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

CLASS ACTION ALLEGATION COMPLAINT

**COMPLAINT**

Plaintiffs allege as follows:

**JURISDICTION**

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), and cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., and the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

2. The jurisdiction stripping provisions of 8 U.S.C. § 1252(a)(2)(B)(ii) do not apply

here because Plaintiffs are not challenging Defendants' discretion with respect to substantive decisions, but rather challenge Defendants' procedural decision to reject, without adjudication and without assignment of a priority date, the petitions at issue herein.

**VENUE**

3. Venue in this district and division is proper under 28 U.S.C. § 1391(e)(1)(C) because no real property is involved in the action and the residence and principal place of business of Plaintiff TENREC, INC. and WALKER MACY LLC is Portland, Oregon, in the county of Multnomah. Plaintiff XIAOYANG ZHU is also a resident of Portland, Oregon.

**PARTIES**

4. Plaintiff TENREC, INC. is a web development and management agency founded in 1997 with its principal place of business in Portland, Oregon. The company develops, builds, hosts, and maintains websites, microsites, blogs, client extranets, intranet applications and content management systems for organizations across North America. TENREC, INC. filed an H-1B petition on behalf of Plaintiff Sergii Sinienok.

5. Plaintiff SERGII SINIENOK is a citizen of Ukraine, and resides in Ukraine. He is the beneficiary of the H-1B petition filed by TENREC, INC. for the position of Lead Developer.

6. Plaintiff WALKER MACY LLC was founded in 1976, and provides landscape architecture, urban design and planning firm services throughout the western United States. The firm's principal place of business is Portland, Oregon, with an additional office in Seattle, Washington. The firm has received 31 awards from the Oregon Chapter of the American Society of Landscape Architects (ASLA) and two National ASLA Merit Awards. WALKER MACY LLC filed an H-1B petition on behalf of Plaintiff Xiaoyang Zhu.

7. Plaintiff XIAOYANG ZHU is a citizen of China, and resides in Portland, Oregon. She is the beneficiary of the H-1B petition filed by WALKER MACY LLC for the position of Landscape Designer.

8. Defendant U.S. Citizenship and Immigration Services is the official government agency responsible for the adjudication of benefits, including H-1B petitions, under the Immigration and Naturalization Act.

9. Defendant Leon Rodriguez is sued in his official capacity as Director of the U.S. Citizenship and Immigration Services ("USCIS"). As Director of USCIS, Mr. Rodriguez is responsible for approving, rejecting and denying petitions for H-1B status filed by United States employers on behalf of beneficiaries.

## STATUTORY BACKGROUND

10. A U.S. employer seeking to employ a citizen from another country (a "nonimmigrant") may petition USCIS for work authorization under the H-1B visa program, which is defined in 8 U.S.C. § 1101(a)(H)(i)(B) (thus, the shorthand, H-1B) as a "specialty occupation" category. The petition must be approved before the nonimmigrant can be issued a visa and admitted (if outside the U.S.) or provided a change to H-1B status from another category of status (if within the U.S.).

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

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

§ 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.705.

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

14. The H-1B category is subject to annual quota limits. Pursuant to 8 U.S.C. § 1184(g)(1)(A) [*hereafter "paragraph (1)"*], the total number of nonimmigrant aliens granted H-1B status cannot exceed 65,000 in each government fiscal year (October 1 to September 30), except that pursuant to 8 U.S.C. § 1184(g)(5)(C), a nonimmigrant alien who has earned a master's or higher degree from a U.S. institution of higher education ("U.S. Master's") is exempt from the numerical limit until the number of U.S. Master's exemptions reaches 20,000. Thus, under paragraph (1), the total number of H-1B nonimmigrants granted in each fiscal year cannot exceed 85,000 combining the regular and U.S. Master's caps.

15. 8 U.S.C. § 1184(g)(3) states that "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status."

