Honorable John H. Chun

Diane Butler
WSBA No. 22030
Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610
206.757.8354
dianebutler@dwt.com

Jonathan D. Wasden
MSB No. 100563
Wasden Law
9427 Goldfield Lane
Burke, VA 22015-1173
843.872.4978
jon@wasden.law
Appearing Pro Hac Vice

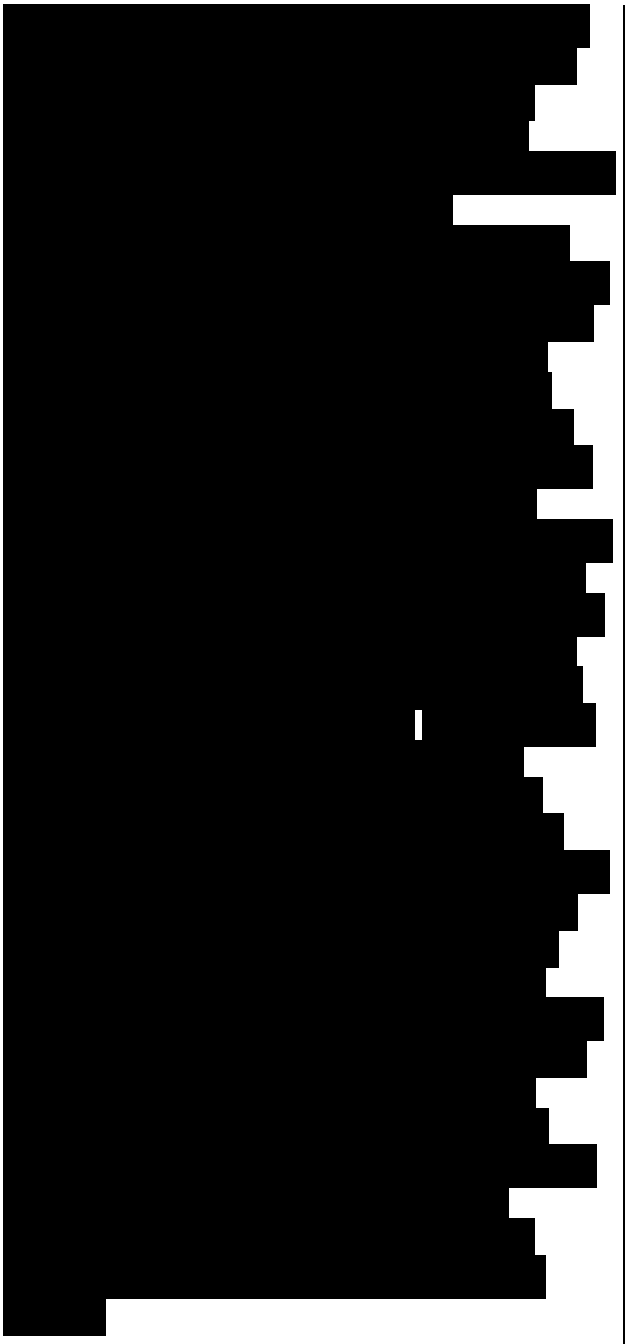
Jesse M. Bless
MA Bar No. 660713
Bless Litigation LLC
6 Vineyard Lane
Georgetown, MA 01833
718.704.3897
jesse@blesslitigation.com
Appearing Pro Hac Vice
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[redacted]

Case No. 2:23-cv-01227-JHC

FIRST AMENDED COMPLAINT



Plaintiffs,

vs.

United States Department of Homeland Security,

Defendant.

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

INTRODUCTION

Plaintiffs hereby file this amended complaint pursuant to Rule 15(a)(1)(A) to make immaterial corrections, add parties, and add a cause of action to challenge the arbitrary, capricious, and unlawful promulgation of a legislative rule without notice and comment.

Before Defendant, United States Department of Homeland Security ("DHS"), may rely on evidence to label a foreign national as inadmissible for fraud or for having made a willful misrepresentation of a material fact, Defendant must provide such evidence to the aggrieved person and provide the person with the opportunity to rebut such evidence prior to finding them inadmissible. Plaintiffs are aggrieved foreign nationals who were neither notified, nor afforded the opportunity to rebut evidence DHS relied on to find them inadmissible. DHS made a blanket finding because each Plaintiff sought employment or worked on Optional Practical Training ("OPT") for one of five businesses while on a student visa. Each business, Andwill Technologies, AzTech Technologies LLC, Integra Technologies LLC, WireClass Technologies LLC, and Global IT Experts (collectively "the OPT Companies"), participated in a scheme to defraud DHS through the recruitment and employment of foreign national students. These nefarious companies are alleged to have asked students to pay the company for pre-employment training in exchange for an employment offer letter so that the student could apply for and eventually receive an OPT employment authorization document ("EAD"). Some, but not all, students who received offer letters or were employed by these companies knowingly and willfully made misrepresentations to DHS or engaged in fraud. Plaintiffs did not, yet DHS sanctioned them anyway without providing them notice and affording them an opportunity to defend themselves. Plaintiffs have since moved on to promising, productive careers yet find themselves ostracized from the immigration system. They do not seek an order from this Court to wipe the slate clean; they

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

merely seek an opportunity to confront DHS and prove that their association with an OPT Company does not render them inadmissible for having either engaged in fraud or for knowingly and willfully making a misrepresentation of material fact when seeking to procure an immigration benefit.

PARTIES[1]

1. [redacted]

[1] Table of material information for each Plaintiff is included for reference as Exhibit A.

