No. 22-5074
Oral Argument Not Scheduled

# United States Court of Appeals
*for the*
# D.C. Circuit

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**ITServe Alliance**

*Appellant*,

*v.*

**Department of Homeland Security**,

*Appellee*.

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On appeal from an order entered by the
United States District Court for the
District of Columbia,
No. 20-CV-3855

## Brief Amicus Curiae of the Immigration Reform Law Institute and U.S. Tech Workers in Support of Appellees

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## Certificate as to Parties, Rulings, and Related Cases

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellees. References to the rulings at issue appear in the Brief for Appellees. Amici are unaware of any related cases.

## Corporate Disclosure Statement

The Immigration Reform Law Institute and U.S. Tech Workers are non-profit corporations with no shareholders.

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## Table of Authorities

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## Statutes and Regulations

20 C.F.R. § 655.705 What Federal agencies are involved in the H-1B and H-1B1 programs, and what are the responsibilities of those agencies and of employers?

Four federal agencies (Department of Labor, Department of State, Department of Justice, and Department of Homeland Security) are involved in the process relating to H-1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

> (a) Department of Labor (DOL) responsibilities. DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:
>
> > (1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs [Labor Condition Applications] and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210.
> >
> > (2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H-1B nonimmigrants.
>
> (b) Department of Justice (DOJ), Department of Homeland Security (DHS) and Department of State (DOS) responsibilities. The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H-1B, H-1B1, and E-3 visas. For H-1B visas, the following agencies are involved: DHS accepts the employer's petition (DHS Form I-129) [Petition for a Nonimmigrant Worker] with the DOL-certified LCA [Labor Condition Application] attached. In doing so, the DHS determines whether the petition is supported by an LCA [Labor Condition Application] which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant

meet the statutory requirements for H-1B visa classification. If the petition is approved, DHS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1255(h)(2)(B)(i). The Department of Justice administers the system for the enforcement and disposition of complaints regarding an H-1B-dependent employer's or willful violator employer's failure to offer a position filled by an H-1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. DHS, is responsible for disapproving H-1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)-(iii); 1182(n)(5)(E)). DOL and DOS are involved in the process relating to the initial issuance of H-1B1 and E-3 visas. DHS is involved in change of status and extension of stays for the H-1B1 and E-3 category.

(c) ....

## Identify and Interests of Amici Curiae

The Immigration Reform Law Institute appeared as amicus in the district court. The Immigration Reform Law Institute is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. The Immigration Reform Law Institute has litigated or filed briefs amicus curiae in many immigration-related cases before federal courts and administrative bodies. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by Immigration Reform Law Institute staff, from the Federation for American Immigration Reform, of which the Immigration Reform Law Institute is a supporting organization. The Immigration Reform Law Institute has represented a wide variety of plaintiffs in immigration matters, ranging from American workers who have been displaced by foreign workers to foreign workers who have not been paid by their employers. Therefore, Immigration Reform Law Institute is dedicating to assisting the courts maintaining a rational immigration system.

U.S. Tech Workers was founded in 2018 to address the displacement of American technology workers through visa programs and offshoring. In 2020, U.S. Tech Workers was instrumental in

getting President Trump to put a halt to the use of H-1B visas to replace American workers at the Tennessee Valley Authority. By working directly with American workers, U.S. Tech Workers has gained extensive experience in the practicable operation of the H-1B visa program.

## Introduction

H-1B is a non-immigrant visa that is available to aliens for employment in specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b). A specialty occupation is one that normally requires a college degree. 8 U.S.C. § 1184(i). H-1B visas are subject annual quotas, 8 U.S.C. § 1184(g), though some alien workers (for example, those employed at universities) are exempt from those quotas. 8 U.S.C. § 1184(g)(5).

The agencies involved in the H-1B program are the Department of Homeland Security, Department of Labor, Department of State, and Department of Justice. 20 C.F.R. § 655.705. The first step in the visa process is for an employer to file a Labor Condition Application[1] with the Department of Labor. 8 U.S.C. § 1182(n); Form ETA-9035 (Attached as an Addendum). The employer specifies the

[1] In government documents the acronym *LCA* is normally used in place of *Labor Condition Application*.

occupation, the location of employment, the wage to be paid, and the prevailing wage on that form. Dep't of Labor Form ETA-9035.