16. Pursuant to regulation, a petition for H-1B status may only be filed within the six (6) month window prior to the start of the October 1 fiscal year, and thus April 1 is the earliest that a petition may be filed for an upcoming fiscal year number under the current regulatory regime. 8 C.F.R. § 214.2(h)(9)(i)(B).

17. If the numerical limit is reached on any one of the first five (5) business days that filings can be made, USCIS conducts a random lottery of all petitions filed on the first five (5) business days to determine which petitions will receive an H-1B quota number and continue to be processed, starting with U.S. Master's cases counted toward the 20,000 cap, then returning the non-selected U.S. Master's cases to the general pool of cases to conduct a final lottery against the 65,000 regular cap. 8 C.F.R. § 214.2(h)(8)(ii)(B). Any petitions filed after that 5 day window

are automatically rejected for the rest of the year, until the following April when petitions are again allowed to be filed during another 5 day window.

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

19. An F-1 student working pursuant to Optional Practical Training (OPT) work authorization following graduation from a U.S. institution of higher education who is selected in the lottery, and is seeking to change status from F-1 to H-1B in connection with the employer's petition for H-1B status will have such OPT work authorization automatically extended to cover any gap until the H-1B work authorization goes into effect, provided the petition is timely filed and the employment start date on the petition is the start of the next fiscal year. 8 C.F.R. § 214.2(f)(5)(vi)(A); 8 C.F.R. § 274a.12(b)(6)(v).

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

**FACTS**

21. USCIS received 124,000 H-1B petitions during the 5 day filing window ending on April 7, 2013, for H-1-B numbers available during FY-2014. Source: https://www.uscis.gov/news/uscis-reaches-fy-2014-h-1b-cap USCIS then rejected approximately 39,000 filings which were not selected at random in the lottery.

22. USCIS received 172,500 H-1B petitions during the 5 day filing window ending on April 7, 2014, for H-1B numbers available during FY-2015. Source: https://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap-0 USCIS then rejected approximately 87,500 filings which were not selected at random in the lottery.

23. USCIS received nearly 233,000 H-1B petitions during the 5 day filing window

ending April 7, 2015, for H-1B numbers available during FY-2016. Source: https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016 USCIS then rejected approximately 148,000 filings which were not selected at random in the lottery.

24. USCIS received over 236,000 H-1B petitions during the 5 day filing window ending April 7, 2016, for H-1B numbers available during FY-2017. Source: https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2017 USCIS then rejected approximately 151,000 filings which were not selected at random in the lottery.

25. Over the past four years, USCIS has rejected approximately 425,500 filings after conducting a random lottery process, and has not assigned any of these rejected petitions a priority date representing the order in which it was filed.

26. On April 1, 2016, Plaintiff TENREC, INC. filed an H-1B Petition (Form I-129, hereinafter "Petition") on behalf of Plaintiff SERGII SINIENOK through counsel with Defendant USCIS after having obtained an LCA certified by Department of Labor confirming the offered salary met or exceeded the prevailing wage.

27. On April 1, 2016, Plaintiff WALKER MACY LLC. filed an H-1B Petition (Form I-129, hereinafter "Petition") on behalf of Plaintiff XIAOYANG ZHU through counsel with Defendant USCIS after having obtained an LCA certified by Department of Labor confirming the offered salary met or exceeded the prevailing wage

28. On April 12, 2016, Defendant USCIS issued a press release stating that it had received over 236,000 petitions for H-1B status, including more than 20,000 U.S. Master's filings, during the first five business days of filing, from April 1 to April 7, 2016, and that it had conducted a random lottery to determine which petitions submitted during those five days would be processed and which would be rejected.

29. Defendant subjected Plaintiffs' petitions to a computer generated random lottery

process, and rejected the petitions without issuance of a receipt notice or an assignment of a priority date because the petitions were not among those randomly selected for processing for an H-1B number in the lottery process.

