

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MADKUDU INC., <i>et al.</i> ,	)	CASE NO. 5:20-cv-2653-SVK
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
U.S. CITIZENSHIP AND IMMIGRATION	)	
SERVICES, <i>et al.</i> ,	)	
	)	
Defendants.	)	

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement is entered into by U.S. Plaintiffs MadKudu Inc., Quick Fitting, Inc., 2nd Street USA, Inc., and Hanguang International Inc., on behalf of themselves and all Class Members, and Defendants U.S. Citizenship and Immigration Services (“USCIS”) and Ur M. Jaddou, in her official capacity as USCIS Director (collectively, “the parties”). The Settlement Agreement and Release will become effective upon approval by the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) as set forth below.

I. RECITALS

WHEREAS:

A. On April 16, 2020, Plaintiffs MadKudu Inc. and Quick Fitting, Inc. commenced a civil action against Defendants on behalf of themselves and all others similarly situated, seeking class certification, designation of class counsel, and declaratory and injunctive relief. Plaintiffs 2nd Street USA, Inc. and Hanguang International Inc. later joined the lawsuit.

B. USCIS had denied Plaintiffs’ H-1B petitions for market research analyst positions, based on the agency’s determination that the Department of Labor’s Occupational Outlook Handbook (“OOH”) entry for market research analysts does not establish that this occupation is a “specialty occupation” under the first regulatory criterion in 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). Plaintiffs sought relief for U.S. employers whose H-1B petitions were denied on this basis, and, but for USCIS’s decision

1 regarding the OOH entry for market research analyst, the U.S. employers' H-1B petitions would have
2 been approved.

3 C. On November 17, 2020, the Court certified, in part, the proposed class under Federal
4 Rule of Civil Procedure 23(b)(2). Dkt. No. 59. The Court defined the certified class as:

5 All U.S. employers who in 2019 through December 6, 2020 filed, or will file, a petition (Form I-
6 129 or any successor) with USCIS for an H-1B classification under 8 U.S.C.

§ 1101(a)(15)(H)(i)(b) for a market research analyst where:

- 7 • USCIS denied or will deny the petition solely or in part based on a finding that the
8 OOH entry for market research analyst does not establish that the occupation is a
specialty occupation, and thus does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); and
- 9 • But for this finding, the petition would be approved.

10 D. On February 2, 2021, Plaintiffs moved to amend the class definition. On February 18,
2021, Defendants filed the certified administrative record, and on March 15, 2021, Plaintiffs filed a
11 motion for summary judgment. The parties subsequently entered settlement negotiations and reached an
12 agreement, and, while these negotiations were ongoing, the Court stayed the completion of briefing on
13 both summary judgment and the Plaintiffs' motion to amend the class definition.

14 E. Plaintiffs and Defendants, through counsel, have conducted discussions and good faith
15 negotiations regarding a compromise and settlement of the action with a view to settling all matters in
16 dispute.

17 F. Defendants deny all liability with respect to the action, deny the allegations in the
18 Amended Complaint, and deny that they acted improperly in any way, but have agreed to the settlement
19 and dismissal of the action with prejudice to avoid the substantial expense, inconvenience, and
20 distraction of further protracted litigation; and put to rest and terminate the action and any and all Settled
21 Claims.

22 G. Considering the benefits that Plaintiffs and Class Members will receive from settlement
23 of the action and the risks of litigation, class counsel have concluded that the terms and conditions of
24 this Agreement are fair, reasonable, and in the best interests of the Plaintiffs and Class Members.
25 Plaintiffs have agreed that Defendants shall be released from the Settled Claims pursuant to the terms
26 and provisions of this Agreement, and have agreed to the dismissal with prejudice of this action and all
27 Settled Claims.
28

II. TERMS OF THE SETTLEMENT AGREEMENT

NOW, THEREFORE, in consideration of the benefits flowing to the parties from the Agreement, the parties hereby stipulate and agree, subject to the approval of the Court pursuant to Fed R. Civ. P. 23(e), as follows:

A. Definitions

For purposes of this Settlement Agreement, the following terms shall be defined as:

1. “Action” means the civil action captioned *MadKudu Inc., et al. v. U.S. Citizenship and Immigration Services, et al.*, No. 20-cv-2653 (N.D. Cal.).
2. “Effective Date” means the date upon which this Agreement shall become effective, as set forth in Section VI., below.
3. “Plaintiffs’ Counsel” or “Class Counsel” means the American Immigration Council, Van Der Hout LLP, American Immigration Lawyers Association (AILA), Joseph and Hall, P.C., and Kuck Baxter Immigration LLC. Should these entities change their names or merge with other entities, those new entities also shall qualify as Class Counsel.
4. “Settled Claims” means all claims for injunctive or declaratory relief relating to Defendants’ interpretation of the Occupational Outlook Handbook entry for market research analyst challenged in this action, whether known or unknown, that could have been brought on behalf of Class Members at any time prior to the Effective Date.

B. Class Definition

1. The parties stipulate to an amended class defined as:

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.

1 2. Plaintiffs will dismiss as moot their pending motion to amend the class definition.

2 3. The amended class, as defined in this Settlement Agreement, does not constrain or
3 restrict USCIS' authority to amend or revise in the future 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

4 **C. Clarification for Adjudicating Future H-1B Petitions for Market Research Analysts**
5 **Under the First Regulatory Criterion**

6 1. USCIS will agree to issue guidance to all H-1B adjudicators which states the
7 following:

8 a. The Occupational Outlook Handbook (OOH) description for market
9 research analysts in existence on the Effective Date demonstrates that the
10 market research analyst occupation satisfies the first regulatory criterion as
11 found in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (as it exists on the date the
12 Court approves the settlement). That is, subject to Sections II.C.1.b-d,
13 below, the said OOH entry for market research analysts demonstrates that
14 a bachelor's or higher degree in a specific specialty is normally required to
15 enter the occupation. However, if the record shows that the petitioner
16 would consider someone as qualified for the position based on less than a
17 bachelor's degree in a specialized field directly related to the position
18 (*e.g.*, an associate's degree, a bachelor's degree in a generalized field of
19 study without a minor, major, concentration, or specialization in market
20 research, marketing, or research methods (*see* Sections II.C.1.b and c), or
21 a bachelor's degree in a field of study unrelated to the position), then the
22 position would not meet the statutory and regulatory definitions of
23 specialty occupation at 8 U.S.C. § 1184(i)(1) and 8 C.F.R.

24 § 214.2(h)(4)(ii);

25 b. A bachelor's or higher degree in business administration with an official
26 minor, major, concentration, or specialization in market research,
27 marketing, or research methods, as annotated on a transcript, diploma, or
28 other official document from the registrar of the institution of higher

1 education, is not a generalized degree; consequently, if a petitioner will
2 accept such a degree, the position may qualify as a specialty occupation.

3 i. Where it is demonstrated that an official transcript, diploma, or
4 other official documentation from the registrar of the institution of
5 higher education is unavailable, the petitioner may submit for
6 consideration:

- 7 • a letter from the Chair of the relevant department, a
8 professor in the relevant department, or an official
9 academic advisor from the institution of higher education
10 that issued the degree relied upon confirming that a minor,
11 major, concentration, or specialization in market research,
12 marketing, or research methods was obtained by the
13 beneficiary; and/or
14 • an unofficial transcript.

15 USCIS will evaluate all submitted evidence, including any
16 explanation as to why an official document is unavailable, and give
17 it appropriate weight in determining if the petitioner has
18 established eligibility.

19 c. A market research analyst position that accepts a bachelor's or higher
20 degree in communications, statistics, computer and information
21 technology, and/or social science may qualify as a specialty occupation if
22 the petitioner is able to demonstrate that an official minor, major,
23 concentration, or specialization in market research, marketing, or research
24 methods is necessary to perform the job duties. An official minor, major,
25 concentration, or specialization is demonstrated by an annotation on a
26 transcript or diploma or other official document from the registrar of the
27 institution of higher education. Where it is demonstrated that an official
28 transcript, diploma, or other official documentation from the registrar of

the institution of higher education is unavailable, the petitioner may submit for consideration:

- a letter from the Chair of the relevant department, a professor in the relevant department, or an official academic advisor from the institution of higher education that issued the degree relied upon, confirming that a minor, major, concentration, or specialization in market research, marketing, or research methods was obtained by the beneficiary; and/or
- an unofficial transcript.

