

IS THE GAME STILL WORTH THE CANDLE (OR THE VISA)?
HOW THE H-1B VISA LOTTERY LAWSUIT ILLUSTRATES THE
NEED FOR IMMIGRATION REFORM

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I. INTRODUCTION

For many immigration attorneys, U.S. companies, and foreign nationals, April 1 is one of (if not the) most stressful days of the year.¹ Aptly known as “April Fools’ Day” to the rest of the nation, April 1 has become one of the busiest, most taxing, and comically challenging days in the practice of immigration law. The reason this otherwise innocuous day brings forth so much anxiety is because every year on April 1, the U.S. government opens what has become known as the “H-1B Visa Lottery”—arguably the worst game ever invented by our government in the history of our country.²

The H-1B Visa Lottery is the mechanism employed by the U.S. government (through its agency, the U.S. Citizenship and Immigration Services (“USCIS”)) to allocate the 65,000 H-1B visas that are available to foreign nationals every fiscal year.³ The H-1B visa is exceedingly popular because it provides foreign nationals who possess a bachelor’s degree or equivalent with temporary authorization to work in the United States for a specific employer

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¹ See Gary Endelman & Cyrus Mehta, *America Cannot be Open for Business through an H-1B Visa Lottery*, INSIGHTFUL IMMIGR. BLOG (Mar. 30, 2015), <http://blog.cyrusmehta.com/2015/03/america-cannot-be-open-for-business-through-an-h-1b-visa-lottery.html>.

² See *id.*

³ See 8 U.S.C. § 1184(g)(1)(A) (2012). An additional 20,000 H-1B visas are reserved for foreign nationals who have earned master’s degrees from accredited public or private non-profit U.S. universities. This number is referred to as the “master’s cap.” See *id.* § 1184(g)(5)(C); David H. Nachman et al., *Not Every Degree Qualifies Foreign Nationals for H-1B Master’s Cap*, STERLING EDUC. SERVS., INC. (June 9, 2016), <http://sterlingeducation.com/the-sterling-blog/not-every-degree-qualifies-foreign-nationals-for-h-1b-masters-cap>.

for a period of up to six years.⁴ Due to its popularity and relatively easy eligibility requirements, significantly more than 65,000 H-1B petitions are filed nearly every year.⁵ In fact, in the last three years alone, USCIS received more than 100,000 H-1B petitions during the first five business days in April—almost double the amount available for that year.⁶

Since the demand for H-1B visas clearly and continuously well exceeds the supply, USCIS conducts a lottery wherein the agency arbitrarily and randomly selects the number of petitions it predicts will be enough to fill the aforementioned quota.⁷ The agency has not provided the public with information on exactly how it conducts this lottery.⁸ The remainder of the unlucky petitions that are not selected are returned to the U.S. companies who filed them.⁹ Then the companies and the foreign nationals begin the year-long wait until the following April 1 when they are eligible to resubmit the petitions and hope they win big in the lottery their second (or third or fourth) time around.¹⁰

To the casual onlooker, the H-1B Visa Lottery probably doesn't seem that bad. After all, it ostensibly provides each employer (referred to as "the petitioner") with a fair shake at having their prospective foreign national workers selected for the temporary employment visa.¹¹ However, as explained in more detail in subsequent discussions in this article, the H-1B Visa Lottery has become less and less "fair," as companies and immigration law practitioners alike have conceived of savvy ways to heighten their chances of having USCIS select and approve their petitions.¹²

The frustrations caused by the H-1B Visa Lottery have long and loudly been bemoaned by employers, foreign nationals, and

⁴ See 8 U.S.C. § 1184(g)(4); George N. Lester IV, *The H-1B Series: Finale*, IMMIGR. DAILY, <https://www.ilw.com/articles/2003,0303-lester.shtm> (last visited Nov. 3, 2016).

⁵ See U.S. CHAMBER OF COMMERCE, H-1B PETITION DATA FY1992–PRESENT, https://web.archive.org/web/20160222174414/http://immigration.uschamber.com/uploads/sites/400/USCC-USCIS-H1B-petition-data-and-cap-dates-FY92-FY16_2.pdf (last visited Nov. 1, 2016).

⁶ See *id.*

⁷ See generally Endelman & Mehta, *supra* note 1 (noting that this number is slightly more than 65,000 in order to take into account petitions that are denied and therefore do not ultimately receive one of the available visas).

⁸ See Press Release, Am. Immigration Council, *Lawsuit Seeks Transparency in H-1B Lottery Process* (May 23, 2016), <https://www.americanimmigrationcouncil.org/news/lawsuit-seeks-transparency-h-1b-lottery-process>.

⁹ See *id.*

¹⁰ See Endelman & Mehta, *supra* note 1.

¹¹ See *id.*; see also Press Release, *supra* note 8 (explaining how the lottery uses a random computer-generated system and the selection process therefore does not favor one company over another).

