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10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 CHAMBER OF COMMERCE OF THE UNITED
14 STATES OF AMERICA, *et al.*,

15 *Plaintiffs,*

16 v.

17 UNITED STATES DEPARTMENT OF
18 HOMELAND SECURITY, *et al.*,

19 *Defendants.*

Civil Action No. 4:20-cv-7331-JSW
U.S. TECH WORKERS' *AMICUS*
***CURIAE* BRIEF IN SUPPORT OF**
DEFENDANTS IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT

Date: September 10, 2021 Time: 9:00
a.m.

Judge: Hon. Jeffrey S. White
Ctrm.: 5

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MEMORANDUM OF PONTS AND AUTHORITES

Amicus curiae U.S. Tech Workers submits this memorandum of points and authorities in support of the federal defendants’ opposition to the plaintiffs’ motion for summary judgment and in support of the federal defendants’ cross-motion for summary judgment pursuant to U.S. Tech Workers’ accompanying motion for leave to file.

IDENTIFY AND INTERESTS OF AMICUS CURIAE

Founded in 2018, U.S. Tech Workers (“UTW”) provides inspiration, leadership, and resources to U.S.-citizen and permanent-immigrant tech workers harmed by guest worker visa programs such as the H-1B. UTW’s goal is to combat the displacement of American workers by uncovering what fuels the offshore pipeline of workers, then using this information to influence policy reform. UTW educates the general public and elected officials about how the continuous flow of workers from abroad impacts American jobs, the economy, and national security. It also promotes policies that favor investing in our country and our workforce.

INTRODUCTION

The H-1B guestworker program admits nonimmigrants in occupations that normally require a college degree. 8 U.S.C. § 1101(a)(15)(H)(i). Employers are required to pay H-1B workers the higher of the prevailing wage for the occupation and location or the actual wage paid to similar employees. 8 U.S.C. § 1182(n)(1).

The H-1B visa program is widely understood to be dysfunctional. Notoriously, it results in the displacement of American workers by low-paid H-1B workers. Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, N.Y. TIMES, June 3, 2015.¹ Even the COVID

¹ Available at <http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html> (last visited July 30, 2021).

1 pandemic did not put a halt to H-1B workers’ displacing Americans. Dave Flessner, *Unions blast*
2 *TVA for outsourcing IT jobs during pandemic*, CHATTANOOGA TIMES FREE PRESS, June 17, 2020.²
3 On the other side of the issue, businesses complain that they are cut off from getting H-1B visas.
4 Press Release, *U.S. Chamber Launches Nationwide Initiative to Address National Worker*
5 *Shortage Crisis and Help America’s Employers Fill Jobs*, U.S. Chamber of Commerce (June 1,
6 2021)³ Largely unreported is that the H-1B statutes drastically restrict enforcement. 8 U.S.C.
7 §§ 1182(n)(1)(G), (n)(2)(G). Unsurprisingly, therefore, over 13% of *approved* H-1B petitions are
8 fraudulent. See U.S. Citizenship and Immigration Servs., *H-1B Benefit Fraud & Compliance*
9 *Assessment*, at 15 (Sept. 2008).⁴ Just five years after the H-1B program went into effect, the
10 Department of Labor Inspector General (“OIG”) called for major reform. *The Department of*
11 *Labor’s Foreign Labor Certification Programs: The System Is Broken and Needs To Be Fixed*
12 (May 22, 1996).⁵ For decades, every OIG Semiannual Report to Congress has also recommended
13 reform of H-1B. The latest such report states:

16 OIG investigations have shown these visa programs, in particular the H-1B
17 program for workers in specialty occupations, to be susceptible to significant
18 fraud and abuse from perpetrators, including dishonest immigration agents,
19 attorneys, labor brokers, employers, and, most often, organized criminal
20 enterprises.

21 ² Available at [https://www.timesfreepress.com/news/business/aroundregion/story/2020/jun/17/unions-blast-tva-](https://www.timesfreepress.com/news/business/aroundregion/story/2020/jun/17/unions-blast-tva-outsourcing-it-jobs-during-pandemic/525525/)
22 [outsourcing-it-jobs-during-pandemic/525525/](https://www.timesfreepress.com/news/business/aroundregion/story/2020/jun/17/unions-blast-tva-outsourcing-it-jobs-during-pandemic/525525/) (last visited July 30, 2021).

23 ³ Available at [https://www.uschamber.com/press-release/us-chamber-launches-nationwide-](https://www.uschamber.com/press-release/us-chamber-launches-nationwide-initiative-address-national-worker-shortage-crisis-and)
24 [initiative-address-national-worker-shortage-crisis-and](https://www.uschamber.com/press-release/us-chamber-launches-nationwide-initiative-address-national-worker-shortage-crisis-and) (last visited July 30, 2021).

