Brent W. Renison, OSB No. 96475
E-mail: brent@entrylaw.com
Parrilli Renison LLC
610 SW Broadway Suite 505
Portland, OR 97205
Tel: (503) 597-7190
Attorneys for Plaintiffs

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' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby respond to Defendants' Motion for Summary Judgment (ECF No. 32), filed by all defendants. Plaintiffs respectfully request the Court deny defendants' motion.

I. Chevron Step One

Defendants argue that because 8 U.S.C. § 1153(e)(3) and (g) contain specific references to waiting lists, and 8 U.S.C. § 1184(g) does not, then the entirety of § 1184(g)'s specific command to issue visas or grant status in the order in which petitions are filed must be ambiguous. While Defendants correctly note that nowhere within § 1184(g) is there reference to

wait lists, as there is within § 1153(e)(3) and (g), a review of the entire statutory scheme, including the legislative history and purpose of the statute shows the statute is not ambiguous. Defendants point to the lack of reference to wait lists in the H-1B statute as making the statute ambiguous, without substantially addressing the significance of the nearly identical language of § 1184(g)(3) and § 1153(e)(1), which set out the order of consideration and distribution of numerically limited visas. The central issue in this case, however, is whether the agency can distribute limited visa numbers in a manner other than in accordance with petition filing date, on a random computer generated basis. The absence of a specific waitlist provision in the H-1B statute does not make the statute ambiguous, as described below.

A. Legislative History

As background to this issue, the legislative history makes clear that before the H-1B category was ever capped numerically, the statute contemplated an orderly system of apportioning limited numbers of immigrant visas. 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 only exception being reference to the re-designated section numbers). Therefore, before 1990, Congress had clearly established procedures for apportioning quota limited visas according to petition filing date order. In addition, the former 8 U.S.C. § 1153(a)(7) read in relevant part:

> "Waiting lists of applicants shall be maintained in accordance with regulations

prescribed by the Secretary of State…"

Former 8 U.S.C. § 1153(a)(7) (pre-1990 statute). Congress knew for many years how the agency had administered the issuance of visas or status to immigrants who were limited by annual quota limits, and 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. This shows an intent for the H nonimmigrant category to be administered in the same manner. 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*. The legislative history shows that Congress wanted "continuous monitoring of all admissions" to occur, in order to keep the issuance of visas or the provision of status within the limits. 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 number of petitions was not limited in any way by the statute. 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.

B. Wait Lists

Does the absence of a mirror provision on wait lists in 8 U.S.C. § 1184(g) make ambiguous the plain command in § 1184(g)(3) that H-1B visas or status be provided in the order in which a petition was filed? It does not. The government's argument that the absence of a corresponding waiting list provision in the H-1B statute makes the statute ambiguous has force only if the statute is read in isolation, something which the Supreme Court has cautioned against. *Nat. Fedn. Of Indep. Business v. Sebelius*, 132 S.Ct. 2566, 2584 (2012). Instead of reading the separate statutory provisions in isolation, as the government suggests, plaintiffs urge the court to consider the entire statutory scheme. Long before the 1990 amendments, Congress established immigrant petition processing rules which provided an orderly petition filing process whereby petitioners (whether individuals or corporations) file petitions and receive a petition filing date called a priority date. At the same time, Congress established a provision providing for waiting lists to be established for those whose petitions were filed but for which an available number was not available for use to get a visa or to obtain status. That was the system in place prior to 1990, and only applied to immigrant visa cases because there were no non-immigrant classifications subject to a numerical limit prior to 1990.

Then, in 1990, Congress added a limitation on the number of H-1B visas or status (not petitions), drawing upon the same language it had previously used for immigrant categories, evincing a plain intention to subject the H-1B category to the same process of distributing visas and status according to petition filing date. When viewed as a whole, the statutory scheme evinces an intent for the agency to use a waitlist system in the same manner as in the immigrant context, even though a specific provision for establishment of such a waitlist was not inserted in the H-1B statute. Indeed, as plaintiffs stated above, the Joint Explanatory Statement of the Committee of Conference explicitly stated, "*In establishing a cap on nonimmigrant visas*, the Conferees suggest continuous monitoring of all *admissions*." *Kavass, Id.* (emphasis supplied). The Conferees, keenly aware of the exact mechanics of the agency's tracking mechanisms for

immigrant admissions by use of the wait list system, intended the continuous monitoring of admissions to occur through a wait list as they knew was in existence at that time for preference immigrants. There was no need for Congress to provide a mandate to set up a wait list system, since one already existed for tracking admissions. The visa bulletin used to track admissions of preference immigrants is updated on at least a monthly basis, to ensure that 1) visas or status is provided to eligible aliens in the order in which their petition was filed; and 2) that the numerical cap on aliens for a given category is not exceeded. This suggests the continuous monitoring that was described by the Conferees in their Joint Explanatory Statement. *Kavass, supra*.