¹² See discussion *infra* Part IV.

immigration attorneys.¹³ However, recently, a number of affected persons have decided to take their grievances to the court. In June 2016, a class-action lawsuit was filed in the United States District Court for the District of Oregon, challenging the legal basis for USCIS to conduct an H-1B Visa Lottery at all.¹⁴ According to the law firm that filed the case, the lawsuit's purpose (among others) is to allow the companies, whose H-1B petitions are not selected in a given year, to resubmit their applications in the following year and enjoy preferential treatment in that next year's lottery in the form of a reserved place in line, ahead of those who are filing an H-1B petition for the first time.¹⁵ As discussed in greater detail below, this seemingly innocent request would shake the H-1B Visa Lottery system to its very core and dramatically alter the way these visas are allocated and awarded each year.¹⁶

The national media discussed or referenced H-1B visas very frequently during the 2016 election cycle, as immigration continues to be a hot-button issue for the country as a whole.¹⁷ However, the media coverage rarely provided an in-depth explanation of this particular visa, its parameters and requirements, or how it functions within the context of employment-based immigration law and policy in the United States.¹⁸ Due to this routine lack of information that is disseminated about this critically important topic, a closer examination of the H-1B Visa Lottery lawsuit is clearly warranted.

To do so, Part II provides an in-depth explanation of the H-1B visa and its lottery system. Part III examines the H-1B Visa Lottery lawsuit and discusses the legal reasoning behind the court challenge. Part IV posits the likely benefits and disadvantages that would result from the lawsuit's success, and discusses the substantive changes that would be implemented to the H-1B framework. Part V provides alternative solutions that may be put

¹³ See, e.g., Endelman & Mehta, *supra* note 1 ("It is self evident that the cap hinders the ability of a company to hire skilled and talented workers in order to grow and compete in the global economy.").

¹⁴ See Complaint at 1, 8, *Tenrec, Inc. v. U.S. Citizenship & Immigration Servs.*, No. 3:16-cv-00995 (D. Or. June 29, 2016).

¹⁵ See *id.* at 13.

¹⁶ See discussion *infra* Part IV.

¹⁷ See, e.g., Frank Camp, *Immigration Such a Hot-Button Issue in 2016 Election That a Stunning Percentage Will Only Vote for Candidate They Agree With on the Matter*, INDEP. J. REV. (2015), <http://ijr.com/2015/09/417923-new-polling-dats-suggests-immigration-may-confusing-issue-2016-election/>.

¹⁸ See, e.g., *id.* (providing an example article that shows that now-President Donald Trump made immigration reform one of the primary talking points during his campaign, but the article contains no mention of the H-1B visa).

forth by both Congress and USCIS to cure the ills caused by the H-1B Visa Lottery outside of the relief sought in the lawsuit at issue in this article. Finally, Part VI offers a conclusion.

The H-1B visa program provides excellent opportunities for U.S. employers to attract foreign talent and to put that talent to use in businesses across the country in order to improve the nation's economy as a whole.¹⁹ Hospitals, schools, large-scale software development companies, technology consulting firms, and financial institutions represent just a small number of companies that routinely sponsor foreign nationals for H-1B visas.²⁰ However, these opportunities are frustratingly compromised and constrained due to the existing arbitrary process utilized by USCIS to abide by the regulatory cap on the amount of H-1B visas that may be issued each year.²¹ By looking to the precise language of the immigration law and regulations governing this visa category, coupled with a commonsense balance of the needs of U.S. employers against the extant immigration framework, the federal government can surely arrive at a better system for allocating these visas that effectively and fairly fulfills the longstanding need for comprehensive and realistic immigration reform.

II. PICKING NUMBERS AND BUYING THE TICKET: A PRIMER ON THE H-1B VISA AND LOTTERY

The Immigration and Nationality Act of 1990 created both the H-1B visa and its cap of 65,000 visas per fiscal year.²² Then in 1999, the annual cap was increased to 115,000 as a result of new provisions in the American Competitiveness and Workforce

¹⁹ See Jeffrey Sparshott, *Immigration Does More Good Than Harm to Economy, Study Finds*, WALL STREET J. (Sept. 22, 2016), <http://www.wsj.com/articles/immigration-does-more-good-than-harm-to-economy-study-finds-1474568991>; Press Release, N.Y.C. Econ. Dev. Corp., NYCEDC and CUNY Launch IN2NYC Program for International Entrepreneurs (Feb. 18, 2016), <http://www.nycedc.com/press-release/nycedc-and-cuny-launch-in2nyc-program-international-entrepreneurs>.

²⁰ See OFFICE OF FOREIGN LABOR CERTIFICATION, EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, H-1B TEMPORARY SPECIALTY OCCUPATIONS LABOR CONDITION PROGRAM—SELECTED STATISTICS, FY 2016 YTD (June 30, 2016), https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2016/H-1B_Selected_Statistics_FY2016_Q3.pdf.

²¹ See Endelman & Mehta, *supra* note 1; *H-1B Fiscal Year (FY) 2017 Cap Season*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2017-cap-season> (last updated Apr. 7, 2016).

²² See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5019 (codified as amended in scattered sections of 8 U.S.C. (2012)); Kumar, *H1B Visa Total Cap Stats from 1990 to 2017, Trend Plot until 2017*, REDBUS2US (Mar. 5, 2016), <http://redbus2us.com/h1b-visa-total-cap-stats-from-1990-to-2017-trend-plot-until-2017/>.