25 ⁴ Available at https://www.cpvisa.com/H-1B_Fraud_&_Comp_Assessment.pdf (last visited
26 July 30, 2021).

27 ⁵ Available at https://www.oig.dol.gov/public/reports/oa/pre_1998/06-96-002-03-321.pdf
28 (last visited July 30, 2021).

1 Semiannual Report to Congress, Oct. 1–Mar. 31, 2021, at 13–14.⁶ The same report points out that
2 the OIG described these vulnerabilities in a white paper issued eighteen years earlier. *Id.* The
3 problems in the H-1B program are vast, longstanding, and well known to the agencies and
4 Congress, yet Congress has not acted to fix them. Semiannual Report to Congress, Oct. 1–Mar.
5 31, 2021, at 13–14. The same report points out that the OIG described these vulnerabilities in a
6 white paper issued eighteen years earlier. *Id.* The problems in the H-1B program are vast,
7 longstanding, and well known to the agencies and Congress, yet Congress has not acted to fix
8 them.
9

10 Deference to an agency’s rulemaking is evaluated under the familiar framework of
11 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
12

13 In interpreting a statute we must examine its language. If the statute is clear and
14 unambiguous, that is the end of the matter. There is no need to look beyond the
15 plain meaning in order to derive the purpose of the statute. At least there is no
16 need to do so when the result is not absurd.

17 If the language is not clear, Congress’s intent must still be ascertained. For
18 example, where Congress includes particular language in one section of a statute
19 but omits it in another section of the same Act, it is generally presumed that
20 Congress acts intentionally and purposely in the disparate inclusion or exclusion.
21 If a court, employing traditional tools of statutory construction, ascertains that
22 Congress had an intention on the precise question at issue, that intention is the
23 law and must be given effect.

24 If, however, the statute is ambiguous, the question for the court is whether the
25 agency’s answer is based on a permissible construction of the statute. And the
26 agency’s interpretation of a statute that it is entrusted to administer is entitled to
27 considerable weight unless it is arbitrary, capricious, or manifestly contrary to
28 the statute.

29 *Tang v. Reno*, 77 F.3d 1194, 1196–97 (9th Cir. 1996) (internal quotations and citations omitted).

30 ⁶ Available at <https://www.oig.dol.gov/public/semiannuals/85.pdf> (last visited July 30,
31 2021).

1 As described *infra*, this case presents a rare situation in which a statute is unambiguous but literal
2 application of it creates absurdity in the form of impossibility, which also implicates deference to
3 the agency’s resolution:

4 [I]t is the task of an agency with the requisite authority to pursue a middle course
5 that vitiates neither provision but implements to the fullest extent possible the
6 directives of each, and it is the task of a reviewing court to ensure that the agency
7 has effected an appropriate harmonization of the conflicting provisions while
8 remaining within the bounds of that agency’s statutory authority.

9 *Citizens to Save Spencer Cty. v. United States EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979) (footnote
10 omitted). As explained below, Defendants have responded appropriately.

11 **ARGUMENT**

12 **I. LITERAL APPLICATION OF THE VISA ALLOCATION STATUTE
13 PRODUCES ABSURD RESULTS.**

14 A statute directs U.S. Citizenship and Immigration Services (“USCIS”) to process visas
15 “in the order in which petitions are filed.” 8 U.S.C. § 1184(g)(3). When Congress created the H-
16 1B program, it mistakenly assumed that “reliance on temporary foreign labor is expected to be
17 reduced.” H.R. REP. 101-723 at 58. Instead, H-1B increased reliance on foreign labor and created
18 situations the statutes are not equipped to handle. There are currently 85,000 H-1B visas available
19 to industry each year (with unlimited visas available to universities). 8 U.S.C. § 1184(g). Congress
20 has established service centers that process H-1B visas in California, Nebraska, Texas, and
21 Vermont. USCIS, *Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker*
22 (June 14, 2021).⁷ On the first day visas are made available, the number of petitions routinely
23 exceeds the number of visas available many times over. As typical over the past two decades, in
24 FY 2021 USCIS received 274,237 requests for visas, more than three times the number of available
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27 ⁷ Available at <https://www.uscis.gov/i-129-addresses> (last visited July 30, 2021).
28

1 visas. *See* Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject
2 H-1B Petitions, 85 Fed. Reg. 69,236, 69,252 (Nov. 2, 2020).

