BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director

GLENN M. GIRDHARRY
Assistant Director

JOSHUA S. PRESS, AKSB # 1005028
Trial Attorney
United States Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-0106
e-Mail: joshua.press@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

TENREC, INC., et al.

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants.

Case No. 3:16-cv-00995-SI

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Oral Argument Requested

This Court should grant Defendants' motion to dismiss because Plaintiffs have failed to meet their burden of establishing that the Court has jurisdiction to review their claims. Specifically, Plaintiffs lack standing to sue because they have incurred no cognizable injury, have not pleaded that the Defendants' "lottery" caused them any actual harm, and can no longer

feasibly achieve redress through litigation given that H-1B visas for past years are now exhausted and the process for new H-1B petitions and visas will soon be relied upon by tens of thousands of people to commence employment for U.S. employers. Simply put, the complete absence of harm specified in Plaintiffs' Complaint, along with Plaintiffs' speculation about the theoretical possibility of future redressability does not give rise to standing under Article III. Nor is it possible to turn back the clock on the six-year statute of limitations. The Court should dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. The Individual Plaintiffs Lack Standing

As an initial matter, the Court should dismiss the individual alien plaintiffs from this case. Plaintiffs' Response (ECF No. 15) asserts that the individual Plaintiffs (Sergii Sinienok and Xiaoyang Zhu) have both constitutional and zone-of-interests standing as beneficiaries to pursue claims relating to the non-processed H-1B visa petitions that the organizational Plaintiffs filed on their behalf. But "numerous courts ... agree (albeit for a variety of reasons) that … petitioner[s]—and not the beneficiar[ies]—of a visa application [are] the proper part[ies] with standing to challenge the agency's action." *Pai v. USCIS*, 810 F. Supp. 2d 102, 111–12 (D.D.C. 2011). "Standing involves both constitutional requirements and prudential limitations." *United States v. Mindel*, 80 F.3d 394, 396 (9th Cir. 1996). "The constitutional requirements are derived from Article III, Section 2, Clause 1 of the United States Constitution, and the prudential limitations are rules of judicial self-governance." *Id*. To demonstrate Article III standing, a plaintiff must establish (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To establish "zone-of-interests" standing (previously known as "prudential" standing), a plaintiff must show that the interest sought to be

vindicated falls "within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

A. Constitutional Standing Of Individual Nonimmigrant Visa Beneficiaries

Regarding Article III standing in relation to an employer's visa petition and its individual alien beneficiaries, the Central District of California has provided the appropriate analysis. *Cost Saver Management, LLC, et al. v. Napolitano, et al.*, 2011 U.S. Dis. LEXIS 156096 (C.D. Cal. June 7, 2011). Specifically, the *Cost Saver* court ruled that a beneficiary of a visa petition has no protected interest in obtaining an approved visa petition for his own future employment. *Id.* at 11–12. A visa beneficiary must instead "assert his own legal rights and interests, and [not] rest his claim to relief on the legal rights or interests of third parties":

> Rather, [the beneficiary] relied on the injury that [the visa petitioner] allegedly has suffered as Plaintiffs contest that [the beneficiary's] direct injury is the denial of the petition[].... This circular argument falls under its own weight. The denial of the visa could not have legally injured [the beneficiary] because any legally protected interest that derives from the [visa] petition belongs to the [petitioner], as it filed the petitions and [the beneficiary] had not been approved for the visa. Although the denial of such petition could have caused an injury-in-fact for [the petitioner], it could not have injured the beneficiary because it did not similarly result in an invasion of one of his legally protected interests.... [T]he party that petitioned for the visa ... is considered the proper party having a personal stake in the outcome sufficient to warrant ... invocation of federal court jurisdiction.

Id. at *10–11.

