prejudiced by delays in the processing of their petitions by USCIS.

12. The CSPA has solved the age-out problem for several types of beneficiaries, especially those who are or were classified as immediate relatives. These beneficiaries will never convert to the first-preference category on turning 21. But for those who cannot take advantage of the CSPA, or who age out after taking into account the protections under the CSPA, turning 21 means either converting from the F-2A to the F-2B category or losing derivative beneficiary status (although derivatives in the F-2A preference category may still automatically convert to F-2B).

13. Any applicant who converts from F-2A to F-2B with a priority date after the current F-2B cutoff of December 1, 1999 will have much longer to wait. For example, an underage Mexican child not covered by the CSPA with a priority date of 2018 would, if she does not get her visa interview before turning 21, convert to the F-2B category and have to wait before a visa became available.

14. This example is not a hypothetical, either. It is a sufficiently common occurrence that the U.S. Consulate in Ciudad Juarez, Mexico has provided for emergency age-out interviewing.

15. I am aware of a case of an underage Mexican national who will turn 21 in June 2020 and, because of the limitations of CSPA will not qualify for its protection, would benefit from emergency consular interviewing to prevent the age-out. Without an

[2] The CSPA has been codified at Immigration and Nationality Act (INA) §§201(f), 203(h), 204(a)(1)(D)(iii), 204(k), 207(c)(2), and 208(b)(3) [8 U.S. Code (USC) §§1151(f), 1153(h), 1154(a)(1)(D)(iii), 1157(c)(2), 1158(b)(3)].

interview date before turning 27, this individual would likely convert to the F-2B category and would have decades to wait.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 28, 2020 at Berkeley, California.

CHARLES WHEELER