

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**SMALL AND MEDIUM ENTERPRISE  
CONSORTIUM, INC., et al.,**

*Plaintiffs,*

**v.**

**KIRSTJEN NIELSEN, et al.,**

*Defendants.*

**Civil Action No. 18-8672**

**ORDER**

**THIS MATTER** comes before the Court on Plaintiff Small and Medium Enterprise Consortium, Inc. (“SMEC”), Plaintiff NAM Info, Inc. (“NAM”), and Plaintiff Derex Technologies, Inc.’s (“Derex” or together with SMEC and Nam, “Plaintiffs”) motion for a temporary restraining order and preliminary injunction to enjoin Defendants in the above-captioned matter from enforcing U.S. Citizenship and Immigration Services’ (“USCIS”) Policy Memorandum 602-0157 (the “Memorandum” or “PM 602-0157”), ECF No. 7;

and it appearing that Defendants opposed Plaintiffs’ motion, ECF No. 24, and subsequently filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), ECF No. 29;

and it appearing that this matter arises out of Defendants’ alleged violation of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., and the Administrative Procedure Act (“APA”), 5 U.S.C. § 500 et seq., through enforcement of PM 602-0157;

and it appearing that SMEC is a non-profit trade association that represents the interests of approximately 300 small and medium sized information technology (“IT”) services companies, First Amended Complaint (“FAC”) ¶ 2;

and it appearing that SMEC member companies sponsor foreign workers for H-1B visas and often place them at third-party worksites, id.;

and it appearing that NAM and Derex are IT service providers that also allegedly rely on the H-1B visa program to fulfill their contractual obligations at third-party worksites, id. ¶¶ 3–4;

and it appearing that Plaintiffs allege that PM 602-0157, issued on February 22, 2018, imposes new evidentiary burdens on employers who place H-1B employees at third-party worksites, id. at ¶¶ 48, 51–53;

and it appearing that Plaintiffs allege that they will lose existing H-1B workers and will be unable to hire sufficient new employees to meet their contractual obligations due to PM 602-0157's requirements, id. ¶¶ 2–4;

and it appearing that Plaintiffs bring the following challenges to two separate regulations and PM 602-0157 in their FAC: (1) a facial challenge to 8 C.F.R. § 214.2(h)(4)(ii) as ultra vires and violative of the APA, FAC ¶¶ 104–16; (2) a challenge to PM 602-0157 as unlawful because it contradicts existing legislative rules, requires gap filling, and creates legal burdens, id. ¶¶ 117–31; and (3) a facial challenge to 8 C.F.R. § 214.2(h)(2)(i)(B) as ultra vires and violative of the APA, id. ¶¶ 132–42;

and it appearing that Plaintiffs seek a temporary restraining order and preliminary injunction enjoining enforcement of PM 602-0157 and for “preservation of the status quo while the merits of the cause are explored through litigation,” ECF No. 7.1 at 10 (internal quotation marks omitted);

and it appearing that in considering whether to grant a preliminary injunction or temporary restraining order, courts consider: “(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3)

whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest,” Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 171 (3d Cir. 2001); see also Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3d Cir. 2017) (explaining that a movant must satisfy the first two “gateway factors” before a court considers the remaining two);

and it appearing that to satisfy the second element, plaintiffs must make “a clear showing of immediate irreparable injury,” Cont’l Grp., Inc. v. Amoco Chems. Corp., 614 F.2d 351, 359 (3d Cir. 1980), “which cannot be redressed by a legal or equitable remedy following trial,” Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989);

and it appearing that Plaintiffs allege that absent a preliminary injunction, they will lose their ability to compete for new work, which will destroy their business models, damage their reputations, and lead to a loss of good will, see ECF No. 7.1 at 46–48; see also FAC ¶¶ 2–4, 66, 74–77, 87, 92, 97–98, 101–03;

