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

MOTION FOR CLASS CERTIFICATION

**CERTIFICATE OF COMPLIANCE**

Pursuant to LR 7-1(a)(1)(A), undersigned counsel certifies that the parties made a good faith effort to resolve the dispute by conferring by telephone and email, and have been unable to do so.

**MOTION**

Plaintiffs respectfully move the Court for certification, pursuant to Fed. R. Civ. P. 23, and L.R. 23, that the instant action is maintainable as a class action. This action meets the prerequisites for class action and is maintainable as a class action.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. THE ACTION MEETS THE PREREQUISITES TO A CLASS ACTION**

For a class to be certified, plaintiffs much satisfy each of the four requirements of Fed. R. Civ. P. 23(a), and at least one of the requirements of Rule 23(b). The class must therefore first meet the requirements of numerosity, commonality, typicality, and adequacy of representation. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). After these requirements have been satisfied, Plaintiffs "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 569 U.S. __ , 185 L.Ed. 2d 515 (2013).

**A. The Class is Numerous and Joinder is Impractical**

The class may comprise as many as 425,500 individuals, a figure which represents the approximate number of H-1B petitions subjected to the random lottery process and not provided a priority date over the past 4 years. Even a small fraction of this number meets the numerosity requirement of Fed. R. Civ. P. 23(a)(1). Joinder of this many individual cases would be highly impractical, due to the sheer number of those affected, and the geographic dispersal of the individuals throughout the United States.

**B. Questions of Law or Fact Are Common to the Class**

Each class member was subjected to an unlawful lottery process and was not provided a

priority date in exactly the same manner, involving exactly the same set of federal statutes and regulations. Fed. R. Civ. P. 23(a)(2). The representatives and class members have suffered the "same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). 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 and not based on a random computerized lottery. For comparison, it is instructive to review the case of "preference" immigrant petitions, which are also subject to annual numerical limitation. That 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 preference 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. The two categories, however, are treated very differently.

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 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.

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

lottery, and provide no priority date or place in line 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. The class representatives and class members all share a common contention – that their petitions were subjected to the random lottery, without the proper assignment of a priority date. They all seek the option to have their petition resubmitted and assigned a priority date, in order to have a place in line for future available H-1B quota numbers in order to obtain H-1B visas or status. Class plaintiffs and class members have no priority over other individuals who file petitions, even if the petitions were filed earlier.

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. 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. This is the common question of law that applies to all class members' cases – whether the regulatory scheme conflicts with the plain language of the statute. The material facts of each class member's case are merely: 1) whether the class member filed an H-1B petition during the relevant 5-day window in any one or more of the four such periods at issue in this lawsuit, in April of 2013, 2014, 2015, and/or 2016, and 2) whether the class member's H-1B petition was subjected to the computer-based random lottery and not assigned a priority date. There are no other facts of any meaningful consequence in this action, and any other particular facts which distinguish between the various individuals who are part of this lawsuit would not serve to negate the validity of the class claims. The common contention is therefore that the random computer generated H-1B lottery is unlawful, and that the law requires acceptance and assignment of a filing date for H-1B petitions.

### C. The claims of the Representative Parties are Typical of the Claims of the Class

As noted above, 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 subjected to 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). All suffer from the same injury – a petition subjected to the random lottery, which does not bear a priority date.

The New York Times reported on a number of H-1B employers and beneficiaries who were subjected to the random lottery and "lost" during the relevant period of time.[1] The story described Theo Negri, "a young software engineer from France, [who] had come up with so many novel ideas at his job at an internet start-up in San Francisco that the American entrepreneur who hired him wanted to keep him on." **Ex. 1**, page 1. His employer, BuildZoom, filed an H-1B petition on his behalf which was subjected to the random lottery and lost. The story noted:

> "Together the top five outsourcing companies had prepared as many as 55,000 H-1B applications. TCS, the company that had prepared applications for at least 14,000 visas, won 5,650 of them."