USCIS will evaluate all submitted evidence, including any explanation as to why an official document is unavailable, and give it appropriate weight in determining if the petitioner has established eligibility.

d. In any case where the petitioner will accept a bachelor's or higher degree in any of the fields specified in Sections II.C.1.b and c, USCIS must issue a Request for Evidence ("RFE") and not deny the petition outright if evidence as to whether the petitioner requires the official minor, major, concentration, or specialization in market research, marketing, or research methods was not initially provided. The position may still qualify as a specialty occupation if the petitioner demonstrates that the degrees in the fields of study listed above, as applicable, along with the official minor, major, concentration, or specialization in market research, marketing, or research methods, is necessary to perform the job duties.

e. USCIS will adjudicate any H-1B petition for a market research analyst, whether pending on or filed after the date that the Court approves the Settlement Agreement, on a case-by-case basis, and where the burden remains on the petitioner to establish eligibility by a preponderance of the evidence. In any adjudication involving a petition for a market research analyst position, the following will apply:

- i. When reviewing the case under the first regulatory criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), USCIS will specify whether it found the position to be a bona fide market research analyst in accordance with the OOH entry for that occupation; where USCIS determines that the position is not a bona fide market research analyst position, it will explain the basis for that determination. For purposes of this Settlement Agreement, a bona fide market research analyst job or position is one which is consistent with the OOH entry for that occupation that is in effect on the date that the Court approves the Settlement Agreement, subject to the stipulations set forth in Sections II.C.1.b and c.
- ii. USCIS will adjudicate the petition with the understanding that a bona fide market research analyst position satisfies the first regulatory criterion for specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), in effect on the date that the Court approves the Settlement Agreement, subject to the stipulations set forth in Sections II.C.1.b and c.
- iii. Provided, however, that where a petitioner will accept an associate's degree as sufficient for the position, the petition will not satisfy 8 U.S.C. § 1184(i)(1) and 8 CFR 214.2(h)(4)(ii) (definition of "specialty occupation"), and may be denied; and where the petitioner will accept a degree other than market research, communications, statistics, computer and information technology, business administration, and/or social science (subject to the stipulations set forth in Sections II.C.1.b and c), the position will not, without more, satisfy the OOH entry for market research analyst and may be denied on that basis.

2. USCIS agrees to include the points enumerated in II.C.1, *supra*, in guidance to all

H-1B adjudicators. USCIS will share its guidance with Plaintiffs' counsel.

D. Reopening Past Denials of Class Members' Petitions

1. Procedure by which class members may request reopening:

- a. Class members shall have 180 days in which to request that their denied H-1B petitions for market research analyst be reopened. No fee will be charged for such a request.
- b. USCIS will provide, within ten (10) business days from the Effective Date, an announcement with directions for class members to send a motion to reopen on Form I-290B, with a cover sheet to clearly identify that the motion is filed by a claimed member of the class, to a designated USCIS service center(s) for the receipt and adjudication of class members' reopening requests. The 180 days in Section II.D.1.a shall commence on the date that USCIS announces directions for class members to send a motion to reopen as provided in this paragraph.
- c. Class members should state in the reopening request that the petitioner requests reopening; provide a receipt number for the petition; confirm that the offer of employment as stated in the petition remains valid; indicate if the petitioner wants a new start date and/or end date for the validity period (as long as the new date(s) falls within the period in the certified Labor Condition Application ("LCA") previously submitted with the petition that the petitioner is seeking to reopen); and demonstrate class membership in accord with Section II.D.2, *infra*.

