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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' RESPONSE TO MOTION TO DISMISS

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby respond to defendants' Motion to Dismiss (ECF No. 14), filed by all defendants. Plaintiffs respectfully request the Court deny defendants' motion because plaintiffs have alleged an injury-in-fact, plaintiffs have Article III standing because they have pled for a remedy that would address the harm alleged, and plaintiffs' complaint is not time barred.

I. Plaintiffs Sergii Sinienok and Xiaoyang Zhu Have Standing as Beneficiaries

Defendants, in a footnote, argue that "[t]he individual Plaintiffs, as the visa beneficiaries, lack standing to contest the treatment of their H-1B petitions." Def. Mot. at 3, fn. 3. None of the

cited authorities proffered by defendants are controlling or persuasive. The Ninth Circuit case cited by defendants, *Xiaodong Wang v. Holder*, 500 F. App'x 650, 651 (9th Cir. 2012) was an unpublished decision, and involved a family petition in which the petitioner admitted marriage fraud and withdrew the petition he filed. The cited case thus lacks precedential value, and is distinguishable. More importantly, however, the unpublished *Wang* case relies on *Matter of Sano*, 19 I&N Dec.. 299, 300 (BIA 1985) for the proposition that "only a visa petitioner can appeal denial of a visa petition." *Wang, supra*, at 651, fn. 1. But a reading of the Board of Immigration Appeal's (BIA's) decision in *Matter of Sano* reveals that the Board only held that "[u]nless the regulations affirmatively grant us power to act in a particular matter, we have no appellate jurisdiction over it." *Id*. at 301. The BIA's jurisdiction is limited to the regulations, which permit only a petitioner to appeal. *Id*. A federal court's jurisdiction, however, is not so limited as will be explained below. The Ninth Circuit, for example, has entertained the appeal of foreign widow beneficiary of a visa petition filed by her deceased U.S. citizen spouse, without requiring the petitioner to sue in order to establish standing. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

The court in *George v. Napolitano*, 693 F.Supp.2d 125 (D.D.C. 2010), cited by defendants in their footnote, briefly discussed the standing of the beneficiary of an I-140 immigrant petition, citing the Supreme Court's standards for Article III standing:

> "To have Article III standing, a plaintiff must establish: '(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))"

George, supra, 130-31. Instead of discussing the beneficiary's injury with any specificity, however, the court in *George* merely cited to an earlier New York decision which stated that the employer is the proper party having a personal stake in the outcome.

See *Blacher v. Ridge*, 436 F.Supp.2d 602, 606 n. 3 (S.D.N.Y 2006). The court in *Blacher* relied upon a finding that the agency's decision not to grant the H-1B petition in that case was a discretionary matter, and beyond the jurisdiction of the court, and did not discuss any of the *Lujan* factors. Id. at 603, fn. 3. Likewise, the other two cases cited by defendants, *Li v. Renaud*, 709 F.Supp.2d 230, 236 n. 3 (S.D.N.Y. 2010) and *Ibraimi v. Chertoff*, 2008 WL 3821678 (D.N.J. 2008), merely cite to the *Blacher* district court decision without any analysis under *Lujan*. Therefore, none of these district court decisions, outside this district, are particularly convincing as they do not discuss the relevant factors announced by the Supreme Court in *Lujan*.

The APA provides judicial review for those who have suffered a "legal wrong" or who have been "adversely affected or aggrieved by" agency action. 5 U.S.C. § 702. Under the APA, plaintiffs must establish that the claims fall within the relevant "zone of interests" that the statute was arguably intended to protect. *Lexmark Intern. v. Static Control*, 134 S.Ct. 1377, 1388, 572 U.S. __ , 188 L.Ed.2d 392 (2014). The test is not "especially demanding" and the "benefit of any doubt goes to the plaintiff" since the APA has "generous review provisions." *Lexmark*, 134 S.Ct. at 1389 (internal citations omitted). The injury alleged by the individual plaintiffs (as opposed to the organizational plaintiffs) is that they were the beneficiary of a petition naming them as the intended worker of the petition, and that the petition was not received or assigned a priority date, denying them the filing date order priority for an H-1B visa or status under the statute. This injury is particularized, concrete, actual, and is directly traceable to defendants' action to put the petitions through the computer based random lottery process on April 9, 2016. The injury is likely to be addressed by defendants being ordered to provide a

receipt and priority date so that plaintiffs have a place in line for H-1B visas or status, and to cease the lottery. The *Lujan* factors are met in this case.

