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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

TENREC, INC., SERGII SINIENOK, WALKER MACY LLC, XIAOYANG ZHU, and all others similarly situated, Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, and LEON RODRIGUEZ, Director, U.S. Citizenship and Immigration Services, Defendants.	Case No. 3:16-cv-00995-SI PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7-1(a)(1)(A), undersigned counsel certifies that the parties made a good faith effort to resolve the dispute by conferring by telephone and email, and have been unable to do so.

MOTION

Plaintiffs hereby move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment declaring the lottery process for H-1B quota distribution unlawful and enjoin its operation, and order further relief as this Court deems just and proper to ensure an orderly priority date filing and waiting date system is implemented for Fiscal Year 2018 and future years in accordance with Congressional intent. Plaintiffs respectfully request for themselves and on behalf of all others similarly situated, an order permitting Plaintiffs and class members the option to resubmit an H-1B petition which was previously submitted and not received and provided a priority date, to receive a priority date based on the original filing, and to be provided a waiting list and assignment of a quota number for H-1B visas or status when such quota number becomes available in a future fiscal year beginning with Fiscal Year 2018. Plaintiffs respectfully request this Court to order defendants to accept H-1B petitions throughout the year, assign priority dates to filed petitions, and make H-1B numbers for visas or status available based on the order in which a petition is filed. Plaintiffs bring this action pursuant to federal question jurisdiction, 28 U.S.C. § 1331, under the Administrative Procedures Act ("APA), 5 U.S.C. § 701 et seq., and the Declaratory Judgment Act, 28 U.S.C. § 2201 (a) to challenge the distribution of H-1B visas and provision of H-1B status by random computer lottery rather than in the order in which petitions are filed.

MEMORANDUM OF POINTS AND AUTHORITIES

I. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

This case presents a federal question which provides jurisdiction under 28 U.S.C. § 1331. The Administrative Procedure Act ("APA") provides for judicial review of final agency

actions. 5 U.S.C. § 702, 5 U.S.C. § 706. Under APA review, the Court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The Court may also compel agency action unlawfully withheld. 5 U.S.C. § 706(1); 5 U.S.C. § 551(13). The Court reviews an agency's interpretation of law *de novo*. *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006). A reviewing court may set aside an agency decision where "there is no evidence to support the decision or if the decision was based on an improper understanding of the law." *Kazarian v. U.S. Citizenship and Immigration Services*, 596 F.3d 1115, 1118 (9th Cir. 2010) (internal citation omitted).

The APA permits review of "final agency action," which carries two conditions: "First, the action must mark the 'consummation' of the agency's decision making process, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948) – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.*"* *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlatic*, 400 U.S. 62, 71 (1970). *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The consummation of the agency's decision making process occurred when defendants subjected all cap-subject H-1B petitions to a random lottery on April 9, 2016.[1] Receipt notices with filing dates were issued to "lottery winners" in early May, but defendants clearly communicated through the agency website that the disputed random lottery regulation would be followed and that only "lottery winners" would be issued receipt notices with filing dates. Defendants' action to conduct a lottery with plaintiffs' petitions on April 9, 2016 and separate the randomly selected "winners" from the "losers" has direct legal

[1] Defendants decided to conduct the random lottery pursuant to regulations at 8 C.F.R. § 214.2(h)(8)(ii)(B) which state in relevant part, "Petitions subject to the numerical limitation not randomly selected or that were received after the final receipt date will be rejected." Rejection is a foregone conclusion for a petition not selected in the random lottery. Rejection is not required for final agency action as the decision to conduct the lottery itself and select winners and losers is the consummation of the agency's decision making process, resulting in no priority date for those not selected randomly.

consequences. Namely, plaintiffs were not assigned a priority date based on their receipt date of April 1, 2016, which provides them with no preference according to their filing date order for available H-1B numbers. Defendants determined on April 9, 2016 that plaintiffs' petitions would not be received as filed or assigned a receipt date for distribution of H-1B numbers. As a direct result of defendants conducting the April 9, 2016 lottery with plaintiffs' petitions, plaintiffs received no assignment of a filing date, and it is as if plaintiffs had not ever filed an H-1B petition at all. As a direct legal consequence of the defendants' actions to conduct a computer-based random lottery on April 9, 2016, plaintiffs were not in line for an H-1B visa or status. The decision to conduct a random lottery and subject plaintiffs' petitions to the lottery was final agency action, from which flowed the legal consequence for plaintiffs of no priority for H-1B visas or status. It is reasonably likely that defendants will conduct another random lottery in April 2017 and distribute FY2018 numbers according to that lottery, resulting in imminent and irreparable injury to plaintiffs who filed petitions earlier than others.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is commonly used to resolve APA challenges involving agreed upon facts confined to the administrative record. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471-72 (9th Cir. 1994); *National Association of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). Viewing the evidence and inferences in favor of the nonmoving party, summary judgment is proper where "the movant shows 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); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986).

III. BACKGROUND

A. LEGAL FRAMEWORK

A U.S. employer seeking to employ a citizen of another country (a "nonimmigrant") may petition USCIS for work authorization under the H-1B visa program, which is defined in 8 U.S.C. § 1101(a)(H)(i)(B) (thus, the shorthand, H-1B) as a "specialty

occupation" category. The petition must be approved before the nonimmigrant can be issued a visa and admitted (if outside the U.S.) or provided a change to H-1B status from another category of status (if within the U.S.).

A position offered by a U.S. employer may qualify as a "specialty occupation" where the occupation requires "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1). The category is utilized by employers seeking professional level workers.

Before an employee may be admitted or provided status as an H-1B worker, the employer must secure certification of a Labor Condition Application ("LCA") with the Department of Labor ("DOL"), which requires certain attestations concerning wages and working conditions, and requires the payment of prevailing wages as determined by the DOL. See 8 U.S.C. § 1182(n). Despite the statute requiring only an LCA prior to the employee being *admitted* or provided status (as opposed to prior to a petition being filed), the regulations specify the LCA must be certified *before a petition may be filed* in the first instance. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.705.

Once the LCA is issued by DOL, the employer must file a petition, Form I-129, with USCIS, along with filing fees totaling $2,325.00. 8 U.S.C. § 1184(c)(1). The petition must be approved by USCIS prior to the nonimmigrant alien being authorized to work. 8 C.F.R. § 214.2(h)(2)(i).

The H-1B category is subject to annual quota limits. Pursuant to 8 U.S.C. § 1184(g)(1)(A) [*hereafter "paragraph (1)"*], the total number of nonimmigrant aliens granted H-1B status cannot exceed 65,000 in each government fiscal year (October 1 to September 30), except that pursuant to 8 U.S.C. § 1184(g)(5)(C), a nonimmigrant alien who has earned a master's or higher degree from a U.S. institution of higher education ("U.S. Master's") is exempt from the numerical limit until the number of U.S. Master's exemptions reaches 20,000. Thus,

under paragraph (1), the total number of H-1B nonimmigrants granted in each fiscal year cannot exceed 85,000 combining the regular and U.S. Master's caps.