**CLASS ACTION ALLEGATIONS**

30. The named Plaintiffs bring this action pursuant to Fed R. Civ. P. 23 on behalf of themselves and all other persons similarly situated. The named plaintiffs seek to represent: All petitioners and beneficiaries of cap-subject H-1B petitions filed with USCIS on or after April 1, 2013 whose petitions were rejected by USCIS and not assigned a priority date because the petition was not among those randomly selected for processing for an H-1B number in the lottery process.

31. The members of Plaintiffs' class warrant class action treatment because they fulfill the requirements under Rule 23(a).

32. The proposed class is so numerous that joinder of all members is impracticable. In the past four years the government has held a lottery each year, in which close to half a million petitions were rejected without being assigned a priority date. In 2016, approximately 236,000 petitions were filed, resulting in approximately 151,000 rejections this year alone. Fed. R. Civ. P. 23(a)(1).

33. There are questions of law or fact common to the class. Every class member was subjected to an unlawful lottery process and petition rejection in exactly the same manner, involving exactly the same set of federal statutes. Fed. R. Civ. P. 23(a)(2).

34. The claims and defenses of the representative plaintiffs are typical of the claims and defenses of the class. The representative plaintiffs cases do not differ in any material way from the class members, as each was the beneficiary of a petition filed by a U.S. employer which was rejected in the random lottery, and each claims that the statute establishes an orderly filing system and process of issuing visas in the order in which petitions are filed, and not a random lottery process. Fed R. Civ. P. 23(a)(3)

35. The representative plaintiffs will fairly and adequately protect the interests of the class, because each has suffered the rejection of an H-1B petition and each has no assurance that in future years the luck of the draw will result in a winning lottery number, which is exactly the situation in which all class members find themselves. Fed R. Civ. P. 23(a)(4)

36. This action is maintainable as a class action pursuant to Fed R. Civ. P. 23(b)(1) because varying adjudication resulting in inconsistent processing of H-1B petitions from state to state or region to region would prove to be unworkable in a federal immigration system designed to be uniform, especially with respect to a numerically limited visa category such as the H-1B category intended to distribute numbers according to date filing order across the country. Varying adjudication would result in inequitable distribution if some cases were subject to the random lottery and others were processed in the order in which petitions were filed.

37. The action is also maintainable under Fed R. Civ. P. 23(b)(2) because the United States has acted or refused to act on grounds generally applicable to the class, utilizing the same unlawful random lottery system across the entire United States for all H-1B petitions filed.

38. Plaintiff's counsel, Brent Renison, is an appropriate class counsel for the proposed class. Renison has undertaken work identifying and investigating potential claims in the action, has experience handling two previous class actions involving immigrant rights issues, and possesses other immigration-related litigation experience. With 19 years of corporate immigration law and litigation practice, he is also considered one of the world's leading corporate immigration lawyers, as attested by his inclusion in Who's Who Legal, Best Lawyers in America, Chambers and Partners, and Superlawyers. Fed. R. Civ. P. 23(g).

## CLAIM FOR RELIEF

Agency Action That Is Arbitrary, Capricious, An Abuse of Discretion or Not In Accordance With Law

39. The APA 5 U.S.C. § 706(2)(A), provides the Court with the authority to hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with the law.

40. The regulatory scheme, which requires petitions only be filed within a 5 day window each year and allows rejection of petitions not randomly selected in a lottery system, is arbitrary and capricious, and not in accordance with the law.

41. The statute which governs the issuance of visas to H-1B nonimmigrants, 8 U.S.C. § 1184(g)(3), states that "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status." The plain language of the statute requires that H-1B petitions be processed in the order in which petitions are filed.

42. In the case of "preference" immigrant petitions, which are also subject to annual numerical limitation, the statute states, "Immigrant visas made available under subsection (a) or (b) shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed…" 8 U.S.C. § 1153(e)(1). The language of the immigrant petition statute is in all material respects the same as the statute covering the filing of H-1B petitions in that visas (whether nonimmigrant or immigrant) are issued in the order in which a petition is filed.