3 When hundreds of thousands of requests arrive on the same day at four different locations
4 across the country, it is impossible determine the order in which the petitions were filed. Here,
5 USCIS is not faced with ambiguity forcing it to choose among alternate meanings of the statute.
6 Rather, the statute directs that which cannot be done. Either USCIS has to halt visa-processing
7 altogether for a fiscal year or it has to adopt some other method of processing applications. *See*,
8 *e.g.*, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892) (“If a literal
9 construction of the words of a statute be absurd, the act must be so construed as to avoid the
10 absurdity.”).
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13 **II. THE CHALLENGED REGULATIONS ADEQUATELY RESPOND TO THE**
14 **ABSURDITY CREATED BY STATUTE.**

15 USCIS’s original approach when it became impossible to determine petition filing order
16 was to select petitions randomly from among those received. USCIS, Press Release, *USCIS*
17 *Reaches FY 2014 H-1B Cap* (Apr. 5, 2014).⁸ This random selection process created massive
18 amounts of useless paper shuffling because it required businesses to file petitions that in most cases
19 would not even be considered due to the visa quotas. 8 U.S.C. § 1184(g).
20

21 To address the wastefulness of the previous lottery system, in 2020 USCIS created another
22 such system when it implemented an electronic registration process for H-1B visas. *See* USCIS
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27 ⁸ Available at <https://www.uscis.gov/archive/uscis-reaches-fy-2014-h-1b-cap-0> (last visited
28 July 30, 2021).

1 H-1B Electronic Registration Process (July 29, 2021);⁹ *see also* 86 Fed. Reg. at 1,678. Under this
2 system, employers pay a \$10 fee to enter a lottery to earn the right to file an H-1B petition on
3 behalf of a specific petitioner. *Id.* This system ensures that only visa petitions that will actually be
4 considered need to be filed.

5 It should be noted that the Electronic Registration Process only applies when USCIS
6 anticipates that it will reach the annual visa limits and so compliance with the statute will be
7 impossible. 8 C.F.R. § 214.2(h)(8)(iii)(A)(5). At other times, USCIS follows the sequential
8 processing mandated by Congress. *Id.*

9
10 **A. A pure lottery system is a highly flawed means of selecting which H-1B**
11 **petitions should be processed.**

12 Trusting visa allocation to pure random chance creates several problems. Plaintiff U.S.
13 Chamber of Commerce identifies two flaws of the lottery system on its web site.

14 The H-1B visa lottery leaves to chance what we should want to guarantee for
15 our economy: that the best and the brightest innovators contribute to our
16 country's success, instead of being forced out and likely given little choice but
17 to go create jobs for our global competitors.

18 Sean Hackbarth, Senior Editor, U.S. Chamber of Commerce, High-Skilled H-1B Visas: Demand
19 Outstrips Supply—Again, Apr. 7, 2015 (quoting Max Levchin).¹⁰

20 Another flaw is that the lottery squeezes out small employers in favor of those who make
21 massive numbers of H-1B visa petitions. A small company that has identified one person it wants
22 to hire has a one-in-three chance of getting that person. A large company, particularly one in the
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25 ⁹ Available at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process> (last visited July
26 30, 2021).

27 ¹⁰ Available at <https://www.uschamber.com/above-the-fold/high-skilled-h-1b-visas-demand-outstrips-supply-again> (last visited July 30, 2021).
28

1 labor brokerage industry, can simply make visa petitions for three times as many people as it needs
2 to get its desired numbers.

3 **B. USCIS’s new regulation addresses several flaws of the current lottery system.**

4 The regulation at issue corrects several flaws of the lottery system. *See* Modification of
5 Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions, 86 Fed. Reg.
6 1,676 (Jan. 8, 2021). Most importantly, it creates predictability for those seeking H-1B visas,
7 especially employers seeking highly skilled workers. That regulation modifies the Electronic
8 Registration Process by selecting workers from the top skill level and moving downwards. *Id.*
9 There will only be lotteries when the process reaches a skill level that will provide more workers
10 than available visas. *Id.* About 6% of H-1B workers are at skill level 4; 11% are at skill level 3;
11 29% are at skill level 2; and 54% are at skill level 1. *See* Government Accountability Office, *H-*
12 *1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, at
13 58 (Jan. 2011) (hereinafter, “*GAO Report*”).¹¹ Given that breakdown, an employer can be certain
14 of getting workers at skill level 4 or 3 (with level 3 being the median wage). Only employers who
15 wish to pay less than the prevailing wage for an occupation and location will have to participate in
16 a lottery and run the risk of not getting a visa.
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20 It is worth noting at this point another, related absurdity in the H-1B statutes. The statutes
21 require that H-1B workers be paid the higher of the prevailing wage (normally the median¹²) for
22 the occupation and location and the wage paid to similar employees. 8 U.S.C. § 1182(n)(1). Thus,
23 under the statute, the skill level 2 (34th percentile) and 1 (17th percentile) wages, as the Department
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26 ¹¹ Available at <https://www.gao.gov/assets/gao-11-26.pdf> (last visited July 30, 2021).

27 ¹² Department of Labor regulations specify the median is the prevailing wage unless the mean
28 is not available, in which case the mean is the prevailing wage. 20 C.F.R. § 655.731(2)(ii).