2. To demonstrate class membership, a petitioner will submit with its reopening request a copy of USCIS' denial of the original H-1B petition. Petitioners who appealed to, and had their appeal dismissed by the Administrative Appeals Office (AAO), will submit a copy of the AAO decision (which hereafter also is referred to as a "denial") instead of the Service Center denial. To establish class membership, the denial of the original H-1B petition must show that:

- a. The petition was filed on or after January 1, 2019, through **[insert date of the Court approval of the settlement]**; for cases in which the decision does not include the filing date of the petition, the petitioner will submit a copy of USCIS' receipt notice for the petition;
- b. USCIS found that the job fell within the market research analyst occupation;
- c. USCIS considered the OOH entry for market research analysts;
- d. USCIS found that the market research analyst occupation was not a specialty occupation under the first regulatory criterion; and
- e. The sole basis for the denial was that the position was not within a specialty occupation.

3. Standard by which USCIS will determine whether to reopen and approve an H-1B petition in response to a reopening request:

- a. Determine whether the petitioner established that it is a class member:
 - i. Was the petition filed on or after January 1, 2019, through the **[date that the Court approves the settlement]**?
 - ii. Is there any amount of time remaining on the period specified in the certified LCA at the time that the reopening request was filed?
 - iii. In the denial, did USCIS determine that the position fell within the market research analyst occupation?
 - iv. In the denial, did USCIS consider the OOH entry for market research analysts under the OOH entry for market research analysts and the regulations in effect on the date that the Court approves the Settlement Agreement?
 - v. Did USCIS deny the petition under the first regulatory criterion in effect on the date that the Court approves the Settlement Agreement, based on a finding that petitioner had not established that the position fell within a specialty occupation?

vi. Was the sole basis for the denial a determination that the position was not a specialty occupation?

b. If USCIS determines that the petitioner is not a class member according to the standards set forth in Section II.D.3.a, it may reject the reopening request.

c. A petitioner may indicate a new start date and end date for the validity period, as long as the new start date and end date falls within the period in the certified LCA previously submitted with the petition that the petitioner is seeking to reopen. USCIS must grant the petitioner's request for a different start date and end date for the validity period if the date(s) requested by the petitioner falls within the period specified in the certified LCA previously submitted with the petition that the petitioner is seeking to reopen.

d. If USCIS finds that the petitioner is a class member and that there is time remaining on the period specified in the certified LCA, it must reopen the petition and re-adjudicate it under the standard set out in Section II.C.1 *supra*. If an issue of fraud or willful misrepresentation comes to USCIS' attention, it will reopen and send the petitioner an RFE or a Notice of Intent to Deny ("NOID").

e. USCIS shall abide by the recent deference guidance issued by USCIS on April 27, 2021, in those cases involving the same parties and facts in which there was a prior approval. *See* <https://www.uscis.gov/news/alerts/uscis-issues-policy-guidance-on-deference-to-previous-decisions>. In such cases, USCIS should defer to the prior approval unless there was a material error, material change, or a new material fact(s).

f. USCIS will not deny a named plaintiff's case without first issuing a RFE or NOID and permitting the named plaintiff to submit additional

documentation and argument to show eligibility and qualification.

4. USCIS will decide all MadKudu class members' reopening requests within 90 days of its receipt of the physical file at the adjudicating office for all timely-filed reopening requests of class members in which, at the time that the class member submits the reopening request, there is any amount of time remaining on the period specified in the previously filed LCA. 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.

5. For any MadKudu class member's reopening request that USCIS intends to deny, USCIS will first send the petitioner a NOID identifying the ground for denial and provide the petitioner a period of 30 days from the notice date to respond. USCIS will decide the request within 60 days of its receipt of petitioner's response to the NOID.

E. Notice to Class Members

1. The parties mutually will agree upon language for a Notice that explains the settlement to class members.

2. Prior to the Court holding a fairness hearing on the Settlement Agreement, USCIS will post this Notice on its website, along with a copy of the Settlement Agreement. USCIS then will update its website with a notice stating the outcome of the Court's fairness hearing.

3. USCIS will announce the Settlement Agreement through its social media, directing readers to its website posting.

4. Plaintiffs will distribute the Notice and Settlement Agreement through various American Immigration Lawyers Association outlets and other relevant forums.