8 U.S.C. § 1184(g)(3) states that "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status."

Pursuant to regulation, a petition for H-1B status may only be filed within the six (6) month window prior to the start of the October 1 fiscal year, and thus April 1 is the earliest that a petition may be filed for an upcoming fiscal year number under the current regulatory regime. 8 C.F.R. § 214.2(h)(9)(i)(B). If the numerical limit is reached on any one of the first five (5) business days in April that filings can be made, USCIS conducts a random lottery of all petitions filed on the first five (5) business days to determine which petitions will receive an H-1B quota number and continue to be processed, starting with U.S. Master's cases counted toward the 20,000 cap, then returning the non-selected U.S. Master's cases to the general pool of cases to conduct a final lottery against the 65,000 regular cap. 8 C.F.R. § 214.2(h)(8)(ii)(B). Any petitions filed after that 5 day window are *automatically rejected for the rest of the year*, until the following April when petitions are again allowed to be filed during another 5 day window.

Petitions subject to the numerical limitation which are filed in the 5 day window, *but which are not randomly selected, are also rejected*. 8 C.F.R. § 214.2(h)(8)(ii)(B). Regulations state that rejection of a petition results in the benefit request not retaining a filing date, and no administrative appeal lies from such rejection. 8 C.F.R. § 103.2(a)(7)(iii).

An F-1 student working pursuant to Optional Practical Training (OPT) work authorization following graduation from a U.S. institution of higher education who is selected in the lottery, and is seeking to change status from F-1 to H-1B in connection with the employer's petition for H-1B status will have such OPT work authorization automatically extended to cover any gap until the H-1B work authorization goes into effect, provided the petition is timely filed and the employment start date on the petition is the start of the next fiscal year. 8 C.F.R.

§ 214.2(f)(5)(vi)(A); 8 C.F.R. § 274a.12(b)(6)(v).

An F-1 student who is in OPT status and whose petition is not accepted in the random H-1B lottery must cease employment upon the expiration of the OPT and depart the country within 60 days of OPT expiration. 8 C.F.R. § 214.2(f)(10)(ii)(D).

B. MATERIAL FACTS

USCIS received 124,000 H-1B petitions during the 5 day filing window ending on April 7, 2013, for H-1-B numbers available during FY-2014. Source: https://www.uscis.gov/news/uscis-reaches-fy-2014-h-1b-cap USCIS then conducted a random lottery resulting in approximately 39,000 filings receiving no filing date.[2]

USCIS received 172,500 H-1B petitions during the 5 day filing window ending on April 7, 2014, for H-1B numbers available during FY-2015. Source: https://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap-0 USCIS then conducted a random lottery resulting in approximately 87,500 filings receiving no filing date.

USCIS received nearly 233,000 H-1B petitions during the 5 day filing window ending April 7, 2015, for H-1B numbers available during FY-2016. Source: https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016 USCIS then conducted a random lottery resulting in approximately 148,000 filings receiving no filing date.

USCIS received over 236,000 H-1B petitions during the 5 day filing window ending April 7, 2016, for H-1B numbers available during FY-2017. Source: https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2017 USCIS then conducted a random lottery resulting in approximately 151,000 filings receiving no filing date.

Over the past four years, USCIS has conducted a computer-based random lottery

[2] USCIS does not publish numbers of rejected petitions. The approximate number of rejections is based upon the number received minus the number which may be approved.

every year resulting in approximately 425,500 filings not being assigned a priority date representing the order in which it was filed. Plaintiffs and class members each filed a petition with USCIS which met the filing requirements for acceptance of petitions during one of the 5 business day windows in which petitions for H-1B status may be filed since April 1, 2013, and each such petition was subjected to the random computer generated lottery conducted by Defendants. Plaintiffs' petitions received no filing date, and no date order preference for an H-1B visa or status.

IV. ARGUMENT

This case presents the question whether Defendants' computer-generated random lottery regulation, 8 C.F.R. § 214.2(h)(8)(ii)(B), and related regulatory scheme conflicts with the unambiguously expressed command of Congress embodied in the statute, 8 U.S.C. § 1184(g)(3), which established a system to apportion limited visa numbers in the order in which petitions were filed. This question may be resolved under the two-step analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Analysis begins "with the text of the statute." *Yokeno v. Sekiguchi*, 754 F.3d 649, 653 (9th Cir. 2014). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). The statute is unambiguous, and therefore this controversy may be resolved under the first step of *Chevron*.

With respect to statutory interpretation of plainness or ambiguity, the Supreme Court has recently reaffirmed a number of guiding canons. In *Nat. Fedn. Of Indep. Business v. Sebelius*, 132 S.Ct. 2566 (2012), the Court first found that the Affordable Care Act labeled the exaction at issue in that case as a "penalty" instead of a "tax", and that because other exactions in the statute were labeled as "taxes" the use of these different words was intentional, citing *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed. 2d 17 (1983) for the proposition that "[w]here Congress uses certain language in one part of a statute and different

language in another, it is generally presumed that Congress acts intentionally." *Nat. Fedn. Of Indep. Business, supra*, at 2583, citing *Russello, supra*, 464 U.S. at 23. In addition to this concept of statutory interpretation, the Court in *Nat. Fedn. Of Indep. Business* reiterated the general rule that a statutory provision cannot be read in isolation. *Id*. at 2584. The Court then proceeded to interpret the the mandate in that case to be a "tax" because of the rule that courts, when faced with the text of a statute which can have more than one possible meaning, must adopt the interpretation which will save the statute from a finding of unconstitutionality. *Id*. at 2593. In the instant case, however, there is no argument regarding the constitutionality of the provision. Rather, plaintiffs argue that the text of the statute is unambiguous, and that when viewing the statutory language against the language of the statute as a whole, and not in isolation, the statute can have but one meaning.

In the case of *Yates v. United States*, 135 S.Ct. 1074 (2015), which held the term "tangible object" not to include a fish, the Court elaborated on the issue of statutory interpretation of a term which is alleged to be unambiguous, reiterating that, "[w]hether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id*. at 1081-82. Therefore, while the ordinary meaning of a word is important to the interpretation of a statutory term, courts view the statute as a whole to place the word in context. In resolving doubts, courts may also look to headings, although such headings are "not commanding." *Id*. at 1083. Justice Ginsburg in *Yates* plurality opinion also relied upon the canon "*noscitur a sociis* – a word is known by the company it keeps – to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" Id. The Court further utilized the canon *ejusdem generis*, which "counsels: 'Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace

only objects similar in nature to those objects enumerated by the preceding specific words.'" Id. at 1086. Those canons reflect a contextual approach which analyzes the words in a statute against other words and phrases in the statute. Justice Kagan, dissenting in *Yates*, explained "I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not 'construe the meaning of statutory terms in a vacuum.' *Tyler v. Cain*, 533 U.S. 656, 662, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). Rather, we interpret particular words 'in their context and with a view to their place in the overall statutory scheme.'" Id. at 1092. While Justice Kagan disagreed with the ultimate decision of the plurality, she reaffirmed the universal view that "context matters" in interpreting statutes. Chief Justice Roberts, in *King v. Burwell*, 135 S.Ct. 2480 (2015) confirmed that a statute is to be read in context 'with a view to [its] place in the overall statutory scheme.'" Slip Op. at 9. In *King*, the Court found the statutory language "an Exchange established by the State under [42 U.S.C. § 18031] " ambiguous through a review of other parts of the statute, the provisions of which would make a finding that a Federal Exchange was not one established by the State problematic. Slip Op. at 13.

