

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ACQUIA INC.; RCI, LLC;)
SYNOPTEK, LLC; MARLY AND CO.)
DESIGN, LLC d/b/a/ MARLY AND CO.)
DESIGN STUDIO; SALMON SIMS)
THOMAS AND ASSOCIATES, PLLC;)
KNIT; and BRIDGE SOLUTIONS)
GROUP, INC.,)
)
Plaintiffs,)
)
v.)
)
U.S. CITIZENSHIP AND)
IMMIGRATION SERVICES; and)
TRACY RENAUD, in her official capacity)
as Senior Official Performing the Duties of)
the Director, U.S. Citizenship and)
Immigration Services,)
)
Defendants.)

**COMPLAINT FOR DECLARATORY RELIEF AND REVIEW OF AGENCY ACTION
UNDER THE ADMINISTRATIVE PROCEDURE ACT**

INTRODUCTION

1. Acquia Inc. (“Acquia”), RCI, LLC (“RCI”), Synoptek, LLC (“Synoptek”), Marly and Co. Design, LLC d/b/a Marly and Co. Design Studio (“Marly and Co.”), Salmon Sims Thomas and Associates, PLLC (“Salmon Sims”), KNIT, and Bridge Solutions Group., Inc. (“Bridge Solutions”) (also collectively referred to as “Plaintiffs”) bring this action challenging the arbitrary and capricious refusal of U.S. Citizenship and Immigration Services (“USCIS”) to accept timely and properly filed H-1B petitions which are subject to the annual statutory cap on H-1B visa numbers allocated each year (hereafter “H-1B Program”). *See* 5 U.S.C. §§ 706(1), 706(2)(A).

2. The sole basis for USCIS' refusal to accept the Plaintiffs' H-1B petitions is Plaintiffs did not backdate the start date of intended employment to October 1, 2020 (hereafter "H-1B backdating"). Plaintiffs filed their petitions *after October 1, 2020* (the start date of the new fiscal year), as they were permitted to do. Without any legal basis, USCIS contends that October 1, 2020 is the only permissible start date of employment that Plaintiffs could list on their H-1B petitions, even though the *actual* start date could not be October 1. No statute, regulation or published instruction for Form I-129 authorizes USCIS to accept as properly filed only petitions with an intended employment start date of October 1, 2020.

3. Requiring an October 1 start date would mean that only a foreign national who is able to start work precisely on October 1, 2020—and not a later date in the fiscal year—could be eligible to receive an H-1B visa number unless the petitioner affirmatively misrepresents the employment start-date. Such an absurd result is not reflected anywhere in the statute or regulations.

4. The H-1B statute and USCIS regulations do not state that an H-1B petition is properly filed only if it lists an employment start date of October 1 (the start date of the new fiscal year). The instructions to Form I-129 also are wholly silent on any such requirement of an October 1 start date. There is no other USCIS policy that limits an H-1B employee's start date to October 1.

5. USCIS has engaged in ad-hoc, inconsistent decision-making on this issue through its Vermont and California Service Centers, which process H-1B petitions. USCIS has approved some H-1B petitions with start dates after October 1, while rejecting other H-1B petitions filed with start dates after October 1. This differing treatment of similarly situated H-1B petitioners is the hallmark of arbitrary and capricious conduct.

6. Plaintiffs each filed their petitions after October 1, 2020. To comply with USCIS' arbitrary requirements, Plaintiffs would necessarily need to provide false data on a Form I-129,

which Plaintiffs and their counsel sign under penalty of perjury. This undermines the integrity of USCIS' own certification requirements on the Form I-129 and exposes Plaintiffs and their counsel to later allegations of providing USCIS with false data or information on a form signed under the penalty of perjury.

7. Further, this new practice of requiring H-1B backdating diverts sharply from more than two decades of the normative practice in connection with H-1B petitions. Historically, H-1B petitioners listed October 1 *or any start date thereafter*, so long as the date for commencement of H-1B employment was *within six months of filing*. See 8 C.F.R. § 214.2(h)(2)(i)(I). USCIS has never instructed petitioners to engage in backdating Form I-129 for H-1B classification, nor has it modified the certification on Form I-129 to carve out an exception for H-1B backdating.

8. USCIS' improper rejection of Plaintiffs' properly filed H-1B petitions has caused Plaintiffs harm. In most years, the demand for H-1B visa numbers has outpaced the supply, raising the stakes for employers and the individuals they seek to employ in H-1B status. USCIS has changed the rules of the H-1B Program with no notice and without any basis in statute, regulation, or published policy, causing chaos for Plaintiffs.