The *Cost Saver* court also addressed Plaintiffs' countervailing authority stemming from *Abboud v. INS*, 140 F.3d 683 (9th Cir. 1998), *superseded by statute as stated by Spencer Enters., Inc. v. United States*, 345 F.3d 683, 692 n.5 (9th Cir. 2003). In that case, the Ninth Circuit held that an alien had standing to challenge the denial of an I-130 visa petition, or "Petition for Alien Relative," filed on his behalf by his deceased United States-citizen father. 140 F.3d 843, 847 (9th

Cir. 1998). Just as is true in this case, the *Cost Saver* court pointed out how the plaintiff in *Abboud* sought an *immigrant* visa under a different section of the INA, whereas the *Cost Saver* beneficiary was hoping to receive a *nonimmigrant* employee visa: "*Abboud* concerned a petition for an I-130 immigrant visa, which allows an immediate relative of United States citizens and lawful permanent residents to obtain an *immigrant* visa and eventually … to become a permanent legal resident …. That situation differs in law and gravity from an employer's attempt through a *nonimmigrant* … visa to transfer its foreign employee temporarily to the United States." 2011 U.S. Dis. LEXIS 156096, at *13–14 (citing *Abboud*, 140 F.3d at 847). The *Cost Saver* decision is thus more apt to the situation here, where "the plaintiff beneficiar[ies] ha[ve] lost nothing other than the opportunity to reside temporarily in the United States, which does not amount to an Article III injury." *Id.* at *14.

B. Zone-Of-Interests Standing Of Individual Nonimmigrant Visa Beneficiaries

In addition to Article III's normal standing requirements, the Supreme Court has held that a person suing under the Administrative Procedure Act ("APA") must also be "arguably within the zone of interests to be protected or regulated by the statute" allegedly violated. *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). In this respect, Sinienok and Zhu claim that they are within the zone of interests of the I-129 nonimmigrant visa petitioning process because they are aliens and the statute speaks of what should happen with aliens' visa petitions. Pl. Resp. at 4 ("The statute starts with 'Aliens' and it is those aliens who are the individual plaintiffs in this case."). But this myopic view of 8 U.S.C. § 1184 misses the forest for the trees.

The question of zone-of-interests standing for I-129 petitioners was discussed in depth in *Khalid v. DHS*, 1 F. Supp. 3d 560 (S.D. Tex. 2014). In that case, the court held that the interest of an employer who filed a Form I-129 petition on behalf of a religious worker in coming to work in the United States was only tangentially related to Congress's purpose in passing the statute. *Id.* at 568–69. "The language of the statute *and the cap on the number of special-immigrant visas*, added to the INA's *overall goal of protecting the American labor force*, does not show a Congressional concern to further the interests of religious-worker aliens who seek to come to or remain in the United States." *Id.* at 569 (emphases added). In other words, contrary to Plaintiffs' arguments that the relevant statute was meant to simply protect "aliens," the statutory cap and its limitations were not created out of Congress's great concern for visa beneficiaries. The key point in the legislation's zone of interest lies in the scarcity on the number of visas. It is impossible to believe that those limits exist to protect alien beneficiaries; the limits are evidence of Congress' concern to protect the United States labor market.

The reasoning of *Khalid* applies with equal force to this case. As nonimmigrant visa beneficiaries (as opposed to the petitioning organizations), the individual Plaintiffs are simply not among the class of people Congress implicitly authorized to sue. This is because the H-1B visa allotment is a clear limitation—not a protection—for alien-worker beneficiaries. If anyone other than U.S. workers are to be protected by the statutory process challenged in this case, it is the prospective U.S. employer who seeks employment authorization on behalf of a foreign national the petitioner intends to employ.

Plaintiffs Sinienok and Zhu lack both constitutional and prudential standing as they are third parties with no cognizable injury to challenge the lottery process and are not within the statutory or regulatory zone of interest. Their claims should be dismissed.

II. Plaintiffs Allege No Injury From The Non-Receipt Of The H-1B Petitions

Plaintiffs' Response argues that they are injured from the non-receipt of their H-1B petitions because they believe the statute requires Defendants to make "a … line for H-1B visa[]" petitioners. Pl. Resp. at 4, 5–6. In short, Plaintiffs want USCIS to create a "line" for new H-1B visa petitions rather than utilize a lottery, and they want a place in that line. *Id.* Without alleging that they will suffer from any "certainly impending" harm from next year's lottery (if one is necessary), Plaintiffs can only argue harm based on their fear "that they will be subjected to a never[-]ending game of chance under the current [H-1B lottery] system." Pl. Resp. at 7 (citing Compl. at ¶ 50). But this is not a sufficient injury for Article III unless Plaintiffs explain how they have been (or will be) actually worse off without the creation of such a line. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) (holding that plaintiffs cannot claim an injury in fact where alleged harm is "based on their fears of hypothetical future harm").