The Labor Condition Application does not identify specific workers. *Id*. Instead, the form allows the employer to specify the number of workers that may work under the Labor Condition Application. *Id*. Labor Condition Applications may specify a number of workers of one or more, and frequently specify a number as high as a hundred. Dep't of Labor, H-1B Disclosure Data.[2] The employer must file a Labor Condition Application for each place of employment. 20 C.F.R. § 655.730(c)(5). A single worker may have multiple work locations, and thus be included in the numbers of workers specified in multiple Labor Condition Applications.

The Department of Labor has two responsibilities in the H-1B application process: it certifies Labor Condition Applications and compiles them for public inspection. 20 C.F.R. § 655.705(a). The Department of Labor must approve any Labor Condition Application within seven days unless it is incomplete or has obvious inaccuracies. *Id*.; 8 U.S.C. § 1182(n)(1). Thus, the Department of Labor's role in the H-1B adjudication process is entirely clerical.

The Department of Labor's minimal authority is evident in the Labor Condition Application data. H-1B workers are required by

[2]Available at https://www.dol.gov/agencies/eta/foreign-labor/performance

statute to be paid at least the prevailing wage for the occupation and location. 8 U.S.C. § 1182(n)(1). Most H-1B prevailing wage claims on Labor Condition Applications, however, are at the bottom 1/6th of U.S. wages, and only 18% are at the median wage or above. U.S. Government Accountability Office, *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Jan. 2001, p. 97 (breaking down prevailing wage claims by skill level); *see also* 79 Fed. Reg. 14,451 n.3 (mapping skill levels to wage percentiles). While nearly all Labor Condition Applications for H-1B visas contain prevailing wage claims that are lower than that required by statute, the Department of Labor is powerless to reject them. 8 U.S.C. § 1182(n)(1).

Next, the employer must submit a visa petition to U.S. Citizenship and Immigration Services. Form I-129 (Petition for a Non-Immigrant Worker).

> The Department of Homeland Security determines whether the petition is supported by a Labor Condition Application which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification. If the petition is approved, the Department of Homeland Security will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country.

20 C.F.R. § 655.705(b) (abbreviations expanded). This is the first step where any scrutiny is applied in the visa application process. Though the I-129 petition form is thirty-six pages long, only eight of the pages are used for H-1B visas. U.S. Citizenship and Immigration Services, Form I-129.[3] Much of the information on the Labor Condition Application, including work location and wage, is duplicated from the I-129 form. *Id*. The information submitted in the petition can be used to determine whether a job really exists, whether the beneficiary is qualified for the job, and whether there are openings under the quotas for the visa.

The final step is to apply for the actual visa from the Department of State on a DS-160 form if the beneficiary is outside the United States. This step has no bearing on this appeal so amici do not address it further. The Departments of Justice and Labor have enforcement roles in the H-1B program that do not involve adjudication. 20 C.F.R. § 655.7059(b). The Department of Justice handles immigration-related discrimination complaints. *Id*. The Department of Labor handles complaints that the provisions of a Labor Condition Application have not been complied with. 20 C.F.R. § 655.7059(a).

An employer may replace an American worker with an H-1B worker unless (1) the replacement takes place within 90 days of

[3] Available at https://www.uscis.gov/i-129

making the visa petition; (2) the H-1B worker does not have a graduate degree; and (3) the H-1B worker is paid less than $60,000 a year. 8 U.S.C. §§ 1182(n)(1)(E), (F), (3)(B). Because H-1B petitions are usually filed on April 1 for the start of the next fiscal year on October 1, these restrictions afford no real protections for American workers.

The ability of employers to displace Americans and the inability of the Department of Labor to ensure H-1B workers are actually paid the prevailing wage has allowed employers to replace Americans with low wage workers on H-1B visas with impunity. *E.g.*, Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements.* N.Y Times, June 3, 2015 (describing Americans being replace by H-1B workers at Disney, Fossil, Northeast Utilities, and Southern California Edison).[4] Such displacements are why the H-1B program is of major concern to amici and technology workers in general.