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

3. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

6. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

9. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

12. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

15. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

18. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

21. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

24. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

27. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

30. [redacted]

32. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

33. [redacted]

35. [redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

69. [redacted]

[redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

71. [redacted]

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

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Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

[redacted]

91. Defendant is the United States Department of Homeland Security ("DHS") which is the parent agency of United States Citizenship and Immigration Service ("USCIS" or "Defendant"). It is also the parent agency of U.S. Customs and Border Patrol ("CPB"). Both USCIS and CBP upload derogatory information relating to "aliens" into a joint Consular Consolidate Database ("CCD") which is accessed and updated by three agencies: DHS, Department of State ("DOS"), and the Department of Labor ("DOL"). These agencies play discrete and legally distinct roles in the process of approving and revoking immigration benefits for employers and foreign nationals. DHS and its component agencies at CBP and USCIS have independent authority to mark a foreign national as inadmissible and construe statutory grounds of inadmissibility at 8 U.S.C. § 1182(a). DHS is an executive agency of the United States, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1).

JURISDICTION

92. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this is a civil action arising under the Constitution, laws, or treaties of the United States. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 2201, as this is a civil action seeking, in addition to other remedies, a declaratory judgment.

93. The United States has waived sovereign immunity, allowing this Court to review challenges to final agency actions and unlawfully withheld action under the APA. 5 U.S.C. § 702. The standards of review for these actions are found in 5 U.S.C. § 706 and the body of law interpreting the APA.

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Seattle, WA 98104-1610

94. There is a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986), and it is "familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

95. There is no alternative forum to challenge the questions of law presented in this case related to DHS's determinations that Plaintiffs are inadmissible, failed to maintain status, lack good moral character, or made a knowing and willful misrepresentation to procure an immigration benefit through their affiliation with the OPT Companies.

96. Each Plaintiff now knows DHS found them inadmissible and entered this information into an electronic database without any proceedings ever being initiated or any notice provided that allowed the individuals to retract or explain derogatory information and present evidence on their behalf.

97. Defendant has found Plaintiffs inadmissible (or has failed to establish his or her admissibility) or ineligible for an immigration benefit due to alleged fraud or willful misrepresentation under the Immigration & Nationality Act ("INA") § 212(a)(6)(C)(i) (8 U.S.C. § 1182(a)(6)(C)(i)); or deportable for failing to continuously maintain lawful status under INA § 237(a)(l)(C)(i) (8 U.S.C. § 1227(a)(l)(C)(i).

98. DHS's decisions against Plaintiffs are the culmination of a process known only to the agency and its constituent parts for which there is no further opportunity to review.

99. This is an active case and controversy. The parties are sufficiently adversarial, and Plaintiffs are former students who are aggrieved after having a notation of fraud, failure to maintain status, or lack of good moral character placed on their records, thereby permanently branding each of them *as persona non grata*.

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Seattle, WA 98104-1610

100. The government *could be right* in particular instances, but the policy and procedure Defendant used to make blanket determinations without notice and opportunity for Plaintiffs to mount any defense are not in accordance with law. This Court can redress the Defendant's actions.

101. Interpretations of a statute involve pure questions of law that are reviewable under the APA.

102. An evaluation that a foreign national "made a fraudulent or willful misrepresentation," failed to maintain lawful status or "lacked good moral character" are nondiscretionary, legal determinations that involve predicate criteria. *Cervantes-Gonzalez v. INS*, 244 F.3d 1001, 1004 (9th Cir. 2000); *Kungys v. United States*, 485 U.S. 759, 108 S. Ct. 1537 (1988).

103. "[A]n administrative agency is required to adhere to its own internal operating procedures." *See also Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).

104. Plaintiffs in this civil action do not challenge consular decisions directly or indirectly. Only DHS's interpretation of statutes and its component agencies' compliance with procedure is under scrutiny in this case.

105. "The two processes—USCIS petition approval and consular visa issuance—are authorized by different statutory subsections and accomplished by personnel attached to distinct agencies that are not even housed in the same Executive department." *Coniglio v. Garland*, 556 F. Supp. 3d 187, 201 (E.D.N.Y. 2021) (*comparing* 8 U.S.C. § 1154 with 8 U.S.C. § 1201).

106. "Thus, while a consular official's [u]njustifiable refusal to vise a passport. . . is beyond the jurisdiction of the court, USCIS's independent decision to permit a visa application to

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

move forward is not." *Coniglio*, 556 F. Supp. 3d at 187 (internal quotations and additional citations omitted).

107. Plaintiffs are not seeking an order directing the State Department or consular officer to grant a visa or even declare any of their immigration status or current or future eligibility for any lawful status.

108. Plaintiffs seek an order directing Defendants to provide an opportunity for each affected individual to show he or she "maintained valid status," possesses "good moral character" and did not make a "knowing and willful misrepresentation" by and through any association with the OPT Companies.

109. The Ninth Circuit also has explained that it "is the duty of a reviewing court to ensure that an agency follows its own procedural rules." *Kelley v. Calio*, 831 F.2d 190, 191-92 (9th Cir. 1987).

110. Indeed, an agency "does not have the discretion to misapply the law," *Mejia v. Ashcroft*, 298 F.3d 873, 878 (9th Cir. 2002); an unreasonable reading of the regulatory language is therefore arbitrary and capricious. *See Salehpour v. INS*, 761 F.2d 1442, 1447 (9th Cir. 1985) ("Where the objective criteria of a regulation are clearly met, there is no room for an agency to interpret a regulation so as to add another requirement.").