Also, under *Lexmark*, the individual plaintiffs are within the zone of interests that the statute was meant to protect. The statute, 8 U.S.C. § 1184(g)(3) states, "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." The statute starts with "Aliens" and it is those aliens who are the individual plaintiffs in this case. Those alien beneficiaries of the petitions are the subject of the statute's numerical limitations, as the statute does not limit the number of petitions that an employer can file, but limits the number of H-1B aliens. The statute specifies that H-1B status or visas are to be provided to those alien beneficiaries in the order in which petitions are filed. The statute plainly addresses both the alien beneficiary and the petitioning employer, and as such, both petitioner and beneficiary of the petition are within the zone of interests that the statute was meant to protect. Both petitioner and beneficiary therefore have standing to sue under Supreme Court precedent.

The Second Circuit has held that the beneficiary of a visa petition has standing for a procedural challenge to a revoked visa petition. *Mantena v. Johnson*, 809 F.3d 721, 731 (2nd Cir. 2015). The Court in *Mantena* properly discussed and applied the *Lujan* test. *Id*. Interestingly, all three of the district court decisions cited by defendants for the proposition that plaintiffs Sinienok and Zhu lack standing (*George v. Napolitano, Li v. Renaud, and Ibraimi v. Chertoff, supra*) relied upon the *Blacher* decision from New York, which is under the Second Circuit's jurisdiction. Because the Second Circuit has reached a contrary result in *Mantena*, the decisions in all those cases is questionable to say the least. The Court in *Mantena* cited with favor the Ninth Circuit case of *Abboud v. INS*, 140 F.3d 843 (9th Cir. 1998), in which the Court

held that a beneficiary of a visa petition has standing when the opportunity to receive an immigration benefit is lost by that individual because the lost opportunity is a "concrete injury" that is "traceable to the [agency's] conduct and remediable by a favorable decision…" *Id*., citing with approval *Ghaly v. INS*, 48 F.3d 1426, 1434 n. 6 (7th Cir. 1995) (alien has standing to raise judicial challenge to INS's denial of an employer's visa petition on the alien's behalf). *Abboud* is controlling in this case. Other circuits outside of the Ninth Circuit have also agreed that the beneficiary of a petition falls within the "zone of interests" under the APA. See *Patel v. USCIS*, 732 F.3d 633, 637-38 (6th Cir. 2013); *Musunuru v. Lynch*, No. 15-1577, Slip Op. 3, fn. 1, (7th Cir. August 3, 2016); *Taneja v. Smith*, 795 F.2d 355, 358 n. 7 (4th Cir. 1986). Contrary to defendants' assertion, plaintiffs Sinienok and Zhu have standing to sue on behalf of themselves and all those similarly situated beneficiaries of H-1B visa petitions.

II. Plaintiffs Have Pleaded Sufficient Facts to Establish Injury

Defendants complain that plaintiffs did not "indicate exactly how any of the Plaintiffs has been injured." Def. Mot. (ECF No. 14, hereafter Def. Mot.) at 9. The complaint described with adequate specificity the injury. Specifically, in the First Amended Complaint (ECF No. 9, hereafter FAC), plaintiffs alleged that 1) plaintiffs had filed an H-1B petition (FAC ¶¶ 26, 27) after having obtained an LCA certified by Department of Labor, 2) defendant USCIS issued a press release that it had conducted a random lottery to determine which properly filed petitions would be accepted and which would be rejected (FAC ¶ 28), and that unselected petitions would be rejected and returned with their filing fees, 3) defendants subjected plaintiffs petitions to the computer generated random lottery process on April 9, 2016 (FAC ¶ 29), 4) as a result of defendants conducting the lottery plaintiffs were not selected and not provided a receipt notice with a priority date for H-1B visas or status (FAC ¶ 30), 5) USCIS issued a notice May 2, 2016 notifying the public it had completed data entry of all selected petitions and would begin returning all the unselected petitions (FAC ¶ 31), 6) USCIS issued a notice on April 22, 2016 notifying the public that it would begin premium processing selected petitions on May 12, 2016

(FAC ¶ 32), 7) USCIS began premium processing petitions May 12, 2016, and failed to issue a receipt notice or an assignment of a priority date for plaintiffs' petitions because they were not selected in the lottery process (FAC ¶ 33), 8) plaintiffs "petitions were filed under the premium processing program, and were required to be processed within 15 days of May 12, 2016, by May 26, 2016, but USCIS failed to issue a receipt notice, assignment of a priority date, or otherwise adjudicate the petitions within the premium processing time limit." (FAC ¶ 34). Further, plaintiffs alleged with specificity that defendants' above actions to 1) conduct a computer based random lottery on plaintiffs' petitions and 2) fail to issue a receipt notice with a priority date in connection with the H-1B petitions filed by plaintiffs under the statute which requires such treatment is unlawful. See FAC ¶¶ claims for relief 44-53, 54-58.