9. Defendants' position is not in accordance with law. Further, no law authorizes an employer to provide false information on a form signed under the penalty of perjury, which Form I-129 requires. USCIS cannot lawfully reject a petition solely on the ground that Plaintiffs did not engage in H-1B backdating, as it has done with Plaintiffs' petitions here.

10. By failing to promulgate a regulation specifying that Plaintiffs must list October 1 as a start date on their H-1B petitions, by failing to amend the published instructions to Form I-129 to reflect that October 1 is a mandatory start-date, and by seeking to force Plaintiffs and their attorneys to engage in unlawful backdating of the Form I-129, USCIS has engaged in arbitrary and

capricious conduct and withheld agency action it is required to take. As such, the agency's actions violate the Administrative Procedure Act (APA) and Plaintiffs seek judicial review under 5 U.S.C. § 706.

PARTIES

11. Plaintiff Acquia, established in 2007 and headquartered in Boston, Massachusetts, is an open-source digital experience company that empowers the world's most ambitious brands to embrace innovation. Acquia has offices across the United States and globally. Acquia has its headquarters at 53 State Street in Boston, Massachusetts. Acquia does business in Massachusetts.

12. Plaintiff RCI, established in 1974, is a wholly-owned subsidiary of Travel + Leisure Co. (formerly known as Wyndham Destinations, Inc.), and the world's leading provider of innovative products and services to the timeshare travel and leisure industry. RCI's global headquarters are located in Orlando, Florida.

13. Plaintiff Synoptek, established in 2013, is an information technology firm employing more than 300 individuals. Synoptek offers comprehensive IT management and consultancy services worldwide, with a focus on midmarket and Fortune 100 companies. Synoptek maintains its headquarters at 8181 Tufts Avenue, Denver, Colorado.

14. Plaintiff Marly and Co., established in 2010, is an interior design and construction firm providing solutions for high-end residential and commercial properties. Marly and Co. has its main offices at 3107 Cole Avenue in Dallas, Texas.

15. Plaintiff Salmon Sims, established in 1996, is a CPA firm with offices in Dallas and Austin, Texas. Salmon Sims offers accounting, tax, audit and business advisory services. Salmon Sims maintains its primary offices at 12720 Hillcrest Road, Suite 500, Dallas, Texas.

16. Plaintiff KNIT, established in 1985, is an architectural firm with more than 35 employees. KNIT maintains offices in Salt Lake City, Seattle and at 7250 Peak Drive, Suite 216, in Las Vegas, Nevada.

17. Plaintiff Bridge Solutions, established in 2010, is a provider of cross-industry information technology solutions. Bridge Solutions maintains its primary offices at 1 Bridge Plaza North, Fort Lee, New Jersey.

18. Defendant USCIS is a component of the Department of Homeland Security, 6 U.S.C. § 271, and an agency within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 551(1). USCIS is responsible for adjudicating immigration benefits, including H-1B petitions. USCIS rejected Plaintiffs' H-1B petitions.

19. Defendant Tracy Renaud is, at the time this Complaint is filed, the Senior Official Performing the Duties of the Director, as the position of USCIS Director remains vacant. In this position, she is responsible for overseeing the adjudication of immigration benefits and establishing immigration policies. The USCIS Director is ultimately responsible for the adjudication of H-1B petitions. Defendant Renaud is sued only in her official capacity.

JURISDICTION

20. This is a civil action against an agency and officer of the United States arising under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* Original jurisdiction over this matter is vested in this Court by 28 U.S.C. § 1331.

VENUE

21. Pursuant to 28 U.S.C. § 1391(e)(1)(C), venue is proper in the District Court for the District of Massachusetts. Acquia has its headquarters in Boston, Massachusetts and regularly transacts business in Massachusetts.

STATUTORY AND REGULATORY BACKGROUND

22. The H-1B visa category allows employers to petition for highly educated foreign professionals to work in “specialty occupations” that require at least a bachelor’s degree or the equivalent. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(B).

23. The H-1B Program has come to operate through an annual lottery process, with the parameters and rules spelled out in the law and federal regulations governing a registration process for the H-1B visa category. *See* 8 C.F.R. § 214.2(h)(8)(iii)(A)-(E). The lottery typically opens several months before the federal fiscal year begins on October 1.