111. There are no statutory or judicially created principles that preclude this Court from setting aside DHS's decision-making, policies, and its interpretation of the INA if any is found to be arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 706.

112. Entry of an order to set aside, vacate and issue declaratory judgment in Plaintiffs' favor will serve a "useful purpose" by reinforcing that the judiciary is "the final authority on issues of statutory construction" with the power to ensure federal agencies follow their own policy

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

and regulations. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 843 (1984); *Kelly*, 831 F.2d at 191-92.

VENUE

113. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(C), because Plaintiff [redacted] resides in King County, Seattle, Washington, and there is no real property at issue.

114. Plaintiffs are appropriately joined under Federal Rule of Civil Procedure 20(a)(1)(A) because they assert a right to relief jointly or severally with respect to and arising out of the same series of transactions or occurrences. Under Fed. R. Civ. P. Rule 20, persons may join in one action if: "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). "[J]oinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724, 86 S. Ct. 1130 (1966); *see Ferger v. C.H. Robinson Worldwide, Inc.,* Case No. C06-174RSL, 2006 WL 2091015 2006 U.S. Dist. LEXIS 50908 (W.D. Wash. 2006).

115. Defendant sanctioned each Plaintiff in the exact same way without notice and an opportunity to contest the sanction through their association with the OPT companies. The material facts and injuries to Plaintiffs are the same.

116. The questions of law and narrow scope of relief against DHS common to all similarly aggrieved Plaintiffs favors joinder of Plaintiffs' claims in this civil action.

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

LEGAL BACKGROUND

ADMINISTRATIVE PROCEDURE ACT

117. Federal agencies must comply with the APA when crafting and enforcing final agency actions (e.g., decisions, sanctions, orders, regulations, and legislative rules). 5 U.S.C. § 553.

118. Courts have authority to review and invalidate final agency actions that are not in accordance with the law, procedurally defective, exceed agency authority, lack substantial evidence, or are arbitrary and capricious. 5 U.S.C. § 706.

119. The APA defines "adjudication" to be the "agency process for the formulation of an order..." *Id.* at § (7).

120. The APA defines an administrative agency "order" as: "the whole or a part of a final disposition, whether affirmative, *negative*, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing…" 5 U.S.C.§ 551(6) (emphasis added).

121. Agency orders may take the form of "sanctions" or "relief" (granting of a benefit).

122. The APA defines a "sanction" to be:

> (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
> (B) withholding of relief;
> (C) imposition of penalty or fine;
> (D) destruction, taking, seizure, or withholding of property;
> (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
> (F) requirement, revocation, or suspension of a license; or
> (G) taking other compulsory or restrictive action;

Id. at § 551(10).

123. The "relief" referenced in § 551(10)(B) is defined at § 551(11) as:

the whole or a part of an agency—

> (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

> (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
> (C) taking of other action on the application or petition of, and beneficial to, a person;

Id.

124. The "agency action" (i.e., sanction or relief) requires written notice to the affected party, an opportunity to respond, and an explanation of its final action including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act…" 5 U.S.C. § 551(13).

125. The agency "…shall make available for public inspection in an electronic format its …(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases…" 5 U.S.C. § 552(a)(2), and (5).

126. Upon request the agency must provide access to an individual's records and receive copies of all documents and data where the individual is referenced. *Id.* § 552a(d) and (e).

127. Agencies are required to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure *fairness to the individual in the determination*…" *Id.* at §552a(e)(5) (emphasis added).

128. When an agency refuses to amend an individual's record in accordance with a request the requestor may sue in federal court. *Id.* §552a(g)(1)(A)

129. When an agency fails to provide requested information on an individual the law grants the requestor the ability to sue. *Id*. §552a(g)(1)(B).

130. DHS is required to provide notice of an adjudication to "interested parties." 5 U.S.C. § 554(b). This notice must include information on the timing of the adjudication, the legal authority the agency relies on for the adjudication, and the matters of fact and law at issue. *Id.*

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

131. The agency must also provide the interested party with the opportunity to submit evidence and legal arguments supporting their request for relief. *Id.* at § 554(c).

132. The agency must also provide the individual with notice of adverse final agency actions. 5 U.S.C. 555(e).

133. When conducting an adjudication resulting in a sanction, the proponent of the order has the burden of proof. 5 U.S.C. § 556(d). The interested party harmed by the sanction or adverse order is entitled to counsel and an opportunity to view evidence against them and submit new evidence in rebuttal. *Id.*

134. Agencies must comply with Constitutional due process requirements when their orders include sanctions. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965)).

135. The Supreme Court explained that any final agency action based on adverse facts must be preceded by notice and an opportunity to be heard. *Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019).

IMMIGRATION AND NATIONALITY ACT

136. The INA, 8 U.S.C. § 1101, *et seq*, divides authority primarily between three separate agencies: DHS, DOL, and DOS.

137. DHS is responsible for determining if the applicant for an immigration benefit meets all the substantive statutory criteria for a given visa category or other benefit type. *See* 8 U.S.C. §§ 1101, 1184, 1153.

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

138. Depending on the visa category, the DOL has the duty to set and enforce wage and working condition requirements as well as to take steps to protect US workers. 8 U.S.C. § 1182(n), (o), and (p).

139. DOS has the limited role of determining statutory *admissibility* as defined by § 1182(a). Even if DHS determines an individual is eligible for the benefit sought their visa may be denied if DOS determines they do not me the admissibility criteria. 8 U.S.C. § 1201.