Plaintiff has shown an injury-in-fact. It is not conjectural or hypothetical that plaintiffs' petitions were subjected to the computer based random lottery, and that defendants unselected their petitions without assignment of a priority date. Defendants do not deny that plaintiffs' petitions were subjected to the challenged lottery process. Defendants do not deny that plaintiffs' petitions were unselected in the lottery. Defendants do not deny that plaintiffs' petitions were not issued a receipt notice. Defendants do not deny that plaintiffs' petitions did not receive a priority date. These are the "concrete, particularized, and actual" injuries that plaintiffs have alleged. As a consequence of defendants' actions to conduct the lottery and unselect plaintiffs petitions from the receipt process and the premium processing program, which the FAC alleges are unlawful, plaintiffs were denied a legal right to a priority date under the statute, as alleged in the FAC ¶¶ 45, 46, 55. Without a priority date assignment, plaintiffs allege that they are "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 each 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." FAC ¶ 50. Defendants do not explain with specificity how the above allegations do not constitute an injury. Absent from the section of their motion concerning

"injury" (Def. Mot. pp. 9-11) is any citation to the paragraphs of allegations in the FAC. The generalized statement that "there is nothing to indicate exactly how any of the Plaintiffs has been injured" is not specific. The defendants do not explain or address how plaintiffs' allegations specifically covering the filing of petitions, the conducting of a computer generated random lottery on those petitions by defendants, the unselection of those petitions, the non-issuance of a priority date, are somehow not "concrete or particularized." The complaint is far from "silent with regard to the injurious effect of those processes" as stated by defendants. Def. Mot. at 10. The injury is the unselection in the lottery April 9, 2016 and subsequent non-assignment of a priority date. FAC ¶¶ 45, 55. The plaintiffs claim that the statute requires H-1B petitions to be processed in the order in which petitions are filed. FAC ¶ 46. Plaintiffs claim that they will be subjected to a never ending game of chance under the current system. FAC ¶ 50.

Defendants, in requesting dismissal of the suit, also attempt to compare this controversy to another H-1B challenge decided by Judge Stewart of this district court. *Ching Yee Wong v. Napolitano*, 654 F. Supp. 2d 1184 (D. Or. 2009). The *Wong* case, however, is distinguishable. It involved not only an H-1B filing, but a later immigrant petition and adjustment of status application which depended on the earlier H-1B filing. Specifically, the H-1B petition in *Wong* was filed August 9, 2008 by a non-profit called APACSA on September 12, 2002, requesting a three-year period of H-1B status ending in 2005. The petition had been denied March 12, 2003, and APACSA appealed the decision to the Administrative Appeals Office (AAO), an administrative appeals board, which dismissed the appeal on April 28, 2004. Instead of pursuing a district court action to challenge the denial which became final after the AAO dismissed the administrative appeal, however, APACSA did nothing for over four years. Instead,

> "Wong left APACSA and began working for Olson Institutional Pharmacy Services, dba RX Direct. On May 12, 2004, RX Direct filed another H-1B extension on behalf of Wong for the position of graphic designer. In its petition RX Direct disclosed the APACSA petition as still pending. On July 12, 2004, USCIS issued an official approval notice to RX Direct, granting its H-1B extension petition on behalf of Wong, effective through May 20, 2007. RX Direct filed a subsequent extension petition for Wong for the same position on December

> 4, 2006, which USCIS again granted on May 21, 2007, effective through May 20, 2010."

Wong, *supra*, 654 F. Supp 2d at 1187. APACSA had filed suit January 1, 2009 and the cases were combined. In essence, APACSA filed suit in 2009 to complain about a petition it filed requesting professional services far in the past, spanning the period between 2002 and 2005, and only brought suit in connection with a later claim by the beneficiary of that long denied petition that the previous H-1B petition (with corresponding long expired validity) should have been approved. The beneficiary had been working for another company for over 5 years, and in the interim APACSA had not filed any new petition or sought judicial review of its administratively denied petition. The case in *Wong* is illustrative of a controversy that has ceased to be "live" in the words of Judge Stewart. *Id*. at 1192.