Improvement Act.²³ The cap was again increased to 195,000 in 2001 by the American Competitiveness in the Twenty-First Century Act, before being reduced back to 65,000 in 2004.²⁴ That same year was the inaugural year that added 20,000 more visas specifically reserved for foreign nationals who earned master's degrees from an accredited public or private non-profit U.S. university.²⁵ The numerical cap remains unchanged since 2004.²⁶

As briefly touched upon above, the H-1B visa is a temporary (or “nonimmigrant”) work visa that allows the foreign national to work for the U.S. employer that filed the petition on the national's behalf.²⁷ Eligibility for an H-1B visa is twofold. First, the job offered to the foreign national must qualify as a “specialty occupation.”²⁸ According to the USCIS regulations, a specialty occupation is one that normally requires a bachelor's degree, or its foreign equivalent, in order to perform the occupation's job duties.²⁹ While it may be commonsense knowledge that some positions require at least a bachelor's degree, such as a physician, CEO, or accountant, USCIS frequently doubts the veracity of a specialty occupation claim for positions such as programmer analyst, store manager, or chef.³⁰ Therefore, every H-1B petition must include

²³ See American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended in scattered sections of 8 U.S.C.); Kumar, *supra* note 22.

²⁴ See American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251, 1251 (codified as amended in scattered sections of 8 U.S.C.); Kumar, *supra* note 22.

²⁵ See Kumar, *supra* note 22.

²⁶ See *id.*

²⁷ See 8 C.F.R. § 214.2(h) (2016).

²⁸ See *id.* § 214.2(h)(4)(iii)(A).

²⁹ See *id.*; see also U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SECURITY, INSTRUCTIONS FOR PETITION FOR NONIMMIGRANT WORKER: USCIS FORM I-129, at 7 (Aug. 13, 2015), <https://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf> [hereinafter INSTRUCTIONS FOR FORM I-129] (describing what qualifies as a “specialty occupation”). Recent USCIS decisions have imposed an additional requirement that the foreign national possess a bachelor's degree that is related to the specialty occupation. While this may be considered a commonsense requirement, it does not appear in the USCIS regulations, thereby again questioning how far USCIS may go to implement parameters on the H-1B program.

³⁰ See U.S. Citizenship & Immigration Servs., Admin. Appeals Office, Decision Letter on a Petition for a Nonimmigrant Worker 2, 12 (June 8, 2012), [https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20\(H-1B\)/Decisions_Issued_in_2012/Jun082012_08D2101.pdf](https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2012/Jun082012_08D2101.pdf); U.S. Citizenship & Immigration Servs., Admin. Appeals Office, Decision Letter on a Petition for a Nonimmigrant Worker 2, 9 (Apr. 1, 2011), [https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20\(H-1B\)/Decisions_Issued_in_2011/Apr012011_11D2101.pdf](https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2011/Apr012011_11D2101.pdf); U.S. Citizenship & Immigration Servs., Admin. Appeals Office, Decision Letter on a Petition for a Nonimmigrant Worker 2, 8 (Dec. 3, 2010), [https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20\(H-1B\)/Decisions_Issued_in_2010/Dec032010_10D2101.pdf](https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2010/Dec032010_10D2101.pdf).

proof, or at least an explanation, to confirm that the position in question in fact qualifies as a specialty occupation.³¹

The second requirement is that the foreign national must possess all of the qualifications necessary to perform the job duties of the specialty occupation through his or her education, work experience, or a combination of these credentials.³² To prove this eligibility, each H-1B petition must include copies of the foreign national's degrees, transcripts, and/or work experience letters along with a detailed explanation of how these credentials equip the national with the skills and knowledge needed to perform the job duties of the specialty occupation.³³

The USCIS adjudication officer may question any aspect of an H-1B petition, but most frequently calls into question one or both of these requirements.³⁴ When an officer does not believe that a position qualifies as a specialty occupation or that the foreign national is qualified to perform the job duties, the officer will issue a formal "Request for Evidence" to the petitioning employer.³⁵ This Request will inform the employer of the petition's deficiencies and instruct the employer on what forms of evidence USCIS will accept in order to issue an approval for the case.³⁶

To request an H-1B visa, employers must complete a Form I-129 "Petition for Nonimmigrant Worker" and file this petition, along with the supporting documentation and applicable fees, with the correct USCIS service center with jurisdiction over the employer.³⁷ As stated above, in order to be considered in the H-1B Visa Lottery, the employer should file the petition and ensure delivery to USCIS during the first five business days in April. The regulations require USCIS to accept H-1B petitions during these first five days, no matter how many petitions it receives on April 1.³⁸ Thus, delivery

1B)/Decisions_Issued_in_2010/Dec032010_18D2101.pdf.

³¹ See INSTRUCTIONS FOR FORM I-129, *supra* note 29, at 7.

³² See 8 C.F.R. § 214.2(h)(4)(iii)(A).

³³ See INSTRUCTIONS FOR FORM I-129, *supra* note 29, at 7.

³⁴ See, e.g., sources cited *supra* note 30 (illustrating challenges to H-1B petitions on the ground that petitioners failed to demonstrate that the foreign national possessed a specialty skill); see also *U.S. H-1B Visa for Specialty Workers*, WORKPERMIT.COM, <http://www.workpermit.com/immigration/usa/us-h-1b-visa-specialty-workers> (last visited Nov. 7, 2016) ("Positions that are not specialty occupations, or for which the candidate lacks the qualifications/experience for an H-1B visa, may be filled using an H-2B visa.")