When viewing the statutory language at issue in this case in relation to its place in the overall statutory scheme, the statute is unambiguous. The phrase, "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status," 8 U.S.C. § 1184(g)(3), means just what it says, particularly in light of the context of the overall statutory scheme. Not only is the ordinary meaning of the phrase plain, but the statutory scheme supports this plain meaning.

A. H-1B PETITIONS MUST BE ACCEPTED FOR FILING AT ANY TIME AND QUOTA LIMITED H-1B VISAS OR STATUS ARE TO BE PROVIDED IN ORDER OF PETITION FILING DATE

1. Petitions, Visas, and Status Described

In order to make sense of the statutes about to be discussed, it is important to first understand some fundamental concepts underlying the immigration system. The American

immigration system is largely a petition based system, whereby an employer or a U.S. citizen or lawful permanent resident files a petition on behalf of a prospective employee or a close family relative. These petitions all have USCIS form numbers, including the I-129 petition for nonimmigrant workers (such as for the H-1B), the I-140 petition for employment based immigrants, and the I-130 for family based immigrants. The petition process for nonimmigrant cases is covered in 8 U.S.C. § 1184 (heading "Admission of Nonimmigrants"), and the immigrant petition process is detailed in 8 U.S.C. § 1153 (heading "Procedure for Granting Immigrant Status"). The petition is filed in order to establish eligibility for a certain type of visa category, but does not automatically result in the beneficiary of that petition obtaining a visa or status.

A visa is a type of authorization issued by the U.S. State Department, affixed in the passport, which allows the bearer of the visa to apply for admission to the United States with the U.S. Customs and Border Protection agency ("CBP") at a port of entry. The Immigration and Nationality Act ("INA") defines immigrant and nonimmigrant visas at 8 U.S.C. § 1101(a)(16) and 8 U.S.C. § 1101 (a)(26) respectively, and notes that such visas are issued to "eligible" immigrants and nonimmigrants. The use of the term "eligible" is in contrast to the concept of "admissible" as outlined below. So, a visa is a form of travel document, allowing the individual to knock on America's door. The CBP agent decides, based on the presentation of the visa, whether the individual qualifies for admission and can be let in the door, using a number of statutory and regulatory criteria, including such grounds of inadmissibility as criminal convictions, terrorist intentions, public charge concerns, etc. These grounds of inadmissibility are contained largely within 8 U.S.C. § 1182 (heading "Classes of Aliens Ineligible for Visas or Admission"). The INA clarifies that the term "application for admission" means the person's application to be admitted into the United States and "*not to the application for the issuance of an immigrant or nonimmigrant visa*." 8 U.S.C. § 1101(a)(4) (emphasis supplied). Thus, a visa is issued based on *eligibility* provisions for the category, and the person's *admission* is governed by

separate and distinct admissibility provisions.

A person's *status* is what results when a person is admitted to the United States by CBP. A person admitted after presentation of an H-1B visa is said to be admitted in H-1B status. Once admitted in a particular status, such as an F-1 student, B-2 visitor, or H-1B specialty worker, a person may apply to change that status to another type of classification, through application with USCIS. See 8 U.S.C. § 1258 governing Change of Nonimmigrant Status. A person in nonimmigrant status may also apply to "adjust" status to lawful permanent resident under 8 U.S.C. § 1255 with USCIS.

2. Petition Process and Quota Limited Visa or Status

The INA states that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe…" 8 U.S.C. § 1184(a). Clearly, a person's *admission* in nonimmigrant status is subject to wide latitude by the agency. Yet the language used in that statutory provision relates to the person's *admission*, and not to the *petition* process, and not to quota distribution. Instead, the petition process for nonimmigrant cases involving H-1B classification is governed by 8 U.S.C. § 1184(c) (heading "Petition of Importing Employer; Involvement of Departments of Labor and Agriculture"), which specifies an importing employer must file a petition before a nonimmigrant will be provided a visa, and that the "approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant."

The petition, visa, and admission status are all separate concepts governed by distinct statutory provisions. In the case of an H-1B, an employer's petition is a prerequisite to the individual beneficiary of that petition obtaining a visa or being admitted in that status. See 8 U.S.C. § 1184(c)(1) ("Such petition shall be made and approved before the visa is granted…The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.") The issuance of visas or the provision of status to an H-1B nonimmigrant is numerically limited each fiscal year to no more than 65,000, with an exception of 20,000 for

those who hold U.S. Master's degrees, for a combined annual quota limit of 85,000. 8 U.S.C. § 1184(g)(1). The statute limiting the number of *visas*, or provision of *status* to H-1B nonimmigrants, however, does not include a limitation on the number of *petitions*. The statute is very specific, in that the annual limitation only applies to "[t]he total number of aliens who may be *issued visas or otherwise provided nonimmigrant status* during any fiscal year…" Id. The provisions dealing with H-1B petitions, 8 U.S.C. § 1184(c), does not include a numerical limitation. The statute is also very specific in regard to the orderly distribution of such visas or status - in 8 U.S.C. § 1184(g)(3) the statute requires that,

> "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) *in the order in which petitions are filed for such visas or status*." (emphasis supplied).

The plain language of the statute requires that H-1B visas or status be provided in the order in which petitions are filed. Random order assignment from among cases filed in a 5 day window is unambiguously forbidden. The regulation, on the other hand, specifies random lottery even while recognizing that numbers must be apportioned by filing date order:

> (B) When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, *USCIS will make numbers available to petitions in the order in which the petitions are filed.* USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the 'final receipt date'). The day the news is published will not control the final receipt date. *When necessary to ensure the fair and orderly allocation of numbers in a particular classification subject to a numerical limitation or the exemption under section 214(g)(5)(C) of the Act, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection as validated by the Office of Immigration Statistics. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected…If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (i.e., if the numerical limit is reached*

> *on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days, conducting the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first*." (emphasis supplied).

8 C.F.R. § 214.2(h)(8)(ii)(B). The internal inconsistencies contained within the aforementioned regulation include the statement that "USCIS will make numbers available to petitions in the order in which the petitions are filed," yet "random selection will be made via computer-generated selection" and "USCIS will randomly apply all of the numbers among the petitions received on any of those five business days…" Providing numbers in the order in which petitions are filed is the opposite of applying a random lottery to petitions filed at the same time. It is only the *issuance of visas or provision of nonimmigrant status* which is subject to the numerical limitations of 8 U.S.C. § 1184(g)(1), and not the number of petitions which may be filed. Congress intended that the agency allow petitions to be filed at any time, and for the numbers of those visas or status to be made available in the order in which such petitions are filed. The fact that USCIS subjects all petitions filed within the 5 business day window to the random lottery, whether filed on day one, two, three, four or five, and not in the order in which they are filed, reveals yet another regulatory conflict with the statute.

