UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

MILAN ATANACKOVIC, et. al,	:	
	:	
Plaintiffs	:	
	:	
v.	:	Case No.6:17-cv-06689-WKS
	:	
	:	
ELAINE C. DUKE, et. al,	:	
	:	
Defendants.	:	

OPINION AND ORDER

Plaintiffs seek review of Customs and Border Patrol's ("CBP") decision to deny Dr. Milan Atanackovic admission into the United States. At issue before the Court are Plaintiffs' and Defendants' Motions for Summary Judgment and Defendants' Motion to Strike Extra-Record Evidence.

For the reasons set forth below, Plaintiffs' Motion for Summary Judgment is **granted in part and denied in part**. Defendants' Cross-Motion for Summary Judgment is **denied** and Defendants' Motion to Strike is **denied**.

Statutory Background

I. The Immigration and Nationality Act and Canadian Citizens

Under the Immigration and Nationality Act ("INA"), a foreign national arriving at the United States is considered an "applicant for admission." 8 U.S.C. § 1225. "In general," a nonimmigrant applicant for admission who "is not in possession

of a valid immigrant visa or border crossing identification card at the time of application for admission is inadmissible." 8 U.S.C. § 1182(a)(7)(B)(i)(II).

However, both Department of Homeland Security ("DHS") and Department of State regulations state that Canadian citizens are visa-exempt. DHS regulations provide that "[a] visa is generally not required for Canadian citizens, except those Canadians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2." 8 C.F.R. § 212.1(a)(1). Similarly, Department of State regulations provide that:

> A visa is not required for an American Indian born in Canada having at least 50 percentum of blood of the American Indian race. A visa is not required for other Canadian citizens except for those who apply for admission in E, K, V, or S nonimmigrant classifications as provided in paragraphs (k) and (m) of this section and 8 C.F.R. § 212.1.

22 C.F.R. § 41.2.

II. J-1 Visa Program

The J-1 visa program allows nonimmigrant exchange visitors to temporarily come to the United States to teach, conduct research, or receive training. 8 U.S.C. § 1101(a)(15)(J). The J-1 visa program specifically mentions people coming to the U.S. to "receive graduate medical education." *Id*. To be eligible for

a J-1 visa, an applicant must have "a residence in a foreign country which he has no intention of abandoning." *Id*.

People who come to the U.S. through the J-1 visa program to receive graduate medical training become subject to the two-year foreign residence requirement of 8 U.S.C. § 1182(e):

> No person admitted under section 1101(a)(15)(J) of this title . . . who came to the United States . . . in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States.

8 U.S.C. § 1182(e). Individuals subject to the two-year foreign residence requirement are also ineligible to apply for a change of status from J-1 to another nonimmigrant status from within the United States. 8 U.S.C. § 1258(a).

People subject to the two-year foreign residence requirement may seek a waiver of this requirement through the Department of State if (1) the alien's "departure from the United States would impose exceptional hardship" upon the alien's American citizen (or lawful permanent resident) spouse or child; (2) the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion;

(3) a U.S. government agency states that a waiver would be in the national interest; or (4) the alien's home country does not object to a waiver. 8 U.S.C. § 1182(e).

III. H-1B Visa Program

The H-1B visa program allows U.S. employers to temporarily hire foreign workers in specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b). In order to employ a foreign worker, an employer must first submit a Form I-129 Petition for a Nonimmigrant Worker to the U.S. Citizenship and Immigration Services ("USCIS"). See 8 U.S.C. § 1184(c)(1), 8 C.F.R. § 214.2(h)(1)(i) ("The employer must file a petition with the Service for review of the services or training and for determination of the alien's eligibility for classification as a temporary employee or trainee, before the alien may apply for a visa or seek admission to the United States."). If USCIS "approves the H-1B classification, the nonimmigrant then may apply for an H-1B visa." 20 C.F.R. § 655.700(b)(3).

Factual Background

I. Undisputed Facts

Dr. Atanackovic first entered the United States on a J-1 visa on June 5, 2013. ECF 1 at 6. Dr. Atanackovic's J-1 status was sponsored by the Educational Commission for Foreign Medical Graduates. ECF 1 at 7. As such, Dr. Atanackovic is subject to

the two-year foreign residence requirement on the basis of his participation in graduate medical education. *Id*.