³⁵ See *My Case Status: Request for Evidence*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/cris/Dashboard/CaseStatus/BucketDescriptions.do> (last visited Nov. 7, 2016).

³⁶ See *id.*

³⁷ See 8 C.F.R. § 214.2(h)(2)(i)(E) (2016).

³⁸ See Press Release, U.S. Citizenship & Immigration Servs., USCIS Will Accept H-1B Petitions for Fiscal Year 2017 Beginning April 1, 2016 (Mar. 16, 2016), <https://www.uscis.gov>

on April 1 is not strictly required but has become the standard practice in immigration law because it is the first day the H-1B cap opens.³⁹ It is worth noting, however, that even though the cap opens on April 1, the H-1B winners will not actually take up their H-1B status until October 1, which is the start of the fiscal year.⁴⁰ April 1 became the start date for the H-1B Visa Lottery because USCIS regulations prohibit employers from filing petitions more than six months before the foreign worker's anticipated start date.⁴¹

Starting on April 1 and continuing through the five business days, USCIS service centers will accept the submitted H-1B petitions.⁴² Typically, USCIS publishes updates on the H-1B count on its website and will publish an official announcement once it receives enough petitions to exhaust the quota.⁴³ Once enough petitions are received and the cap is reached, USCIS will return the unselected petitions to the unlucky employers.⁴⁴ When USCIS returns the complete petition to the employer, no filing fees are collected because the petition did not make it through the lottery.⁴⁵ The only acknowledgement of this that the employer receives is a standard form explaining to the employer that the petition was not selected in the lottery.⁴⁶

The petitions that are selected will receive the same treatment as all other immigration petitions: USCIS will assign a unique receipt number to each case and provide the employer with a paper receipt notice which bears the case's number.⁴⁷ The employer can look up the status of the case by typing the receipt number into the USCIS website.⁴⁸ Because USCIS has so many petitions that require

/news/news-releases/uscis-will-accept-h-1b-petitions-fiscal-year-2017-beginning-april-1-2016.

³⁹ See *id.*

⁴⁰ See Endelman & Mehta, *supra* note 1.

⁴¹ See *H-1B Fiscal Year (FY) 2017 Cap Season*, *supra* note 21.

⁴² See Press Release, *supra* note 38.

⁴³ See, e.g., Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches FY 2017 H-1B Cap (Apr. 7, 2016), <https://www.uscis.gov/news/news-releases/uscis-reaches-fy-2017-h-1b-cap>.

⁴⁴ See Press Release, U.S. Citizenship & Immigration Servs., USCIS Completes the H-1B Cap Random Selection Process for FY 2016, <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016> (last updated Apr. 13, 2015).

⁴⁵ See *id.*

⁴⁶ See, e.g., Kumar, *H1B Lottery Rejection Letter Sample FY 2016 VCS and CSC*, REDBUS2US (June 23, 2015), <http://redbus2us.com/h1b-lottery-rejection-letter-sample-fy-2016-vsc-and-csc/> (providing an actual example of this standard rejection form).

⁴⁷ See, e.g., Kumar, *USCIS Online H1B Case Status Meaning—Detailed Screenshots, Changes Flow*, REDBUS2US (May 4, 2016), <http://redbus2us.com/uscis-online-h1b-case-status-meaning-detailed-screenshots-changes-flow/> (providing an example of a petition that was selected).

⁴⁸ See *id.*

processing (either issuing receipt notices for selected petitions or return notices for rejected petitions), it can take several weeks for the employer to find out if a petition was selected.⁴⁹ Due to the amount of petitions USCIS must review, it can then take several more weeks or even months for the employer to receive a final decision on the case.⁵⁰

As discussed in further detail below, one of the realities of the H-1B Visa Lottery that is loudly hailed as unfair is the fact that a petition which is selected and then denied does *not* free up space for a previously rejected petition to be included in the lottery.⁵¹ This practice, along with others, has spurred one law firm to take the perceived injustices of the H-1B Visa Lottery to task in the court system.⁵² The closer examination of the H-1B Visa Lottery lawsuit which is presented in the next part may in fact bolster the argument for getting rid of the lottery altogether.

III. FEELING LUCKY: THE H-1B VISA LOTTERY LAWSUIT

On June 29, 2016, the law firm of Parrilli Renison LLC filed its complaint for the class-action suit challenging the legality of the H-1B Visa Lottery in the United States District Court for the District of Oregon.⁵³ The lawsuit alleges that that USCIS's action to conduct a random lottery is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," and therefore the agency's action is in violation of the Administrative Procedures Act.⁵⁴ In support of this claim, the lawsuit cites the applicable statute governing the issuance of H-1B visas, 8 U.S.C. § 1184(g)(3), which states: "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status."⁵⁵ Thus, the lawsuit argues, the plain language of the statute requires USCIS to process the H-1B

⁴⁹ See Kumar, *How Long Does H1B Visa Processing Take? Petition Premium vs. Regular?*, REDBUS2US (May 24, 2016), <http://redbus2us.com/how-long-does-h1b-visa-processing-take-petition-premium-vs-regular/>.

⁵⁰ See Press Release, *supra* note 38; see also *H-1B Frequently Asked Questions*, BERKELEY INT'L OFF., http://internationaloffice.berkeley.edu/h-1b_faqs (last visited Nov. 4, 2016) (discussing the timeframe for obtaining H-1B status).