If one tries to justify the computer generated lottery system currently used by defendants to apportion H-1B visas or admission, there is no way to reconcile it against the legislative history and overall statutory scheme. Diversity visas, also added in 1990, were to be given out strictly in a random order, and not according to petition filing date as both the preference immigrant categories and the H-1B category. The government's attempt to render the statute ambiguous only through the lack of a wait list provision in one part of the statute must fail as it does not take into account the entire statutory scheme, and the closely worded provisions of 8 U.S.C. § 1184(g)(3) and 8 U.S.C. § 1153(e).

C. Order of Consideration for Visas or Status

If, however, the Court finds that the absence of a specific wait list provision in § 1184(g) creates an ambiguity with respect to the narrow issue of how the agency is required to carry out the command to issue visas or grant status in the order in which a petition is filed, plaintiffs urge the Court not to find the whole statutory scheme ambiguous. The absence of a corresponding wait list provision should not create an ambiguity on the issue of order of consideration for H-1B visas or status, because upon review of the statute in the entirety, the statute is plain. In other words, should the Court find the agency is free to utilize a different process, aside from wait lists, to distribute H-1B visas or status in petition filing date order, the agency should in no way remain free to distribute such visas or status on a random basis, without regard to petition filing

date order.

In practice, however, the agency has used wait lists in connection with another non-immigrant classification which is numerically limited. As explained in Plaintiffs' Motion for Summary Judgment (ECF No. 31, pp. 29-31), defendants use wait lists, just as in the immigrant petition context, for apportioning visas or status to non-immigrant U visa beneficiaries. The selection of a petition priority date and wait list system by defendants, even in the absence of a statutory mandate to do so, reflects the view within the agency that such a distribution is a reasonable way to manage a numerically limited non-immigrant category. The alleged distinction, hinted by defendants (ECF No. 32, p. 13), between immigrant visas and nonimmigrant visas tends to fade when one considers that the agency uses petition filing date order and wait lists for both immigrants and non-immigrants alike who are subject to numerical limits. Whether the agency carries out the mandate utilizing a wait list system or some other reasonable method, however, might create no practical difference, as long as the situation that persists now (game of chance) does not continue.

D. Simultaneous Submissions and Labor Condition Applications

Defendants also argue that the statutory scheme is ambiguous with respect to "simultaneous submissions" and does not support a "mail-intake" process. ECF No. 32, pp. 18-21. In defense of this theory, defendants claim that 8 U.S.C. § 1184(c)(1), which states that a petition filed for H, L, O, or P classification shall be determined "after consultation with appropriate agencies of the Government, upon petition of the importing employer" precludes Labor Condition Applications (LCAs) from being filed with USCIS after H-1B adjudication.[1] *Id*. p. 18-19. That statute places no limit on the number of petitions, or time of year during which they may be filed. 8 U.S.C. § 1184(c)(1). Furthermore, the only agency specifically described in that statute is the Department of Labor and Department of Agriculture as relates to

[1] In other words, defendants claim that the statutory scheme requires the "simultaneous submission" of a petition and a certified LCA issued by the Department of Labor.

§ 101(a)(15)(H)(ii)(a), which is the agricultural worker program, H-2A. The H-2A program has very distinct processes and procedures from the H-1B program. Specifically, 8 U.S.C. § 1188(a)(1) requires: "A petition to import an alien as an H-2A worker (as defined in subsection (i)(2)) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification…" The specific command for H-2A petitions is not found in 8 U.S.C. § 1184(c)(1) with respect to H-1B petitions and the LCA.