**Ex. 1**, pages 4-5. Smaller companies which submit only one or two petitions have a much lower chance of obtaining the global talent they seek in the lottery. The article details the rejection story of Mark Merkelbach and his small engineering firm in Seattle which filed two H-1B petitions:

> "For water projects I China, he needed engineers and landscapers who speak Mandarin, and he could not find them in the local market. With his H-1B visas denied, Mr. Merkelbach had to move the jobs to Taiwan."

**Ex. 1**, page 3. The New York Times also describes the case of Atulya Pandey, an entrepreneur from Nepal with a degree from the University of Pennsylvania, who founded a start-up Pagevamp, but who now manages the growing New York company of 10 remotely from Nepal following his H-1B filing rejection. **Ex. 1**, pages 3, 6 and 7. A Chicago Times article also profiles Kaan Gunaydin of Turkey, who is a graduate of Northwestern University and was the

[1] See Julia Preston, *Large Companies Game H-1B Visa Program, Costing the U.S. Jobs*, New York Times, Nov. 10, 2015.

beneficiary of three H-1B petitions in three separate years by his employer Enova International.[2] An H-1B petition has been filed for him three years in a row, and for three years he lost the lottery instead of being given a priority date and place in line. The plaintiffs have claims which are typical of these class members. Whether subjected to one lottery or three or four, each was not provided a filing date and place in line. Enclosed for further evidence of the claims of class members are declarations from those who have filed an H-1B petition and were not given a priority date due to the H-1B lottery. **Ex. 3 – 11**.

**D. The Representative Parties Will Fairly and Adequately Protect the Interests of the Class**

Each representative has been subjected to the random H-1B lottery, and each has no assurance that in future years the luck of the draw will result in a winning lottery number for each of them, which is exactly the situation in which all class members find themselves. Fed. R. Civ. P. 23(a)(4). The adequacy requirement of Rule 23(a)(4) asks "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1020 (9th Cir. 1998). In this case all the plaintiffs have the same injury, a petition subjected to the random lottery with no priority date, and all have the same benefit from the action, the option to resubmit the petition for a petition filing date and priority for H-1B visas and/or status that come available in the future. Plaintiffs and their counsel have demonstrated commitment to the class and will prosecute the action vigorously.

## II. THIS ACTION IS MAINTAINABLE AS A CLASS ACTION

**A. Prosecuting Separate Actions by Individual Class Members Risks Inconsistent Adjudications That Would Establish Incompatible Standards of Conduct.**

Separate actions across the country would result in inconsistent processing of H-1B

[2] See Alexia Elejalde-Ruiz, *Foreign workers waiting to win the H-1B lottery*, Chicago Tribune, April 15, 2016. **Ex. 2**.

petitions from case to case, from state to state, or from region to region, depending on the outcome of each separate action. USCIS treats district court judgments as only applying to the individual plaintiff, and not to other cases, so that if a particular H-1B beneficiary obtains a judgment in his or her favor, USCIS will apply that judgment only to that individual. Additionally, USCIS also routinely treats cases within the jurisdiction of a circuit court judgment differently than other circuits where no precedent exists, or where contrary precedent exists, resulting in regional differences in the adjudication of what should be a consistent federal system of uniform immigration rules. Moreover, in a system involving a quota of H-1B numbers, and the apportionment of each of those visas according to the order in which the petitions were filed, there would be serious inequity between those who were able to successfully prosecute and prevail on their individual cases, and those who for whatever reason (lack of resources, lack of competent counsel) could not. Prosecution of individual cases would also result in Defendants applying one set of rules to those individuals whose cases were the subject of a district or circuit court ruling, and others whose cases were governed by contrary regulation.

For example, suppose that 10 class members successfully pursue individual claims in 10 different states, two of which are ultimately decided by different circuit courts, and eight of which are decided by district courts. The eight district court litigants would have their petitions accepted and a priority date assigned, and would be provided H-1B status in the order in which their petitions were filed, but all others in the exact same situation (even same city, state, and employer) would be subject to the random computer generated lottery process. Likewise, those with work sites in the states which are covered by the jurisdiction of the two circuit courts would benefit from a priority date system in which the filing date order determines when an H-1B visa would be provided, whereas all the other states in the nation outside of these two circuits would be processed through the random lottery. This would not only be undesirable for individual class members, but completely unworkable for Defendants.