and it appearing that Plaintiffs’ allegations relate to future harms that are either too speculative, Adams v. Freedom Forge Corp., 204 F.3d 475, 488 (3d Cir. 2000) (“[T]he risk of irreparable harm must not be speculative.”); see also Spacemax Intern. LLC v. Core Health & Fitness, LLC, No. 2:13-4015-CCC-JAD, 2013 WL 5817168, at \*2 (D.N.J. Oct. 28, 2013) (noting that merely pleading the likely loss of market share and goodwill is insufficient to demonstrate irreparable harm), or too remote in time support injunctive relief,<sup>1</sup> see Macchione v. Coordinator Adm’r in Washington, D.C., 591 F. App’x 48, 49–50 (3d Cir. 2014);

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<sup>1</sup> Plaintiffs provide the Court with evidence of one extension denial, ECF No. 7.2 at 14–22, one request for evidence, id. at 23–26, and one petition amendment denial, id. 27–29. However, the Court was also made aware that both NAM and Derex have each had two H-1B petitions approved since PM 602-0157’s issuance. See ECF No. 29.1 at 13 n.9. Though the Court recognizes that “the possibility of Plaintiff[s]’ business[es] failing, even if remote, would be detrimental to all parties concerned,” Plaintiffs’ apparent ability to have at least some success with its H-1B petitions “raises doubts about the immediacy of the harm and whether any such harm would truly be irreparable.” EUSA-

and it appearing that therefore, Plaintiffs are not entitled to a preliminary injunction or temporary restraining order because Plaintiffs fail to make a clear showing of irreparable harm, see, e.g., Ace American Ins. Co. v. Wachovia Ins. Agency Inc., 306 F. App'x 727, 731 (3d Cir. 2009);

and it appearing that Defendants move to dismiss Plaintiffs' claims on the grounds that: (1) Plaintiffs lack constitutional standing; (2) the statute of limitations bars Plaintiffs' Counts I and III; and (3) Plaintiffs fail to allege a final agency action as required under the APA, Defs.' Br. at 27–46;

and it appearing that Defendants first argue that Plaintiffs' FAC should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1)<sup>2</sup> for lack of standing because Plaintiffs' allegations only relate to possible future harms, Defs.' Br. at 27–30;

and it appearing that to bring suit under the APA, plaintiffs must have both constitutional and prudential<sup>3</sup> standing, see Bennett v. Spear, 520 U.S. 154, 161–62 (1997);

and it appearing that to satisfy the “case” or “controversy” requirement of Article III of the U.S. Constitution, plaintiffs must show that: (1) they have “suffered an injury in fact”; (2) “that is

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Allied Acquisition Corp. v. Teamsters Pension Trust Fund of Phila. & Vicinity, No. 11-3181 (JBS-AMD), 2011 WL 3651315, at \*11 (D.N.J. Aug. 18, 2011).

<sup>2</sup> To determine how the pleading must be reviewed, a district court must first decide whether the defendant's 12(b)(1) motion presents a facial or factual attack. See Constitution Party of Pa. v. Aichele, 757 F.3d 347, 357 (3d Cir. 2014). A facial attack challenges subject matter jurisdiction “without disputing the facts alleged in the complaint, and it requires the court to ‘consider the allegations of the complaint as true.’” Davis v. Wells Fargo, 824 F.3d 333, 346 (3d Cir. 2016) (quoting Petruska v. Gannon Univ., 462 F.3d 294, 302 n.3 (3d Cir. 2006)). In contrast, a factual attack challenges the factual allegations in the complaint, either through the filing of an answer or otherwise presenting competing facts. Id. Here, Defendants do not support their motion with a sworn statement of facts or otherwise present competing facts; rather, Defendants argue that the facts pled do not establish standing. Defendants' motion must therefore be construed as a facial attack. See In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 632 (3d Cir. 2017). Accordingly, in considering Defendants' motion to dismiss, the Court accepts the facts in the FAC as true and draws all reasonable inferences in favor of the nonmoving party. Constitution Party of Pa., 757 F.3d at 358.