## Summary of the Argument

The Immigration and Nationality Act limits the Department of Labor's adjudicative role in the H-1B visa application process to one function only: verifying that the Labor Condition Application

[4] Available at https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html

form is filled out correctly. The Labor Condition Application describes a job, but it does not identify any workers who will fill the job. The filing and rubber stamp approval of a Labor Condition Application by the Department of Labor cannot possibly constitute approval for an H-1B non-immigrant to change his area of employment because the Department of Labor has no information who the worker even is, let alone whether the worker is qualified for the employment specified on the Labor Condition Application. Furthermore, allowing H-1B non-immigrants to change employment based upon the approval of a Labor Condition Application would make it impossible for the Executive Branch to ensure that the annual quotas for H-1B workers—the only real protection for American workers in the H-1B program—are complied with because such visa counting takes place in the Department of Homeland Security. Employers then would be allowed to circumvent the quotas entirely by specifying employment that is quota exempt in the visa petition, then moving the non-immigrant to a position to which the quota should apply after filing a Labor Condition Application.

## Argument

### I. Federal Agencies are faced with fraud on a massive scale in the H-1B visa program.

The H-1B visa program is notorious for its rampant fraud. The last compliance audit found that 13.4% of approved H-1B visas were fraudulent. U.S. Citizenship and Immigration Services, *H-1B Benefit Fraud & Compliance Assessment*, Sept. 2008, p. 8. In addition to its frequency, H-1B fraud takes place on a massive scale, often involving thousands of foreign workers and millions of dollars. *E.g.*, Press Release, U.S. Department of Justice, *Sunnyvale Man Sentenced To 15 Months For Visa Fraud*, Nov. 23, 2021 (over 100 fraudulent H-1B visas had resulted in more than $1.5 million in proceeds)[5]; Ethan Baron, *H-1B: Chinese woman, in U.S. on visa, indicted over alleged visa fraud involving thousands of foreign citizens*, San Jose Mercury-News, July 26, 2019;[6] Press Release, *Wright State University Agrees to Pay Government $1 Million for Visa Fraud*, U.S. Dep't of Justice, November 16, 2018.[7]; Rachel Weiner, *Va. man behind $20 million H-1B visa fraud faces depor-*

[5] Available at https://www.justice.gov/usao-ndca/pr/sunnyvale-man-sentenced-15-months-visa-fraud

[6] Available at https://www.mercurynews.com/2019/07/26/h-1b-chinese-woman-in-u-s-on-visa-indicted-over-alleged-visa-fraud-involving-thousands-of-foreign-citizens/

[7] Available at https://www.justice.gov/usao-sdoh/pr/wright-state-university-agrees-pay-government-1-million-visa-fraud

*tation after prison*, Washington Post, Dec. 28, 2017.[8] These are typical examples of an extensive problem.[9]

In all of the above cases, the non-immigrants were not working where they were supposed to be. In one example, Raju Kosuri "launched over a dozen businesses that claimed to provide information technology services out of Danville, Va. In fact, he admitted, they existed merely as vehicles to get visas for Indian nationals who would actually work elsewhere." Weiner, *supra*; *see also United States v. Prasad*, No. 2:16-cr-00244-KJM, 2018 U.S. Dist. LEXIS 130971, at *1-2 (E.D. Cal. Aug. 2, 2018) (Defendant "submit[ted] more than 100 phony H-1B visa applications" with nonexistent job locations.); *United States v. Guntipally*, No. 16-CR-00189-LHK-1, 2019 U.S. Dist. LEXIS 38898, at *8 (N.D. Cal. Mar. 8, 2019) (Defendant submitted more than 100 visa petitions for jobs that did not exist).

In order to weed out the existing rampant H-1B fraud efficiently, the Department of Homeland Security needs to know the location where each H-1B non-immigrant is supposed to be working.

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[8] Available at https://www.washingtonpost.com/local/public-safety/va-man-behind-20-million-visa-fraud-faces-deportation-after-prison-sentence/2017/12/22/61007138-e729-11e7-833f-155031558ff4_story.html

[9] The Google searches "H-1B Fraud site:JUSTICE.GOV" and "H-1B Fraud site:ICE.GOV" give an idea of the frequency and scale of H-1B fraud.

For example, if the employer has stated on the H-1B visa petition that the non-immigrant will be working at 52 Chambers Street in New York City, a Department of Homeland Security investigator verifying compliance should be able to go to that address during business hours on a weekday and find the non-immigrant there. *Cf. In re Simeio Solutions, LLC*, 26 I. & N. Dec. 542, 543–44, (B.I.A. April 9, 2015) (U.S. Customs and Immigration investigators conducted a site visit to verify H-1B employment and found the employer had vacated the location two months earlier).