Finding of Fraud or Willful Misrepresentation

140. Section 1182(a) of Title 8 designates "[c]lasses of aliens ineligible for visas or admission." 8 U.S.C. § 1182(a).

141. For instance, "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." 8 U.S.C. § 1182(a)(6)(C)(i).

142. A misrepresentation must be knowing, willful and material, meaning the applicant must be fully aware of the nature of the information sought and knowingly, intentionally, and deliberately make an untrue statement. *Matter of S- and B-C-*, 9 I. & N. Dec. 436, 447 (A.G. 1961).

143. The definition of "materiality" with respect to 8 U.S.C. § 1182(a)(6)(C)(i) has two components: A misrepresentation made in connection with an application for a visa or other documents, or with admission to the United States, is material if either: (1) The individual is ineligible on the true facts; or (2) "the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she be inadmissible." *Id*.

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

144. A finding of fraud or misrepresentation is a sanction as defined in the APA. *See* 5 U.S.C. § 551(10).

145. The ground of inadmissibility is a penalty and thus qualifies as a "sanction." *Policy Manual*, Vol. 8, part j, Ch. 2 https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2 (last visited July 31, 2023)

146. The sanction only applies to communication from the "alien" or foreign national. 8 U.S.C. § 1182(a)(6)(C)(i). Thus, these sanctions can only be made against "the alien" or foreign national. The petitioning US company, by definition, cannot be found "inadmissible" because neither the corporate entity nor the US owners need visas to enter the country or otherwise establish admissibility to the US.

147. To sanction a foreign national under 8 U.S.C. § 1182(a)(6)(C)(i) the relevant agency must determine if the "alien" made an affirmative communication directly to an agency administering portions of the INA.

148. The relevant agency must find that the "alien's" communication with the agency was in conjunction with a request for immigration benefits. *Id.*

149. The relevant agency must find that the "alien" knew their communication was false at the time it was made to the agency. *Id.*

150. Finally, the relevant agency must determine if the "alien's" knowingly false communication was material to the final agency action. *Id.*

151. The Government will not consider a misrepresentation "material," and therefore will not find an alien inadmissible based on the misrepresentation if the noncitizen retracts or corrects the misrepresentation once the government notifies the noncitizen of the allegation. *See Matter*

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

of R-R-, 3 I. & N. Dec. 823 (BIA 1949); *Matter of M-*, 9 I. & N. Dec. 118 (BIA 1960); *Matter of R-S-J-*, 22 I. & N. Dec. 863 (BIA 1999).

152. USCIS's Policy Manual instructs that "the [adjudicating] officer should keep in mind the severe nature of the penalty for fraud or willful misrepresentation. The person will be barred from admission for the rest of his or her life unless the person qualifies for and is granted a waiver. The officer should examine all facts and circumstances when evaluating inadmissibility for fraud or willful misrepresentation." *Policy Manual*, Vol. 8, part j, Ch. 2

153. Section 1227(a)(1)(B) of Title 8 of the U.S. Code classifies an individual as a deportable alien if his or her nonimmigrant visa (such as an F-1 student visa or H-1B nonimmigrant employment-based visa) has been revoked.

154. Section 1227(a)(1)(C)(i) of Title 8 of the U.S. Code applies to an "alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted."

The F-1 Program

155. An F-1 visa provides foreign national students valid immigration status for the duration of a full course of study at an approved academic institution in the United States. 8 U.S.C § 1101(a)(15)(F)(i).

156. The Immigration and Nationality Act authorizes a "F" nonimmigrant visa category or "student visa" for:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an ... academic high school ... in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

> place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn...

8 U.S.C § 1101(a)(15)(F)(i).

157. An F-1 visa provides foreign national students valid immigration status for the duration of a full course of study at an approved academic institution in the United States. *Id*.

158. The INA provides foreign national students and their derivative spouses and children, designated as F-2, valid Immigration status for the duration of a full course of study at an approved academic institution in the United States.

159. DHS monitors the academic progress and movement of foreign students and exchange visitors from entry into the United States to departure through the Student and Exchange Visitor Information System ("SEVIS"). *See* About SEVIS | Study in the States (dhs.gov), https://studyinthestates.dhs.gov/site/about-sevis (last accessed July 31, 2023).

160. The regulations at 8 C.F.R. § 214.2(f)(1) establish the procedure by which a foreign national may pursue his or her course of study as an F-1 nonimmigrant. This federal regulation requires that a nonimmigrant student submit a Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, to SEVIS that is issued in the student's name by an approved school. 8 C.F.R. § 214.2(f)(1)(i)(A)-(B).

161. The student must also possess documentary evidence of financial support in the amount indicated on the form. *Id*.

162. Students who enter the United States with F-1 visas are subject to an array of regulations. 8 C.F.R. § 214.2(f).

163. The regulations govern participation in an authorized "practical training" role following the completion of studies. 8 C.F.R. § 214.2(f)(10)(i).

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Seattle, WA 98104-1610

164. There are two types of practical training programs. 8 C.F.R. § 214.2(f)(10)(ii).

165. Curricular Practical Training ("CPT") is any "alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school" that is an "integral part of an established curriculum." 8 C.F.R. § 214.2(f)(1)(i).

166. Optional Practical Training ("OPT") is temporary employment that is "directly related to the student's major area of study." 8 C.F.R. § 214.2(f)(1)(ii).