<sup>3</sup> To satisfy the prudential standing requirement, plaintiffs must “demonstrate that their grievance falls within the zone of interests to be protected or regulated by the statute in question.” Maiden Creek Assocs, L.P. v. U.S. Dep't of Transp., 823 F.3d 184, 189 (3d Cir. 2016) (internal quotation marks omitted). Because Defendants do not argue that Plaintiffs' lack prudential standing, the Court need not address this issue here.

fairly traceable to the challenged conduct of the defendant”; and (3) the injury “is likely to be redressed by a favorable decision,” Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016);

and it appearing that Plaintiffs plead sufficient facts to establish constitutional standing because the facts pled show that: (1) PM 602-0157’s new requirements create additional burdens that cause economic hardship for Plaintiffs and Plaintiffs’ members,<sup>4</sup> see FAC ¶¶ 72–73, 79–85, 93–99; (2) their injury is traceable to Defendants’ enforcement of PM 602-0157; and (3) their injury is likely to be redressed should this Court find PM 602-0157 and its related regulations unlawful,<sup>5</sup> see Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 278 (3d Cir. 2014) (“In the context of a motion to dismiss, we have held that the ‘[i]njury-in-fact element is not Mount Everest. The contours of the . . . requirement, while not precisely defined, are very generous, requiring only that claimant allege [ ] some specific, identifiable trifle of injury.’”);

and it appearing that Defendants next argue that Plaintiffs’ challenges to 8 C.F.R. § 214.2(h)(4)(ii) and 8 C.F.R. § 214.2(h)(2)(i)(B) are barred by the statute of limitations, Defs.’ Br. 30–32;

and it appearing that the statute of limitations for filing a civil claim against the United States is six years after the claim accrues, 28 U.S.C. § 2401; see Pa. Dep’t of Pub. Welfare v. U.S. Dep’t of Health & Human Servs., 101 F.3d 939, 944–45 (3d Cir. 1996);

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<sup>4</sup> Defendants’ argument that Plaintiffs’ allegations are insufficient to confer standing because they relate solely to “possible future injuries” is unavailing at the motion to dismiss stage. Many of Plaintiffs’ allegations relate to the ongoing burden of complying with PM 602-0157’s requirements. While it may be shown at a later stage that PM 602-0157’s requirements are not binding, and that therefore, PM 602-0157 does not create additional burdens, the Court cannot reach such a conclusion now. As such, the Court is satisfied that Plaintiffs adequately plead injuries that are “certainly impending,” which is sufficient to confer Article III standing. Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979).

<sup>5</sup> Because Plaintiff SMEC is suing on behalf of its members, it must demonstrate that: (1) “its members would otherwise have standing to sue in their own right”; (2) “the interests it seeks to protect are germane to the organization’s purpose”; and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977). Defendants do not argue that the latter two elements are not adequately pled. Thus, the Court does not address them here. With respect to the first element, the Court finds Plaintiffs’ allegations sufficient to confer standing upon SMEC’s members in their own right for the reasons previously stated.

and it appearing that courts in the Third Circuit have found that facial challenges to an agency action accrue at the time the rule was promulgated, but that “[a] fresh limitation period arises . . . when the agency subsequently applies the rule against a party who challenges such application on statutory or constitutional grounds,” Custin v. Wirths, 12-910 (KM), 2014 WL 356254, at \* 9 (D.N.J. Jan. 31, 2014);<sup>6</sup>

and it appearing that Plaintiffs do not present an as-applied challenge to 8 C.F.R. § 214.2(h)(4)(ii) or 8 C.F.R. § 214.2(h)(2)(i)(B) because Plaintiffs do not allege that either regulation was applied unconstitutionally to them in any specific instance, but rather that the regulations themselves were facially unlawful, see FAC ¶¶ 104–16, 132–42;