In 2016, USCIS approved an H-1B petition, submitted by Unity Hospital, to employ Dr. Atanackovic. *Id*. The approved petition was valid from September 12, 2016 to September 11, 2019, with notice to the Peace Bridge in Buffalo, New York as the designated port of entry. *Id*. Dr. Atanackovic did not obtain an H-1B visa. ECF 12-2 at 2-3. Rather, Dr. Atanackovic presented himself at the United States border with his approved H-1B petition. *Id*. With this documentation, Dr. Atanackovic entered the United States multiple times between September 2016 and January 2017. *Id*.

On January 11, 2017, Dr. Atanackovic again presented himself for admission to the United States at the Peace Bridge port of entry. ECF 1 at 7. Dr. Atanackovic was denied admission on January 11, 2017 "because United States Customs and Border Protection determined that Dr. Atanackovic did not have the necessary waiver under 8 U.S.C. § 1182(e) to be allowed admission to work at Unity Hospital." ECF 12-2 at 2. The ground of inadmissibility cited by CBP was 8 U.S.C. § 1182(a)(7)(A)(i)(I). ECF 12-1 at 23, ECF 13 at 14. Dr. Atanackovic was allowed to withdraw his request for admission and return to Canada. ECF 12-2 at 2-3.

After his denial of admission in January 2017, Dr. Atanackovic filed a Department of Health and Human Services clinical Interested Government Agency waiver request. ECF 1 at 12. This was approved by USCIS on July 27, 2017. *Id*. A new employer, Rochester General Hospital, filed a new H-1B petition for Dr. Atanackovic on July 14, 2017. *Id*. The new H-1B petition was approved on August 1, 2017 and Dr. Atanackovic was admitted to the United States on the new H-1B petition at the Peace Bridge port of entry on August 9, 2017. *Id*.

Dr. Atanackovic currently resides with his family in the state of New York and works at Rochester General Hospital. ECF 12-2 at 3.

In October, 2017, Dr. Atanackovic; his wife, Bojana Savic; Unity Hospital of Rochester; and Rochester General Hospital (collectively, "Plaintiffs") filed this case in United States District Court for the Western District of New York against Elaine C. Duke, Acting Secretary of the U.S. Department of Homeland Security; Kevin K. McAleenan, Acting Commissioner of U.S. Customs and Border Protection; Rose Brophy, Director of Field Operations for U.S. Customs and Border Protection in the Buffalo Field Office; and Jefferson B. Sessions, the Attorney General of the United States (collectively, "Defendants"). ECF 1. The Complaint alleges three causes of action: (1) abuse of discretion and violation of the Administrative Procedure Act,

(2) failure to provide reasoned analysis describing a marked change in policy of permitting visa-exempt Canadians from entering the United States when such nationals are subject to the two-year foreign residence requirement, and (3) declaratory relief under the Declaratory Judgment Act. *Id*.

Plaintiffs filed a Motion for Summary Judgment, arguing that Defendants' refusal to admit Dr. Atanackovic was arbitrary and capricious, and that Defendants needed to provide a reasoned analysis for a marked change in policy. ECF 9-1 at 2. Defendants filed a Cross-Motion for Summary Judgment alleging that Plaintiffs' claims are moot, that CBP's actions were discretionary and not subject to review by this court, and that CBP's actions were lawful. ECF 12-1 at 2. Defendants also filed a Motion to Strike extra-record evidence submitted by Plaintiffs. ECF 15 at 1.

II. Disputed Facts

Plaintiffs submitted a Statement of Material Facts and four supporting declarations with their Motion for Summary Judgment. Defendants argue these should not be considered by the Court. ECF 15. The declarations come from Dr. Atanackovic, the named Plaintiff in this case; Mary Parlet, Vice President of the Primary Care Institute for Rochester Regional Health ("RRH"); Gregory H. Siskind, experienced practicing immigration attorney and co-author of the J-1 Visa Guidebook and The Physician

Immigration Handbook; and William A. Stock, experienced immigration attorney and immediate past president of the American Immigration Lawyers Association ("AILA"). ECF 9-3.