Furthermore, the LCA requirement of 8 U.S.C. § 1182(n) is not a consultation between USCIS and DOL, but rather a direct attestation filing between the employing petitioner and DOL, after which DOL issues a certification to the employer. This is not a "consultation" between the agencies. In approving petitions for H, L, O or P status, the agency regularly consults with other agencies directly, including the FBI, CIA and NSA for security checks, as well as CBP and ICE for immigration records checks, but USCIS never "consults" with DOL directly on H-1B petitions because it is the employer who files the LCA with DOL and who receives the certification directly from DOL for later direct submission by the employer to USCIS. Additional support for this view can also be found in the H-1B1 statute, for Chilean and Singaporean nationals, and the E-3 program for Australians. The LCA provision covering those visa categories, 8 U.S.C. § 1182(t), provides that an LCA be filed before an H-1B1 or E-3 non-immigrant may be "admitted or provided status", and neither category requires any petition with USCIS before the person may be admitted as such. For example, an alien may apply directly for an H-1B1 or E-3 visa at the consulate abroad (U.S. State Department), and be admitted by CBP without ever having applied through USCIS. There is no "consultation" between USCIS and DOL, nor even an LCA submitted to USCIS by the employer in such a circumstance. Consider also the language of the numerically limited U visa, 8 U.S.C. § 1184(p)(1), which states explicitly that the "petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification from [law enforcement agency]". The conclusion that defendants wish the Court to draw, that DOL must be "consulted" by USCIS before a petition is filed, and the form of that

consultation is the LCA, is not supported by the statute. Moreover, while the general H-1B definitional provision of § 101(a)(15)(H)(i)(b) does reference the LCA filing requirement of INA § 212(n) [8 U.S.C. § 1182(n)] a review of the more specific section referenced in that definition, § 1182(n), shows that the LCA is only required before an alien may be admitted or provided status. Of course, an alien in the United States in H-1B status must have had an LCA filed on his or her behalf, and the definitional provision reflects that. With respect to the petition that precedes the alien's application for a visa or application for change of status, the LCA is not required as a prerequisite. In reviewing the entire statutory scheme, one finds that 1) § 1184(c) provides for an employer to file a petition for a number of different petition-based nonimmigrant categories including H-1B, and only the H-2A category is specifically limited by the Department of Labor and Department of Agriculture consultation requirement; 2) § 1101(a)(15)(H)(i)(b) defines the general category of H-1B classification including the LCA requirement of § 1182(n), but that § 1182(n) requires only an LCA to be filed before the alien is admitted or provided status; 3) § 1184(c) provides no numerical limitation or fiscal year restraint on the filing of an employer petition; 4) § 1184(g)(1)(A) provides numerical limitations on issuance of H-1B visas or provision of status to aliens per fiscal year; and 5) § 1184(g)(3) provides for visa issuance or provision of nonimmigrant status to those numerically limited aliens based upon the petition filing date of the employer petition referenced in § 1184(c). Reviewing the above statutory scheme in the entirety, Congress did intend an orderly "mail intake" process.

Defendants argue that an "orderly line might create a multi-year bottleneck overnight" which it argues would frustrate the plain language and intent of the Act." *Id*. p. 18. At present, however, there are already numerous class members who have submitted two or three successive petitions which have all failed to be selected in the random lottery, and this circumstance constitutes a *de facto* multi-year bottleneck, with the exception that such unlucky individuals have no place in line for a number ahead of those who file later than them. The result is that some wait for multiple years to no avail (*de facto* waiting list), while others apply and receive a

number the first time (*de facto* cut in line), which is a manifestly unjust result that Congress did not intend when § 1184(g)(3) was enacted. Congress knew exactly how the agency handled numerically limited visa categories when required to issue visas or status in the order in which a petition was received when the 1990 Act was enacted. The agency put petition filing dates on a wait list, the visa bulletin, which was (and continues to be) updated each month to keep track of two agencies issuances against the cap. Congress knew a wait list would also eventually happen when it placed numerical caps on the H-1B category, because that is precisely what happened when they placed numerical caps on the immigrant category. Congress could not have envisioned that instead of setting up such a system for H-1B visas as the agency had done in the immigrant visa context, the agency would instead distribute visas according to lottery. Congress was aware of the waitlist system, and how it worked. Congress chose language in 8 U.S.C. § 1184(g)(3) which mirrored 8 U.S.C. § 1153(e) for a reason - precisely so that numerically limited H-1B visas or status would be distributed in the same manner as was the longstanding practice for preference immigrant visas.