Indeed, just as was true from the Complaint, Plaintiffs' Response is silent regarding whether the organizational Plaintiffs have found another employee, *i.e.*, a U.S. worker, to work in its intended new jobs. Both documents are equally silent regarding whether the organizational Plaintiffs still want to employ the individual alien Plaintiffs—or have any intention to do so in the future. And both documents are silent regarding whether the individual Plaintiffs still want to be employed by the organizational Plaintiffs. Without listing *any* of this information, it is difficult to imagine how they are suffering from any real-world, much less "certainly impending"

harm. *See McFarland v. City of Clovis*, — F. Supp. 3d. —, 2016 WL 632663, at *4 (E.D. Cal. Feb. 17, 2016) ("McFarland needs to make factual allegations that identify the specific policy at issue, explain how the policy is deficient, [and] *explain how the policy caused him harm*." (emphasis added)). Indeed, without any explanation of how the lack of an H-1B "line" is causing harm to the Plaintiffs, their "injuries" are entirely speculative, as they are premised on the *potential* that all will be well by the time they and their H-1B petitions have gotten to the "front" of the line. *Cf. Whitaker v. Health Net of Cal., Inc.*, 2012 WL 174961, at *2 (E.D. Cal. Jan. 20, 2012) ("[P]laintiffs do not explain how the loss here has actually harmed them …. Any harm stemming from their loss thus is precisely the type of conjectural and hypothetical harm that is insufficient to allege standing." (footnote omitted)).

It is therefore not surprising that Plaintiffs' attempt to distinguish *Ching Yee Wong v. Napolitano* is unavailing. 654 F. Supp. 2d 1184 (D. Or. 2009). Specifically, Plaintiffs describe that case as in line with a stale or moot claim rather than presenting any "live" issues. Pl. Resp. at 8. But this characterization misreads how Judge Stewart explicitly dismissed the complaint because it "fail[ed] to allege that [the organizational plaintiff] ha[d] suffered or will suffer any injury as a result of USCIS's denial of [the] H-1B application on [the individual plaintiff's] behalf." *Id.* at 1189. Regardless of the other factual minutiae involved in *Wong*, that same rule of law should apply with equal force in this case. *Cf. United States v. Battles*, 362 F.3d 1195, 1198 (9th Cir. 2004) (opining that "justice demands that we treat like cases alike" when there is "no principled distinction" between cases).

III. Plaintiffs Have Not Pleaded Sufficient Facts to Establish Redressability

Similarly, at this point in the filing period, the statutory quotas for H-1B visas are exhausted for FY 2017. If Plaintiffs' arguments and proposed remedy were granted at this eleventh hour, it would be grossly unfair to the H-1B petitioners whose alien beneficiaries are less than a month away from being eligible to commence employment in H-1B status because it would require an upheaval of the entire system. Of course, this drastic approach would be even more unfair if the Plaintiffs' request were applied retroactively to prior fiscal years. Although Plaintiffs claim they are only seeking declaratory relief, they are actually seeking injunctive relief based entirely on a past allegation of harm—a remedy that would require the agency to go back in time to recapture past visa petitions and thereby violate an act of Congress. *See* Pl. Resp. at 9 ("The injury can be redressed by requiring the agency to comply with the statute and issue receipt notices with priority dates for those rejected petitions, and requiring the agency to provide H-1B status in the order of petition filing date[.]").

Again, even though Plaintiffs fear they will again lose out in the next H-1B visa lottery, Pl. Resp. at 9–10, the Ninth Circuit has been crystal clear that "[p]ast exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. Nor does speculation or 'subjective apprehension' about future harm support standing." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (citations omitted). Here, it is speculative that a cap will be needed for next year's lottery. And it is even more speculative to believe that the organizational Plaintiffs will seek to petition in next year's lottery for these same individual beneficiaries—or any other beneficiary. Plaintiffs' silence on those issues speaks volumes.