Dr. Atanackovic's declaration gives a more detailed account of his experience with CBP officers on January 11, 2017, the day he was refused admission into the United States. ECF 9-3 at 6.

Mary Parlet's declaration addresses the organizational plaintiffs. Ms. Parlet is the Vice President of the Primary Care Institute for Rochester Regional Health, the parent company that owns both Rochester General Hospital and Unity Hospital. ECF 9-3 at 10. Parlet explains how the denial of Dr. Atanackovic's admission into the United States effected Unity Hospital and how both Unity Hospital and Rochester General Hospital rely on Canadian doctors. ECF 9-3 at 11-12. Gregory H. Siskind's declaration describes his view of the admissibility of Canadian doctors who were previously admitted to the U.S. on J-1 status. ECF 9-3. William A. Stock's declaration also gives his understanding of the legal scheme surrounding Canadian doctors working in the United States. *Id*. Mr. Stock attests that "[o]ver the course of more than 20 years of practice, I have worked with Canadian physicians subject to the 212(e) requirement who have been allowed entry in H-1B status." *Id*. at 21.

Discussion

I. Legal Standards

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if the moving party establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court should grant summary judgment if, after considering the evidence in the light most favorable to the nonmoving party, the Court finds that no rational jury could find in favor of that party. *Scott v. Harris*, 550 U.S. 372, 380 (2007). The moving party bears the burden of establishing that there are no factual issues and that they are entitled to judgment as a matter of law. *Battery Steamship Corporation v. Refineria Panama S.A.*, 513 F.2d 735, 738 (2d Cir. 1975).

The Administrative Procedure Act ("APA") provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review," 5 U.S.C. § 704. The APA provides that agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency decision is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

II. Subject Matter Jurisdiction

Before reaching the merits, the Court must address two threshold issues in this case. The first is whether federal courts have authority to review the CBP's denial of admission in this instance. The second is whether Plaintiffs' claims are moot.

a. CPB's Actions on January 11, 2017 Are Subject to Review by This Court.

Defendants contend that the authority to admit Dr. Atanackovic at the border is commensurate with the authority to issue such a visa. That authority "is an area of legislative discretion in which the courts do not have the authority to intervene." ECF 12-1 at 22.

Under the doctrine of consular nonreviewability, "a consular officer's decision to deny a visa is immune from judicial review." *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir.2009). The doctrine of consular

nonreviewability "is broad in scope, precluding a court from reviewing a consular officer's decision to deny a visa even if that decision's foundation was erroneous, arbitrary, or contrary to agency regulations." *Lleshi v. Kerry*, 127 F. Supp. 3d 196, 200 (S.D.N.Y. 2015) (internal quotations omitted). However, the Supreme Court has never extended this doctrine to individual admissibility determinations by CBP officers at the ports of entry. *See American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400, 418 (S.D.N.Y. 2006) ("The doctrine of consular nonreviewability applies to review of a consular official's decision to issue or withhold a visa, not to the decisions of non-consular officials and certainly not to DHS.") (internal quotations omitted).

The doctrine of consular nonreviewability is based in part on the discretion that consular officials have under the INA. Looking at the language of the statute, there seems to be a difference between the discretion wielded by consular officers and the authority belonging to CBP officers at ports of entry. In 8 U.S.C. § 1201, which regulates the "Issuance of visas," the statute states that "[u]nder the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issues thereunder, a consular officer *may* issue [ ] to an immigrant who has made proper application therefor, an immigrant visa . . . [and] to a nonimmigrant who

has made proper application therefor, a nonimmigrant visa." 8 U.S.C. § 1201(a)(1) (emphasis added). Further down in that same section, the statute provides:

> Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the [sic] United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law.

8 U.S.C. § 1201(h). Similarly, Department of Homeland Security regulations state that:

> Each alien seeking admission at a United States port-of-entry must present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal under the immigration laws, Executive Orders, or Presidential Proclamations, and is entitled, under all of the applicable provisions of the immigration laws and this chapter, to enter the United States.

