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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

TENREC, INC., et al.

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants.

Case No. 3:16-cv-00995-SI

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

Oral Argument Requested

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendants, the United States Citizenship and Immigration Services ("USCIS"), and USCIS Director León Rodríguez, in his official capacity, hereby respectfully move this Court to dismiss the Plaintiffs'

amended complaint (ECF No. 9) with prejudice in the above-captioned action.[1] The bases for this motion, as set forth in the accompanying memorandum, are (1) that Plaintiffs' Complaint fails to adequately allege an injury-in-fact; (2) Plaintiffs lack Article III standing because they do not sufficiently plead for a remedy that would actually redress any alleged harm; and, even if the Court finds otherwise, (3) Plaintiffs' Complaint is time-barred because it comes over eight years after the regulation was promulgated despite the six-year statute of limitations. For the reasons supplied in this motion and the memorandum in support thereof, Defendants respectfully submit that the Court should grant the motion and dismiss this action with prejudice.[2]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

This case represents Plaintiffs' challenge to USCIS's lawful administration of its H-1B specialty occupation nonimmigrant visa worker program. In essence, Plaintiffs seek to compel Defendants to completely revamp the administration of that program, seeking declaratory and injunctive relief to stop USCIS from using its computer-generated random selection processes for allocating H-1B nonimmigrant visas—capped at 85,000 each fiscal year—when the agency receives more H-1B petitions than the statutory cap. To put it bluntly, Plaintiffs are complaining because they did not "win" USCIS's "random lottery" selecting them for an H-1B nonimmigrant

[1] Plaintiffs filed their original complaint on June 2, 2016 (ECF No. 1) and served the Defendants with the summons via certified mail on June 9, 2016. Plaintiffs filed an amended complaint on June 29, 2016 (hereinafter, "the Complaint" or "Compl."). References to the Complaint in this memorandum are to the amended complaint.

[2] In accordance with LR 7-1(a), undersigned counsel for Defendants represents that he conferred with Plaintiffs' counsel on the relief sought by this motion and learned as a result that Plaintiffs dispute the grounds of this motion and intend to oppose it.

visa. *See, e.g.*, Compl. at ¶ 57. This Court, however, lacks jurisdiction over the Complaint because Plaintiffs have not demonstrated the requisite injury-in-fact to proceed. In addition, even if such an injury has been adequately pleaded (which it has not), the Plaintiffs do not seek a remedy that would adequately redress any of their alleged harm. And styling this case as a class action does nothing to cure these constitutional deficiencies: "*Before* a class is certified ... the named plaintiff[s] must have standing, because at that stage no one else has a legally protected interest in maintaining the suit." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F. 3d 672, 676 (7th Cir. 2009) (Posner, J.) (citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). Finally, Plaintiffs have brought this case brought two years *after* the APA's six-year statute of limitations has run. The Court should therefore dismiss this case with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. BACKGROUND

A. Plaintiffs' Alleged Injuries

According to the Complaint, the Plaintiffs are two businesses (Tenrec, Inc. and Walker Macy, LLC) and two individuals, the intended alien beneficiaries of each company's H-1B petitions (Sergii Sinienok and Xiaoyang Zhu, respectively). *See* Compl. at ¶¶ 4–7.[3] The organizational Plaintiffs each filed a Form I-129, Petition for Nonimmigrant Worker ("H-1B visa

[3] The individual Plaintiffs, as the visa beneficiaries, lack standing to contest the treatment of their H-1B petitions. *See, e.g.*, *Xiaodong Wang v. Holder*, 500 F. App'x 650, 651 (9th Cir. 2012) (citing *Matter of Sano*, 19 I. & N. Dec. 299, 300 (BIA 1985) (noting that only the visa petitioner can appeal denial of visa petition); *see also George v. Napolitano*, 693 F. Supp. 2d 125, 130 (D.D.C. 2010); *Li v. Renaud*, 709 F. Supp. 2d 230, 236 n.3 (S.D.N.Y. 2010); *Ibraimi v. Chertoff*, 2008 WL 3821678 (D.N.J. 2008); c*f. also* 8 C.F.R. § 103.3(a)(1)(iii)(B) (providing that, in an administrative appeal, the affected party "does not include the beneficiary of a visa petition").

petitions") on April 1, 2016, *Id.* at ¶¶ 26–27, but did not receive "a receipt notice … for [their] petitions because such petitions were not among those randomly selected for processing for an H-1B number in the lottery process." Compl. at ¶ 33. Importantly, however, nothing prevents Plaintiffs, or any other United States employer that did not "win the lottery," from filing new H-1B petitions on behalf of any alien beneficiary at the commencement of the filing period for the next fiscal year.