The regulation at issue in this case, establishing a random lottery, was first promulgated in 2005 as an "Interim rule with request for comments," following Congress' passage of the provision which added the 20,000 exemption for those with U.S. master's degrees. 70 Fed. Reg. 23775 (May 5, 2005).[3] **Ex. 4**. Less than three years later, following the first year the cap was reached in the first days of filing (2007), another "Interim rule with request for comments" was issued, changing the filing window from the first 2 days, to the first 5 days, and

[3] On December 8, 2004, the Omnibus Appropriations Act (OAA) for Fiscal Year 2005 was signed into law, Pub. L. 108-447, 118 Stat. 2809, adding the 20,000 Master's exemption, and effectively increasing the cap from 65,000 to 85,000. The OAA did not change any other relevant statutory provisions with respect to the H-1B cap, other than to add the master's category.

making rule changes with respect to multiple petition filings, noting that some employers were at an "unfair advantage" because some were filing multiple petitions in the hopes of increasing chances at obtaining a limited lottery number.[4] 73 Fed. Reg. 15389 (March 24, 2008). **Ex. 5**. Nevertheless, despite these concerns USCIS did not prohibit multiple filings by different employers on behalf of the same individual, or bar large companies from multiple filings through different business units or subsidiaries, providing an example of such a permissible situation: "Thus, in this example, if the bottled beverage plant owned by the *Fortune 500 company* and the cereal manufacturing company owned by the same Fortune 500 company are each in need of the services of a Chief Financial Officer*, both may file one petition each on behalf of the same alien*." 73 Fed. Reg. at 15393 (emphasis supplied). With the 2008 regulation, USCIS left open the door to large companies with multiple business units or subsidiaries to file *more than one* petition for the same employee in the lottery, and thus receive twice or more the chance of securing a number in the random lottery than a small company. See 8 C.F.R. § 214.2(h)(2)(i)(G); 73 Fed. Reg. at 15393.[5] This situation is unfair to small businesses, and is not

[4] See, for example, the post on Quora entitled, "*How one can file multiple petitions to improve their chances in H-1B lottery 2016-2017*?", which describes how individual employees can seek sponsorship from multiple companies in the lottery process, thus increasing their chances with each company sponsorship, and even suggesting "H-1B consultants" are a means to this end. **Ex. 7**. Last accessed on May 10, 2016 via https://www.quora.com/Howonecanfilemultiplepetitionstoimprovetheirchancesin H1Blottery2016 2017

[5] See Miriam Jordan, "*U.S. Firms, Workers Try to Beat H-1B Visa Lottery System*," The Wall Street Journal, June 2, 2015.

"Immigration lawyers involved in the process say they have helped firms file multiple H-1B skilled-worker visa applications for the same person. Some workers, meanwhile, are accepting offers from multiple employers, each of whom files a petition on their behalf, the lawyers say. Such practices, which aren't illegal, likely have occurred in the past without public notice but appear to be proliferating as the economy rebounds and competition for the coveted visas intensifies, immigration lawyers say. Smaller businesses say such moves disadvantage them because they can't afford to match them. Lawyers charge $2,000 to $4,000 to prepare each petition. It isn't known how many of the record 233,000 applications filed in April for the 85,000 H-1B slots this year were duplicates. Some attorneys who prepare applications believe it could be thousands. 'It is no surprise that with the system the way it is today, a lottery based on chance rather than a rational system addressing need, companies are using all legal means necessary to fill their business needs,' said Elizabeth Hyman, executive vice president of

the result intended by Congress when the statute was enacted. Each petitioner should have an equal chance, regardless of size, to establish a petition filing date. The lottery system, however, has invited some larger employers with multiple entities, and some enterprising beneficiaries with multiple job offers from multiple different employers, to game the system and have a better chance at a number than others filing on the same day. This is a capricious result, not dependent on filing date (as directed by Congress) but on the advantage a larger corporate structure or multiple job offer situation can be brought to bear.

Although 2005 was the first time a regulation established a random lottery, earlier regulations permitted rejections of petitions filed at a time when no H-1B quota numbers were available for issuance of visas or status. 56 Fed. Reg. 61111 (December 2, 1991). **Ex. 1**. After issuance of a notice of proposed rulemaking, the agency noted the following in the final rule,

> "The proposed rule contains the requirement that aliens who may be accorded nonimmigrant classification (excluding those in DOD research) shall be limited to 65,000 for each fiscal year. Eleven comments were received relating to this provision… One commenter suggested that the numerical cap should not apply to extensions of stay *while two suggested that a system should be established to keep track of the backlog of numbers similar to that presently in use by the Department of State for permanent visa numbers*…The proposed rule clearly states that the numerical limitation applies only to new petitions and not extensions of stay. *Further, the statute requires that aliens are to be issued visas in the order in which petitions are filed. The service will not institute a backlog system since H-1B nonimmigrants are coming temporarily to the United States and the need for the beneficiary's service may dissipate over the course of time.*"

Final Rule, *supra*, 56 Fed. Reg. 61111 at 61113. Therefore, it is clear that the agency received

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advocacy for CompTIA, an IT-industry group. 'Companies are struggling to fill their open high-skilled positions and the H-1B lottery system isn't working.'… 'Some companies are being creative, within the boundaries of ambiguous regulations, to maximize their chances of winning the lottery,' said Stephen Yale-Loehr, an immigration scholar. 'The practice is growing and will continue to grow,' said Greg McCall, a Seattle-based immigration attorney. Mr. McCall said a company with four subsidiaries requested that he file four petitions this year for the same worker. 'So I did,' he said. 'It is a best practice.' One petition was selected, he said."

Ex. 8. Last accessed on May 18, 2016 via
http://www.wsj.com/articles/companiesworkersgameh1bvisalotterylawyerssay1433237586

comments urging the establishment of a priority date and waitlist system, but that the agency declined to establish one in favor of a rejection system, solely because "the need for the beneficiary's service may dissipate over the course of time." *Id*. Whereas in other sections of the preamble to the final rule, the agency responded to comments by explaining how the agency was bound to follow the statute established by Congress and not free to create a different rule, on the issue of the waitlist, the agency created its own reason and its own rule. The stated reason was that if petitions were waitlisted, the need for the services might dissipate over time. This reason, however, was not one enunciated by Congress, and not a consideration listed in the statute passed by Congress. The rejection regulation was simply the agency taking policy into its own hands, in contravention of the wishes and express direction of Congress.

Following the promulgation of that rule at the end of 1991, the agency then proposed to soften the rejection rule, allowing the Service to accept petitions for filing for a future start date instead of rejection of the petition, seeking to address "unnecessary work for the Service and an unnecessary hardship on petitioners in certain situations." 62 Fed. Reg. 67764 (December 30, 1997). **Ex. 2**. The proposed rule did not become a final rule. Eighteen months later, however, the agency again proposed to change the rule to allow petitions to be submitted and accepted instead of being rejected, and a work start date of the next fiscal year to be assigned. 64 Fed. Reg. 32149 (June 15, 1999). **Ex. 3**. According to the proposed rule,

> "The proposed procedures *are intended to minimize burdens* to the great majority of employers who use the H nonimmigrant visa program *by removing the requirement to refile a new or amend petition once the numerical cap is reached*. In addition, this *proposed rule would ensure consistent treatment of all petitioners whose petitions have not been adjudicated by the time the numerical cap has been reached in a fiscal year by assigning all of them an October 1 or later work start date*." (emphasis supplied)

64 Fed. Reg. 32149. Therefore, after disregarding the statute in 1991, the agency backtracked in proposed regulations appearing to signal that the rejection rules were working a hardship on the agency and on petitioners. The 1999 proposed rule noted that the 1997 proposed rule had

received only three comments, all positive. It is not clear why the 1999 proposed rule was never adopted as a final rule, but the agency was clearly troubled by the rigid rejection rule, which created more work for the agency and hardship to petitioners. To the extent that Defendants may argue that Congress' "longstanding acquiescence" to the rejection of petitions filed during a time where H-1B quota numbers are not available, there are two problems with such an argument.