Separate actions, as the above scenario describe, would result in incompatible standards

of conduct for Defendants who must implement a nationwide policy of apportioning statutorily limited H-1B numbers according to the order in which petitions were filed. A class action may thus be maintained under Fed. R. Civ. P. 23(b)(1), and will result in consistent standards of conduct for Defendants.

### B. The Defendants Have Acted or Refused to Act on Grounds That Apply Generally to the Class

The class is also maintainable under Fed. R. Civ. P. 23(b)(2). The primary relief sought in this suit is injunctive or declaratory. See *Wal-Mart*, 131 S. Ct. at 2557-58. Defendants have applied the H-1B random lottery process uniformly and unequivocally nationwide, treating each lottery loser's petition in exactly the same way regardless of residence or work place, following non-selection pursuant to random computer lottery. The class of individuals impacted by this random lottery process is harmed in the same way, by refusal by defendants to assign an orderly priority date to the petition, so that H-1B numbers can be issued based on the order in which petitions were filed. Final injunctive and declaratory relief is appropriate for this class as a whole because the unlawful lottery process has been applied generally to this class, and any relief must also be applied generally to the class so that the orderly process of apportioning limited H-1B numbers is consistent and equitable nationwide. There can be no satisfactory resolution of this matter, given the limited quota numbers distributed on a nationwide basis, if defendants are permitted to treat class members differently.

## III. CLASS DEFINITION

Pursuant to Fed. R. Civ. P. 23(c)(B), the class representatives respectfully request certification of the following class:

> 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.

The class claims are that the computer generated random H-1B lottery process is not in accordance with the plain language of the statute, is unlawful, and should be set aside in favor of

a system which is compatible with the statutorily mandated apportionment of H-1B quota numbers in the order in which petitions are filed. The class seeks an order compelling defendants to accept for filing those H-1B petitions subjected to the lottery upon request by members of the class, compelling defendants to assign priority dates to H-1B petitions which are resubmitted for acceptance by members of the class, and compelling defendants to conform the regulations to the clear language of the statute for future H-1B filings.

## IV. APPOINTMENT OF CLASS COUNSEL

Class representatives respectfully request appointment, pursuant to Fed. R. Civ. P. 23(c)(1)(B) and 23(g), of Brent Renison as class counsel. 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.

### A. Counsel's Work in Identifying and Investigating Potential Claims

With respect to Fed. R. Civ. P. 23(g)(1)(A)(i), Renison has maintained a class member registration form on the website of his law firm, Parrilli Renison LLC (www.entrylaw.com), and has reviewed and investigated the facts of class members' claims.

### B. Counsel's Experience in Handling Class Actions

Considering the experience factors outlined in Fed. R. Civ. P. 23(g)(1)(A)(ii), he has been certified as lead class counsel in a prior, successful class action, *Hootkins, et. al. v. Napolitano,* No. 07-cv-05696-CAS-MAN (C.D. Cal. 2010), in the Central District of California. That lawsuit challenged the "widow penalty" in immigration law whereby widow(er)s of a U.S. citizens were being denied lawful permanent resident status due to the death of the spouse during bureaucratic processing. After prevailing on summary judgment on most claims, Renison

successfully negotiated a favorable settlement agreement with USCIS which was approved by the court.[3] Renison has also prosecuted another class action, *Tran v. Napolitano*, 10-cv-00724-ST, in the District of Oregon over a two year period, which resulted in dismissal for mootness in the Ninth Circuit due to the fact that the class had not been certified prior to dismissal in the district court, and the class representatives had already received the relief sought by the time the case went to oral argument at the circuit court. See *Tran v. Napolitano*, 11-35277 (9th Cir. 2012), unpublished. These two separate class actions took Renison approximately five years to resolve. Renison also has extensive experience handling complex litigation involving the interpretation of immigration statutes.