Defendants also argue that the information contained in each petition such as prevailing wage at time of filing "would either be too speculative or would become stale for purposes of establishing eligibility…" ECF No. 32, p. 18. Plantiffs anticipated this argument and responded at length in their Motion for Summary Judgment. *See* Plaintiffs' MSJ (ECF No. 31, pp. 25-28). Rather than recount that entire argument again here, plaintiffs respond to defendants' specific arguments. Defendants argue that, "Any suggestion of a post-filing LCA would itself be *ultra vires* and would clearly frustrate statutory intent…" and cite to § 1101(a)(15)(H)(i)(b), § 1182(n), and § 1184(c)(1). The language of § 1182(n), however, only applies to an alien who is seeking to "be admitted or provided status" and only requires the employer to attest to certain agreed upon practices such as paying a prevailing wage "during the period of authorized employment…based on the best information available as of the time of filing the application…" *Id*. The statute does not require the employer or DOL to continuously monitor wage increases or

changes after the filing, and even under current procedures DOL certifies LCAs 6 months in advance with a 3 year validity by regulation, in effect acquiescing in wages for a period three and a half years in the future without modification. In addition, 8 U.S.C. § 1182(n)(1)(G)(ii) states that "The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i)(b) within 7 days of the date of the filing of the application." *Id*. This short period is a timeframe commensurate with review of basic attestations to future compliance with prevailing wage rates, and not a complex adjudication. It can and should be a simple attestation procedure before a person is admitted after their turn comes to receive a visa or status. Indeed, as described in Plaintiffs' Motion for Summary Judgment (ECF No. 31, p. 26), the legislative history strongly suggests that the LCA is a condition to be fulfilled after the fact, describing it as a "post-entry attestation" See 2 Igor I. Kavass, Bernard D. Reams, Jr., *The Immigration Act of 1990: A Legislative History of Pub. L. No 101-649*, 122 (1997). In viewing the statute as a whole, this simple attestation should not be viewed as voiding the plain command of § 1184(g)(3).

Defendants argue that § 1184(g)(3) "was never intended to be a mail-intake rule as Plaintiffs suggest, and Congress was silent on the precise manner in which USCIS should handle the hundreds of thousands of petitions it receives every April." Def. MSJ, ECF No. 32, p. 19. Plaintiffs disagree. Congress plainly required, pursuant to § 1184(g)(3), that aliens subject to the H-1B numerical limits be issued visas or given status in the order in which petitions were filed. There is no silence in that statement. The fact that, purely by regulation, USCIS rejects H-1B petitions for all but a 5 day window each year is an artificial construct of their own creation, and it is that kind of situation that Congress never envisioned when it enacted the statute. Defendants argue that Congress gave the agency only a "general outline" to follow. ECF No. 32, p. 19. The command of § 1184(g)(3) is no general outline. The government correctly notes that the agency receives truckloads of hundreds of thousands of petitions on "the very first filing day" (ECF No.

32, p. 20), without also saying that it is precisely their own regulation, not the statute, that bottlenecks all applications into a 5 day window (which was just 2 days at first, until they discovered the nightmare of all those trucks). What other government agency closes its doors 360 days of the year to filings? The government also explains that they are left with "nothing but blind luck to determine 'the order in which [H-1B] petitions are filed.'" *Id*. at p. 20. But Congress did not authorize USCIS to turn to "blind luck" in determining petition filing order. Instead, at the time Congress enacted the H-1B cap and corresponding statutory mandate to issue visas and grant status in the order in which a petition was filed, Congress was aware of how the agency to that point had dealt with numerically limited categories – through a priority date and wait list system designed to allow those who file first to be considered for visas or status first, in filing date order. Defendants, ECF No. 32, p. 20, argue that § 1184(g)(3) says nothing about "what to do with H-1B petitions after a fiscal year's caps have already been reached." Contrary to this assertion, § 1184(g)(3) plainly states that numerically restricted "aliens" (not petitions) are to given visas or status in petition filing date order, and § 1184(c)(1) governing the filing of H-1B "petitions" contains no such numerical limit. If Congress had intended to limit petition filings, it would have inserted the numerical limit in § 1184(c)(1) and not § 1184(g)(1). Thus, the statute plainly contemplates that the agency accept petitions without any artificial filing limit, but that the aliens who are beneficiaries of those petitions are to be limited each fiscal year in the order in which petitions are filed. Plaintiffs are, therefore, in strong disagreement with defendants about "what to do" with the petitions. Defendants reject petitions aside from a 5 day window each year, and even the vast majority of those submitted are rejected in the random lottery. Plaintiffs insist that the agency must allow petitions to be filed pursuant to § 1184(c)(1) year-round without temporal limit, but that the aliens who seek H-1B visas or status as a result of such a petition be limited to the fiscal year limit in the order their petition was filed. Random determination is unambiguously precluded by the statute.