First, the case law recognizing that an agency's longstanding interpretation is accorded deference, particularly when Congress has amended or reenacted relevant provisions without change, applies only to *Chevron* step two analysis, not to *Chevron* step one. *Barnhart v. Walton*, 535 U.S. 212, 217-218 (2002). The Court first looks to "whether the statute unambiguously forbids the Agency interpretation," and only if the statute is ambiguous does the Court proceed to apply deference, including the type of deference discussed in *Barnhart*. *Id*. The statute is not ambiguous, and therefore this type of deference is not considered. Second, even were the statute deemed to be ambiguous, the regulation has been subject to multiple proposed regulations questioning the wisdom of a rule allowing outright rejection of petitions, and the random lottery addition to the regulation was created in 2005, *after* the last Congressional action in the H-1B arena to add the master's exemption numbers. Further, that particular change in 2005 was only to the numbers, not the system, and therefore Congress cannot be assumed to have sanctioned the agency's interpretation. In fact, as late as 2011, the agency proposed yet further changes to the lottery system.

In a notice of proposed rulemaking in 2011, the agency sought to establish a registration requirement for petitioners to sign up for a number online, prior to submitting an actual petition, and then having that registration subject to the random lottery. 76 Fed. Reg. 11686 (March 3, 2011). **Ex. 6**. The proposed regulation did not become a final rule, despite proclaiming to save H-1B petitioners an estimated $23,884,568 over a 10 year period due to tens

of thousands of unnecessary petition filings. Id. at 11692.[6] The proposed changes in 1997 and 1999 and creation of the random lottery in 2005, followed by further revision in 2008 and proposed revision in 2011, must be seen as multiple attempts to respond to problems which have arisen in the program, the root cause of which is the fact that petitions are not received and assigned a priority date in an orderly manner, as required by Congress.

Defendants may argue that the issuance of H-1B visas or the provision of H-1B status is being made in the order in which petitions are filed, even with the random lottery, because USCIS receives more than the quota on one single day in a year. This single day filing phenomenon, however, is created by USCIS's very own policy of not receiving (and rejecting) cases for the rest of the year. The statute, however, does not permit the agency to refuse to receive *petitions* when there are not sufficient numbers of H-1B visas. What the statute authorizes is the *withholding of visas, or of status*, until a number is available, based on the petition filing date (order in which a petition is filed). The combination of the non-receipt of petitions, the requirement to file within a 5 day window, and random lottery all serve to conflict directly with the statute's plain language. These policies are not entitled to deference because they interfere with the assignment of a petition filing date as mandated by the plain meaning of the statute, and to the allotment of visas or status based on that filing date order.

B. STATUTORY PROVISIONS FOR PREFERENCE IMMIGRANT QUOTA DISTRIBUTION ARE NEARLY IDENTICAL TO THE H-1B STATUTE YET TREATED DIFFERENTLY UNDER THE REGULATIONS

For comparison to the broader context in which petitions are processed, it is instructive to review the case of "preference" immigrant petitions, which are also subject to annual numerical limitation.[7] That statute states,

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[6] The 2011 proposed rule provides great detail into the extensive waste caused by the current lottery system.

[7] Indeed, this is precisely what the two commenters described in the 1991 final rule intended the agency to consider. See 56 Fed. Reg. at 61113.

> "Immigrant visas made available under subsection (a) or (b) shall be issued to eligible immigrants *in the order in which a petition in behalf of each such immigrant is filed*…" 8 U.S.C. § 1153(e)(1). (emphasis supplied)

The language of the preference immigrant petition statute is in all material respects the same as the statute covering the filing of H-1B petitions, 8 U.S.C. § 1184(g)(3), in that visas (whether nonimmigrant or immigrant) are to be issued in the order in which a petition is filed:

> "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) *in the order in which petitions are filed for such visas or status*." (emphasis supplied).

Only the order in which the alien and the visa are placed in the sentence is different – reference to the visa limit comes first and alien last in the former, and reference to the alien first and visa limit last in the latter. The heart of the sentence, which is distribution of limited visas according to the order in which a petition is filed, is materially the same. In 8 U.S.C. § 1153(e)(1) reference is made to "visas made available under (a) or (b)" which is § 1153(a) or § 1153(b). The latter covers "Priority workers" which are allotted a number "not to exceed 28.6 percent of such worldwide level", § 1153(b)(1), and such level being that described in [INA] "201(d)" [8 U.S.C. § 1151(d)] (see § 1153(b)). The provisions at 8 U.S.C. § 1151 set out the "Worldwide Level of Immigration" including employment based immigrant numerical limitations by fiscal year as described in 8 U.S.C. § 1151(a)(2) and 8 U.S.C. § 1151(d). The provisions at 8 U.S.C. § 1151 limiting the number of employment based immigrants in a given fiscal year are not unlike the "Limitation on Numbers" found at 8 U.S.C. § 1184(g). As stated above, the issuance of quota limited visas, whether immigrant or nonimmigrant, are specified to be in the order in which petitions are filed. The two categories, however, are treated very differently under the regulations.

1. Preference Immigrant Petitions

In the case of preference immigrant petitions, the regulations provide for the assignment of a priority date, which is the date that a Department of Labor certification is filed,

or the date the petition is filed in cases where no DOL certification is required. 8 C.F.R. § 204.5(d). The priority date represents the order in which the petition was filed, and that date is officially notated on the petition approval notice. The Department of State Bureau of Consular Affairs maintains a "Visa Bulletin" waiting list, which consists of categories and corresponding dates, and an applicant may proceed to apply for a visa when "the applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin…" 8 C.F.R. 245(g)(1).[8] Preference immigrant petitions are not rejected when filed at a time when visas are not available, and not subjected to a random lottery process. Such petitions are filed and received, assigned a priority date, and the applicant then waits until a visa is available (by consulting the Visa Bulletin wait list) before applying for a visa abroad, or applying for change of status from within the United States. The quota limited number is issued when the visa is issued or the person's status is adjusted or changed. In some cases, the priority date may be quickly reached allowing the individual to obtain a visa in a matter of weeks or months, and in other cases the priority date may take months or years to be assigned a visa, depending on the order in which petitions are filed, and depending on the demand for visas and status change requests.

2. H-1B Petitions

H-1B petitions which are subject to numerical limitation, however, are required to be filed only during a 5 day window in April, and subject to a random computer generated lottery to decide which of the filed petitions will be accepted for that year's numbers. There is no statutory basis for the agency to require an extraordinarily narrow filing window, a random lottery, and no priority date for unlucky nonimmigrant petitions on the one hand, and an orderly priority date assignment system and waiting list for preference immigrant petitions on the other hand, because the statutes governing the filing of petitions for both nonimmigrant and immigrant petitions utilize the same operative language and require numerically limited beneficiaries to

[8] The State Department's Visa Bulletin is published monthly, and can be viewed here (including for past months): https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html

receive visas in the order in which the petition was filed. The current regulatory system used for the H-1B lottery is arbitrary and capricious, as it results in a potentially never ending game of chance for petitions filed during a 5 day window each year, with some unlucky individuals trying and failing year after year to obtain a quota number, while some lucky lottery winners obtain a visa number in the very first year a petition is filed on their behalf. It is statistically possible for an individual to have been the beneficiary of an H-1B petition in more than one year, and to have been rejected each time, while another beneficiary obtains a winning lottery number in the very first year. In fact, given the 1 in 3 chance each year, this arbitrary result is rather likely to happen with some frequency.