Nevertheless, the Ninth Circuit's opinion in *Zixiang Li v. Kerry* is illustrative of the redressability dilemma that Plaintiffs present. 710 F.3d 995 (9th Cir. 2014). That case involved a similar challenge by aliens seeking permanent residence who alleged that immigration officials misallocated immigrant visas to other eligible applicants. *Id.* at 1000. By the time the complaint was before the court, however, the plaintiffs were essentially arguing over visa-exhaustion requirements from prior fiscal years. This was a problem because the court of appeals had no ability to go back in time to recapture and reallocate those visas during the current fiscal year. Consequently, the aliens' claims for prospective relief (which would have required the State Department to take visa numbers from one fiscal year and allocate them to another fiscal year) were moot. *Id.* at 1003

The same specter of redressability and mootness exists here because "Congress has established annual numerical limits on the number of [non-]immigrant visas." *Id.* Those numbers are currently assigned, and the H-1B visas that Plaintiffs ultimately seek will be, in less than a month, relied upon by approved petitioners and their beneficiaries to enter the United States and commence employment for U.S. employers. In such circumstances, the relief Plaintiffs seek (that is, a "do-over" where USCIS no longer uses a lottery system, but instead creates a "line" of petitioners) would no longer be feasibly redressable for Article III. *See, e.g.*, *Alpha K9 Pet Servs. v. Johnson*, — F. Supp. 3d. —, 2016 WL 1090241, at *1 (S.D. Tex. Mar. 21, 2016) ("[E]ven assuming that Business Plaintiffs['] injuries can be established, that demonstration does not render them redressable."). And this is especially true where, as here, Plaintiffs are seeking visas that are (or will essentially be) no longer available. *See id.* ("The petitions filed by these Business Plaintiffs were for the 2015 fiscal year.... Given that the 2015 season has already

passed, requiring USCIS to reconsider or grant their applications would have no real life effect." (internal citations and quotations omitted)). The simple truth is that "[o]nce [one of these limited] visa number[s] is gone, it cannot be recaptured absent an act of Congress." *Zixiang Li*, 710 F.3d at 1002.

In this case, USCIS has already accepted a sufficient number of H-1B petitions to meet the FY17 H-1B numerical limitation. And beneficiaries of H-1B petitions accepted and approved under the FY17 H-1B cap are in the process of being issued visas by the State Department to allow those beneficiaries to travel to the United States and commence employment in less than a month (specifically, on or after October 1, 2016). Beneficiaries who were already in the United States and were approved for a change of status will simply change to H-1B nonimmigrant status on that date without the need for a separate visa. Furthermore, cap-subject H-1B petitions approved in prior fiscal years have already been relied upon to employ foreign workers in the United States, the visas from those prior fiscal years have been allocated, and Plaintiffs' attempt to establish a "line" would create upheaval not only for those petitioners with an approved FY17 cap-subject H-1B petition, but also for all U.S. employers currently employing H-1B nonimmigrant workers from those prior fiscal years for which Plaintiffs seek to include in their class claims. In short, the Plaintiffs' approach would create chaos and is not logistically feasible for this or past fiscal years. And without alleging any future injury, this Court lacks the ability to redress Plaintiffs' alleged injuries. *Updike v. City of Gresham*, 62 F. Supp. 3d 1205, 1214 (D. Or. 2014) (Simon, J.).

IV. Plaintiffs' Claims Are Time-Barred

Finally, 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. Although Plaintiffs contend that the statute does not apply to the case at bar, this ignores how "[w]hen, as here, plaintiffs bring a facial challenge to an agency ruling … 'the limitations period begins to run when the agency publishes the regulation.'" *See, e.g.*, *Hire Order, Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (quoting *Dunn–McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997)) (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991)).[1]

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should grant its motion and dismiss the above-captioned action.

Respectfully submitted this 1st day of September 2016.

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director

GLENN M. GIRDHARRY
Assistant Director

By: */s/ Joshua S. Press*
JOSHUA S. PRESS

[1] Finally, Defendants believe this is an important issue. Defendants' counsel is, therefore, ready and willing to be physically present for oral argument if the Court grants Defendants' request.

Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-0106
joshua.press@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 3,005 words, including headings, footnotes, and quotations, but excluding the caption, signature block, and any certificates of counsel.

By: */s/ Joshua S. Press*
JOSHUA S. PRESS
Trial Attorney
United States Department of Justice
Civil Division
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, I electronically filed the foregoing DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

By: */s/ Joshua S. Press*
JOSHUA S. PRESS
Trial Attorney
United States Department of Justice
Civil Division
Attorney for Defendants