B. The H-1B Visa

United States businesses use the H-1B visa classification to employ foreign workers in specialty occupations that require theoretical or practical application of a body of highly specialized knowledge, including, but not limited to architecture, engineering, medicine, law, and fields that require the attainment of a bachelor's degree or higher. 8 U.S.C. § 1101(a)(H)(i)(b); 8 C.F.R. § 214.2(h)(4)(ii). The H-1B classification is one of several visa classifications requested via filing a Form I-129, Petition for Nonimmigrant Worker.

Congress has limited the number of cap-subject H-1B visa petitions that may be granted in a given fiscal year. Pursuant to statute, the current numerical limitation for cap-subject H-1B petitions for each fiscal year ("FY") is 65,000 ("regular cap") with an exemption for the first 20,000 workers who have earned a master's or higher degree from a United States institution of higher education ("the master's cap"), for a combined total of 85,000 H-1B cap-subject petitions that may be approved each fiscal year under the limitations established by Congress.[4] *See* 8 U.S.C. § 1184(g).

[4] Up to 6,800 visas are set aside from the 65,000 regular cap each fiscal year for the H-1B1 program under the terms of the legislation implementing the United States/Chile and United

This year, like every year since the general H-1B cap was set at 65,000 in FY 2004, USCIS received more H-1B petitions than can be approved per the statutory cap. Additionally, this year, like many years in the immediate past, USCIS received more than enough petitions during the first five (business) days in which they could be filed. Specifically, USCIS received approximately 236,000 H-1B petitions in the first five (business) days—almost triple the number of H-1B visas allowed by statute. Compl. at ¶ 24. In order to meet its statutory mandates, USCIS has established and published a procedure to equitably and timely accept and receipt enough petitions to ultimately approve the maximum allowed by statute. 8 C.F.R. § 214.2(h)(8)(ii)(B).

The extraordinarily large number of cap-subject H-1B visa petitions received makes it impossible, as a practical matter, to allocate H-1B visas in the manner Plaintiffs demand—that is, the specific order in which the petitions are filed on a "rolling" basis. *See* 8 U.S.C. § 1184(g)(3). Indeed, given the excessive demand for H-1B visas, a substantial backlog would immediately ensue if the Plaintiffs' proposed process were implemented. And USCIS would almost certainly wind up adjudicating requests to temporarily employ H-1B workers in employment that would not commence for several years. Such a process would make it impossible for USCIS to adjudicate cap-subject H-1B requests in a manner that ensures eligibility and maintains the integrity of the H-1B program. Consequently, to ensure the fair and orderly allocation of visas under the cap, and maintain the integrity of the H-1B program, USCIS issued a rule via Federal Register notice on March 24, 2008 that, among other things, codified 8 C.F.R. § 214.2(h)(8)(ii)(B). *See Petitions Filed on Behalf of H-1B Temporary Workers Subject to*

States/Singapore free-trade agreements. Unused visas in this group become available for H-1B use for the next fiscal year. *See* 8 U.S.C. § 1184(g)(8).

or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15,389 (Mar. 24, 2008). That regulation provides that if the H-1B numerical limit is exceeded during the first five business days that those petitions can be filed, then USCIS "may" randomly select by computer-generated selection the "number of petitions deemed necessary to generate the numerical limits of approvals." 8 C.F.R. § 214.2(h)(8)(ii)(B). This process is sometimes referred to as a "lottery." *See*, *e.g.*, Compl. at ¶¶ 2, 17, etc. The regulation also provides that USCIS will reject any H-1B petitions received after the H-1B numerical limit has already been met. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B).

USCIS initiates the lottery by first performing a limited initial review of the petitions filed to determine which petitions are marked as eligible for a visa under the master's cap. If the number of cap-subject petitions claiming exemption from the H-1B numerical limits under the master's cap in a fiscal year exceeds 20,000 during the first five business days in which cap-subject petitions may be filed, the agency conducts a "lottery" among master's cap eligible petitions, selecting a sufficient number of petitions to meet the 20,000 statutory exemption. USCIS randomly selects more than the 20,000 master's cap allowance, anticipating rejection, denial, or revocation of a certain percentage of these petitions based on historical data. Master's cap filings that are not selected in the master's cap lottery are then added back into the general pool of petitions and, if USCIS receives more than 65,000 petitions subject to the general cap (less the number of H-1B1 visa set asides pursuant to the free-trade agreements with Chile and Singapore), a second lottery is held. The agency then randomly selects more than the 65,000 petitions allowed under the general cap (minus the H-1B1 set-asides for this year, plus unused H-1B1 visas from the previous year, if any), anticipating rejection, denial, or revocation of a certain

percentage of petitions based on historical data. Any petitions not selected in either lottery are marked for rejection along with a refund of their fees. *See id.*