The lottery system as set out in the regulations is manifestly contrary to the plain language of the statute, and results in arbitrary and capricious results not intended by Congress. Such a system does not allow petitioning employers and employee beneficiaries to make employment decisions in an orderly manner. Turning for a moment back to the language in the 1991 final rule which initially established a rejection system instead of a priority date assignment system with waiting list, the agency stated its reasons were "*The service will not institute a backlog system since H-1B nonimmigrants are coming temporarily to the United States and the need for the beneficiary's service may dissipate over the course of time.*" Final Rule, *supra*, 56 Fed. Reg. at 61113. Nevertheless, if employers and employees know in advance that the agency is processing H-1B petitions for those who have a particular priority date, enabling them to make an educated assessment of the potential wait time until a visa number is available given the other petitions ahead in line, then a sponsorship might not be attempted in the first place in some instances, and might be filed at the earliest possible opportunity in another instance. This is precisely the situation employers are faced with in the context of preference immigrant petitions, and yet employers file preference immigrant petitions all the time. There is an established system, with priority dates, and waiting lists, and employers make educated decisions with the assistance of counsel on a regular basis. Employers make long terms plans to sponsor key

employees in some cases, and where the need will not be met in time, employers decide to forego sponsorship in favor of other alternatives. The agency is in no position to impose its own policy considerations, such as whether the need for the employee may dissipate over time, on a system already determined by Congress to be one which visas and status are distributed in the order in which petitions are filed. If Congress begins to find that "*the need for the beneficiary's service may dissipate over the course of time"*, then it is Congress which may make the policy decision to change the language of the statute to allow for some other system of apportionment of the limited visa numbers not in the order in which petitions are filed, or modify the numbers of available visa numbers from those Congress set back in 1991 (such as when Congress added the 20,000 U.S. Master's exception numbers).

While the statute is plain, legislative history also supports apportionment of H-1B visas according to petition filing date. Congress established the H visa program in 1952 as part of the Immigration and Nationality Act of 1952, including the requirement that a petition be filed by a petitioning employer. See INA § 214(c) [8 U.S.C. § 1184(c)]. Prior to the 1990 Immigration Act, Pub. L. No. 101-649, however, the H category had no numerical limit. Numerical restrictions on immigrant classifications, however, had been imposed long before 1990, and pursuant to the 1952 provisions of then INA § 203(b) [8 U.S.C. § 1153(b)],

> "Immigrant visas issued pursuant to paragraphs (1) through (6) of subsection (a) shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney as provided in section 204."

Id. The language of the pre-1990 INA section above is identical to the present 8 U.S.C. § 1153(e)(1) with the exception of reference to the re-designated family and employment preference section numbers. Therefore, before 1990, Congress had clearly established procedures for apportioning quota limited visas according to petition filing date order.

In enacting numerical limits for the first time on H nonimmigrants in 1990, Congress used language virtually identical to the existing immigrant visa section to require distribution of visas in the order in which a petition was filed. The 1990 Act,

Pub. L. No. 101-649, became law following the filing of a Conference Report which was then voted on and agreed in the House and Senate. According to the Conference Report, 101-955,

> "The Conference substitute provides 65,000 for specialty occupations and 66,000 for nonagricultural H-2 temporary workers…*In establishing a cap on nonimmigrant visas*, the Conferees suggest continuous monitoring of all *admissions*." (emphasis supplied)

2 Igor I. Kavass, Bernard D. Reams, Jr., *The Immigration Act of 1990: A Legislative History of Pub. L. No. 101-649*, 125-26 (1997) ("Joint Explanatory Statement of the Committee of Conference"). Congress was clearly concerned with the numbers of *visas and admissions*, not *petitions*. Just as in the case of immigrant preferences, Congress intended limitations on the number of aliens, and intended visas and admissions to be provided in the order in which a petition was filed. The 1990 Act also established (at the same time it reenacted petition filing date order apportionment for employment based immigrants and carried that language over to the H-1B statute) an entirely *different* system based on a lottery, for Diversity Visa Lottery immigrants.

C. THE DIVERSITY VISA LOTTERY STATUTE MANDATES A DISTRIBUTION STRICTLY IN RANDOM ORDER WHICH SHOWS CONGRESS INTENDED THAT PROGRAM, AND NOT THE H-1B PROGRAM, TO BE SUBJECT TO LOTTERY

Within the same Act, the 1990 Act, Pub. L. No. 101-649, Congress added new numerical restrictions on H-1B nonimmigrants, and also created a completely new Diversity Immigrant category capped numerically at 50,000. The "Diversity Visa Lottery" which is governed by 8 U.S.C. § 1153(e)(2), states,

> "Immigrant visa numbers made available under subsection (c) (relating to diversity immigrants) shall be issued to eligible qualified *immigrants strictly in a random order* established by the Secretary of State for the fiscal year involved." (emphasis supplied).

Thus, Congress intended applicants for the Diversity Visa Lottery immigrant visas to be subject

to an annual random lottery system. The principle of *expressio unius est exclusio alterius* as applied to the two parallel provisions 8 U.S.C. § 1184(g)(3) and 8 U.S.C. § 1153(e)(1) on the one hand, and the disparate lottery provision of 8 U.S.C. § 1153(e)(2) on the other, requires that both the H-1B petition process and the immigrant petition process be governed by procedures to ensure that visas in the H-1B and preference immigrant categories are provided in date filing order and not randomly. The issuance of visas "*strictly in a random order*" as provided in the Diversity Visa Lottery statute cannot be used for a process mandated by Congress to be "*in the order in which petitions are filed* for such visas or status" (H-1B statute) or "*in the order in which a petition in behalf of each such immigrant is filed*" (preference immigrant statute).

Defendants have established a petition filing date order system for preference immigrant petitions, and a random lottery for H-1B petitions, where the language in the two statutes is virtually identical, and where another program is *expressly* designated in the same Act to be distributed in random order. See *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The inclusion by Congress of particular language regarding the distribution of numerically limited diversity visa numbers "strictly in a random order" and the omission of that language in another section of the INA reflects Congressional intent to have only the diversity visa program be governed by random lottery procedure. Likewise, the inclusion by Congress of particular language "in the order in which petitions are filed" and the omission of that language in the diversity lottery statute reflects intent to have the H-1B quota distributed in that manner, and not in the random lottery process. Defendants can no more establish a petition filing date system for the diversity visa lottery, than they can establish a lottery for the H-1B program. The regulation establishing a 5 day filing window and random lottery process for numerically limited H-1B visas, 8 C.F.R. § 214.2(h)(8)(ii)(B), conflicts with the plain language of the statute, and is therefore *ultra vires*

and not in accordance with law.

D. DEPARTMENT OF LABOR PROVISIONS FOR THE PROTECTION OF UNITED STATES WORKERS DO NOT SUPPORT A LOTTERY SYSTEM OVER A PRIORITY DATE SYSTEM

In order to protect the wages and working conditions of U.S. workers, and to avoid exploitation of foreign workers, Congress has established by statute important protections in relation to the H-1B category, which are carried out by the Department of Labor. Because these protections impact the procedures relating to filing H-1B petitions, and the issuance of visas or provision of status, a discussion of the statute is necessary. These DOL protections, however, do not support a lottery system over a priority date system. Before an employee may be admitted or provided status as an H-1B worker, the employer must secure certification of a Labor Condition Application ("LCA") with the Department of Labor ("DOL"), which requires certain attestations concerning wages and working conditions, and requires the payment of prevailing wages as determined by the DOL. The statute, 8 U.S.C. § 1182(n)(1) ("Labor Condition Application"), states:

> "No alien may be *admitted or provided status* as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following: [LCA statements outlined in (n)(1)(A)]" (emphasis supplied).