In contrast, the controversy in this case is live. Both petitions in this case were filed with a requested start date of October 1, 2016, the earliest possible start date allowed by defendants' regulations, for a period extending through late 2019. Both petitions were supported by certified Labor Condition Applications (LCAs) with three-year validity periods covering the requested validity dates, through late 2019. Those LCAs are currently still active and certified by Department of Labor, and have not been withdrawn. Plaintiffs only recently filed H-1B petitions with USCIS and received unselection treatment, and plaintiffs have specifically requested relief in the complaint in the form of the ability to resubmit the unlawfully unselected petitions. FAC, prayer for relief, ¶¶ 4-7. Contrasting the instant case with the *Wong* case, here each plaintiff was "actively seeking to employ an alien and was thwarted by the action of a federal agency, which again presents a text-book instance of an actual, concrete injury." *Wong*, *supra*, 654 F.Supp.2d at 1190.

III. Plaintiffs have Pleaded Sufficient Facts to Establish Redressability

Defendants argue that plaintiffs' claims cannot be redressed because the lottery process has concluded, and the statutory quotas for the H-1B visas is now exhausted for the FY 2017

lottery cycle.[1] Def. Mot. at 11. This statement misses the point, and confuses *petitions* with *visas and status*. Plaintiffs claim that despite the quota limitation of 85,000 H-1B "visas or status" in each fiscal year, those quota numbers are to be provided in the order in which an H-1B *petition* is filed. The order in which a petition is filed is determined by the "priority date" which corresponds to the date a petition is filed with the agency. Plaintiffs claim that defendants' unlawful computer generated random lottery process has deprived them of a *petition priority date*, not *visas or status*. Without a priority date, plaintiffs have no current entitlement to a place in line for visa numbers which become available according to that filing date. It does not matter if the quota numbers to which plaintiffs may be entitled could lead to a visa or status in a future fiscal year, because the injury is the lack of a receipt notice bearing a priority date at the current time. The Court can presently redress the injury by requiring defendants to follow the statutory mandate and receive petitions in the order in which they are filed, assigning priority dates to them. Defendants have thus far conducted the lottery, unselected plaintiffs' petitions in that random lottery, and returned the petitions as rejections without issuing a receipt notice with a priority date corresponding to the date of filing. The statute, 8 U.S.C. § 1184(g)(3) states that, "Aliens who are subject to the numerical limitations of paragraph (2) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status." FAC ¶ 46. Plaintiffs cannot receive visas or otherwise be provided nonimmigrant status without first having a petition with a filing date order, priority date, recorded on the petition receipt. This is the current injury. The injury can be redressed by requiring the agency to comply with the statute and issue receipt notices with priority dates for those rejected petitions, and requiring the agency to provide H-1B status in the order of petition filing date (and not randomly). Otherwise, as alleged in the complaint, plaintiffs will be subjected to "a potentially never ending game of chance for petitions filed during a 5 day window each year,

[1] FY 2017, or "Fiscal Year 2017" is the government fiscal year, which runs from October 1 through September 30, and in this case, from October 1, 2016 to September 30, 2017.

with some unlucky individuals trying and failing each 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." FAC ¶ 50. With a receipt notice that bears a priority date, plaintiffs will be in line for an H-1B quota number when it becomes available. Being in line, with an assigned priority date over others who file later instead of a lottery number, redresses the injury. Without this present relief, plaintiffs will again be subjected to another computer generated random lottery process in just over 7 months from now, when defendants plan to hold the next 5 day filing window and lottery (April 2017). As plaintiffs alleged, this is "potentially never ending." FAC ¶ 50.