F. General Provisions

1. The Parties will submit the Settlement Agreement, the Notice to Class Members and a joint stipulation regarding the class definition, *see* B.1, to the Court for its approval.

2. Defendants will reopen and re-adjudicate Plaintiff Hanguang's petition in accordance with Sections II.C.1 and II.D.3.c-f, within 14 days of the Court's approval of

1 the Settlement Agreement.

2 4. Each party shall bear its own fees and costs.

3 **III. DISPUTE RESOLUTION**

4 If there is a claim of a breach of this Settlement Agreement, the parties shall mutually resolve to
5 address the matter within 90 calendar days of the date of notice of an alleged breach. The Court retains
6 jurisdiction to resolve any disputes over enforcement of the Settlement Agreement that are not resolved
7 between the parties pursuant to this section.

8 **IV. EFFECTIVE DATE**

9 This Settlement Agreement will be effective on the date the Settlement Agreement receives final
10 approval by the Court and shall remain in effect for a period of five (5) years beginning five (5) days
11 after the date of approval. Subject to the dispute resolution and modification procedures in Sections III
12 and VI.B, respectively, the Court retains jurisdiction to resolve any disputes over enforcement of the
13 Settlement Agreement that arise and are presented to the Court during the effective period.

14 **V. RELEASE: SCOPE AND EFFECT OF RELEASE**

15 As of the Effective Date, Plaintiffs and Class Members, on behalf of themselves, their heirs,
16 executors, administrators, representatives, attorneys, successors, assigns, agents, affiliates, and partners,
17 and any persons they represent, by operation of any final judgment entered by the Court, fully, finally,
18 and forever release, relinquish, and discharge the Defendants of and from any and all of the Settled
19 Claims. The foregoing release includes all claims for injunctive or declaratory relief relating to
20 Defendants' interpretation of the OOH entry for market research analysts challenged in this action,
21 whether known or unknown, that could have been brought on behalf of Class Members at any time prior
22 to the Effective Date. This Release shall not apply to claims that arise or accrue after the termination of
23 this Settlement Agreement.

24 **VI. ADDITIONAL PROVISIONS**

25 A. This Settlement Agreement and the obligations incurred herein, shall be in full and final
26 disposition of the Action with prejudice, including any and all Settled Claims against Defendants. On
27 the Effective Date, Plaintiffs and Class Members shall be deemed to have fully, finally, and forever
28 released, relinquished, and discharged Defendants of all Settled Claims.

1 B. This Settlement Agreement may not be modified or amended, nor any of its provisions be
2 waived, except by a writing signed by all parties hereto or their successors-in-interest.

3 C. This Settlement Agreement constitutes the entire agreement among the parties hereto
4 concerning the settlement of the Action, and no representations, warranties, or inducements have been
5 made by any party hereto other than those contained and memorialized in such documents.

6 D. This Settlement Agreement may be executed in one or more counterparts. All executed
7 counterparts and each of them shall be deemed to be one and the same instrument provided that counsel
8 for the parties to this Agreement shall exchange among themselves original signed counterparts.

9 E. This Settlement Agreement shall be binding upon, and inure to the benefit of, the
10 successors and assigns of the parties hereto.

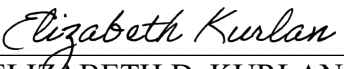
11 F. All counsel executing this Settlement Agreement warrant and represent that they have the
12 full authority to do so, and that they have the authority to take appropriate action required or permitted
13 to be taken under the Agreement to effectuate its terms.

14 G. Class Counsel and Defendants' Counsel agree to cooperate fully with another in seeking
15 Court approval of this Settlement Agreement and promptly agree upon and execute all such other
16 documentation as reasonably may be required to obtain final approval by the Court of the settlement.

17 **VII. SIGNATURES**

18 For and on behalf of Defendants:

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20 EXECUTED this 20 day of August, 2021

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6 For and on behalf of Plaintiffs:

7 EXECUTED this 20th day of August, 2021

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