8 C.F.R. § 235.1(f)(1).

Thus, a consular officer "may" or may not issue a visa to an applicant who has made a proper application. 8 U.S.C. § 1201(a)(1). However, for a CBP officer to deny entry to a person seeking admission at the border, they need a valid legal basis. See 8 U.S.C. § 1201(h) (". . . found to be inadmissible *under this chapter or any other provision of law*") (emphasis added); 8 C.F.R. § 235.1(f)(1) (". . . that the alien is not subject to

removal *under the immigration laws, Executive Orders, or Presidential Proclamations* . . . .") (emphasis added).

The statute distinguishes between the absolute discretion of consular officers and the legal authority of CBP officers. Dr. Atanackovic is not attempting to challenge a consular denial. He is strictly challenging CBP's decision at the border. The doctrine of consular nonreviewability does not apply.

Lastly, the INA's jurisdiction stripping provision concerning expedited orders of removal is inapplicable. 8 U.S.C. § 1252(a)(2)(A)(i) provides that "no court shall have jurisdiction to review . . . an order of removal pursuant to section 1225(b)(1) of this title." 8 U.S.C. § 1252(a)(2)(A)(i). Section 1225(b)(1) allows immigration officers to process aliens for expedited removal if they are found inadmissible under, as relevant here, 8 U.S.C. § 1182(a)(7). Dr. Atanackovic was found inadmissible under Section 1182(a)(7), but he was allowed to withdraw his application for admission and so was not subject to an order of expedited removal. As such, judicial review is not precluded: the INA explicitly forbids judicial review of orders of expedited removal, but it is silent on withdrawals of admission.

Finally, there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 670 (1986),

superseded on other grounds by 42 U.S.C. § 405. It takes "clear and convincing evidence to dislodge that presumption." *Kucana v. Holder*,558 U.S. 233, 250 (2010)(internal citation and quotation omitted). There is no such evidence here. The Court has authority to review CBP's actions on January 11, 2017.

b. Plaintiffs' Claims Regarding Dr. Atanackovic's Denial of Admission on January 11, 2017 Are Not Moot.

Federal district courts do not have subject matter over moot cases. *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999). A case is moot when "the parties lack a legally cognizable interest in the outcome," *Powell v. McCormack*, 395 U.S. 486, 496 (1969). When "[i]nterim relief or events have completely or irrevocably eradicated the effects of an alleged violation of law and there is no reasonable expectation that the violation will recur then a case is moot." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). But "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see also Wong v. Dep't of State*, 789 F.2d 1380 (9th Cir. 1986) (finding that even though aliens challenging the revocation of their L-1 visas were eventually admitted into the country after waivers were granted, the issue of the revocation remained live because other benefits would have been given to the L-1 visa holder).

8 U.S.C. § 1182(e) provides for waivers of the two-year residence requirement if (1) the alien's "departure from the United States would impose exceptional hardship" upon the alien's American citizen (or lawful permanent resident) spouse or child; (2) the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion; (3) a U.S. government agency states that a waiver would be in the national interest; or (4) the alien's home country does not object to a waiver. 8 U.S.C. § 1182(e).

Dr. Atanackovic is currently working for Rochester General Hospital through a waiver from the third basis outlined above. Defendants contend that this moots the case: "Dr. Atanackovic is currently permitted to live in the United States and work as a physician in H-1B status at Plaintiff Rochester General Hospital." ECF 12-1 at 19.

However, Dr. Atanackovic is still unable to work at Unity Hospital, where he was originally hired. Plaintiff Unity Hospital is unable to employ Dr. Atanackovic. If the court finds in Dr. Atanackovic's favor, he will be able to enter the U.S. on H-1B status without a waiver, and will thus be able to work for Unity Hospital. The parties still have a concrete interest in the resolution of this case. The case is not moot.

III. Defendants' Motion to Strike Evidence Outside of the Administrative Record.

Generally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). In the Second Circuit, "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). The Supreme Court has also stated that if "the bare record" does "not disclose the factors that were considered or the [agency's] construction of the evidence it may be necessary for" district courts to "require some explanation in order to determine if the [agency] acted within the scope of [their] authority and if [it's] action was justifiable under the applicable standard." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency

for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Further, under Federal Rule of Civil Procedure 56(c)(4), "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Ultimate or conclusory facts and conclusions of law also cannot be used on a summary judgment motion. *BellSouth Telecomm., Inc. v. Grace & Co.*, 77 F.3d 603, 615 (2d Cir.1996). When an affidavit does not comply with these basic requirements, the offending portions should be disregarded by the court. *United States v. Alessi*, 599 F.2d 513, 514-15 (2d Cir.1979).