⁵¹ See Complaint, *supra* note 14, at 4–7, 11–12.

⁵² *Id.* at 1, 14; see Brent Renison, *H-1B Lottery is Illegal*, PARRILLI RENISON LLC: ENTRYLAW (Mar. 31, 2016), <http://www.entrylaw.com/blog/h-1b-lottery-is-illegal>.

⁵³ Complaint, *supra* note 14, at 8, 14–15.

⁵⁴ *Id.* at 9–10.

⁵⁵ *Id.* at 10; see 8 U.S.C. § 1184(g)(3) (2012).

petitions in the order in which the petitions are received.⁵⁶

Due to the agency's failure to abide by the plain language of the statute, the lawsuit claims that the affected parties, which include both the U.S. employers who file the petitions and the foreign nationals who are the potential beneficiaries thereof, are unlawfully subjected to a "potentially never ending game of chance" because a number of particularly unlucky individuals may never be selected in the lottery even though their prospective employers file a petition on their behalf year after year.⁵⁷ Additionally, in its press release about the class-action suit, the law firm claimed that the lottery losers are further harmed because many of them are forced to leave their jobs and homes in the U.S. and uproot their families in order to return to their home country.⁵⁸

In its prayer for relief, the lawsuit's complaint outlines the desired action to be taken by the court.⁵⁹ The complaint compares the aforementioned statute governing the issuance of H-1B visas to the statute that governs the issuance of immigrant visas (i.e., "green cards").⁶⁰ During this comparison, the complaint highlights that, for immigrant visas, the applicable statute says: "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 . . ." ⁶¹ The complaint argues that the two statutes are materially the same in that they both require the visas in question to be issued in the order in which the petitions are filed with USCIS.⁶²

However, the primary difference between the two statutes, as the complaint points out, is that the immigrant visa statute provides for the assignment of a "priority date," which marks the order in which each petition is filed, thereby creating a waiting list for immigrant visa petitions.⁶³ Once the priority date assigned to the immigrant visa petition is published on the Department of State's monthly "Visa Bulletin," the petition's beneficiary will receive the immigrant visa.⁶⁴ Thus, in contrast to the unlucky H-1B petitions, immigrant

⁵⁶ See Complaint, *supra* note 14, at 10.

⁵⁷ *Id.* at 6, 11.

⁵⁸ See Renison, *supra* note 52.

⁵⁹ See Complaint, *supra* note 14, at 13–14.

⁶⁰ See *id.* at 10–11.

⁶¹ *Id.* at 10; see 8 U.S.C. § 1153(e)(1) (2012).

⁶² See Complaint, *supra* note 14, at 10.

⁶³ See *id.* at 10–11; see also 8 C.F.R. § 204.5(d) (2016) (providing the regulatory provision regarding priority dates).

⁶⁴ See Complaint, *supra* note 14, at 10; see also 8 C.F.R. § 245.1(g)(1) (providing the regulatory provision regarding the Visa Bulletin process).

visa petitions are *not* rejected outright and are not processed through a random lottery selection.⁶⁵

The complaint notes that if Congress had desired to implement a random lottery process for H-1B visas, it clearly had the legislative power to do so since Congress did determine that such a process was necessary for the distribution of “diversity visas.”⁶⁶ The applicable statute governing this visa program specifically 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.”⁶⁷ Consequently, the complaint alleges that the interpretive principle of *expressio unius est exclusio alterius* when applied to the parallel provisions of the H-1B and immigrant visa provisions, as compared to the disparate diversity visa provision, demands that both the H-1B and the immigrant visa petitions be governed by the same procedures—which is the assignment of a priority date and not an outright rejection of the petition.⁶⁸

Therefore, the complaint charges the court with eradicating the H-1B Visa Lottery system completely, and in its place establishing a priority date assignment system identical to that which is used for immigrant visa petitions.⁶⁹ While the plaintiffs make a strong case for their position, the next section closely examines both the benefits and disadvantages of a ruling in their favor—and posits why a win for these plaintiffs may not result in a jackpot for all H-1B petitioners and beneficiaries.

IV. WINNERS AND LOSERS: POTENTIAL EFFECTS OF THE H-1B VISA LOTTERY LAWSUIT

Should the court rule in favor of the plaintiffs, perhaps the greatest achievement would be that of increased transparency and objective fairness throughout the H-1B visa process as a whole. In its “FAQs” on the lawsuit, the law firm argues that a practical structure for priority date assignment would replace the current system of chance and would reward those employers who took

⁶⁵ See Complaint, *supra* note 14, at 10.

⁶⁶ See *id.* at 11; see also 8 U.S.C. § 1153(c), (e)(2) (2012) (defining and describing the statutory process for issuing “diversity visas.”).

⁶⁷ 8 U.S.C. § 1153(e)(2); see Complaint, *supra* note 14, at 11.

⁶⁸ See Complaint, *supra* note 14, at 11.

