

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' REPLY TO  
DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment (ECF No. 34), filed by all defendants. Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Summary Judgment (ECF No. 31).

In response to plaintiffs' discussion about the inequity created by multiple filings for the same beneficiary, defendants characterize this discussion as merely "policy complaints that ignore how Section 1184(g)(3) is silent regarding both (1) what the agency must do with petitions received after each year's fiscal cap has been reached and (2) how to process a sudden

influx of hundreds of thousands of petitions received all at once.” Def. Response, p. 4 (ECF No. 34). Plaintiffs, however, do not ignore the language of § 1184(g)(3) as that language relates to what the agency must do with petitions received after a fiscal cap has been reached. Instead, plaintiffs have consistently argued that defendants must continue to accept petitions all year and assign them a priority date order of filing, which date must then later be used to distribute H-1B visas or status according to the earlier petition filing date. The language of § 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” (not aliens) contains no such numerical limit. If Congress had intended to limit petition filings, it would have inserted the numerical limit in § 1184(c)(1) (dealing with petitions) and not § 1184(g)(1) (dealing with aliens). This is not silence, as defendants’ characterization suggests, but plain language providing unlimited petition filing, but limited issuance of visas or status to aliens based on the order in which the petition was filed. Defendants suggest that § 1184(c)(1), which states that the question of importing a nonimmigrant under § 1101(a)(15)(H) “shall be determined...upon petition of the importing employer” and that “[s]uch petition shall be made and approved before the visa is granted” is silent with respect to what the agency must do with “such petition.” Because the statute directs an importing employer to make a petition before a visa may be granted, and does not limit when a petition must be filed other than before a visa is granted, this is not silence. Additionally, § 1184(c)(1) states that “[t]he approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant” which shows that a petition is a precursor to visa eligibility. In order to be considered an H-1B nonimmigrant, the statutory scheme still requires the availability of an H-1B visa number or status adjustment under the limits imposed by § 1184(g)(1) and in order of petition filing date as directed by § 1184(g)(3), as well as any necessary Labor Condition Application required prior to admission under § 1182(n). The statutory scheme is not silent with respect to what the agency must do with a petition, since it must accept such petition without limitation as a prerequisite to an alien being

eligible for consideration for a quota limited visa or status grant.

Defendants seek to leverage the absence of a wait list provision in § 1184(g) into an ambiguity over the order of consideration for limited H-1B visas or status in spite of specific language in § 1184(g)(3) which matches language in § 1153(e)(1). But the Supreme Court has foreclosed this type of isolationist approach:

“A statutory ‘provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme...because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.’ *United Sav. Assn. of Tex. V. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). Thus, an agency interpretation that is ‘inconsisten[t] with the design and structure of the statute as a whole,’ *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. \_\_\_, \_\_\_, 133 S.Ct. 2517, 2529, 1867 L.Ed.2d 503 (2013), does not merit deference.”

*Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014). The remainder of the statutory scheme, including § 1153(e)(1), clarifies that when Congress utilizes language “in the order in which a petition is filed” for distributing fiscal year numerically limited visas or status to aliens, that this means the distribution is to be in order of petition filing, and that petitions are to be filed without arbitrary limitation. The agency interpretation which includes distribution through random lottery, is “inconsisten[t] with the design and structure of the statute as a whole.” *Utility Air Reg. Group, supra*, quoting *Univ. of Tex. Southwestern Medical Center v. Nassar, supra*. Thus, according to recent Supreme Court precedent, the agency interpretation does not merit deference.

With respect to defendants’ claim that the statute is silent about “how to process a sudden influx of hundreds of thousands of petitions received all at once,” Def. Response, p. 4 (ECF No. 34), the answer is that this situation is entirely created by defendants’ refusal to accept petitions all year in accordance with the statutory scheme intended by Congress. If petitions were accepted all year, instead of in 2 or 5 days per year (which is a patently arbitrary timeframe), employers would file them all year-round, resulting in a gradual flow of petitions in date filing order, instead of a flood. Those who filed earlier would have an earlier priority date and an

earlier consideration for an H-1B visa or status grant. That is precisely what Congress intended when it specified that the limited visa numbers would be given out in petition filing date order, creating an orderly system of distribution. The lottery system that defendants now defend is far from orderly, or fair, because it depends on chance and totally disregards petition filing date order. Defendants in their Response completely sidestep the arbitrary nature of the lottery process for distribution of quota limited visas or status.

Defendants seek to analogize their claim of statutory silence regarding rejection of petitions and running of a lottery selection process with the tip-pooling issue presented in *Oregon Restaurant & Lodging Association v. Perez*, 816 F.3d 1080 (9th Cir. 2016), *reh'g en banc denied*, \_\_ F.3d \_\_, 2016 WL 4608148 (9th Cir. Sept. 6, 2016). While the reasoning of the Court in *Perez* is unquestionably correct, plaintiffs reject defendants' characterization of the case in *Perez* as one similar to the case at bar. In *Perez*, the statute's "clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule." *Id.* at 1088. There is no such silence here which would allow defendants the freedom to reject petitions and herd them into a 5 day filing window, drawing straws to determine which petitions to accept or reject. Plaintiffs do not argue that there is a statutory silence which "repudiates" agency action. Instead, plaintiffs consider the statutory scheme, viewed in its entirety, as unambiguously forbidding the rejection of petitions and the selection of H-1B winners and losers through a computer generated random lottery process.

The Supreme Court has determined the meaning of a statutory silence which is more analogous to the case at bar, in *Tarrant Regional Water Dist. v. Hermann*, 133 S.Ct. 2120 (2013). In *Tarrant*, the Court had to decide whether silence regarding state borders in § 5.05(b)(1) of the Red River Compact, Act of Dec. 22, 1980, 94 Stat. 3305; Compact, 1 App. 7-51, had significance where other sections of the Act had specific language "within their respective boundaries" and where the plaintiff claimed borders were irrelevant when interpreting § 5.05(b)(1) because of the latter's silence on state borders. The Court found that "Tarrant's

argument [that silence about state borders means borders are not applicable] fails to account for other sections of the Compact that cut against its reading” and stated that “[a]pplying Tarrant’s understanding of § 5.05(b)(1)’s silence regarding state lines to other of the Compact’s provisions would produce further anomalous results.” *Id.* at 2131. The Court pointed to another section of the Compact, § 6.01(b) which was also silent on the issue of state lines:

“Consider § 6.01(b). That provision states that ‘Texas is apportioned sixty (60) percent of the runoff of [subbasin 1 of Reach III] and shall have unrestricted use thereof; Arkansas is entitled to forty (40) percent of the runoff of this subbasin.’ *Id.*, at 32. Because Texas is upstream from Arkansas, water flows from Texas to Arkansas. Given this situation, the commonsense reason for § 6.01(b)’s 60-to-40 allocation is to prevent Texas from barring the flow of water to Arkansas. While there is no reference to state boundaries in the section’s text, the unstated assumption underlying this provision is that Arkansas must wait for its 40 percent share to go through Texas before it can claim it. But applying Tarrant’s understanding of silence regarding state borders to this section would imply that Arkansas could enter into Texas without having to wait for the water that will inevitably reach it. This counterintuitive outcome would thwart the self-evident purposes of the Compact. Further, other provisions of the Compact share this structure of allocating a proportion of water that will flow from an upstream State to a downstream one. Accepting Tarrant’s reading would upset the balance struck by all these sections.

*Tarrant, supra*, 133 S.Ct. at 2131-32. In *Tarrant*, the Supreme Court found an “unstated assumption” in the statute which meant state boundaries applied even when the particular statutory section was silent about them. Here, the unstated assumption is that because Congress directed the agency to distribute H-1B visas or status “in the order in which petitions are filed for such visas or status” as plainly commanded by § 1184(g)(3), then the use of a wait list applies because the other statute utilizing this plain language, § 1153(e)(1), uses a wait list and a contrary system of apportionment such as a lottery would result in a “counterintuitive outcome [that] would thwart the self-evident purposes” of the statute. *Tarrant, supra*. Congress drafted § 1184(g)(3) with the system already in place under § 1153(e)(1) in mind, and with the self-evident use of wait lists in mind. There is no other logical way of distributing limited visas based on a petition filing date other than through a waiting list. The agency cannot make aliens

stand in a line outside the agency for months or years, so the wait list is the logical distribution method. Taking § 1184(g)(3)'s silence with regard to wait lists to mean that the agency can reject petitions almost year-round and force employers to file in a 5 day window, conducting a random lottery by computer to distribute visas in arbitrary fashion is folly.

Defendants also argue that their interpretation of the statute is reasonable because adopting plaintiffs' interpretation would "create a never-ending waiting list for H-1B petitions to be adjudicated (oftentimes with years-old labor, prevailing wage and employment-related information)." Def. Response, p. 8, ECF No. 34. Merely claiming that plaintiffs' interpretation is not reasonable, however, is not the same as defending the reasonableness of defendants' own interpretation. First, such a waiting list is not never ending, because 85,000 visas or status will be distributed each year to those with the earliest filing dates. The only potentially never-ending situation is lottery non-selection year after year due to the inherent arbitrariness of the lottery. Second, Congress knew prior to 1990 that nearly identical language used in the immigrant visa context in practice resulted in a wait list long before inserting that language in § 1184(g). Third, defendants fail to defend their lottery system from specific claims made by plaintiffs which render the agency interpretation unreasonable including: 1) larger employers with multiple entities, and enterprising beneficiaries with multiple job offers from multiple different employers can game the system for a better chance in the lottery (Plaintiffs' MSJ, p. 15, ECF No. 31); 2) it is possible for an individual to have been the beneficiary of an H-1B petition in multiple years, and have been rejected each time, while another beneficiary obtains a winning lottery number in the first year (Plaintiffs' MSJ, p. 21, ECF No. 31); and 3) 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 (a *de facto* cut in line). (Plaintiffs' MSJ, p. 32). Defendants in their Response chose not to directly address any of these concerns about the reasonableness of the rejection and lottery system. In refusing to address these effects head on, their claim to reasonableness fails.

In defending the lottery system, defendants insist there is a “crucial difference” between nonimmigrant and immigrant statutes, urging the Court to disregard the mirror statutory language of 8 U.S.C. § 1153(e)(3). Def. Resp. MSJ, p. 8, ECF No. 34. The Supreme Court has counseled, however, that “[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.” *Yates v. United States*, 135 S.Ct. 1074, 1081-82 (2015). Here, the language of § 1153(e)(3) and § 1184(g) is nearly identical, the specific context in which both are used is the yearly numerical limitation on an alien’s admission, whether as an immigrant or nonimmigrant, into the United States; the specific context in which the language is used is on the one hand immigrant visas given to aliens, and on the other hand non-immigrant visas given to aliens; and the broader context of the statute as a whole is that both statutes seek to distribute limited visas or status which apply to numbers of aliens, and not petitions, so that only that many aliens can be admitted in that particular status (whether immigrant or nonimmigrant) each fiscal year. Those are the considerations that the Supreme Court requires be consulted, and plaintiffs respectfully submit that whether an alien is admitted as an immigrant or as a nonimmigrant is of lesser importance to the meaning of those statutory provisions than is the order of consideration of numerically limited visas to aliens in the order in which a petition is filed. In other words, the distinction between immigrants and nonimmigrants in the statute is not one of those contextual indicators that causes one to view the same statutory language completely differently. Defendants hope to convince the Court that this distinction is key to the interpretation of the statute, because their own policy concerns about nonimmigrant petitions becoming “stale” supports their unreasonable interpretation. But this distinction is a false distinction. The statutes are nearly identical with respect to the distribution of fiscal year limitations on aliens of both types, and the entire statutory scheme forbids the lottery system to distribute one type while the other type is distributed in filing date order.

Moreover, defendants focus on the final status that each nonimmigrant and immigrant

achieve at the end of the day, while ignoring the reality that an immigrant petition may just as easily become “moot” if the petitioning employer no longer wishes the services of the beneficiary being sponsored for a green card due to a long wait and passage of time. Likewise, for family based immigrants, family disagreements or loss of affection can often lead a petitioner to withdraw a petition after having waited on a list for several years. There is no indication in the statute, nor in legislative history, to suggest that Congress meant to treat immigrants and nonimmigrants differently in the way that fiscal year numerical limitations on aliens were administered, just because one is temporally limited to 6 years (albeit with unlimited 1 and 3 year extensions possible in certain circumstances) and the other is not. Each category must have a petition filed, and each alien is limited per fiscal year, leading to the conclusion that Congress envisioned each kind of alien would end up having to wait for a period of time before being given a visa or being admitted if the number of applicants exceeded the number of slots available for such aliens in a given fiscal year.

Defendants argue that just because Congress has mandated a random process of distribution in the Diversity Visa Lottery, 8 U.S.C. § 1153(e)(2), that does not mean it is precluded from instituting a lottery to distribute numbers in another context. While such a generalized statement has some truth in the abstract, defendants’ argument as applied to this statutory scheme might have greater force if § 1184(g)(3) did not contain specific language as to how limited H-1B visas and status were to be distributed. The specific language of § 1184(g)(3) precludes such an interpretation. The canon of statutory interpretation *expressio unius est exclusio alterius*, creates a presumption that Congress acted intentionally when it included particular lottery language in one section but omitted it in another section of the same Act. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). Not only was it omitted, but contrary language was explicitly inserted. The three statutory sections, 8 U.S.C. § 1153(e)(1), § 1153(e)(2), and § 1184(g)(3) were all sections of the same Act, the 1990 Immigration Act. Defendants have not sufficiently rebutted the presumption that this “disparate

inclusion or exclusion” was intentional as is required by that canon of statutory interpretation. *Russello, Id.* at 23. Here, there exists not only a disparate inclusion (including petition filing date order in two sections, and random order in one section), but also a disparate exclusion (excluding random order in two sections, while excluding filing date order in one section). That is more than mere silence. In reviewing the overall statutory scheme, the Court may presume that Congress acted purposely when it mandated distribution in “strictly in a random order” for Diversity Visa applicants, and mandated distribution according to petition filing date order for preference immigrants and H-1B nonimmigrants.

With respect to defendants’ discussion of the U visa program (Def. Resp. at 12-14), and the priority date and wait list system employed there, plaintiffs admit that the U visa statute does not mandate a particular order or system of apportionment of fiscal year numerically limited visas. Plaintiffs also concede that in the absence of any specific statutory mandate, defendants may have acted within their statutory authority to fill a gap created by Congress in distribution of the numerically limited U visas. Plaintiffs have not argued that the creation of a petition filing date system and wait list for the U visa program *requires* that the agency also institute such a system for H-1B visas. Instead, plaintiffs point to defendants’ use of this apportionment system as an indication that the agency has been able to successfully distribute numerically limited nonimmigrant visas (in addition to immigrant visas already discussed elsewhere) in an orderly fashion through use of this system. It is the statutory scheme, including § 1184(g)(3), not the U visa regulations, which require distribution of H-1B visas or status in a petition filing date order.

Indeed, defendants’ attempt to draw a meaningful distinction between immigrant and nonimmigrant categories as relates to fiscal year numerical limitations loses force when viewed in light of the U visa program distribution system. Just as one might say that an employer’s need for a highly skilled employee may diminish over a long period of time if the H-1B visa does not become available for use, a prosecutor’s need for a U visa witness may also diminish over time as the statute of limitations closes in. The agency uses a priority date and wait list program on its

own initiative even in the face of this diminishing need. The agency has adopted a mechanism to give those who are on the waitlist a temporary authorized status for U visa petition beneficiaries, and it is possible that similar treatment may be provided to H-1B petition beneficiaries who are on a waitlist. In fact, under current regulations an F-1 student in the Science, Technology, Engineering and Math (“STEM”) disciplines can obtain a 24-month extension of Optional Practical Training (OPT) work authorization beyond the initial 12 months of OPT, for a total of 3 years of OPT, which can enable a STEM beneficiary significantly better chances of weathering a several-year wait for H-1B status. The administration has extended the OPT program in the past, including to fill the gap between expiration of F-1 status and the start of H-1B status (called “cap-gap”) and could do so in the future for those on a wait list. Most importantly, however, is that utilization of the U visa priority date and wait list system shows that the agency has adopted it with success in another nonimmigrant category which is limited numerically. This undermines the defendants’ arguments that a wait list system would prove unworkable for H-1B visas.

For the reasons given above, and based upon the written submissions of the parties, plaintiffs respectfully request that Plaintiffs’ Motion for Summary Judgment (ECF No. 31) be granted.

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 16, 2016, I electronically filed the foregoing PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' 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