Despite the clear language of the statute requiring only an LCA *prior* to the employee being *admitted or provided status* (as opposed to prior to a petition being filed), the regulations specify the LCA must be certified *before a petition may be filed* in the first instance. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.705. In addition, DOL regulations specify that an application for an LCA shall be submitted "no earlier than six months before the beginning date the validity period of intended employment shown on the LCA," and that an LCA validity period shall "not exceed 3 years for an LCA issued on behalf of an H-1B or H-1B1 nonimmigrant…" 20 C.F.R. § 655.730(b); 20 C.F.R. § 655.750. There are no statutory mandates with respect to the six month or three year provisions in the regulations. The

certification of an LCA takes just 7 days, as mandated by statute. 8 U.S.C. § 1182(n)(1)(G)(ii); 20 C.F.R. § 655.730(b). The LCA is an attestation, submitted electronically through DOL's website, and the certification is issued by email one week later.

The USCIS regulation requiring a certified LCA *prior to the filing* of an H-1B petition, 8 C.F.R. § 214.2(h)(4)(i)(B)(1), is not in accordance with the plain language of the statute, which requires that "[n]o alien may be *admitted* or *provided status* as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an [LCA]." 8 U.S.C. § 1182(n)(1) (emphasis supplied).[9] Additionally, legislative history suggests the LCA is a condition to be fulfilled after the fact:

> "With respect to the *post-entry* attestation required H-1B visa petitioners, the prevailing wage to which an employer must attest is expected to be interpreted by the Department of Labor in a like manner as regulations currently guiding section 212(a)(14)."

2 Igor I. Kavass, Bernard D. Reams, Jr., *The Immigration Act of 1990: A Legislative History of Pub. L. No. 101-649*, 122 (1997) (emphasis supplied). Because the statute only requires an LCA before a nonimmigrant is admitted or provided status, and because the legislative history notes that it is a "post-entry" attestation requirement, there is no basis to require the LCA before a petition may be filed. In issuing visas or providing nonimmigrant status in the H-1B category in the "order in which petitions are filed for such visas or status" there will necessarily be a delay

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[9] The 1991 Final Rule contained this response to a comment:

"The Service recognizes that obtaining an approved labor condition application may create difficulties for certain types of employers. However, the provision that the labor condition application be approved prior to the alien's admission to the United States is found in the statutory definition of the H-1B classification in section 205(c)(1) of Public Law No. 101-649. Further, in order to ensure that the labor condition application is approved prior to entry, it is only logical that the approved labor condition application be a part of the petition package."

Final Rule, *supra*, 62 Fed. Reg. at 61112. Therefore, while recognizing the statute only mandated an LCA be certified prior to the alien's *admission*, and not prior to the *petition* being filed, the agency simply preferred to require it before a petition was filed because it was "only logical." This reflects the agency's view that its policy determinations override Congress' express direction as embodied in the statute.

between the filing and approval of the petition and the ultimate issuance of the visa or provision of the status in those fiscal years (such as in the past 4 years) when demand exceeds the cap limitations. Due to the large number of applicants for H-1B visas, which this year was nearly three times the annual quota, the waiting list to obtain a visa or be provided status may extend for several years following the filing of a petition. Defendants' purely regulatory requirement that an LCA be certified *before the filing of the petition* coupled with the three-year regulatory validity period would potentially pose significant challenges to the operation of the statutory scheme of visa apportionment by petition filing date order. Specifically, 8 C.F.R. § 214.2(h)(9)(iii)(A) specifies that, "An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application."

With respect to the DOL attestations, it is instructive to review a similar provision as applied to preference immigrants. Just as the issuance of visas or provision of status to preference immigrants and H-1B applicants is to be in the order in which the petition is filed, the preference immigrant statute also contains a DOL provision similar to the H-1B category intended to protect U.S. workers. Both DOL provisions are found within the INA section titled "General Classes of Aliens Ineligible to Receive Visas and Ineligible for Admission; Waivers of Inadmissibility" - 8 U.S.C. § 1182. The DOL provisions do not relate to the filing prerequisites of petitions. The DOL protection provisions for H-1B workers are found within 8 U.S.C. § 1182(n) (quoted above), and the provisions for preference immigrants are found at 8 U.S.C. § 1182(a)(5). The latter section states,

> "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that –
> (I) There are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available *at the time of application for a visa and admission to the United States* and at the place where the alien is to perform such skilled or unskilled labor, and

(II) The employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed." emphasis supplied.

8 U.S.C. § 1182(a)(5)(A)(i). Therefore, the statute in both the H-1B and the preference immigrant categories requires the U.S. worker protection provisions to be fulfilled before the person is *admitted or provided a visa*, and not as a prerequisite to the petition being filed.

Pursuant to USCIS regulations covering preference immigrant petitions, however, "A petition is considered properly filed if it is (1) Accepted for processing under the provisions of part 103; (2) *Accompanied by any required individual labor certification*…" 8 C.F.R. 204.5(a). The Department of Labor, prior to 2007, allowed labor certifications to remain valid indefinitely. Effective July 16, 2007, however, Department of Labor regulations specify:

> "An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification."

20 C.F.R. § 656.30(b)(1). If the preference immigrant petition is filed within 180 days of the labor certification, then the petition remains valid indefinitely. See 8 C.F.R. 204.5(n)(3) ("Validity of approved petitions. Unless revoked under section 203(e) or 205 of the Act, an employment-based petition is valid indefinitely.")

Therefore, in the preference immigrant petition context, a labor certification is obtained prior to the petition being filed, and then the petition remains valid indefinitely, even if the beneficiary waits in line for several years (or decades) before being issued a visa or being provided status based on the availability of a visa according the order in which the petition has been filed. While the requirement of a labor certification prior to the petition being filed is not in accordance with the language of the statute, it does not seriously impact the process because the date of filing the labor certification establishes the person's priority date, and the petition remains valid indefinitely. In the H-1B context, however, an LCA is obtained prior to the petition being filed, but the LCA is limited to a 3-year period, and validity of the H-1B petition

under current regulations may not be for longer than the LCA validity. In a system where the wait for a visa may be many years, as in the preference immigrant petition context, the USCIS regulation at 8 C.F.R. § 214.2(h)(9)(iii)(A) would prove unworkable and in conflict with the statutory structure, unless the petitioner is allowed to obtain another LCA at the time of the visa issuance or grant of H-1B status. Indeed, requiring the LCA only shortly before the individual beneficiary is issued a visa or admitted in H-1B status would be in harmony with the statutory scheme, including 8 U.S.C. § 1182(n)(1), which requires prevailing wages, presumably freshly determined, be paid. The regulations, 8 C.F.R. § 214.2(h)(9)(iii)(A), which interfere with the establishment of a priority date filing system and waiting list must also be declared *ultra vires* and not in accordance with the overall statutory scheme.