and it appearing that therefore, Plaintiffs’ challenge to § 214.2(h)(4)(ii) accrued when it was promulgated in 1990 and Plaintiffs’ challenge to § 214.2(h)(2)(i)(B) accrued when it was promulgated in 1991, and that the six year statute of limitations has since expired, see ECF No. 29.1 at 32;

and it appearing that Plaintiffs also argue that their challenges are nevertheless timely because Defendants reopened the matter when they issued PM 602-0157 and a new review period is triggered “each time the agency reopens and reconsiders its authority for the regulation,” ECF

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<sup>6</sup> Plaintiffs contend that challenges to the Constitutional or statutory authority of a regulation may be brought at any time, regardless of how old the regulation is. See ECF No. 32 at 19–20 (citing Wind River Mining Corp. v. United States, 946 F.2d at 714–16 (9th Cir. 1991)). As an initial matter, Plaintiffs misconstrue the Ninth Circuit’s holding in Wind River. There, the Ninth Circuit held that “a substantive challenge to any agency decision alleging lack of agency authority may be brought within six years of the agency’s application of that decision to the specific challenger.” Wind River, 946 F.2d at 716. In other words, the Ninth Circuit created an exception to the general statute of limitations rule where a plaintiff presents an as-applied challenge to the regulation. See id. (“The challenge must be brought within six years of the agency’s application of the disputed decision to the challenger.”). Though the Third Circuit has not explicitly addressed this issue, this Court follows both Wind River and the in-circuit authority that holds that challenges to the Constitutional or statutory authority of a regulation accrue at the time the rule was promulgated, unless the claim presents an as-applied challenge. See Custin, 2014 WL 356254, at \*9. Moreover, Plaintiffs’ attempt to distinguish Custin is misguided. Plaintiffs claim that Custin is irrelevant because it involved a procedural or policy challenge to a federal regulation. See ECF No. 32 at 23–24. The plaintiff in Custin, however, challenged the Constitutional and statutory validity of a federal regulation. See Custin, 2014 WL 356254, at \*9 (finding that plaintiff challenged “the Constitutional and statutory validity of 20 C.F.R. § 615.8(c) on its face,” but that plaintiff did “not bring an ‘as applied’ challenge, which might potentially accrue at a later date”).

No. 32 at 24 (citing Pub. Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147, 150–51 (D.C. Cir. 1990));

and it appearing that pursuant to the “reopening” or “reopener” doctrine, judicial review of an otherwise stale challenge is permissible where an agency has “undertaken a serious, substantive reconsideration” of its existing rule, Nat'l Min. Ass'n v. U.S. Dep't of Interior, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (“The reopener doctrine allows judicial review where an agency has—either explicitly or implicitly—undertaken to ‘reexamine its former choice.’”);<sup>7</sup>

and it appearing that Plaintiffs allege that in issuing PM 602-0157, Defendants reexamined 8 C.F.R. § 214.2(h)(4)(ii)'s definition of “employer” and 8 C.F.R. § 214.2(h)(2)(i)(B)'s itinerary requirements because it places “new evidentiary burdens on employers who place H-1B employees at third-party worksites,” FAC ¶ 51; see also id. ¶¶ 55–65, 104–42;

and it appearing that Plaintiffs have pled facts sufficient to demonstrate that the reopening doctrine applies and that therefore, Plaintiffs' challenges to 8 C.F.R. § 214.2(h)(4)(ii) and 8 C.F.R. § 214.2(h)(2)(i)(B) are not barred by the statute of limitations;

and it appearing that Defendants next argue that Plaintiffs fail to allege a final agency action as required by the APA, ECF No. 29.1 at 33–46;

and it appearing that an agency action must be final for it to be judicially reviewable, meaning that: (1) the action marks “the consummation of the agency's decisionmaking process— it must not be of a merely tentative or interlocutory nature”; and (2) “the action must be one by which rights or obligations have been determined, or from which legal consequences flow,”