24. The regulations governing the registration process include two provisions relating to the intended employment start date: “A petitioner may submit a registration during the initial registration period only if the requested start date for the beneficiary is the first day of the fiscal year.” 8 C.F.R. § 214.2(h)(8)(iii)(A). But where “USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner may submit a registration with a requested start date after the first business day for the applicable fiscal year, as long as the date of registration is no more than 6 months before the requested start date.” *Id.* The regulation is limited to the registration, never mentioning the Form I-129 (H-1B petition), and is silent as to the circumstances that occurred in 2020 (the very first year of the electronic H-1B registration process), where USCIS did not keep the registration period open

or re-open the registration period, but made a second selection of registrations from the initial registration period.

25. Here, Plaintiffs paid into the lottery in March 2020 and ultimately won the lottery, which gave them the ability to file an H-1B petition on behalf of the foreign national (the “beneficiary”) they intend to employ in H-1B status.

26. A company’s filing of an H-1B petition (Form I-129) with USCIS is a required step in the process for a foreign national to be able to work for the company in H-1B status.

27. For integrity and fraud prevention objectives, USCIS requires that H-1B petitioners and their counsel sign a certification to Form I-129, which expressly calls for a petitioner and their counsel to affirm the accuracy of all data and information supplied on a Form I-129.

28. The language of the attestation on Form I-129 that USCIS requires Plaintiffs to sign is as follows: “I certify, under the penalty of perjury, that I have reviewed this petition and that *all of the information contained in the petition, including all responses to specific questions, and in the supporting documents, is complete, true, and correct.*” (Emphasis added.)

29. The certification that counsel signs is based on the petitioner’s truthfulness. The language includes, inter alia: “By my signature, I certify . . . under penalty of perjury The petitioner has reviewed this completed petition as prepared by me and informed me that all of the information in the form . . . is complete, true, and correct.”

30. There is no USCIS regulation or policy that prohibits an H-1B worker from starting *after* October 1 in a given fiscal year to be eligible for H-1B status.

STATEMENT OF FACTS

31. Each Plaintiff in this action received a registration selection notice from USCIS on or around August 14, 2020. Plaintiffs were winners of a second round of lottery selections that

USCIS conducted from registrations submitted in March 2020, in the initial registration period, but not selected by USCIS in the first round.

32. The registration selection notices specified a filing period as required by the H-1B regulations. *See* 8 C.F.R. § 214.2(h)(8)(iii)(D)(1)-(2). Specifically, each Plaintiff was eligible to file an H-1B petition between August 17, 2020 and November 16, 2020 for the foreign national identified in their respective registrations. Roughly half of the time period that USCIS authorized for filing H-1B petitions was after October 1. Plaintiffs filed their H-1B petitions during the permissible window of acceptance of such petitions: between October 1, 2020 and November 16, 2020.

33. Upon information and belief, Defendants have accepted some H-1B petitions with an intended employment start date after October 1, that were filed by petitioners whose registrations were selected by USCIS, while rejecting Plaintiffs' H-1B petitions. But for each Plaintiff here, USCIS rejected Plaintiffs' H-1B petitions solely because such petitions listed an employment start date after October 1, 2020.

34. With its H-1B backdating policy, USCIS has acted arbitrarily and capriciously toward: (a) Plaintiff Acquia and Rachita Bhatia, the beneficiary of the H-1B petition Acquia filed; (b) Plaintiff RCI, and Akhilesh Abhay Manikeri and Huajing Jiang, the beneficiaries of the H-1B petitions RCI filed; (c) Plaintiff Synoptek, and Naga Venkata Satya Rajendra Kumar Chilukuri and Yury Azizovich Khanbutaev, the beneficiaries of the H-1B petitions Synoptek filed; (d) Plaintiff Marly and Co. and Maria Victoria Santillan Cordova, the beneficiary of the H-1B petition that Marly and Co. filed; (e) Plaintiff Salmon Sims and Sami Ui Isalm, the beneficiary of the H-1B petition Salmon Sims filed; (f) Plaintiff KNIT and Rui Yao, the beneficiary of the H-1B petition

KNIT filed; and (h) Bridge Solutions and Murali Pachiappan, the beneficiary of the H-1B petition Bridge Solutions filed.

35. The only basis for rejection given by USCIS is that each Plaintiff listed a start date of intended employment after October 1, 2020 on Form I-129. Defendants did not cite any statutory or regulatory basis for these rejections. Historically, when the H-1B cap has not been reached by October 1 of a given fiscal year, employers frequently filed Form I-129 petitions after October 1, and USCIS never rejected those for listing a start date after October 1.