167. Once a student has completed his or her course of study and any accompanying practical training, he or she has sixty days to either depart the United States or transfer to another accredited academic institution and seek a transfer of the F-1 visa. 8 C.F.R. § 214.2(f)(5)(iv).

168. If a student voluntarily withdraws from the F-1 program, he or she has fifteen days to leave the United States. *Id*.

169. A student who "fails to maintain a full course of study without the approval of the DSO [Designated School Official] or otherwise fails to maintain status" must depart the United States immediately or seek reinstatement. *Id*.

170. To apply for OPT a student asks the DSO to recommend them for the program. The recommendation is made after determining the job corresponds to the degree the student earned.

171. The DSO makes recommendations by endorsing the Form I-20 and making notations in SEVIS.

172. The DSO asks students for information to determine if the practical training is related or in furtherance of the student's discipline.

173. In conjunction with the request OPT students file a Form I-765 Application for Employment Authorization.

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174. Students list employment classification on the employment application.

175. For OPT programs beginning prior to awarding a degree the classification is (c)(3)(A).

176. For OPT programs beginning subsequent to awarding a degree the classification is (c)(3)(B).

177. For STEM OPT programs beginning prior to awarding a degree the classification is (c)(3)(C).

178. The Form I-765 asks STEM OPT students the following additional questions:

a) The student's degree (major course of study and title of degree);
b) The employer's name as listed in E-Verify; and,
c) The employer's E-Verify Company Identification Number.

179. E-Verify is a program administered by the Social Security Administration and USCIS that confirms an employer's legitimacy and the employee's eligibility to work in the US.

180. STEM OPT students must submit a Form I-983 Training Plan for STEM OPT Students.

181. On the Form I-983 the student is asked for their name, email address, name of school recommending STEM OPT, name of school where the degree was earned, SEVIS School Code for the school recommending STEM OPT, the DSO's name and contact information, student's SEVIS ID number, the period requested for STEM OPT, the Qualifying Major and Classification of Instructional Program's Code, level of degree, date awarded, employment authorization number.

182. The employee is not asked any questions related to payment for training, nor is there any information in the form instruction that would alert unaware students that paid training was prohibited.

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The H-1B Visa

183. The H-1B visa was created in the Immigration Act of 1990, Pub. L. 101-649 (1990), and allowed foreign nationals to temporarily work in the United States in "specialty occupations" for a period not to exceed six years. 8 U.S.C. §§ 1101(a)(15)(h)(i)(B), 1182, and 1184.

184. To receive a "specialty occupation" visa for an employee the employer must establish to the agency it meets each of the three tests:

1. Does the occupation require a highly specialized body of knowledge?
2. Does the occupation require a degree in a specific specialty? And
3. Does the prospective employee have both a degree and knowledge?

8 U.S.C. § 1184(i).

185. The maximum number of new H-1B visas available each fiscal year is capped at 85,000.

186. The initial H-1B visa is referred to as the "cap H-1B."

187. The structure of the law anticipated employers of nonimmigrant H-1B workers would eventually petition for an immigrant visa under 8 U.S.C. § 1153(b)(2) and (3) ("EB2" and "EB3" visas respectively).

188. Two things became immediately apparent from the inception of the H-1B visa: First, the United States had a shortage of information technology ("IT") workers; Second, owing to India's heavy investment in information technology education in the 1980s (and continuing on into the present) the vast majority of H-1B visas have always been petitioned on behalf of Indian Nationals.

189. Roughly 73% of new H-1B visa holders are from India.

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

190. Within a few years another fact became glaringly obvious: due to 8 U.S.C. § 1152(a)(2)'s per country limits on immigrant visas, a backlog of Indian Nationals waiting for immigrant visas steadily grew. These backlogs made it impossible for H-1B holders to secure an immigrant visa in the H-1B's six year maximum, forcing highly skilled employees to leave the country and wait years for an immigrant visa.

191. Also, at the time the visa was created, there were no provisions allowing the employee to change employers while on an H-1B. This made the H-1B visa holders vulnerable to mistreatment.

192. Congress acted to remedy these problems in the *American Competitiveness in the 21st Century Act* ("AC21"), Pub. L. 106-313 (2000). At § 104(c), Congress authorized H-1B holders with an approved immigrant visa petition, who were waiting for their visa to be current, to stay in the United States until their immigrant visa was available. That provision states the qualifying H-1B holder "may apply for, and the [Secretary] may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon." *Id*.

193. Also, at § 105 Congress granted H-1B visa holders the ability to change employers in the US. Codified at 8 U.S.C. § 1184(n)(1):

> [a] nonimmigrant alien described in paragraph (2) who was *previously issued a visa or otherwise provided nonimmigrant status under section* 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

Id. (emphasis added).

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Seattle, WA 98104-1610

194. Underpinning both of these newly created benefits was the requirement for the nonimmigrant to secure the initial cap H-1B visa. The law endowed cap H-1Bs with a recognizable right and value to the employee, and not the employer. If the employee does not have a cap H-1B they cannot use the benefits and protections created by Congress.

STATEMENT OF THE FACTS

195. Plaintiffs are former students who lawfully entered the United States to pursue a full course of study.

196. Plaintiffs pursued a full course of study and then sought to extend their status in the United States through practical training.

197. Plaintiffs received an offer of employment from one of the four OPT Companies.

198. These companies marketed themselves to schools and students as information technology staffing companies with clients who needed IT workers for short-term projects.