## II. Congress has severely restricted the Department of Labor's role in the H-1B visa program.

The first step for an employer seeking a non-immigrant worker on an H-1B visa is to file a Labor Condition Application with the Department of Labor. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Department of Labor is required to approve all Labor Condition Applications within seven days unless there are obvious errors or inaccuracies. 8 U.S.C. § 1182(n)(1). The Department of Labor is also prohibited from reviewing Labor Condition Applications after approval. 8 U.S.C. § 1182(n)(2)(G)(v). Through these enactments, Congress has expressly limited the Department of Labor's authority in the H-1B application process to one function only: *verifying that Labor Condition Application forms are filled out correctly*.

8 U.S.C. 1182(n)(1). For decades, every Department of Labor Inspector General's semiannual report to Congress has complained that the agency lacks a meaningful role in the foreign labor certification process. *E.g.*, *Semiannual Report to Congress*, Oct. 1, 2020–Mar. 31, 2021, pp. 69–70. For now, the approval of an H-1B Labor Condition Application simply means that the Department of Labor has certified that the form was filled out correctly. 8 U.S.C. § 1182(n)(1).

The Department of Labor's only substantive role in the H-1B program is enforcement. 8 U.S.C. § 1182(n)(2). Even in that role, the Department of Labor's authority is severely restricted to specific circumstances. *Id*. "[T]he Department [of Labor] cannot verify employers' attestations to the H-1B certifications unless a complaint is filed. Such is unlikely, as foreign workers are generally reluctant to do so for fear of retaliation and losing their jobs." *Semiannual Report*, p. 70.

## III. A Labor Condition Application does not identify a worker.

The Labor Condition Application merely asks for the description of a job and not the identity of any specific worker. Dep't of Labor Form ETA-9035. In fact, the employer can specify that the application applies to any number of workers. In other words, the La-

bor Condition Application does not specify *who* will be working *where*. Even if the Department of Labor's authority were not explicitly limited to checking that the form is filled out correctly, the approval of a Labor Condition Application could not constitute approval of a specific non-immigrant alien's working in a specific job because that information is not available to the agency. The Department of Labor acknowledges that is it the function of the Department of Homeland Security to determine whether the job specified in the Labor Condition is, in fact, a specialty occupation eligible for H-1B and whether the beneficiary (who is not specified on the Labor Condition Application) is qualified for the that job. 20 C.F.R. § 655.705(b).

The actual petition for a visa is made to U.S. Citizenship and Immigration Services on the form I-129.[10] This is the first point in the visa process where the Labor Condition Application gets matched to a specific alien worker. A copy of the Labor Condition Application is filed with the visa petition. *Instructions for Petition for Nonimmigrant Worker*, Form I-129;[11] *Optional Checklist for*

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[10] Available at https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf

[11] Available at https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.

*Form I-129 H-1B Filings*, Form M735.[12] Nonetheless, the I-129 visa petition duplicates much of the information already in the Labor Condition Application, including the job, place of employment, and wage to be paid. This is the only step in the H-1B visa process where an agency has the information required to approve employment for a specific alien.

## IV. The approval of a subsequent Labor Condition Application cannot constitute approval to move a worker because Labor Condition Applications do not identify workers and the Department of Labor has no knowledge of where non-immigrants are working on H-1B visas.

After an H-1B visa is approved, the employer can file a new Labor Condition Application specifying a different work location. Dep't of Labor Form ETA-9035. The Department of Labor must then give perfunctory approval of that application within seven days as long as the form is filled out correctly. 8 U.S.C. § 1182(n)(1). Like the initial Labor Condition Applications, the new application contains nothing that identifies the non-immigrant workers who might work under it. The filing and approval of a Labor Condition Application does not mean that anyone actually will work under it.

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[12] Available at https://www.uscis.gov/sites/default/files/document/forms/m-735.pdf

At least three concerns arise when an employer seeks to change the work location of an H-1B non-immigrant. First, was the supposed job at the original work location a *bona fide* job to begin with? *See Franchitti v. Cognizant Tech. Sols. Corp.*, No. 3:17-cv-06317, 2021 U.S. Dist. LEXIS 155008, at *6–7 (D.N.J. Aug. 17, 2021) (describing the employer practice of applying for H-1B visas for non-existent jobs to maintain a stockpile of such workers to be used when work becomes available). Second, does the new Labor Condition Application reflect *bona fide* employment eligible for an H-1B visa that the non-immigrant is qualified for? *See Prasad, supra* (defendant employer had submitted over 100 H-1B petitions for non-existent jobs). Third, does the change of employment affect the annual visa quotas? 8 U.S.C. §1184(g).