Defendants argue, "before the caps are exhausted, there is nothing in the statute that

clearly suggests that Congress intended for arbitrary luck or those willing to pay for premium mail delivery to be given preferential treatment under Section 1184(g)(3)." ECF No. 32, p. 20. Plaintiffs agree that Congress did not intend "arbitrary luck" to play into who gets or doesn't get a limited number, but disagree that those willing to pay for a faster method of filing are to be given preferential treatment. That is because USCIS considers a petition filed when it is received by the agency, and if one uses an overnight courier service to file a petition versus the U.S. mail, sometimes the petition filed by courier will arrive there first. But in all the other contexts in which the agency processes petitions, and gives out visa numbers to those whose petitions were filed first (preference immigrant cases, U non-immigrant cases), the agency considers those who file on the same day equally. It is sometimes the case that two petitions filed on the same day will result in one individual obtaining a visa first or being granted status first. That is because the system for filing petitions and the system for being given a visa or being granted status is separate in many cases. But that does not pose an issue for the agency, because it is the provision of a visa or status that is limited to each fiscal year, and provided the government does not issue more visas or status than Congress has directed each year, nor give undue priority for those visas to those who file later than others, the agency is following the law.

In order to keep track of the issuance of numerically limited visas (both preference immigrants and U non-immigrants) by the U.S. State Department at embassies and consulates abroad on the one hand, and issuance of such status by USCIS on the other hand, the State Department maintains a "visa bulletin" and "wait list" for these categories, and the two agencies engage in "continuous monitoring" of the issuance of visas and status through coordination, using the bulletin and wait list as a tool to carry out the orderly distribution. (See *Kavass, supra*, for reference in the legislative history of the "continuous monitoring" of admissions). The two agencies coordinate on a day-to-day, and in some cases, hour-to-hour basis in order to ensure that the two agencies' visa issuances and status grants do not exceed the cap. The agencies do this by publishing dates which are considered the oldest dates that can be issued a visa, and

opening the gates a little at a time to ensure that earlier filers have sufficient time to obtain a visa or be granted status ahead of those who file later. Because Congress set an annual fiscal year limit, the agency is free to manage the visa issuance and status grant process over a period of the 12-month-long fiscal year, through continuous monitoring of visas and admissions, so that no more than the Congressionally limited number of aliens is provided visas or status. It is a task that the agency has accomplished for many years.

A review of the entire statutory scheme leads to the conclusion that Congress intended the agency to allow petitions to be filed without numerical or temporal limitation, and that each petition would be provided a filing date upon which to distribute the limited numbers of visas or status to the alien beneficiaries of those petitions. Congress was well aware that the language used for order of consideration was carried out through the use of wait lists, and used the same language for the H-1B statute. This shows intent to have the H-1B category managed in the same way.

II. Chevron Step Two

Should the Court determine after thorough review of the entire statutory scheme that the statute is ambiguous, as urged by defendants, plaintiffs respectfully request the Court find that defendants' specific regulatory action to establish a lottery system is not entitled to deference, and in any event not reasonable even if it receives deference. As an initial matter plaintiffs urge the Court to find that defendants lottery rule, issued only as an interim rule with request for comment, is not entitled to full *Chevron* deference. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the Supreme Court has stated, "the overwhelming number of our cases applying Chevron deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *United States v. Mead*, 533 U.S. 218, 230 (2001). The Court further explained that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a