36. These arbitrary and capricious rejections injure Plaintiffs for being truthful, and not listing a false intended employment start date on Form I-129.

37. With its H-1B backdating policy, USCIS has acted arbitrarily and capriciously toward Plaintiffs.

FINAL AGENCY ACTION AND EXHAUSTION OF REMEDIES

38. Neither the Immigration and Nationality Act nor implementing regulations require a petitioner to take further administrative action after USCIS rejects a filing, which in this case is Plaintiffs' filing of their H-1B petitions.

39. Administrative appeal of USCIS' rejection of a filing is precluded by 8 C.F.R. § 103.2(a)(7)(iii). USCIS' rejection of the filing of a Plaintiff's H-1B petition or its rejection of a Plaintiff's refiling in those cases where a Plaintiff tried again, is the final agency action under the APA. *See* 5 U.S.C. §§ 551(13); 701(b)(2); 704. Plaintiffs have no administrative remedies to exhaust.

STATEMENT OF CLAIM

COUNT I

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) For Denying Form I-129 Petitions Arbitrarily, Capriciously, and Not In Accordance With Law

40. Plaintiffs incorporate by reference all preceding paragraphs.

41. The APA entitles “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . to judicial review.” 5 U.S.C. § 702.

42. “Agency action,” for purposes of the APA includes “an agency’s failure to act.” 5 U.S.C. § 551(13).

43. The APA empowers this Court to set aside a final agency action where, as here, the agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

44. Defendants arbitrarily and capriciously failed to accept and adjudicate Plaintiffs’ H-1B petitions. Defendants’ failure to accept Plaintiffs’ petitions has no basis in any federal statute, federal regulation or in USCIS’ own written instructions to Form I-129. Defendants have no legal authority to reject Plaintiffs’ petitions. The rejections are arbitrary and capricious.

45. Defendants have no basis to mandate H-1B backdating. No statute or regulation mandates Plaintiffs who intend to employ the beneficiaries of their H-1B petitions starting after October 1 to request employment with a start date of October 1, 2020. Defendants’ rejections of Plaintiffs’ H-1B petitions constitute a pattern of arbitrary and capricious action.

46. Defendants cannot assert 8 C.F.R. § 214.2(h)(8)(iii)(A) as a justification for rejecting Plaintiffs’ H-1B petitions. This regulation, which requires a requested start date of the first day of the fiscal year in a registration submitted during the initial registration period, cannot

rationality be applied to Defendant USCIS' second selection of registrations that were submitted in the initial registration period. In its registration selection notices, which Plaintiffs received on or around August 14, 2020, USCIS specified an H-1B petition eligibility filing period that included the time-period from October 2, 2020 through November 16, 2020.

47. USCIS expected and authorized the filing of H-1B petitions after October 1, 2020. For any petition filed after October 1, 2020, the beneficiary would not be starting work in H-1B status on October 1, 2020. Requiring an October 1, 2020 intended employment start date is an irrational application of 8 C.F.R. § 214.2(h)(8)(iii)(A) for H-1B petitions filed by Plaintiffs and others after October 1, as USCIS directed them to do by providing a post-October 1 filing period.

48. Defendants may not mandate that Plaintiffs falsify the certification of attestation on the Form I-129. H-1B backdating would require Plaintiffs to make a material misrepresentation with respect to the start date of intended employment on Form I-129.

49. Defendants have engaged in arbitrary and capricious action in rejecting Plaintiffs' petitions solely because Plaintiffs decline to make a sworn misrepresentation on Form I-129. Rather than safeguarding the integrity of the H-1B Program, USCIS is depriving Plaintiffs of access to the H-1B Program simply for abiding by the agency's certification language on Form I-129.

50. Plaintiffs properly filed their petitions with USCIS, after October 1, 2020 and within the permissible period for filing prescribed by the H-1B regulations for such filings.

51. Defendants' rejection of Plaintiffs' H-1B petitions, after payment and selection within the registration system, and Defendants' failure to act to remedy the erroneous rejections is arbitrary, capricious, an abuse of discretion, and not in accordance with law as set forth above. 5 U.S.C. § 706(2)(A).

COUNT II

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) for Inconsistent and Arbitrary Adjudication of Form I-129s with Post-October 1 Start Dates

52. Plaintiffs incorporate by reference all preceding paragraphs.

53. Defendants' rejections of Plaintiffs' H-1B petitions evince a pattern of arbitrary and capricious action. Upon information and belief, Defendants have accepted some H-1B petitions with an intended employment start date after October 1, that were filed by petitioners whose registrations were selected by USCIS in the same second selection period in August 2020, while rejecting Plaintiffs' H-1B petitions.