**C. Counsel's Knowledge of the Applicable Law**

With respect to Fed. R. Civ. P. 23(g)(1)(A)(iii), Renison is considered to have considerable knowledge of immigration law gained through 19 years of private practice experience in immigration law, including 4 years teaching immigration law as an adjunct professor at the University of Oregon School of Law.

**D. Resources That Counsel Will Commit to Representing the Class**

Regarding the factor listed at Fed. R. Civ. P. 23(g)(1)(A)(iv), "the resources that counsel will commit to representing the class," Renison will undertake this litigation pursuant to an agreement to provide representation in exchange for assignment of fees under the Equal Access to Justice Act ("EAJA"), which are only granted upon successful litigation of the matter, and further upon finding that the government position was not substantially justified. Undertaking such a contingency upon a contingency reflects dedication to the cause of class members. Renison has shown a commitment, in prior cases, to dedicating advance resources to federal litigation in the past. Some, but not all of the work Renison has undertaken in the past has been compensated by fees granted under the Equal Access to Justice Act ("EAJA"). For example,

[3] The settlement agreement in *Hootkins* is maintained on the USCIS website: https://www.uscis.gov/laws/legal-settlement-notices/hootkins-settlement

after two years of litigation, the Ninth Circuit granted $36,675 for Renison's legal fees, and $54,933.20 in total for District Court and Court of Appeals work on *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). *Freeman v. Mukasey*, 2008 WL 1960838, *7-8 (9th Cir. 2008). Renison has also been granted EAJA fees after investing substantial work in other cases, such as *Al-Kudsi v. Gonzales*, No. 05-1584-PK (D. Or. 2006) (Agreed Order Granting EAJA Fees in the amount of $32,500 for district court work); *Alqudah v. Gonzales*, No. 06-1367-BR (D. Or. 2007) (Stipulated Order for $10,508.25 in EAJA fees for district court work); *Abou-Elmajd v. Gonzales*, No. 06-1154-KI (D. Or. 2007) (Order granting $23,404.20 in EAJA fees for district court work); *Hootkins, et. al. v. Napolitano*, No. 07-cv-05696-CAS-MAN (C.D. Cal. 2010) (Stipulation and Agreement of Settlement and Release ordering $125,000 in fees for district court class action involving widows of U.S. citizens).

Not all actions Renison has undertaken with no advance payment have been compensated, however, such as the multi-year *Tran v. Napolitano*, supra, class action lawsuit which resulted in mootness. That pursuit was entirely unpaid. Another example of Renison remaining unpaid is the case of *Williams v. DHS Secretary*, 741 F.3d 1228 (11th Cir. 2014), in which Renison successfully litigated a widowed immigrant's case after significant time and expense, including travel to Florida for oral argument, resulting ultimately in that case being accepted for nationwide application by USCIS. The Eleventh Circuit, however, found the government's position substantially justified, despite ruling against the USCIS interpretation, and denied EAJA fees. This also occurred in the case of *Lockhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009), which involved oral argument in Ohio before the Sixth Circuit at Renison's expense, a completely successful resolution of the case in Ms. Lockhart's favor, and yet resulted in a denial of EAJA fees despite the success of the litigation. Renison's corporate immigration practice is busy to an extent that he turns paying work away, yet still finds the time and resources to take up matters of significant importance to immigrants.

### E. Effort, Ability and Commitment

Therefore, in response to the factors in Fed. R. Civ. P. 23(g)(1)(A), Renison has done the work to investigate the claims, has extensive experience handling class actions and federal litigation, is knowledgeable about the applicable law, and shows true commitment to representing the class, to the extent of investing significant personal time and effort into the matter with only possible financial reward at the conclusion of the litigation.

## V. NOTICE TO CLASS

Pursuant to Fed. R. Civ. P. 23(c)(2), it is appropriate for Defendants to review the records maintained within their computer systems of those approximately 425,500 petitions subjected to the random lottery and not assigned a priority date, and issue an appropriate notice to class members.

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 July 7, 2016, I electronically filed the foregoing MOTION FOR CLASS CERTIFICATION 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