⁶⁹ See *id.* at 13.

efforts and action to promptly file their H-1B petitions.⁷⁰ Additionally, the FAQs allege that the current lottery system has yielded the unfair (and most likely unintended) consequence of greatly benefiting larger companies that have multiple subsidiaries.⁷¹ This corporate structure allows one foreign worker to have several H-1B petitions filed on his or her behalf because each brand or subsidiary of the company can submit a petition.⁷² This strategy increases the worker's chances of being selected in the lottery.⁷³ The priority date assignment structure would remove the impetus for such schemes since there would no longer be the risk of outright rejection for any petition, and all petitions submitted in the same year would have the same priority date.⁷⁴

Moreover, from a practical standpoint, the assignment of a priority date and a clearly demarked place in an H-1B visa waiting line would also provide both the U.S. employers and the foreign national beneficiaries with the opportunity to make long-term plans, both in terms of staffing needs (from the company's perspective) and in terms of life plans such as pursuing higher education, having or growing a family, and moving from country to country (from the foreign national's perspective).

While these potential benefits should certainly be taken into consideration, the disadvantages that may flow from a ruling in the plaintiffs' favor may give the court pause when making its decision. First and foremost, while the complaint lauds the process for immigrant visa allotment and the assignment of priority dates, it makes absolutely no mention at all of the largest (and most dreaded) elephant in the room of immigration law—the priority date backlog.

As part of the Immigration and Nationality Act of 1990, “Congress [established] an annual limit[ation] on the number of green cards that may be allocated in every fiscal year,” similar to the yearly allotment for H-1B visas.⁷⁵ However, for the immigrant visas, Congress further spread the available number among the

⁷⁰ See *FAQs on H-1B Lottery Class Action Lawsuit*, PARRILLI RENISON LLC: ENTRYLAW, <http://static1.squarespace.com/static/52334c36e4b0dc010cb9d0e4/t/574f150e8a65e2aef7d6f67b/1464800527047/FAQs+on+H-1B+Lottery+Lawsuit.pdf> (last visited Nov. 2, 2016).

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See Complaint, *supra* note 14, at 10; *FAQs on H-1B Lottery Class Action Lawsuit*, *supra* note 70.

⁷⁵ Emily C. Callan & JohnPaul Callan, *Peter Approved My Visa, But Paul Denied It: An Analysis of How the Recent Visa Bulletin Crisis Illustrates the Madness that is U.S. Immigration Procedure*, 9 DEPAUL J. SOC. JUST. 1, 2 (2016).

different countries in the world to help ensure that nationals from a single country did not receive all of the available green cards in any particular year.⁷⁶ Since every year there are significantly more foreign nationals from certain countries, such as India and China, who wish to immigrate than there are green cards available, the immigrant visa categories for nationals from these countries “has become severely backlogged[,]” with the result that their priority date waiting line is “upwards of [ten] years.”⁷⁷

Thus, assigning priority dates for H-1B visa beneficiaries would almost certainly result in the same backlog whereby beneficiaries who had petitions filed for them in 2016 may not be eligible to begin working for the U.S. employer until several years later—if the offered position is even still available at the time of eligibility.

Because of this potential (almost guaranteed) backlog, the lawsuit’s victory may in reality deter many U.S. employers from filing H-1B petitions. A small number of companies may be willing to wait one to two years before their foreign workers can join the company, but as the waiting line gets longer and longer, the number of willing employers will likely decrease. While a decrease in willing employers may help reduce the backlog, this sort of system would merely create an endless chain of events whereby the backlog ebbs and flows from year to year. At least the current system, as unfair as it may seem, is reliable, consistent, and predictable.

However, there are other available solutions to cure the ills put forth in the plaintiffs’ complaint. As explained in the subsequent section, additional action may be taken by Congress and USCIS in order to address the perceived unfairness caused by the H-1B Visa Lottery system and concomitantly make great strides in fulfilling the loudly touted need for comprehensive immigration reform.

V. TAKING A GAMBLE ON H-1B VISA REFORMS

As previously stated, in the author’s opinion and experience (born from nearly eight years of work experience in employment-based immigration law), the H-1B visa is very popular among both foreign nationals and U.S. sponsoring employers due to the relative ease of meeting the visa’s eligibility requirements.⁷⁸ During the exceptionally contentious 2016 election cycle in particular, the H-1B visa made headlines bearing both criticisms and praises as the

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *See supra* notes 3–6 and accompanying text.

nation's law and policymakers continued to debate its parameters.⁷⁹ The foregoing lawsuit has highlighted that the system is not without its faults and it would be in the best interests of Congress to act pursuant to its Article II authority and update the H-1B visa laws.⁸⁰

A. The Easiest Legislative Fix: Increase the H-1B Cap

It need hardly be stated that the easiest (though likely not the quickest) way to address the lack of available H-1B visas is for Congress to simply increase the number of visas that may be issued each year. Since this would be such an easy and commonsense fix, it should come as no surprise that multiple bills that would increase the H-1B cap have continuously been introduced into both chambers of Congress. One such bill, originally sponsored by three Democratic and three Republican Senators, including vocal immigration opponents Marco Rubio and Jeff Flake, was titled the "Immigration Innovation," or "I-Squared," bill.⁸¹ This bill would have allowed U.S. companies to sponsor an unlimited amount of foreign national workers, so long as these workers possessed advanced degrees in the science, technology, engineering, or mathematics fields from U.S. institutions.⁸² Unfortunately, the I-Squared bill died in committee, and U.S. companies and foreign workers alike are still waiting for Congress to increase the statutory cap.⁸³

B. A Second Legislative Solution: Congress should Create More Employment Visa Categories

A much more radical (and therefore unlikely) solution would be for Congress to craft an entirely new temporary employment visa category that foreign nationals could utilize in the event that their H-1B petitions are not selected in the lottery. Many immigration-related bills already include provisions that create new employment visas.