199. IT staffing is a legitimate business that employs many OPT and H-1B foreign national employees. Indeed, major technology companies like Google, Microsoft, Apple, and others have large numbers of American and foreign nationals employed by staffing companies.

200. The vast majority of Indian H-1Bs work for a staffing company and complete projects on contracts for larger companies.

201. Typically, the staffing company agrees to provide highly skilled IT professionals to a "vendor," which is a separate company. The vendors compete against other vendor companies for specific projects with an "end client." The winning vendors supply workers with the requisite skills from staffing companies.

202. IT staffing thus provides larger companies ("end clients") flexibility to accomplish shorter and long-term projects without having to hire full-time employees.

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Seattle, WA 98104-1610

203. The OPT Companies solicited employees from schools and communicated with DSOs.

204. They told DSOs and the foreign nationals that they were legitimate staffing companies with contracts with vendors with end client projects.

205. The OPT Companies told DSOs and Plaintiffs that they would employ them and place them on these contracts to ultimately work at an end client.

206. USCIS's E-Verify program had verified the OPT Companies, indicating they were legitimate companies with whom Plaintiffs could seek employment.

207. Each Plaintiff made a request to the DSO for practical training.

208. Each Plaintiff updated their SEVIS account to accept OPT.

209. Each Plaintiff submitted a Form I-765 listing the applicable eligibility classification for OPT.

210. Plaintiffs who applied for STEM OPT queried E-Verify system to confirm the employer was authorized to employ students in OPT and submitted a Form I-983.

211. None of the Plaintiffs were asked by the US immigration agencies if they had paid for training, and none of the Plaintiffs made representations about paid training when seeking to procure an immigration benefit.

212. At the time Plaintiffs received a job offer from one of the OPT Companies they had no warning or reason to believe that the offer was not bona fide.

213. Plaintiffs accepted employment from the OPT Companies, which promised to provide training services, networking opportunities, and internships.

214. The OPT Companies commonly represented that new employees needed introductory training prior to being placed on contracts with vendors or end clients.

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215. The OPT Companies offered upgraded training programs and charged a fee for the service.

216. Plaintiffs, all recent college graduates without prior exposure to the United States employment market, perceived the opportunities as legitimate employment opportunities and needed pre-employment training.

217. Nothing in the government forms or applications for practical training alerted Plaintiffs to any problems associated with paid training prior to the start of employment.

218. Nothing on the forms or applications asked whether the student paid any fees to the potential employer.

219. Following completion of training, the OPT Companies told Plaintiffs that their resumes would be marketed to vendors and end clients.

220. However, the OPT Companies rarely marketed the students and left them waiting without an end client.

221. The OPT Companies were not legitimate, and DHS uncovered their scheme to defraud the government, schools, and foreign national students.

222. Rather than protect the students, however, DHS secretly sanctioned them as if they were co-conspirators who knowingly participated in the fraudulent operation.

223. Several individuals like [redacted] ended association with the fraudulent companies in under a month. Following training and failure to secure a contract with a client Plaintiff [redacted] saw the nature of the scam and transferred his practical training to a legitimate IT staffing company.

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224. Notwithstanding the typically short tenure with these companies, DHS labeled Plaintiffs, the victims of the fraud, as "knowing co-conspirators" and issued inadmissibility determinations which were entered into government databases.

225. The agency describes adjudicatory outcomes of inadmissibility to be "penalties." Policy Manual, Volume 8, Chapter 9, 2023on E. https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2 (accessed September 9, 2023) ("When making the inadmissibility determination, the officer should keep in mind the severe nature of the penalty for fraud or willful misrepresentation.").

226. Thus, these penalties are sanctions as defined by 5 U.S.C.§ 551. Sanctions are part of an "order" and are the product of an adjudication. *Id.*

227. Sanctions require notice to the affected party and an opportunity to respond. The regulations at 8 C.F.R. § 103.2(b)(16) also require the agency to provide notice to an affected party when the agency order intends to rely on "derogatory information."

228. The defendant agency entered sanctions based on fraud or misrepresentation against all of the Plaintiffs but failed to give any Plaintiff notice and an opportunity to be heard.

229. DHS entered *sub silentio* sanctions into databases accessed by it and the Department of State.

230. Plaintiff [redacted] experience is illustrative of the finality and binding nature of the sanction. After briefly working for Integra Technologies, Plaintiff [redacted] moved to a legitimate staffing company, Mythri Consulting LLC. Mythri continued her practical training and eventually petitioned DHS for an H-1B visa and change of nonimmigrant status on her behalf. DHS approved the visa petition but denied the change of status ("COS") from F-1 to H-1B. The basis of the COS denial was that she was inadmissible for fraud or misrepresentation.

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231. DHS informed this employer that the employee must leave the country and apply for a nonimmigrant waiver of inadmissibility prior to getting a visa from the US consulate.

232. A waiver of inadmissibility requires the applicant to concede guilt. Form I-601, Instructions, at page 9, https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf (last visited September 9, 2023). Plaintiff [redacted] cannot apply for a waiver because she has not communicated knowingly false information to the US government in an attempt to gain a benefit.

233. In the COS denial, DHS did not provide notice and an opportunity to be heard on the alleged fraud or misrepresentation. Rather, DHS pronounced the fraud finding as a *fait accompli,* and directed her to apply for a waiver.

234. DHS has found Plaintiffs also failed to maintain status, engaged in unauthorized employment, and lack good moral character.

235. DHS did not notify Plaintiffs or afford them an opportunity to make knowing and timely retractions of any misrepresentations prior to concluding an inadmissibility adjudication.