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) authorizes a party to present a defense to a claim grounded on the court's "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1); *see also Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039–40 (9th Cir. 2003). In reviewing such a motion, courts must presume that they lack subject-matter jurisdiction until the plaintiff proves otherwise. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1026 (9th Cir. 2001). Plaintiffs have the burden of establishing jurisdiction. *See Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770 (9th Cir. 2000); *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (noting that a federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears). Courts should dismiss a suit brought by a plaintiff without Article III standing under Rule 12(b)(1). *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109–10 (1998); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

Similarly, although this Court must accept properly pleaded factual allegations as true and construe them in the light most favorable to the plaintiff, "wholly vague and conclusory allegations are not sufficient to withstand a motion to dismiss." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1080 (9th Cir. 2010) (en banc); *Jarlstrom v. City of Beaverton*, 2014 WL 5462025, at *3 (D. Or. Oct. 27, 2014) (Simon, J.) ("[A] court is not required to presume the truthfulness of allegations—including allegations of a threat

of injury—that are mere legal conclusions. Just as Plaintiff's complaint must plausibly suggest his entitlement to relief, it must plausibly suggest his standing to sue in federal court.").

IV. ARGUMENT

The Court should dismiss Plaintiffs' claims for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Federal courts sit to decide cases and controversies, not to resolve "hypothetical question[s]," *Munns v. Kerry*, 782 F.3d 402, 416 (9th Cir. 2015) (Reinhardt, J., concurring), or abstract disagreements about policy or politics. *Habeas Corpus Res. Ctr. v. U.S. Dep't of Just.*, 816 F.3d 1241, 1254 (9th Cir. 2016). Without alleging that they will suffer from any "certainly impending" harm from next year's lottery, Plaintiffs simply do not have Article III standing—an integral part of the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). As the Supreme Court has explained, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co.*, 523 U.S. at 102.

To establish standing, a plaintiff must show that (1) he has suffered an injury in fact, which is an invasion of a legally protected interest that is concrete, particularized, and actual or imminent rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) a favorable decision on the judicial relief requested is likely to redress the injury. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S.

167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). As explained by the Supreme Court, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560–61 (citing *Simon*, 426 U.S. at 41–42); *see also Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). Unless that showing is made, "courts have no charter to review and revise legislative and executive action," *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009), and engaging in such review would be tantamount to an advisory opinion, "inimical to the Constitution's democratic character." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011).[5]

A. Plaintiffs Have Not Pleaded Sufficient Facts To Establish Any Injury

First, the Court should dismiss Plaintiffs' Complaint because they lack standing to challenge USCIS's administration of the H-1B lottery where there is nothing to indicate exactly how any of the Plaintiffs has been injured. Without this information, the Plaintiffs can neither demonstrate the requisite injury in fact, nor that any conceivable injury could be redressed by a favorable decision (see below). *See, e.g.*, *Lujan*, 504 U.S. at 560-61; *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (the role of the courts is "neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies."). While Plaintiffs' Complaint challenges the legality of Defendants'

[5] *See also* Letter from Chief Justice Jay and Associate Justices of the United States Supreme Court to President George Washington (Aug. 8, 1793), 3 Henry P. Johnston, *Correspondence and Public Papers of John Jay* 488–89 (1891) ("[T]he lines of separation drawn by the Constitution between the three departments of the [federal] government.... [B]eing in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the

administrative processes, the Complaint is silent with regard to the injurious effect of those processes. The Complaint is silent regarding whether the organizational Plaintiffs found another employee, *i.e.*, a U.S. worker, to complete its intended jobs. The Complaint is silent regarding whether the organizational Plaintiffs still want to employ the individual alien Plaintiffs. The Complaint is even silent regarding whether the individual Plaintiffs still want to be employed by the organizational Plaintiffs. This silence speaks volumes. A comparison to another H-1B case decided by this district court, *Ching Yee Wong v. Napolitano*, is instructive. 654 F. Supp. 2d 1184 (D. Or. 2009).