Along with their Motion for Summary Judgment, Plaintiffs attached a Statement of Material Facts and four supporting declarations. The declarations come from Dr. Atanackovic; Mary Parlet, Vice President of the Primary Care Institute for Rochester Regional Health ("RRH"); and two experienced immigration attorneys: Gregory H. Siskind and William A. Stock. ECF 9-3. Defendants argue that these declarations are outside the boundaries of APA's "record-rule" and should not be considered in determining the lawfulness of the agency's actions. ECF 12-1 at 16 n.2, ECF 15.

Here, the Court cannot evaluate Plaintiffs' second claim without extra-record evidence. Plaintiffs argue that Defendants' refusal to let Dr. Atanackovic into the country is a marked change of policy. The administrative record submitted to the court only contains information regarding Dr. Atanackovic's personal entries into the United States. More information is needed to understand if there was a general CBP policy of allowing similarly situated individuals to enter the United States, and if Dr. Atanackovic's denial of entry was a change in policy that warranted an explanation from the agency.

Further, this is one of the "rare circumstances" in which remand to the agency would not be helpful. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Defendants deny there has been a change of policy. It is unclear how this could be remanded back to the agency for additional investigation or explanation, given that the action which brought the parties into court (Dr. Atanackovic's denial of entry) and the administrative record it created are well over a year old. There does not seem to be an appropriate vehicle for which CBP can re-examine Dr. Atanackovic's admissibility with the history of their policy in mind, especially given that Defendants do not believe there was ever such a policy. Given these circumstances, extra-record evidence may be allowed into consideration.

However, two of the declarations at issue, those of Mr. Siskind and Mr. Stock, contain legal conclusions. The Court will not consider the legal arguments contained in the declarations but will consider portions of the declarations which draw from Mr. Siskind and Mr. Stock's personal knowledge. Specifically, the Court will consider the personal observation that Canadian citizens, in the past, have been allowed to enter the United States on H-1B status despite being subject to the two-year foreign residency requirement. This will be used not to determine whether it was correct under the law to do so, but to determine if CBP had a policy of doing so such that denying Dr. Atanackovic admission violated that policy.

In sum, the Court will consider Dr. Atanackovic's declaration, Mary Parlet's declaration, and a limited portion of the two remaining declarations in determining the merits of Plaintiff's Count II. Plaintiffs' other claims, however, are purely legal questions that do not necessitate inquiry into extra-record evidence. The Court will disregard the declarations for those claims, but not strike them. Defendants' Motion to Strike is **denied**.

IV. Cross-Motions for Summary Judgment

Plaintiffs present two main arguments in their Motion for Summary Judgment. First, Plaintiffs assert that Defendants' refusal to admit Dr. Atanackovic was arbitrary and capricious

and otherwise not in accordance with the law. Second, Plaintiffs contend that Defendants failed to provide a reasoned explanation describing a marked change in policy. In Defendants' Cross Motion for Summary Judgment, they argue that CBP's actions on January 11, 2017 were lawful and neither arbitrary nor capricious.

a. Defendants' Refusal to Admit Dr. Atanackovic Was an Abuse of Discretion and Otherwise Not in Accordance with Law.

As mentioned above, both DHS and Department of State regulations state that Canadians do not need visas to enter the United States except in specific circumstances. 8 C.F.R. § 212.1(a)(1) ("[a] visa is generally not required for Canadian citizens, except those Canadians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2."), 22 C.F.R. § 41.2 ("A visa is not required for an American Indian born in Canada having at least 50 percentum of blood of the American Indian race. A visa is not required for other Canadian citizens except for those who apply for admission in E, K, V, or S nonimmigrant classifications as provided in paragraphs (k) and (m) of this section and 8 C.F.R. § 212.1.").