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<sup>7</sup> The Third Circuit has yet to address the reopening doctrine. However, the Second, Sixth, and Ninth Circuits have followed the D.C. Circuit and adopted its reasoning. See Marks v. Crunch San Diego LLC, 904 F.3d 1041, 1046 (9th Cir. 2018); Central Hudson Gas & Elec. Corp. v. F.E.R.C., 783 F.3d 92, 106 (2d Cir. 2015); Ohio Pub. Interest Research Grp., Inc. v. Whitman, 386 F.3d 792, 800 (6th Cir. 2004). Defendants fail to explain why this Court should not adopt the reasoning of its sister circuits. Accordingly, this Court follows its sister circuits in recognizing the reopening doctrine.

Bennett, 520 U.S. at 177–78; see Naik v. Renaud, 947 F. Supp. 2d 464, 471 (D.N.J. 2013) (“If there is no final agency action, a court lacks subject matter jurisdiction.”); see also Univ. of Medicine & Dentistry of N.J. v. Corrigan, 347 F.3d 57, 69 (3d Cir. 2003) (listing the following factors as most relevant in assessing finality of an agency action: whether the decision represents the agency’s definitive position on the question, whether the decision has the status of law and expectation of immediate compliance, and whether the decision has immediate impact on the daily operations of the party seeking review);

and it appearing that Plaintiffs allege that Defendants are “currently applying” PM 602-0157’s new requirements, FAC ¶ 100; see, e.g., FAC ¶ 53 (“Defendants now require employers who are job contractors [to] file copies of [third party contracts] at the time of filing.”), which allegedly impacts Plaintiffs’ operations and involves the determination of their rights, see, e.g., id. ¶ 93 (“Defendants’ standards for adjudicating H-1B extensions have become wildly unpredictable. Employees who have received multiple extensions for the same position . . . are now being told their position now longer qualifies as a ‘specialty occupation.’ These extension requests are being denied.”); see also id. at ¶¶ 55–65, 72–77, 79;

and it appearing that Plaintiffs therefore adequately allege facts that show that PM 602-0157 constitutes a final agency action at the motion to dismiss stage;<sup>8</sup>

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<sup>8</sup> Defendants also argue that Plaintiffs present “a broad programmatic challenge” to USCIS policy, as opposed to a particular final agency action. ECF No. 29.1 at 41–46; see Lujan v. Nat. Wildlife Fed., 497 U.S. 871, 891 (1990) (“[R]espondents cannot seek wholesale improvement of [a] program by court decree, rather than in the . . . halls of Congress, where programmatic improvements are normally made.”). Defendants’ argument is unavailing for two reasons. First, Defendants fail to mention the exception to the rule in Lujan: “a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately . . . is ‘ripe’ for review at once[.]” Id. As discussed, Plaintiffs have adequately pled that PM 602-0157 is a substantive rule that requires them to immediately adjust their conduct. Second, even if the exception does not apply, Plaintiffs have not presented a “wholesale” challenge. As the Supreme Court explained in Lujan, agency actions are not ripe for review “until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens him.” Id. Here, Plaintiffs have adequately pled that Defendants are currently applying PM 602-0157’s requirements to their detriment. This is not a programmatic challenge to the H-1B visa process, but rather, a challenge to the requirements in PM 602-0157 that relate to employers, like Plaintiffs and Plaintiffs’ members, who place workers at third-party worksites.

**IT IS** on this 18th day of January, 2019;

**ORDERED** that the Plaintiffs' motion for a temporary restraining order and preliminary injunction, ECF No. 7, is **DENIED**, and that Defendants' motion to dismiss, ECF No. 29, is **DENIED**.

*/s Madeline Cox Arleo*  
**HON. MADELINE COX ARLEO**  
**UNITED STATES DISTRICT JUDGE**