pronouncement of such force." *Id*. Because both the 2005 and 2008 rules at issue in this lawsuit came in the form of an "Interim rule with request for comments," we have no record of any of those comments, or how (or even if) the agency considered any public comment at all. See 70 Fed. Reg. 23775 (2005); 73 Fed. Reg. 15389 (2008). The formal administrative procedure referenced in *Mead* was one involving notice of proposed rulemaking, followed by a final rule which incorporates public comment. This formal procedure ensures that public concerns are heard, considered, and incorporated into the decision-making process, and that the agency does not simply become a dictator of policy in a vacuum of their own concerns. Here, however, the agency did nothing more than announce a process and put it into place, with no evidence that any comments were considered before or after the lottery was put into place. Indeed, even though the agency had the opportunity to address the 2005 comments in the 2008 rule, there was no reference to public comment. Instead, the agency focused on its own problems that a 2 day filing window created for their employees and for courier companies, and on some abuses with multiple filers, which it ultimately failed to correct adequately as plaintiffs complain. Additionally, in the 2008 Interim rule with request for comments, the agency noted that it was implementing the amendments immediately but that "USCIS nevertheless invites comments on this rule and will consider all timely comments in the preparation of a final rule." 73 Fed. Reg. at 15393. That was over eight (8) years ago, and there is no sign of a final rule setting out the public comments from the 2005 and 2008 request for comment. The only inkling the public has of the process (or their submitted comments) since 2008 is the 2011 "Notice of Proposed Rulemaking" which proposed electronic registrations and the creation of a "waitlist" system. See 76 Fed. Reg. 11686 (2011). Nowhere within the 2011 NPRM is a discussion of any comments submitted following the 2005 and 2008 request for comments. Although the agency gave the public notice of the rule in the Federal Register, the "comment" part of notice-and-comment, followed by final rule which addresses the comments, is noticeably absent. The Interim rule establishing a lottery was "not promulgated subject to the rigors of the

Administrative Procedure Act, including public notice and comment" and would not typically enjoy full *Chevron* deference. *Jacks v. Crabtree*, 114 F.3d 983, 984-85 & n.1 (9th Cir. 1997). This two-legged stool of a policy, which has teetered on for over a decade without addressing public concern over the controversial lottery system, should not be provided full *Chevron* deference in the first place.[2]

If the Court determines, however, that this case presents the rare exception in which *Chevron* deference is nevertheless warranted for defendants' interim rule, defendants' interpretation is not reasonable. Defendants begin their discussion of *Chevron* step two by stating, "USCIS's promulgation of 8 C.F.R. § 214.2(h)(8)(ii)(B)…is an eminently reasonable interpretation of a program that must be fair and not provide for preferential treatment." Plaintiffs agree that the program must be fair and not provide preferential treatment, but disagree that USCIS' rule provides that.

Specifically, the system allows for multiple simultaneous submissions by different employers, even affiliated companies, for the same alien, giving that beneficiary higher chances of obtaining a visa through random selection. The system also allows for those who file later to receive the same consideration as those who filed years before. Those who file later and are randomly selected are given preferential treatment over those who filed earlier and are not selected. Instead of describing a hypothetical scenario involving two employers standing at the post office mailing their petitions which arrive at slightly different times at the agency, as is described in footnote 17 of defendants motion (ECF No. 32, p. 21), defendants might be asked to address the fairness or unfairness of the real-life scenario of two petitioning employers one of whom has two other affiliated companies filing for the same individual, who obtains an H-B slot

[2] The first time the cap was reached the first day of filing was April, 2007. Def. MSJ, ECF No. 32, p. 7, fn. 8. Before that event, petitioners could at least plan on filing in the first days of April to ensure an H-1B number for the year. In lottery years, not even early planning could ensure an eventual number. The Great Recession hit the pause button on the problems created by the lottery from 2009 to 2012, but since 2013, employers have not been able to plan early filings with any assurance of an eventual number.

the very first year they try, and one of whom is a small company who has filed a single petition each year for three years in a row without having the beneficiary's petition be selected at random. How is that fair and equitable?

The answer is that the petition rejection and lottery system is neither fair nor equitable, and the regulatory scheme setting up a computer generated random lottery is an unreasonable interpretation. When Congress has determined that a random process is in order, it has established such a process, as in the case of the Diversity Visa Lottery. Here, there is absolutely no indication whatsoever that Congress intended the agency to subject H-1B petitions to such a selection process.