1 of Labor currently defines them, should not be valid at all for H-1B because they are less than
 2 median (that is, the normal prevailing wage). 79 Fed. Reg. at 14,451 & 20 C.F.R. § 655.731(2)(ii).
 3 Unfortunately, the Department of Labor is required to approve all H-1B Labor Condition
 4 Applications where wage claim are made within seven days unless there are obvious errors or in
 5 accuracies and the agency is prohibited from post approval review. 8 U.S.C. § 1182(n)(1) &
 6 (n)(2)(G)(v). Therefore, prevailing wage claims and wages less than the actual prevailing wage for
 7 the occupation and location are automatically approved and make up the majority of prevailing
 8 wage claims. *See GAO Report*, at 58.

10 The modification to the Electronic Registration Process also makes America more
 11 competitive on the world market in acquiring highly skilled workers. For example, the system used
 12 in Canada places greatest value on workers with at least six years of experience. Government of
 13 Canada, *Six selection factors—Federal Skilled Worker Program* (Sept. 3, 2020).¹³ As a
 14 consequence, the current lottery system pushes highly skilled workers to Canada while America
 15 gets largely random entry-level workers under H-1B. *GAO Report*, at 58. Under the new
 16 regulation, highly skilled workers will have priority in getting H-1B visas over low skilled
 17 workers.
 18 workers.

20 The idea of using wages to allocate visas has widespread support. The Cato Institute argued
 21 that a wage-based selection is one way to get the most out of the H-1B program. Chad Sparber,
 22 Cato Inst., *An Alternative to the H-1B Lottery* (Sept. 6, 2017).¹⁴ Senators Richard Durbin and
 23

24 ¹³ Available at [https://www.canada.ca/en/immigration-refugees-](https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html)
 25 [citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-](https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html)
 26 [selection-factors-federal-skilled-workers.html](https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html) (last visited July 30, 2021).

27 ¹⁴ Available at [https://www.cato.org/publications/research-briefs-economic-](https://www.cato.org/publications/research-briefs-economic-policy/alternative-h-1b-lottery)
 28 [policy/alternative-h-1b-lottery](https://www.cato.org/publications/research-briefs-economic-policy/alternative-h-1b-lottery) (last visited July 30, 2021).

1 Charles Grassley have also called for a wage-based allocation of H-1B visas to improve the
 2 program. Sen. Richard Durbin and Sen. Charles Grassley, Letter to DHS Sec. Mayorkas (Mar. 3,
 3 2021).¹⁵

4 **III. THE MODIFICATIONS TO THE ELECTRONIC REGISTRATION PROCESS**
 5 **HELP AMERICAN WORKERS.**

6 H-1B workers are overwhelmingly low paid, with only 17% of employer prevailing wage
 7 claims being at or above the prevailing wage for the occupation and location as required by statute.
 8 *Compare GAO Report*, at 58; 20 C.F.R. § 655.731(2)(ii) with 8 U.S.C. § 1182(n)(1). This outcome
 9 is antithetical to the H-1B program’s statutory intent. 8 U.S.C. § 1182(n)(1). An Indian market
 10 analysis company writing for investors points out that its Information Technology industry “has
 11 relied on labour arbitrage for maintaining margins” and that U.S. wages are about 25–30% higher
 12 than H-1B wages. CRISIL, *Bulging staff cost, shrinking margins Operating margins of IT firms to*
 13 *shrink yet again, as H-1B visa rules continue to curb arbitrage* (May 27, 2019).¹⁶ U.S. employers
 14 routinely take advantage of this huge H-1B–American worker wage differential to use foreign
 15 firms (generally Indian) to supply H-1B replacements for their American workers. *See, e.g., Joseph*
 16 *N. DiStefano, Decision day for 1,300 Vanguard workers as their jobs head to India-based Infosys,*
 17 *PHILA. INQUIRER*, July 29, 2020;¹⁷ *N.Y. TIMES, supra; CHATTANOOGA TIMES FREE PRESS, supra.*
 18 American workers have grounds for hope that the modifications to the Electronic Registration
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 24 ¹⁵ Available at <https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-to-dhs-implement-h1-b-visa-program-reforms> (last visited July 30, 2021).

25 ¹⁶ Available at <https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html> (last visited July 30, 2021).

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 27 ¹⁷ Available at <https://www.inquirer.com/news/vanguard-infosys-outsourcing-recordkeeping-20200729.html> (last visited July 30, 2021).
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1 System will focus the H-1B program on highly skilled workers who create jobs, rather than low-
2 paid workers who displace Americans.

3 **CONCLUSION**

4 For the foregoing reasons, the plaintiffs' motion for summary judgment should be denied
5 and the defendants' cross-motion for summary judgment should be granted.

6 Dated: July 30, 2021

7 Respectfully submitted,

8 /s/ Lawrence J. Joseph

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