236. DHS did not examine all facts and circumstances when adjudicating an individual's inadmissibility for fraud or willful misrepresentation as Plaintiffs were not advised of the allegations or offered an opportunity to submit evidence to show that they did not make a knowing and willful misrepresentation.

237. DHS did not afford the public that it had changed the published process that affords foreign nationals with notice and an opportunity to defend themselves against a charge of inadmissibility based on an allegation that the foreign national made a knowing and willful misrepresentation of material fact when seeking to procure an immigration benefit.

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

COUNT I
(Violation of the Administrative Procedure Act)
DHS's construction of INA § 212(a)(6)(C)(i) is not in accordance with law

238. Plaintiffs incorporate the prior paragraphs as if restated here.

239. Federal courts have authority to hear challenges to final agency actions, and hold unlawful actions that are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute…

5 U.S.C. § 706.

240. An agency violates the APA when it exceeds its statutory authority or encroaches on another agency's authority.

241. An agency violates the APA when it fails to follow its guiding statute or own regulations.

242. Here, DHS exceeded its authority, failed to follow the law, and marked Plaintiffs as inadmissible without a full evidentiary record and based on a misrepresentation of the INA.

243. "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." 8 U.S.C. § 1182(a)(6)(C)(i).

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244. Binding agency precedent confirms the plain language of the statute. A misrepresentation must be knowing, willful and material, meaning the applicant must be fully aware of the nature of the information sought and knowingly, intentionally, and deliberately make an untrue statement. *Matter of S- and B-C-*, 9 I. & N. Dec. 436, 447 (A.G. 1961).

245. The Government will not consider a misrepresentation "material," and therefore will not find an alien inadmissible based on the misrepresentation if the noncitizen retracts or corrects the misrepresentation once the government notifies the noncitizen of the allegation. *See Matter of R-R-*, 3 I. & N. Dec. 823 (BIA 1949); *Matter of M-*, 9 I. & N. Dec. 118 (BIA 1960); *Matter of R-S-J-*, 22 I. & N. Dec. 863 (BIA 1999).

246. Defendant, by and through its constituent agencies, have construed INA § 212(a)(6)(C)(i) to allow inadmissibility adjudications without the aggrieved noncitizen making a knowing and voluntary misrepresentation to a government official.

247. Defendant's construction of the statute is contrary to the plain language and its past policy as evidenced by its Policy Manual and past precedent.

248. Plaintiffs did not make any knowing and voluntary misrepresentation to a government official and yet have been found inadmissible under INA § 212(a)(6)(C)(i).

249. USCIS's interpretation contravenes the principles of statutory construction as established in DHS precedent and its broader policy to enforce immigration law.

250. Defendant's action is not in accordance with law and must be set aside pursuant to the APA. 5 U.S.C. § 706(2)(A).

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Seattle, WA 98104-1610

COUNT II
(Violation of the Administrative Procedure Act)
DHS engaged in arbitrary, capricious, and unlawful final agency action

251. Plaintiffs incorporate the prior paragraphs as if restated here.

252. Precedent, regulations, and policy with the force and effect of law supplement the bare bones" of federal statutes, and that, even in areas of expansive discretion, agencies must follow their own "existing valid regulations." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266, 268, (1954).

253. Under the *Accardi* doctrine, an individual can sue an agency for failure to follow the agency's own rules and procedures. *Accardi*, 347 U.S. at 268; *Alcaraz*, 384 F.3d at 1162.

254. The fraud finding is the agency's "final disposition." Thus, the entry of the finding is an "order" which is separate and discreet from other final dispositions. However, DHS failed to comply with 5 U.S.C. § 554(b) which requires timely notice of the allegations and an opportunity to provide a meaningful response.

255. The inadmissibility adjudication has no impact on an employer. Thus, the "interested party" in an inadmissibility adjudication is the foreign national. DHS was required to give Plaintiffs, the interested parties, an opportunity to provide evidence, make legal arguments, and rebut agency allegations. 5 U.S.C. § 554(c).

256. DHS was required to give each Plaintiff "prompt notice" of an adverse decision in an agency action. 5 U.S.C. § 554(e). This notice must include an explanation of the grounds for the denial.

257. DHS violated § 554(e), as it did not provide timely notice, nor did it provide a written explanation of the adverse decision. DHS is conducting adjudication by ambush, depriving affected parties of procedural rights, and leaving inadmissibility findings a secret which is only

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discovered when Plaintiffs apply for an immigration benefit in the United States or a visa at a US consulate.

258. Consular officers typically state DHS is responsible for the finding of inadmissibility and refer foreign nationals to seek relief before DHS. Yet, there is no administrative forum to do so.

259. DHS did not disclose the existence of "derogatory information" prior to ordering the sanction. This requirement is anchored in both due process, the APA at 5 U.S.C. § 551(13), and 8 C.F.R. § 103.2(b)(16).

260. DHS is required to follow an eight-step process prior to entering a sanction based upon fraud or misrepresentation. *See* Policy Manual, Volume 8, Chapter 2, Section E. This process was not followed.

261. DHS has followed its adjudicatory process but has treated Plaintiffs to a different policy without announcing a reason from departing from its process. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis.").

262. For example, DHS did not comply with Step 2 and make an actual finding that Plaintiffs knowingly and willfully misrepresented material facts when seeking to procure an immigration benefit. DHS has not shown that any component agency complied with any of the procedural requirements before making an inadmissibility determination.