Dr. Atanackovic first entered the United States on J-1 status to receive graduate medical education. This makes him subject to the two-year foreign residence requirement laid out

in 8 U.S.C. § 1182(e). In pertinent part, the two-year foreign residence requirement states that:

> [n]o person admitted [on J-1 status to receive graduate medical education] shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States.

8 U.S.C. § 1182(e).

Although both parties agree that Dr. Atanackovic is subject to the two-year residence requirement, they disagree on what that means. According to Plaintiffs, the two-year residence requirement only prevents Dr. Atanackovic from applying for an immigrant visa, for permanent residence, or for a nonimmigrant visa, but does not prevent him from entering the United States. Further, Plaintiffs allege that since Dr. Atanackovic is Canadian, and thus visa-exempt, he does not need an H-1B visa to enter the United States on H-1B status. Since he does not need an actual H-1B visa, and the foreign residence requirement only applies to obtaining a visa, the foreign residence requirement does not prohibit his entering the United States on H-1B status.

Defendants contend that a visa merely allows individuals to travel to a port of entry and apply for admission. Because Dr. Atanackovic was Canadian, he was exempt from this requirement.

However, to enter the United States to work temporarily, he still had to be eligible for H-1B *status*. To be eligible for H-1B status after previously holding a J-1 visa, Dr. Atanackovic had to either meet the foreign residence requirement or obtain a waiver. *Id*. at 3.

Plaintiffs' reading of the statute is correct: The two-year foreign residence requirement in 8 U.S.C. § 1182(e) only prevents people subject to the requirement from applying "for an immigrant visa, or for permanent residence, or for a nonimmigrant visa." 8 U.S.C. § 1182(e). It is silent about being eligible for particular nonimmigrant status in the United States.

The regulations surrounding Canadians and visas are equally clear: Canadians do not need visas except for those who apply for admission in E, K, V, or S nonimmigrant classifications. 8 C.F.R. § 212.1(a)(1), 22 C.F.R. § 41.2. Dr. Atanackovic does not fall under any of those categories, so he does not need a visa to enter the United States. Since he does not need a visa to enter the United States on H-1B status, the foreign residence requirement does not prohibit him from obtaining H-1B status.

CBP found Dr. Atanackovic inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I). ECF 12-1 at 23, ECF 13 at 14. CBP determined that "Dr. Atanackovic did not have the necessary waiver under 8 U.S.C. § 1182(e) to be allowed admission to work

at Unity Hospital." ECF 12-2 at 2. This is incorrect. As just discussed, Dr. Atanackovic did not need a waiver to 8 U.S.C. § 1182(e)'s foreign residence requirement because he did not need a visa to enter the United States on H-1B status. Because CBP officers can only deny admission if they find an applicant "to be inadmissible under . . . any provision of law" and Dr. Atanackovic was not inadmissible, the CBP officer's actions were arbitrary and capricious, and not in accordance with law.

Plaintiffs' motion for summary judgment on Count I is **granted**.

b. Plaintiffs Have Not Proven that Defendants Needed to Provide a Reasoned Analysis Describing a Marked Change in Policy.

In general, "agency action is arbitrary and capricious if it departs from agency precedent without explanation." *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 182 (2d Cir. 2005). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency must "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id*. at 2126 (quoting *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)).

Plaintiffs argue that the refusal of admission to Dr. Atanackovic constituted a change in policy which required an explanation. Defendants argue there was no change in policy.

At the summary judgment stage of proceedings, the moving party bears the burden of establishing that there are no factual issues. Plaintiffs have not done so here. Plaintiffs contend that Dr. Atanackovic's previous admissions, plus the declarations of Mr. Siskind and Mr. Stock, prove that there was a policy of admitting visa-exempt Canadians who are subject to the two-year foreign residence requirement. However, as explained above, the declarations of Mr. Siskind and Mr. Stock are full of legal conclusions which the court cannot consider. The only permissible excerpt from the declarations that is relevant here is one sentence from Mr. Stock which explains that "[o]ver the course of more than 20 years of practice, [he has] worked with Canadian physicians subject to the 212(e) requirement who have been allowed entry in H-1B status." ECF 9-3 at 21. This is not enough to show that there was a set policy and that Defendants have definitively changed their position.