None of these issues is within the Department of Labor's investigative or approval authority. 8 U.S.C. § 1182(n); 20 C.F.R. § 655.705(b). The Department of Labor has no information on which aliens will work under a Labor Condition Application or, indeed, whether *any* aliens at all will actually work under a particular application. *See* Form ETA-9035. The Department of Labor's sole role in the change of location process is to ensure that the Labor Condition Application form is filled out correctly. 8 U.S.C. § 1182(n)(1). Its investigative power over such a transfer is limited to whether the employer complied with the terms of the

Labor Condition Application. 8 U.S.C. §1182(n)(2). Consequently, the Department of Labor has no authority *and no ability* to ensure that the alien actually worked at the location specified on the original Labor Condition Application; to determine whether the non-immigrant is qualified to work under the new application; or to ensure that the non-immigrant actually works at the new location. *Id*. That authority belongs to the Secretary of Homeland Security, who has enforcement authority over 8 U.S.C. §§ 1101–1537. 8 U.S.C. § 1103(a)(1); *see, e.g.*, Press Release, *Tracy California resident convicted on multiple counts of "H-1B" visa fraud, aggravated identity theft*, U.S. Immigrations and Customs Enforcement, Aug. 6, 2019 (case investigated by Homeland Security Investigations where the convict had filed H-1B petitions for nonexistent jobs).

## V. Allowing employers to move H-1B workers without filing an amended visa petition would undermine the statutory visa quotas.

The only real protection for American workers in the H-1B program is annual quotas on the number of workers. 8 U.S.C. § 1184(g). Workers employed "at" a university or government research institution are exempt from those quotas. 8 U.S.C. § 1184(g)(5). Department of Homeland Security regulations interpret "at" as meaning *physically present* rather than *employed by*.

8 C.F.R. § 214.2(h)(8)(iii)(F)(4). If an alien's H-1B original visa petition specified employment exempt from the quotas, and an amended visa specifies employment subject to the quotas, the amended petition is applied to the quota and can only be approved if the quota for that fiscal year has not been reached. 8 C.F.R. § 214.2(h)(8)(iii)(F)(5).

Allowing an H-1B nonimmigrant to change employment based upon the Department of Labor's statutory-required rubber-stamping of a Labor Condition Application would undermine the quota system that protects Americans. *See* 8 U.S.C. § 1182(n)(1). The Department of Homeland Security—not Labor—keeps track of the H-1B quotas and ensures that non-immigrant job changes do not cause the quotas to be exceeded. 8 C.F.R. § 214.2(h)(8)(iii)(F). Currently, if an H-1B non-immigrant's original job was exempt from the quotas and the new job is not exempt from the quotas, the Department of Homeland Security updates the count towards the quotas and does not permit such a job change if it would cause the quotas to be exceed. *Id*. The Labor Condition Application contains no information about whether the employment is exempt from the quotas. Form ETA-9035. If an amended visa petition were not required to change employment, an employer in the contract labor business could circumvent the quotas entirely by having their H-1B workers employed "at" an

exempt institution for a brief period of time initially, file a new labor Condition Application, then move to employment subject to the quota. *See* Press Release, *Wright State University Agrees to Pay Government $1 Million for Visa Fraud*, U.S. Dep't of Justice, November 16, 2018 (a Department of Homeland Security investigation showed that a university applied for quota-exempt H-1B visas, then subcontracted them for $1.8 million in fees to a consulting company that had the non-immigrants work all over the country in positions unrelated to the university).

## Conclusion

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted, August 29, 2022,

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**Certificate of Compliance with Rule 32(A)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,363 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 using 14 pt. Century Schoolbook.

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## Certificate of Service

I certify that on Aug. 29, 2022, I filed the attached Brief Amicus Curiae of the Immigration Reform Law Institute and U.S. Tech Workers in Support of Appellees with the ECF system that will provide notice and copies to all parties.

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