54. Defendants have no legal authority to reject Plaintiffs' petitions solely because they listed an intended employment start date after October 1, 2020.

55. Defendants have no legal basis for accepting some H-1B petitions with an intended employment start date after October 1, while rejecting Plaintiffs' and other petitioners' H-1B petitions solely for listing an intended employment start date after October 1.

COUNT III

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(1) for Unlawfully Withholding Agency Action

56. Plaintiffs incorporate by reference all preceding paragraphs.

57. The APA empowers this Court to compel agency action "unlawfully withheld." 5 U.S.C. § 706(1).

58. Defendants unlawfully rejected Plaintiffs' H-1B petitions. Defendants' failure to accept Plaintiffs' petitions has no basis in any federal statute, federal regulation, or in USCIS' own written instructions to Form I-129. Defendants have no legal authority to reject Plaintiffs' petitions.

59. Defendants have no legal basis to mandate H-1B backdating as a condition to accept an H-1B petition. No statute or regulation mandates Plaintiffs who intend to employ the beneficiaries of their H-1B petitions starting after October 1 to request employment with a start date of October 1, 2020.

60. Plaintiffs properly filed their petitions with USCIS, after October 1, 2020 and within the permissible period for filing prescribed by the H-1B regulations for such filings.

61. USCIS unlawfully withheld agency action when it rejected Plaintiffs' H-1B petitions, after payment and selection within the registration system. 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Issue a declaration that USCIS's rejection of Plaintiffs' Forms I-129 solely on the basis of Plaintiffs' listing an intended employment start date after October 1, 2020 is arbitrary, capricious, and not in accordance with the law;
2. Enter an Order compelling Defendants to accept Plaintiffs' improperly rejected H-1B petitions filed on behalf of the respective foreign national beneficiaries identified in the Complaint;
3. Enter an Order compelling Defendants to accept any and all H-1B petitions that Defendant has rejected for failing to engage in H-1B backdating;
4. Award Plaintiffs their reasonable attorneys' fees and costs under the Equal Access to Justice Act 28 U.S.C. § 2412, 5 U.S.C. § 504, or any other applicable law; and
5. Award any other such relief as the Court deems just, equitable, and proper.

Respectfully submitted,

/s/ Laurence A. Schoen

Laurence A. Schoen, BBO #633002
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, PC
One Financial Center
Boston, MA 02111
Tel: 617-348-1764
Email: LSchoen@mintz.com

Douglas Hauer, BBO #652730 (Admission to Court
forthcoming)
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, PC
One Financial Center
Boston, MA 02111
Tel: 617-348-3044
Email: dhauer@mintz.com

Leslie K. Dellon (pro hac vice forthcoming)
Katherine Melloy Goettel (pro hac vice
forthcoming)
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
Tel: 202-507-7530 (Dellon)
Tel: 202-507-7552 (Goettel)
Email: LDellon@immcouncil.org
Email: kgoettel@immcouncil.org

Andrew J. Driggs (pro hac vice forthcoming)
Driggs Immigration Law
17777 Center Court Drive N, Suite 600
Cerritos, CA 90703
Tel: 714-923-7080
Email: andrew@driggsimmigrationlaw.com

Lin Rose Walker (pro hac vice forthcoming)
Scott R. Malyk (pro hac vice forthcoming)
Meyner and Landis LLP
One Gateway Center, Suite 2500
Newark, NJ 07102
Tel: 973-602-3458 (Walker)
Tel: 973-602-3455 (Malyk)
Email: lwaker@meyner.com
Email: smalyk@meyner.com

Jeff Joseph (pro hac vice forthcoming)
Joseph & Hall P.C.
12203 East Second Avenue
Aurora, CO 80011
Tel: 303-297-9171
Email: jeff@immigrationissues.com

Noelia Rodríguez-Quiñones (pro hac vice
forthcoming)
Barnes & Thornburg LLP
201 S Main Street # 400
South Bend, IN 46601
Tel: 574-229-4527
Email: NRodriguez@btlaw.com

Sarah Hawk (pro hac vice forthcoming)
Barnes & Thornburg LLP
3475 Piedmont Road N.E. Suite 1700
Atlanta, GA 30305
Tel: 404-264-4030
Email: Sarah.Hawk@btlaw.com

Counsel for Plaintiffs

Dated: March 11, 2021