263. DHS has misapplied 8 U.S.C. § 1182(a)(6)(C)(i) to statements of third parties that were not knowing, willful, or material.

264. DHS instituted a clandestine program to brand all Plaintiffs who agreed to work for the OPT companies, regardless of duration, as inadmissible without any public notice of the sanction

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or opportunity for comment. DHS has destroyed any sense of fairness in the inadmissibility adjudication process and entered sanction orders without any notice or opportunity to be heard.

265. The inadmissibility determinations are arbitrary, capricious, and not in accordance with law and agency procedure. 5 U.S.C. §§ 706(2)(A), (D).

COUNT III
(Violation of the Administrative Procedure Act)
DHS's decision-making was procedurally deficient and irregular

266. Plaintiffs incorporate the prior paragraphs as if restated here.

267. DHS's findings were procedurally irregular.

268. DHS did not acknowledge Plaintiffs rights to retract and rebut allegations.

269. DHS did not consider any individual evidence particular to a Plaintiff prior to finding them inadmissible.

270. DHS did not tell Plaintiffs a determination of inadmissibility or failure to maintain status has been made against them or entered into government databases.

271. DHS instituted lifetime bars to admissibility contrary to the warnings and required notice and opportunity for rebuttal contrary to the norms and instructions embedded within the Agency's Policy Manual.

272. Thus, USCIS's failure to consider specific arguments from Plaintiffs led it to "rel[y] on factors which Congress has not intended it to consider [and] entirely fail[] to consider an important aspect of the problem" before it to ensure it made a rational decision. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (defining "arbitrary and capricious"); *Innova Sols., Inc. v. Baran*, 983 F.3d 428, 434-35 (9th Cir. 2020).

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

COUNT IV
(Violation of the Administrative Procedure Act)

273. Plaintiffs incorporate the prior paragraphs as if restated here.

274. Defendant failed to follow the APA's notice-and-comment procedures by enacting a new rule that substantially diverted from past regulatory practices and requirements. 5 U.S.C. § 553(b).

275. Legislative rules have the "force of law," and are subject to notice and comment under the APA before becoming effective. *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1087-88 (9th Cir. 2003).

276. "The critical factor to determine whether a directive announcing a new policy constitutes a legislative rule or a general statement of policy 'is the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case.'" *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009) (second and third alterations in original) (quoting *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

277. The APA requires federal agencies to publish notice of rules in the Federal Register and then allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

278. The "agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 135 S. Ct. 1199, 1203 (2015).

279. Section 553(d) also provides that a promulgated final rule shall not go into effect for at least thirty days. 5 U.S.C. § 553(d).

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Seattle, WA 98104-1610

280. These procedures are "designed to assure due deliberation" of agency regulations and "foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) (internal quotations and citations omitted).

281. Here, DHS instituted a new rule for any employees associated or affiliated with any OPT companies.

282. DHS made a blanket rule that any period of OPT employment rendered the employee inadmissible for having made a willful misrepresentation of a material fact when seeking to procure an immigration benefit.

283. DHS made a rule that unlike all other foreign nationals, it would not provide notice and an opportunity to challenge an allegation of fraud or misrepresentation.

284. This rule did not leave any agency, or implementing officials, free to exercise discretion to follow, or not to follow, the announced policy.

285. Plaintiffs have been affected by this new rule.

286. Defendants did not follow the notice and comment procedures before enacting the rule in violation of the APA.

287. The Court should set aside and vacate the rule until DHS follows the notice and comment procedures.

PRAYER FOR RELIEF

Wherefore, in view of the above authority, Plaintiffs pray the Court:

A. Takes jurisdiction over this matter;

B. Sets aside and vacates DHS's interpretation of the phrase "fraud or willfully misrepresenting a material fact" in 8 U.S.C. § 1182(a)(6)(C)(i) to the extent it is either not based

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920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610

on actual statements made by the aggrieved person or without offering the aggrieved person notice and an opportunity to retract or explain such statements;

C. Sets aside and vacates DHS's adjudication, mark, label signifying Plaintiffs' inadmissibility;

D. Enjoins DHS from inadmissibility adjudications against Plaintiffs under 8 U.S.C. § 1182(a)(6)(C)(i) based upon its unlawful interpretation or without an opportunity to be heard;

E. Orders DHS to provide Plaintiffs with notice and an opportunity to retract any alleged misrepresentations and allegations of fraud prior to making or maintaining an inadmissibility determination;

F. Orders DHS to reinstate Plaintiffs period in the United States as lawful status unless and until DHS makes a lawful and proper adjudication of inadmissibility;

G. Grants all other relief that is necessary and proper to restore Plaintiffs to the position they were in prior to the unlawful determinations of DHS; and

H. Awards counsel fees under the Equal Access to Justice Act.

September 11, 2023

Respectfully Submitted,

/s/Diane Butler
Diane Butler
WSBA No. 22030
Davis Wright Tremaine LLP
920 Fifth Ave, Suite 3300
Seattle, WA 98104-1610
206.757.8354
dianebutler@dwt.com

/s/Jonathan D. Wasden
Jonathan D. Wasden
MSB No. 100563
Wasden Law
9427 Goldfield Lane
Burke, VA 22015-1173
843.872.4978

jon@wasden.law
Appearing Pro Hac Vice

/s/Jesse M. Bless
Jesse M. Bless
MA Bar No. 660713
Bless Litigation LLC
6 Vineyard Lane
Georgetown, MA 01833
718.704.3897
jesse@blesslitigation.com
Appearing Pro Hac Vice