⁷⁹ See, e.g., Camp, *supra* note 17.

⁸⁰ See *Tenrec, Inc. v. U.S. Citizenship & Immigration Servs.*, No. 3:16-cv-995-SI, 2016 U.S. Dist. LEXIS 129638, at *8–9 (D. Or. Sept. 22, 2016); Complaint *supra* note 14, at 11.

⁸¹ See I-Squared Act of 2015, S. 153, 114th Cong. (2015); Tony Lee, *Hatch, Rubio, Flake Co-Sponsor Bill to Increase H-1B Guest-Worker Visas*, BREITBART (Jan. 13, 2015), <http://www.breitbart.com/big-government/2015/01/13/hatch-rubio-flake-co-sponsor-bill-to-increase-h-1b-guest-worker-visas/>.

⁸² See Lee, *supra* note 81.

⁸³ See S. 153.

For example, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 provided for the implementation of a new agricultural worker visa program.⁸⁴ However, although visas for agricultural workers garner much attention in the context of immigration reform,⁸⁵ these visas aren't well-suited for foreign nationals who have achieved advanced degrees and possess specialized training and skills, and therefore are not adequately calculated to meet the need for more H-1B visas.⁸⁶

Presently, the most recent legislation crafted to alleviate the H-1B cap burden is the Startup Act of 2015.⁸⁷ The Startup Act aims to grant conditional permanent resident status (thereby bypassing the temporary visa route altogether) to a maximum of 50,000 foreign nationals who possess a master's or doctorate degree in a science, technology, engineering, or mathematics field.⁸⁸ These concentrations are collectively known as "STEM" and represent the "vast majority" of H-1B specialty occupations.⁸⁹ The Startup Act visa would allow these foreign nationals to remain in the U.S. for one year after the expiration of their student visa in order to give them time to secure a job position in one of the STEM fields.⁹⁰ Once the foreign national receives a STEM-related job offer, he or she would be admitted to the U.S. as a permanent resident.⁹¹

Unfortunately, neither of the aforementioned bills passed both chambers before the end of the relevant legislative term.⁹² Due to the increasingly contentious political climate, it is doubtful that any

⁸⁴ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

⁸⁵ See, e.g., Yunita Ong, *The H-2A Problem: Why a Perfectly Legal Farmworker Visa Program Isn't Being Used More*, UNITED PRESS INT'L (Mar. 5, 2015), http://www.upi.com/Top_News/US/2015/03/05/The-H-2A-problem-Why-a-perfectly-legal-farmworker-visa-program-isnt-being-used-more/7521425481876/.

⁸⁶ See generally *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last visited Nov. 7, 2016) (discussing the parameters of the temporary H-2A temporary agricultural workers visa).

⁸⁷ Startup Act, S. 181, 114th Cong. (2015).

⁸⁸ See *id.*

⁸⁹ See Jonathan Rothwell & Neil G. Ruiz, *H-1B Visas and the STEM Shortage*, BROOKINGS (May 10, 2013), <https://www.brookings.edu/research/h-1b-visas-and-the-stem-shortage/>.

⁹⁰ See S. 181.

⁹¹ See *id.*

⁹² See *id.* (showing that the Startup Act did not pass either chamber before the end of the legislative term); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (showing that the Border Security, Economic Opportunity, and Immigration Modernization Act passed the Senate but failed to pass the House before the end of the legislative term).

immigration-related law will be enacted any time soon.

C. The Stop-Gap Measure: USCIS should Promulgate New H-1B Regulations . . . and Adhere to the Regulations Currently in Place

USCIS is not empowered to make new laws, as this authority is reserved solely for Congress.⁹³ Nonetheless, the agency *is* authorized to promulgate its own regulations in order to execute its duties and these regulations can often have the force of law.⁹⁴

As briefly touched upon above, a petition, which is selected and then denied, does *not* free up space for a previously rejected petition to be included in the lottery.⁹⁵ However, a petition that is selected, approved, and then not used by the beneficiary to obtain the H-1B visa *is* supposed to free up space in the form of an additional visa number that will be added to the H-1B numbers the following year.⁹⁶ This carryover practice is specifically authorized in the H-1B regulations, which state:

When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petition that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year.⁹⁷

Unfortunately, USCIS simply does not follow this mandate. By its own admission, USCIS does not adhere to this regulation because the agency allegedly takes into account these potential scenarios (wherein approved visa petitions are ultimately not used by their beneficiaries) when conducting the initial lottery.⁹⁸ However, there is literally no way for USCIS to accurately predict how many approved petitions will go unused. The agency has no empirical method to use to ensure that it accepts enough petitions to fulfill the cap.⁹⁹

⁹³ See U.S. CONST. art. I, § 1.

⁹⁴ See, e.g., 8 C.F.R. § 2.1 (2016) (stating that the Secretary of Homeland Security may delegate the authority to any employee of the Department of Homeland Security—including USCIS employees—to create regulations to administer and enforce immigration laws).

⁹⁵ See Complaint, *supra* note 14, at 6–7.

⁹⁶ See 8 C.F.R. § 214.2(h)(8)(ii)(C).