Plaintiffs have not made a sufficient evidentiary showing. There is still a dispute of fact as to whether a policy existed. For this reason, summary judgment on Plaintiffs' Count II is **denied**.

c. Plaintiffs' Claims Do Not Warrant Declaratory Judgment.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added). The Second Circuit has laid out certain prudential factors for district courts to consider in determining whether to exercise their discretion to consider a declaratory judgment action:

> (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; ... (2) whether a judgment would finalize the controversy and offer relief from uncertainty[;] ... (3) whether the proposed remedy is being used merely for procedural fencing or a race to res judicata; (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (5) whether there is a better or more effective remedy."

New York v. Solvent Chem. Co., Inc., 664 F.3d 22, 26 (2d Cir. 2011) (quoting *Dow Jones & Co., Inc. v. Harrods Ltd.*, 346 F.3d 357, 359-60 (2d Cir. 2003)) (alterations in original).

"When the traditional remedy provides the parties with the procedural safeguards required by the law to insure the availability of a proper remedy, the courts, in exercising their

discretion, may properly dismiss the declaratory judgment." *U.S. Bank Nat. Ass'n ex rel. Lima Acquisition LP v. PHL Variable Ins. Co.*, No. 12–CV–6811, 2014 WL 998358, at *10 (S.D.N.Y. Mar.14, 2014) (citing *John Wiley & Sons, Inc*. v. *Visuals Unlimited*, No. 11-CV-5453-CM, 2011 WL 5245192, at *4 (Nov. 2, 2011)). "Federal courts . . . 'must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, . . . [particularly] where a ruling is sought that would reach far beyond the particular case.'" *Jenkins v. United States*, 386 F.3d 415, 417 (2d Cir. 2004) (quoting *Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 243).

In their Complaint, Plaintiffs ask for declaratory judgment on a number of issues. Plaintiffs asked the Court to declare:

> (1) "that Canadian national physicians and their derivative family members who are subject to the two-year foreign residence requirement of 8 U.S.C. § 1182(e) who are in possession of an approved H-1B petition and H-4 spouses and children who have H-4 approvals from USCIS and/or who are eligible to apply for H-4 status to CBP based on their relationship to the H-1B beneficiary, with an unexpired passport valid for six months beyond the admission date are admissible to the United States in H-1B and/or H-4 derivative status." ECF 1 at 15.
>
> (2) "that Dr. Atanackovic was eligible to be admitted in H-1B status to the United States." *Id*.
>
> (3)"that the Defendants' position that 8 U.S.C. § 1182(e) prevents all of those subject to it, including citizens of Canada, from obtaining H-1B or H-4 status in any manner is contrary to the statutory standards, regulations,

> legislative history, congressional intent, and due process of law." *Id*.
>
> (4) "that CBP has a duty to explain its change in policy and standards with respect to the adjudication of Dr. Atanackovic's application for admission." *Id*.

Plaintiffs do not address their declaratory judgment claim in the Motion for Summary Judgment.

Regarding Plaintiffs' first request for declaratory judgment, the intervention Plaintiffs seek "would reach far beyond the particular case." *Jenkins v. United States*, 386 F.3d 415, 417 (2d Cir. 2004). The second and third requests have already been addressed in this Court's finding in favor of Plaintiffs on Count I, and a declaratory judgment would not serve any additional purpose in clarifying or settling the legal issues involved. *See New York v. Solvent Chem. Co., Inc.*, 664 F.3d 22, 26 (2d Cir.2011). Plaintiffs' fourth request is foreclosed by this Court's decision against Plaintiffs on Count II. Thus, Plaintiffs' Count III is **dismissed without prejudice**.

Conclusion

For the reasons set forth above, Plaintiffs' Motion for Summary Judgment is **granted in part and denied in part**. Summary judgment on Count I is **granted**, on Count II is **denied**, and on Count III is **dismissed without prejudice**. Defendants' Motion for Summary Judgment is **denied**. Defendants' Motion to Strike is **denied**.

DATED at Burlington, in the District of Vermont, this 27th day of March, 2019.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge