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' SUPPLEMENTAL BRIEF

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby submit this supplemental brief in support of Plaintiffs' Cross Motion for Summary Judgment (ECF No. 31).

During oral argument, the Court requested confirmation regarding the nature of the 1991 regulation, which provides rejection of employer petitions during times when visas are unavailable to employee beneficiaries due to the numerical limits on aliens found in 8 U.S.C. § 1184(g)(1). That regulation, 56 Fed. Reg. 61111 (1991), was a final regulation which was promulgated after Notice of Proposed Rulemaking (NPRM), public comment, and which addressed public comment in a detailed fashion in the final rule. In effect, the 1991 rule has

every indicia of the type of regulation which may be accorded deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The 1991 rejection regulation, in contrast to the 2005 and 2005 lottery regulations, thus gets past *Chevron* Step Zero.[1] See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). That the regulation is contemplated under the holding in *Chevron*, however, does not result in the regulation being accorded deference. Only where the statute is ambiguous (*Chevron* Step One), and further only where the Court finds the agency's interpretation embodied in the regulation is reasonable (*Chevron* Step Two), does *Chevron* deference apply.

The statute is above all not ambiguous because the plain command of both § 1153(e)(1) and § 1184(g)(3) require limited visas issued to individuals be apportioned according to the filing date order of an employer's petition. The statute's purpose in distributing visas in petition filing date order is self-evident, and unambiguous. A review of reasonableness of the government's position in rejecting petitions, instead of accepting them and assigning orderly filing dates, is relevant not only to the determination of whether it is afforded deference under *Chevron* Step Two, but also in avoiding absurd results when reading the entire statutory scheme for plain meaning under *Chevron* Step One. Therefore, the following short discussion will incorporate an analysis of the reasonableness or absurdity of the government position, with a contemplation of the overall statutory scheme, with the express intent that the discussion apply to both Steps One and Two of *Chevron*.[2]

As an initial matter, the 1991 regulation includes a provision which directs the agency to reject employer petitions when the employee visa number is not available, unlike the immigrant

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[1] The 2005 and 2008 interim rules with request for comments instituting a lottery system do not get past *Chevron* Step Zero.

[2] This is done because avoiding absurdity in results is the focus of *Chevron* Step One and Step Two. See *Tarrant v. Herrmann*, 133 S.Ct. 2120 (2013) "Read together and to avoid absurd results…" *Id*. at 2131. In other words, avoiding an absurd result may lead the Court to determine the meaning of the plain language of the statute, notwithstanding silence with regard to some provisions, ending with *Chevron* Step One.

visa context where petitions are received throughout the year. This provision, in times when there are less employers filing petitions in a given day than there are available in the whole year, has functioned for a number of years since 1991 without great calamity. That is because in years when the first days of filing do not bring a deluge of filings in excess of the annual cap, a petitioning employer having previously received a rejected petition (or knowing the petition will be rejected, refrained from filing), has a ready avenue just months later in preparing a petition for filing the first day of the filing season, thus assuring the employer the petition will indeed be received. This happened, for example, in the years prior to 2007, and the years between 2009 and 2012. In those years of relatively lower demand, employers who received a rejection were able to refile several months later and be guaranteed a number, provided they filed on April 1.[3] Having to re-file a rejected petition represents some inconvenience to employers, as was discussed in the 1997 and 1999 proposed rules which stated the agency was intending to change the rejection policy to an acceptance policy[4]. Yet, as inconvenient as re-filing a rejected petition might be, at least the employer could re-file with assurance of a number in those years if the petition was filed April 1. The intractable problem with the rejection policy, however, is that it does not avoid absurdity when there are more petitioners wishing to file on a single day than there are numbers available in the whole year, such as happened in 2007, 2008, and every year from 2013 to the present time. In such years of relatively high demand, there is no alternate route to re-file with assurance of an eventual number. In order to be considered reasonable, a

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[3] I use an April 1 filing as a prime example of being guaranteed a number in the years mentioned, although in many of those years one could file in May, June, July, and even into December or the following January in some cases. Historical data on the date that the "cap" was reached is readily available and has varied by year.

[4] 62 Fed. Reg. 67764 (1997) ("[I]t *would not seem prudent to reject an H-1B petition* or H-2B petition filed for that fiscal year since this procedure could create unnecessary work for the Service and an *unnecessary hardship on petitioners* in certain situations."); 64 Fed. Reg. 32149 (1999) (proposing "*mechanisms other than rejection of petitions*" and "[t]he Service believes that this proposal will benefit the great majority of petitioners by *relieving them from the burden of refiling or submitting a new petition once the cap is reached*.").

regulation must be able to address all likely potential fact situations over time, not just situations which may exist in certain years or months. The 1991 regulation, however, does not reasonably address the situation in which pent-up demand (caused by the very rejection policy itself) causes employers to file more petitions in one day than are available for an entire year. This leads to absurd results, chief among them the arbitrary lottery.

If the rejection policy were to be upheld, there exists no process (lottery or otherwise) which could provide a reasonable way to carry out the directive of § 1184(g)(3) to issue visas to individual employee beneficiaries in the order in which an employer's petition was filed. If the agency is allowed to maintain the policy of rejecting employer's petitions until the day that is 6 months in advance of the upcoming fiscal year, then it can well be anticipated that the agency will receive more petitions in one day than are available in the entire fiscal year. If the agency then picks the first 85,000 that make it to the mailroom on that magical day, rejecting every petition that arrived a minute later, this will also yield an absurd result. Obtaining a visa or not would then come down to the best courier system available, or the weather in a given part of the country which could delay deliveries. Such delays can and will happen, but with a filing date and wait list system, a delivery delay in filing the employer petition may result merely in a short delay at the end of the process when the alien applies for the visa. A filing delay is transformed from a win or lose proposition to a relative priority issue – a little later than sooner, rather than potentially never. The fact remains that the rejection system itself causes absurd results in times of great demand, because the year-round rejection of petitions, save for a single day or couple of days, disrupts the normal flow of employer petitions which an agency would receive throughout the year. The rejection policy is the illness, and the random lottery a poor dressing for the wound.

Take this example: Employer A wishes to employ Employee X under the H-1B visa system. X has finished her degree in May 2017, and A wishes to file a petition in May 2017. Employer A's petition is thus ripe for filing in May 2017. Due to the rejection policy, however,

Employer A may not file a petition for X in May 2017, because in April, 2017, USCIS received more petitions than the 85,000 limit. Employer A then decides to file at the next available opportunity, April 1, 2018. Another Employer B wishes to employ Employee Y under the H-1B system. Y has finished his degree in December 2017, and A wishes to file a petition in December 2017, which makes the case ripe for filing then. Employer B cannot file a petition, however, until April 1, 2018, due to the rejection policy. Therefore, while Employer A might have filed in May 2017, gaining a priority date of May 2017 with respect to future numbers for employee X, they will be given the same April 2018 priority as would Employer B filing for employee Y, who are ready to file much later. Last minute, Employer C offers a position to employee Z in March 2018, just in time to file the next month April 2018. All three employers are treated as if their case became ripe at precisely the same time. Multiply this scenario several hundred thousand times, spread over the entire year, and it becomes apparent that the rejection policy has led to the current crisis by herding all applications into a single day, or short window of days. This herding occurs in blatant disregard for the ripeness of the individual employer and employee relationship creating petition eligibility, and prevents the orderly and sequential filing of petitions. The agency's policy is not a reasonable way to distribute limited visas in accordance with the mandate of § 1184(g)(3). The self-evident purpose of that statute is to distribute visas according to employer petition date filing order, which will vary from employer to employer, employee to employee, and day to day. The only way to avoid anomalous results as outlined above is to eschew a rejection policy, and allow a natural year-round filing of petitions by employers.

Such a system of year-round filing of employer petitions, but limited issuance of employee visas based on the priority date of the employer's petition, is in keeping with the statutory scheme. While § 1184(g)(1) limits alien beneficiaries per fiscal year, § 1184(c) does not limit employer petitions. The absence of a limit on the number of employer petitions, and the presence of a limit on the number of alien admissions, must mean something. The separation

of the employer's petition process from the employee beneficiary application for a visa must also mean something. Certainly, the beneficiary may not apply for a visa without first having a petition approved: "Such petition shall be made and approved *before* the visa is granted." § 1184(c)(1) (emphasis added). The sequence of filings suggests these two processes are separate, one before the other. Rejecting an employer's petition because of a quota limit on an employee beneficiary's visa is inappropriate, and frustrates entirely the intent of § 1184(g)(3).

A review of the entire statutory scheme shows a plain system of petition filing date assignment throughout the year, as is done in the immigrant visa context under § 1153(e)(1) which utilizes functionally identical language as found in § 1184(g)(3). I repeat that statutory language again here to highlight another clue to guide the statutory interpretation:

> "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." *Id*. (emphasis supplied)

Since Congress used the phrase "in the order", would that not presuppose one petition following the other, in sequential order, and not the situation in which we now find ourselves - with all petitions being filed simultaneously on April 1?[5] The definition of "order" is "[t]he arrangement or disposition of people or things in relation to each other according to a particular sequence, pattern, or method." Oxford Dictionary, Oxford University Press, 2016. A once-a-year simultaneous filing of all petitions in the year is not "in the order" because it does not arrange petitions in relation to each other according to a particular sequence. Here, the sequence should be according to the ripeness of the employer-employee relationship and willingness and ability to file a petition. The rejection system which precludes the natural creation of a sequential order of filings, and artificially creates the annual one-day filing phenomenon, is the epitome of disorder. Its ruinous effects are seen in the present-day lottery.

There are no such anomalous results yielded in the agency's own administration of the

[5] While the filing window was April 1 and 2, and was expanded to the first 5 business days in April, the agency treats all petitions filed in the window as filed on a single day.

immigrant visa process, because employers who file early see their employee beneficiaries receive visas before employers who file later. That is, there is an order to the filing system. It is a system which quite naturally creates a waiting list. The creation of a waitlist is the unstated assumption of the entire statutory scheme. See *Tarrant v. Herrmann*, 133 S.Ct. 2120, 2131 (2013). Just as the Red River described in *Tarrant* naturally flows from Texas to Louisiana, placing an annual limit on something in high demand and then expressly giving priority to those first in line will create, logically, a wait list.[6]

For the reasons given above, and based upon the oral arguments and 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

[6] Even without intending to create a waitlist, the agency has in fact produced one. Thousands of employers have filed petitions in multiple years since 2013 in an attempt to secure a number, and these petitions constitute a *de facto* waiting list. The waiting list phenomenon is unavoidable. An *orderly* wait list, however, is required by the law enacted by Congress.

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2016, I electronically filed the foregoing PLAINTIFFS' SUPPLEMENTAL BRIEF 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