III. Skidmore Deference

The government urges the Court to give its' interpretation of the statute deference under *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S.Ct. 161 (1944), and *United States v. Mead*, 533 U.S. 218 (2001). Those cases deal with deference to agency interpretations that do not result from the rigors of formal rule-making. Here, the agency engaged in rulemaking in connection with the establishment of the lottery system in 2005 and again in 2008, albeit in the form of an interim rule with request for comments, and did not ever acknowledge the comments or issue a final rule.[3] If the agency's establishment of an H-1B lottery system through interim rule is determined to fall within *Skidmore* and *Mead*, plaintiffs respectfully submit that there has been nothing persuasive presented by defendants to support such a rule given the structure of the statutory scheme. Defendants arguments on this point, ECF No. 32, pp. 22-24, consist of generalized statements about the agency's expertise, and how establishing a priority date system would undermine a process that has been in place for several years. The defendants fail to note,

[3] Because the agency only issued interim rules with request for comments, and never a final rule, it is unclear whether the public comments might have suggested viable alternatives to the lottery system, and unclear whether the agency ever considered any of those comments at all. This does not point to a "thoroughness" of consideration required for deference. *Skidmore v. Swift*, *supra*, 323 U.S. at 140.

however, that the priority date system was in effect for decades before the H-1B statute was enacted in its current form, and continues to operate to this day. Defendants also do not address the apportionment of U nonimmigrant status according to filing date order with a waitlist, which also continues to be administered by the agency. The arguments also include this surprising statement about defendants' interpretations: "They are also consistent with the relevant legislative history as stated in various committee reports." Defendants do not cite to any particular report, however, for this position. Additionally, the fact that some administrative processes may be changed as a result of ensuring the system is fair is not an argument of great force. In summary, there does not appear to be anything persuasive here for defendants.

IV. Prior Construction Canon

Defendants claim that two legislative acts, the first in 2000 and the second in 2005, serve to provide congressional approval of their interpretation, relying upon *United States v. Winkles*, 795 F.3d 1134, 1140 (9th Cir. 2015) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1979)). Def. MSJ, ECF No. 32, pp. 26-29. Defendants resort to the "prior construction canon" relies upon a very mixed history that does not support their argument. As explained in plaintiffs' Motion for Summary Judgment, ECF No. 31, pp. 15-17, defendants' 1991 rule disregarded public comment about a rejection policy, then in 1997 and again in 1999 the agency proposed regulations which would have allowed petitions to be accepted, not rejected, and be considered for a visa the following fiscal year.[4] This is hardly a consistent position on rejection policy. It

[4] The 1997 proposed rule explained: "The regulation currently provides that, in the event that the numerical limitation is reached in a fiscal year, the Service shall reject any new petitions which are filed with a notice that numbers are not available until the next fiscal year. This proposed rule modifies the regulatory language by enabling the Service to adopt a *different procedure* in the event that rejecting petitions is determined not to be the most appropriate action for the Service to undertake." 62 Fed. Reg. 67764 (1997). The 1999 proposed rule further explained: "On December 30, 1997, the Service proposed to amend 8 CFR 214.2(h)(8)(ii)(E) to enable the Service, in its discretion, to adopt mechanisms *other than rejection of petitions* filed after the cap had been reached…All three commenters *applauded* the Service's proposal…Under the *current regulation, the service would reject* such employers' petitions and accompanying fees. The *proposed regulation*, however, would require the Service to *accept all petitions*, together with filing fee, for adjudication and processing, regardless of the petitioner's requested work start date." 64 Fed. Reg. 32149 (1999). (emphasis supplied).

was against that backdrop of a proposed administrative change in policy to the rejection rule (allowing the agency to "accept all petitions", see fn. 4 preceding page) that Congress added some additional provisions regarding H-1B visas as part of the American Competitiveness in the Twenty First Century Act ("AC21"), Pub. L. No. 106-313 (2000). Congress was aware of the agency's proposed rules in 1997 and 1999, which proposed changing the rejection rule to allow the agency to "accept all petitions" for consideration for a future fiscal year. Presumably, if the agency was formally considering accepting all petitions and not rejecting them, Congress would not need to enact any legislation in that regard. Defendants' conclusion that the enactment of AC21 served to provide congressional approval of the rejection rule is misplaced given these proposed regulations which transmitted agency intention to the contrary. In fact, the proposal in the 1997 and 1999 proposed regulations to accept all petitions (and not reject them) after the H-1B visa quota had been reached explicitly supports plaintiffs' position that there is no limit on petitions, only on visas or status.