IV. Plaintiffs Claims Are Not Time Barred

Defendants argue that plaintiffs' claims are time barred because the initiation of this suit comes more than 6 years after the regulations creating the lottery were promulgated. Defendants cite to *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). As the Court in *Wind River* explained, however, "The statute requires that the judicial complaint be filed 'within six years after the right of action first accrues.' 28 U.S.C. § 2401(a). The more difficult question posed in this case is when Wind River's right of action first accrued." *Id*. at 713-14. The date on which a right of action first accrues determines when the six years ends. In this case, the right of action did not first accrue upon the promulgation of the regulation in 2008, but rather accrued when the agency adversely applied that challenged regulation to plaintiffs' cases, and in the larger context, against the class members that plaintiffs seek to represent. The class definition alleged in the complaint encompasses "All petitioners and beneficiaries of cap-subject H-1B petitions filed with USCIS on or after April 1, 2013 whose petitions were subjected to the computer-generated random lottery process by USCIS and not assigned a priority date." FAC ¶ 35. The right of action first accrued on April 1, 2013 for some class members, and in April 2014, 2015, and 2016 for others, including the named plaintiffs. Some class members have lost two or three successive lotteries between 2013 and the present. These dates, however, are all within 6 years of the filing of the complaint.

The Court in *Wind River* discussed a case involving a 1946 Civil Service Commission decision which was challenged thirty years later following a 1974 denial of a claim based on that decision. The Court explained, "the court ruled that Oppenheim was not barred from bringing an APA challenge to the commission's current denial of benefits, because Oppenheim's action 'seeks to set aside recent arbitrary agency action' (to the extent the 1946 decision was substantively wrong and reliance upon it would be arbitrary) rather than to recover damages from the government for its 1946 decision." *Wind River*, supra, 946 F.2d at 715, citing *Oppenheim v. Coleman*, 571 F.2d 660 (D.C. Cir. 1978). The Ninth Circuit adopted the D.C. Circuit's approach in determining when a right of action accrues. Specifically, the Ninth Circuit held in *Wind River*,

> "If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision…**If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger**…The government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs."

Id. at 715 (emphasis added). In the instant case, plaintiffs challenge the "adverse application" of the regulation to conduct a lottery, and claim the regulation as applied to the petitions lacks statutory authority and is *ultra vires*. FAC ¶¶ 45-53. Plaintiffs do not allege a "mere procedural violation" nor is this a "policy-based facial challenge." The challenged action is the "adverse application" of the random lottery regulation to petitions filed beginning April 1, 2013. *Id*. The fact that there are many affected plaintiffs and the action is filed as a class action does not convert it into a policy-based facial challenge, as it remains a challenge to the application of the regulation to specific petitions. As such, under the *Wind River* rule the government is not permitted to avoid plaintiffs' challenge to the lottery merely because the regulation itself was issued before the adverse application of the regulation was applied to plaintiffs' cases. The *Wind*

River exception was recently discussed in a footnote to one of defendants' cited cases, *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954, fn. 6 (9th Cir. 2015) (en banc). There, the Ninth Circuit, *en banc*, explained that a cause of action accrues six years following the "application of the decision to a particular challenger." *Id*. Therefore, because application of the challenged regulation to the plaintiffs' and class members' petitions is alleged to have occurred within the past six years before the instant lawsuit was filed, and the challenge is to statutory authority, the right of action accrued at the time of the application of those regulations to the challenger's cases from 2013 to the present, and all claims fall within the exception announced in *Wind River*. Plaintiffs' claims are not barred by 28 U.S.C. § 2401(a).[2]

V. Defendants' Request for Oral Argument

Defendants requested oral argument by stating that request in the caption, pursuant to LR 7-1(d)(2). Plaintiffs' counsel views the arguments in defendants' motion as not absolutely requiring oral argument, unless it would assist the Court resolve the issues. Alternately, if the Court in its discretion elects to hear oral argument, Plaintiffs' counsel respectfully requests, pursuant to LR 7-1(d)(3), consideration of a telephonic hearing for all parties, due to the additional time and expense required for travel and preparation for such a hearing. Notwithstanding this request, if the Court elects to hear oral argument in person from defendants' counsel, who may very well travel from Washington D.C. at government expense, plaintiffs' counsel intends to appear in person at oral argument as well.

VI. Conclusion

For the reasons given above, and based upon the written submissions of the parties, Defendants' Motion to Dismiss with prejudice should be denied.

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[2] The Ninth Circuit recently found an agency decision made in 2012 to have been the operative agency action challenged, and not the 1987 rulemaking by the agency, stating "To hold otherwise would require Plaintiffs to have filed suit nearly a decade before FWS took the action that caused their injury." *California Sea Urchin Commission v. Bean*, No. 14-55580, Slip Op. at 9, (9th Cir. July 12, 2016) The Court found the *Wind River* exception to apply since the challenge was to the agency's statutory authority to take a recent action. *Id*. at 13.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO MOTION TO DISMISS with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

s/ Brent W. Renison
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