43. In the case of preference immigrant petitions, the regulations provide for the assignment of a priority date, which is the date that a Department of Labor certification is filed, or the date the petition is filed in cases where no DOL certification is required. 8 C.F.R. § 204.5(d). The priority date represents the order in which the petition was filed. The Department of State Bureau of Consular Affairs maintains a "Visa Bulletin" waiting list, and an applicant may proceed to apply for a visa when "the applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin…" 8 C.F.R. 245(g)(1). Preference immigrant petitions are not rejected, and not subjected to a random lottery process. Such petitions are filed and received, assigned a priority date, and the applicant then waits until a visa is available before applying for a visa abroad, or status from within the United States.

44. There is no statutory basis for the agency to require a 5 day filing window, a

random lottery, and a rejection system for unlucky nonimmigrant petitions on the one hand, and an orderly priority date assignment system and waiting list for preference immigrant petitions on the other hand, because the statutes governing the filing of petitions for both nonimmigrant and immigrant petitions utilize the same material language and require numerically limited beneficiaries to receive visas in the order in which the petition was filed. The current regulatory system used for the H-1B lottery is arbitrary and capricious, as it results in a potentially never ending game of chance for petitions filed during a 5 day window each year, with some unlucky individuals trying and failing 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.

45. When Congress has determined a random lottery process is necessary for the distribution of numerically limited visas, Congress has specifically mandated such a lottery process. The "Diversity Visa Lottery" which is governed by 8 U.S.C. § 1153(e)(2), states "Immigrant visa numbers made available under subsection (c) (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved." Thus, Congress intended applicants for the Diversity Visa Lottery immigrant visas to be subject to an annual lottery system. Congress did not intend H-1B visas to be subject to a random lottery, and thus the current H-1B regulatory regime which includes a random lottery is not in accordance with law.

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

*each such immigrant is filed*" (preference immigrant statute). The regulation establishing a 5 day filing window and random lottery process for numerically limited H-1B visas, 8 C.F.R. § 214.2(h)(8)(ii)(B), conflicts with the clear language of the statute, and is therefore *ultra vires* and not in accordance with law.

47. Regulatory provisions which interfere with the operation of a priority date and waiting list system as required by statute are also unlawful and not in accordance with the statute, including 8 C.F.R. § 214.2(h)(9)(iii)(A) and 8 C.F.R. § 214.2(h)(4)(i)(B)(1). Such provisions prevent the orderly distribution of quota limited H-1B visas or provision of H-1B status according to the order in which petitions are filed in years where demand exceeds the quota limits, and are therefore *ultra vires*.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Assume jurisdiction over this action;
2. At the earliest practicable time, certify this action as a class action and appoint class counsel;
3. Hold unlawful and set aside Defendants' regulations requiring H-1B petitions to be filed during a 5 day filing window and subjected to a random lottery in which losing lottery filings are rejected and not assigned a priority date, as such regulations are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law pursuant to 5 U.S.C. § 706(2)(A);
4. Order Defendants to vacate the unlawful rejection of the H-1B petitions, and Order Defendants to accept for filing those rejected H-1B petitions upon request by members of the class;
5. Order Defendants to assign priority dates to those improperly rejected H-1B petitions which are resubmitted for acceptance by members of the class;
6. Order Defendants to accept H-1B petitions throughout the year and assign priority

dates to filed petitions;

7. Order Defendants to make H-1B numbers available based on the order in which a petition is filed;

8. Order Defendants to engage in notice and comment rulemaking to conform the regulations to the clear language of the statute for future H-1B filings;

9. Award plaintiff reasonable costs and attorney's fees under the Equal Access to Justice Act following separate motion after final disposition; and

10. Award such further relief as the Court deems necessary or proper.

DATED this 2nd day of June, 2016.

By */s/ Brent W. Renison*

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