Like this case, in *Wong*, an organizational plaintiff filed a complaint for declaratory and mandamus relief regarding a failed H-1B petition filed on behalf of an individual plaintiff. *Id.* at 1187–88. The court dismissed the case because there was no injury-in-fact described within the plaintiffs' complaint. *Id.* at 1189. Specifically, "the [c]omplaint fail[ed] to allege that [the organizational plaintiff] ha[d] suffered or will suffer any injury as a result of USCIS's denial of [the] H-1B application on [the individual plaintiff's] behalf." *Id.* Much like this case, the *Wong* organizational plaintiff had "not allege[d] that it would like to employ [the individual plaintiff] in the future or that [the individual plaintiff] would like to work for [the organizational plaintiff] but c[ould]not due to USCIS's actions." And just like this case, "[t]he Complaint d[id] not allege that defendants' actions deprived [the organizational plaintiff] of [the individual plaintiff's] services …. On its face, [the organizational plaintiff's c]omplaint fail[ed] to establish an injury-in-fact related to its employment needs." *Id.* at 1190.

President of calling on the heads of [Art. II, § 2] departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.").

Simply put, because the Plaintiffs' Complaint suffers from the exact same deficiencies as the complaint scrutinized in *Wong*, this Court should decide this case in exactly the same manner: dismissal of the deficient complaint.

B. Plaintiffs Have Not Pleaded Sufficient Facts to Establish Redressability

Second, even if the Court were to rule that the organizational Plaintiffs have sufficiently alleged harm by not having their H-1B petitions accepted by USCIS earlier this year, Compl. at ¶¶ 26–34, there is no redressability because that process has now concluded. At this point in 2016, with the statutory quotas for H-1B visas now exhausted for the FY 2017 lottery cycle, the Plaintiffs are only seeking declaratory and injunctive relief for an alleged *past* harm. *See* Compl. at 13. But, as Dean Chemerinsky explains, "the most important application of the requirement for a personally suffered injury is the requirement that a plaintiff seeking injunctive or declaratory relief must show a likelihood of *future* harm." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 2.5, at 68 (5th ed. 2015) (emphasis added) (discussing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)); *accord Updike v. City of Gresham*, 62 F. Supp. 3d 1205, 1213 (D. Or. 2014) (Simon, J.) ("The possibility of *future* injury must rise beyond the level of speculative or hypothetical injury." (emphasis added)).

In the Ninth Circuit, "[p]ast exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. Nor does speculation or 'subjective apprehension' about future harm support standing." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (citing *Lujan*, 504 U.S. at 564 and *Laidlaw*, 528 U.S. at 184). In short, "[o]nce a plaintiff has been wronged, he is entitled to injunctive relief *only if he can show that he faces a 'real or immediate threat ... that he will*

again be wronged in a similar way.'" *Id.* (omission in original) (emphasis added) (quoting *Lyons*, 461 U.S. at 111); *see also Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990).

Despite the Plaintiffs' (arguable) allegation of having been harmed in the past, the Plaintiffs must still show in the Complaint that the threat of injury in the future is "certainly impending" for this Court to hear their claim for prospective relief. *Clapper*, 133 S. Ct. at 1147, 1150 n.5. Without such a showing, the "alleged threat of future injury is too speculative to support standing." *Updike*, 62 F. Supp. 3d at 1213 (Simon, J.). In short, the Plaintiffs' Complaint requests declaratory and injunctive relief, but contains no facts regarding "certainly impending" harm. They therefore "lack[] Article III standing because [they have] not demonstrated an injury in fact that will be redressed by a favorable ruling." *Id.* Accordingly, this Court must dismiss the Plaintiffs' Complaint.

C. Plaintiffs' Claims Are Time-Barred

Finally, even if Plaintiffs can establish that they have suffered from a redressable harm, their claims are time barred. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. *See* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). The Ninth Circuit has held that this rule "applies to actions brought under the APA," *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991), which makes the Plaintiffs' action brought under the APA two years too late. *Cf. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation*, 73 Fed. Reg. 15,389 (Mar. 24, 2008). The Plaintiffs are therefore time-barred from challenging the H-1B program as defective under the APA. *See, e.g., Big Lagoon*

Rancheria v. California, 789 F.3d 947, 954 (9th Cir. 2015) (en banc) (discussing the APA and the six-year statute of limitations). Accordingly, to the extent Plaintiffs seek to challenge this rule as procedurally defective or otherwise improper under the APA, any such challenge should be dismissed with prejudice.

Moreover, leave to amend here would be futile in this case because there is no amendment that would be sufficient to cure the Plaintiffs' tardiness. *See, e.g., United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011). To put it another way, "[n]o rearrangement of words on paper or exposition of equations and formulae can reify" this type of problem. *Jarlstrom*, 2014 WL 5462025, at *3 (Simon, J.). Dismissal with prejudice is thus appropriate.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should grant its motion and dismiss the above-captioned action with prejudice.

Respectfully submitted this 8th day of August 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 3,268 words, including headings, footnotes, and quotations, but excluding the caption, signature block, and any certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2016, I electronically filed the foregoing DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF 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.

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