Additionally, enactment of H-2B provisions in the REAL ID Act, Pub. L. No. 109-13 (May 11, 2005) also fails to support defendants' assertion that Congress has adopted the agency position. The agency issued its lottery regulation as an "Interim rule with requests for comment" on May 5, 2005. The bill in Congress originated in the House on March 11, 2005 as H.R. 1268, "*Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005*", well before the first lottery regulation appeared. The bill was passed in the House March 16, 2005, and passed in the Senate April 21, 2005 with an amendment. To reconcile the two versions, a Conference committee was held and a "Conference report" (H. Rept. 109-72) was filed May 3, 2005. A Conference report is a combination of two bills which must again be voted on without amendment by both the House and Senate. The Conference report contained the language which would become law. The conference report was voted out of the House May 5, 2005, followed by Senate passage May 10, 2005, and signature by the President May 11, 2005. Because the Conference report was already drafted and agreed upon

before the lottery regulation was issued, and passed by the House on the same day as the lottery regulation, here is no reason to expect that the regulation was ever considered by Congress when it drafted the Conference report and passed the REAL ID Act. The government's reliance on passage of the REAL ID Act for support of the lottery process is misplaced.

The 2005 interim rule establishing a lottery referred to the December 8, 2004 "Omnibus Appropriations Act" (OAA), Pub. L. No. 108-447, 118 Stat. 2809 (2004), as the source of authority for the lottery rule. The OAA only created an exception to the numerical limitation for U.S. master's degree holders up to a certain level, not a re-enactment of a prior statutory section involving the order of consideration for H-1B visas or status. The OAA also preceded the regulation. The Court in *Winkles* explained that it was applying the "rule of statutory construction that 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change' or when it 'adopts a new law incorporating sections of a prior law.'" *United States v. Winkles*, 795 F.3d 1134, 1140 (9th Cir. 2015) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1979). In this case, Congress did not re-enact a statute without change, or adopt a new law incorporating sections of a prior law. The statutory language of § 1184(g)(3) governing the order in which visas or status were to be apportioned to beneficiaries subject to the limits of § 1184(g)(1) was unchanged by that legislation. Additionally, the Supreme Court in *Lorillard* explained that it was relying upon the consistent interpretation of the statute to apply that particular rule of statutory construction. *Lorillard*, supra, 434 U.S. at 581. There has been no consistency in the agency's position with respect to rejection of petitions given the conflicting proposed rules of 1997 and 1999, or of the lottery process itself which was erected after legislative action concluded.

V. Legislative Acquiescence

Defendants claim that Congress' failure to supersede the agency's controversial lottery regulation with new legislation shows a legislative intent to uphold agency policy. Def. MSJ,

ECF No. 32, pp. 29-31. They cite for support the decision in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Chief Justice Burger, writing for the majority, prefaced the statutory analysis by stating "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation", that "'unsuccessful attempts at legislation are not the best guides of legislative intent,'" and that "[n]onaction by Congress is not often a useful guide…" which is certainly true here. *Id*., at 600 (internal citations omitted). The Court in *Bob Jones Univ.* noted, however, that during a 12 year period, 13 bills had been introduced to overturn the IRS interpretation at issue in that case without success, but that "Congress has enacted numerous other amendments to § 501 during this same period, including an amendment to § 501(c)(3) itself." *Id*. Congress, however, has of late failed to pass much of anything, let alone any immigration legislation. Since the 2005 lottery regulation, Congress has not "enacted numerous other amendments" of the immigration law, and has enacted nothing relating to H-1B petitions, visas or status. It would set a dangerous precedent to draw any conclusion about Congressional inaction on immigration that would support defendants' claim to acquiescence. This case presents the "ordinary claim of legislative acquiescence" in which Congressional inaction provides no significance to the interpretation of the statute. See *Bob Jones Univ*., *supra*, 461 U.S. at 600.

VI. Conclusion

For the reasons given above, and based upon the written submissions of the parties, plaintiffs respectfully request that Defendants' Motion for Summary Judgment be denied.

PARRILLI RENISON LLC

By /s/ Brent W. Renison

BRENT W. RENISON
PARRILLI RENISON LLC
610 SW Broadway Suite 505
Portland, OR 97205
Phone: (503) 597-7190
brent@entrylaw.com
OSB No. 96475

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2016, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS' 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