E. USCIS PROCESSES OTHER NUMERICALLY LIMITED NONIMMIGRANT VISA CATEGORIES WITHOUT USE OF A RANDOM LOTTERY IN THE ORDER IN WHICH PETITIONS ARE FILED

In the case of other numerically limited nonimmigrant visa categories, USCIS has implemented a policy of accepting petitions and placing applicants on a waitlist, and not subjecting applicants to a random computer generated lottery. The U visa, for victims of crime, is limited to 10,000 per year:

> "The number of aliens who may be *issued visas or otherwise provided status* as nonimmigrants under section 101(a)(15)(U) in any fiscal year *shall not exceed 10,000*."

8 U.S.C. § 1184(p)(2). The language "issued visas or otherwise provided status" is identical to the H-1B statute - 8 U.S.C. § 1184(g)(1). The statute does not specify that applicants subject to those numerical limitations shall be issued visas or otherwise provided status "in the order in which petitions are filed". Despite this more specific lack of statutory command in the U visa category, USCIS in fact allows petitions for U visa status, using the petition Form I-918, "Petition for U Nonimmigrant Status," to be filed and accepted year-round. In other words, the agency does not reject such petitions unless they are filed within a small window of time each

year. Additionally, the U visa cap has been reached every fiscal year for the past six (6) years, and instead of being rejected when the cap is reached, petitions are conditionally approved and placed on a wait list. The U visa regulations specify:

> "(d) Annual cap on U-1 nonimmigrant status – (1) General. In accordance with Section 214(p)(2) of the Act, 8 U.S.C. 1184(p)(2), the total number of aliens who may be issued a U-1 nonimmigrant *visa* or granted U-1 nonimmigrant *status* may not exceed 10,000 in any fiscal year.
>
> (2) Waiting list. All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status *must be placed on a waiting list* and receive written notice of such placement. *Priority on the waiting list will be determined by the date the petition was filed with the oldest petitions receiving the highest priority. In the next fiscal year, USCIS will issue a number to each petition on the waiting list, in the order of highest priority, providing the petitioner remains admissible and eligible for U nonimmigrant status. After U-1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed.* USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members." emphasis supplied.

8 C.F.R. §214.14(d). As described above in these U visa regulations, the process of apportioning the numerically limited U visas is orderly, and is done in the order in which petitions are filed.[10] This is done *despite no statutory mandate* to process petitions in the order in which they are filed. Therefore, in the H-1B context, cap-subject petitions are subjected to a 5 day random lottery and rejection process, *in spite of the statutory mandate* to process petitions in the order in which they are filed, and in the U visa context *without this statutory mandate*, petitions are accepted throughout the year in an orderly manner and meritorious petitioners placed on a waitlist. In the case of an H-1B beneficiary, there is a high degree of likelihood of not being

[10] Another numerically limited visa category, the T visa category for victims of trafficking, is also subject to a process of apportioning visas according to date filing order, even in the absence of a specific statutory mandate to do so. The T visa category is limited to 5,000 per fiscal year, and the statute is worded closely to the U visa. 8 U.S.C. § 1184(o). The T visa regulations, like the U visa regulations, establish a priority date filing system with a waiting list. 8 C.F.R. § 214.11(m). The T visa limit of 5,000, however, has not yet been reached in any given fiscal year, and so a wait list has not ever been established for T visas or status.

selected in the lottery each year, and while chances improve with successive, yearly attempts, the chance still remains to continue to file and not be selected. U visa applicants, on the other hand, know that their meritorious petition will ultimately be processed in the order in which it was filed, when visa numbers for their place on the waiting list are available. The U visa regulations highlight the difference between a *petition* for the classification on one hand, and the *issuance of a visa or provision of status* on the other hand. The former is not subject to numerical limitations, and may be filed at any time during the year, and the latter is subject to numerical limitations per fiscal year and must be accorded in strictly filing date order based on when the petition was filed. A waiting list, such as the U visa waiting list, or the Visa Bulletin waiting list for preference immigrants, is then utilized to track the issuance of visas or the provision of nonimmigrant status in accordance with the annual limits on those actions. If the H-1B visa quota system were administered according to the U visa regime, with petitions accepted for filing year-round, and a waiting list for the provision of H-1B visas and status according to when each petition was filed, Defendants would not be acting contrary to the statute and arbitrary and capricious results would cease to harm Plaintiffs and class members.

V. CONCLUSION

There is, simply stated, no authority for the random computer generated H-1B lottery, given the plainly worded statutory mandate, and given the wait list and priority date system implemented for other numerically limited categories. The Immigration and Nationality Act sets out a statutory scheme whereby petitioning employers in the immigrant and nonimmigrant categories file a petition, and based upon that petition the alien beneficiary receives a visa or status in the order in which that employer's petition was filed. Petitions are not numerically limited, nor are they required to be filed on a given set of days during the year. The provision of visas or status to the beneficiary employees, however, are subject to numerical limits in certain categories, including immigrant visas and H-1B visas. Congress has determined that immigrant visas which depend upon an employer's petition, as well as H-1B visas which

depend upon an employer's petition, be provided in the order in which a petition is filed by that employer. Congress has also determined that certain diversity visa immigrants can file their own applications in a random lottery and be given visas on a strictly random basis. Considering that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole", a reading of the Immigration and Nationality Act compels the conclusion that the H-1B lottery is illegal, and unambiguously forbidden by the statute. See *Robinson*, supra, 519 U.S. at 341. Defendants cannot, given the statutory scheme of apportioning limited visa numbers by petition filing date, run a lottery system to distribute H-1B visas. The plain language of the statute, as viewed in context against the entire statutory scheme, forbids it.

Even if the statute were to be found ambiguous, the application of the lottery leads to unintended arbitrary and capricious results, and is not a permissible construction of the statute. An employer which petitions for a beneficiary may file year after year without the beneficiary obtaining a visa, while a similarly situated employer may file and be selected the first year. The regulatory scheme also permits multiple related business entities to file multiple petitions, and permits individuals to have multiple companies file petitions on their behalf, artificially increasing chances of success as compared to those who only file a single petition. Additionally, a petitioner which files for two or three or more years without being selected is in effect being placed on a *de facto* waiting list for an H-1B number, except that others who file later are allowed a visa ahead of them! This apportionment by random lottery leads to unfair results not contemplated by Congress when it enacted the statutory scheme.

Plaintiffs respectfully request that this Court grant Summary Judgment in favor of plaintiffs and all others similarly situated, hold unlawful the lottery process for H-1B quota distribution and enjoin its operation, and order further relief as this Court deems just and proper to ensure an orderly priority date filing and waiting date system is implemented for Fiscal Year 2018 and future years in accordance with Congressional intent. Plaintiffs respectfully request for

themselves and on behalf of all others similarly situated, the option and ability to resubmit an H-1B petition which was previously rejected, to receive a priority date based on the original filing, and to be provided a waiting list and assignment of a quota number for H-1B visas or status when such quota number becomes available in a future fiscal year beginning with Fiscal Year 2018. Plaintiffs respectfully request this Court to order defendants to accept H-1B petitions throughout the year and not just during an assigned window of days, assign priority dates to filed petitions, and make H-1B numbers for visas or status available based on the order in which a petition is filed.

DATED this 17th day of October 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, I electronically filed the foregoing PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT 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

s/ Brent W. Renison
Brent W. Renison