⁹⁷ *Id.*

⁹⁸ See USCIS Service Center Operations H-1B Processing Q & A: AILA Doc. No. 07050267, Am. Immigr. Law. Ass'n (May 2, 2007) (on file with author).

⁹⁹ See OFFICE OF INSPECTOR GEN., DEPT' HOMELAND SEC., OIG-05-49: USCIS APPROVAL OF H-1B PETITIONS EXCEEDED 65,000 CAP IN FISCAL YEAR 2005, at 5 (2005), <https://www.oig>

The H-1B visa allotment system is not supposed to be a game of estimates and best guesses. The statute provides for 65,000 visas every year.¹⁰⁰ It does not provide for USCIS to make its own predictions regarding how many petitions will be denied or unused.¹⁰¹ Instead, USCIS has a comprehensive set of instructions that detail precisely how the agency should administer the H-1B program.¹⁰² One way to improve the program would be for USCIS to abide by its own regulations.

It should also be noted that there is another regulation in place that, if followed by USCIS, would also result in more available H-1B visa numbers. Foreign nationals from Chile and Singapore enjoy preferential treatment in the terms of opportunities for employment-based visas.¹⁰³ In 2003 Congress created a special employment visa called the H-1B1 visa just for Chilean and Singaporean nationals.¹⁰⁴ The H-1B1 visa is substantially similar to the H-1B visa and has its own caps of 1,400 for Chilean nationals and 5,400 for Singaporean nationals.¹⁰⁵ The statute also provides that any unused H-1B1 visas may *also* be added to the H-1B visa pool.¹⁰⁶ The text specifically states:

The annual numerical limitation . . . is reduced by the amount of the annual numerical limitations established under clause (i)[, which is 1,400 for nationals of Chile and 5,400 for nationals of Singapore]. However, if a numerical limitation established under clause (i) has not been exhausted at the end of a given fiscal year, the Secretary of Homeland Security shall adjust upwards the numerical limitation in paragraph (1)(A) for that fiscal year by the amount remaining in the numerical limitation under clause (i). Visas under section 1101(a)(15)(H)(i)(b) of this title may be issued pursuant to such adjustment within the first 45 days of the next fiscal year to aliens who had applied for

.dhs.gov/assets/Mgmt/OIG_05-49_Sep05.pdf.

¹⁰⁰ See 8 U.S.C. § 1184(g)(1)(A) (2012).

¹⁰¹ See, e.g., OFFICE OF INSPECTOR GEN., *supra* note 99, at 22 (“H-1B visas . . . should be precisely counted and given to beneficiaries taken in turn from a waiting list of approved petitions.”).

¹⁰² See 8 U.S.C. § 1184.

¹⁰³ See OFFICE OF INSPECTOR GEN., *supra* note 99, at 10.

¹⁰⁴ See United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909, 939–40 (2003) (codified as amended in scattered sections of 8 U.S.C.); United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948, 970 (2003) (codified as amended in scattered sections of 8 U.S.C.).

¹⁰⁵ See 8 U.S.C. § 1184(g)(8)(B)(ii).

¹⁰⁶ See *id.* § 1184(g)(8)(B)(iv).

such visas during the fiscal year for which the adjustment was made.¹⁰⁷

However, it is clear that USCIS does not follow this regulation since no “second chance” lottery to recoup the unused H-1B1 visa numbers has ever been conducted during the first forty-five days of the fiscal year.¹⁰⁸

In addition to complying with current agency rules, USCIS can also promulgate new regulations calculated to level the H-1B playing field. For example, there is already a regulation that prohibits one employer from filing multiple H-1B petitions on behalf of the same beneficiary.¹⁰⁹ This prohibition is *employer* specific, however, and therefore incentivizes companies that have multiple branches and/or subsidiaries to file numerous H-1B petitions for a single beneficiary.¹¹⁰ To remove this incentive, USCIS should promulgate a new regulation to make this prohibition *beneficiary* specific as well so that a beneficiary may only have one H-1B petition filed on his or her behalf per fiscal year.

VI. CONCLUSION

It is certainly true that the plaintiffs in the H-1B Visa Lottery lawsuit have been adversely impacted by the H-1B Visa Lottery. Many of the prospective beneficiaries and their sponsoring employers will likely file new H-1B petitions in subsequent fiscal years, but each time their petition is rejected, their hopes are simultaneously dashed.

This foregoing explanation of the H-1B Visa Lottery’s function in immigration law and how it has become the source of so many problems for so many foreign nationals and U.S. companies has clearly illustrated the overwhelming need for immediate immigration reform. Since Congress continues to miss its opportunities to address the need for more H-1B visas, the best available recourse now rests with USCIS itself. As the nation continues to wait for Congress to act on the wider issue of immigration reform, it is ardently hoped that USCIS will abide by its own regulations and implement new procedural solutions calculated to level the H-1B playing field and make the lottery a kinder game for all players.

¹⁰⁷ *Id.*

¹⁰⁸ See *H-1B Fiscal Year (FY) 2017 Cap Season*, *supra* note 21.

¹⁰⁹ See 8 C.F.R. § 214.2(h)(2)(i)(G) (2016).

¹¹⁰ See *FAQs on H-1B Lottery Class Action Lawsuit*, *supra* note 70.