

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
FENG WANG, et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No.:
)	
MICHAEL R. POMPEO, et al.)	
)	
Defendants.)	
_____)	

AFFIDAVIT OF DAVID J. BIER*

BEFORE ME the undersigned authority appeared DAVID J. BIER who after being duly sworn deposes and says:

1. My name is David J. Bier. Currently, I am an immigration policy analyst at the Center for Global Liberty and Prosperity at the Cato Institute, a nonpartisan think tank in Washington, D.C. I am an expert on immigration visa reform, border security, and interior enforcement, and my work has been cited in the *Washington Post*, *New York Times*, *Wall Street Journal*, *USA Today*, *Politico*, and many other print and online publications.
2. From 2013 to 2015, I drafted immigration legislation as senior policy advisor for Congressman Raúl Labrador, a member and current chairman of the House Judiciary Committee's Subcommittee on Immigration and Border Security. Previously, I worked as the immigration policy analyst at the Competitive Enterprise Institute and most recently as the director of immigration policy at the Niskanen Center.
3. I provide this declaration to explain the effects of the U.S. Department of State (DOS) policy to count immigrant visa numbers in the employment-based investment category of EB-5. More specifically, the current policy of the DOS is to count the investor, and any derivative family members (i.e., spouse and minor children), if applicable, against the numerical cap under the EB-5 category.

* David J. Bier is an immigration policy analyst at the Cato Institute.

EB-5 Immigrant Visa Numbers

4. In Fiscal Year 2014, the employment-based fifth (EB-5) preference category for investors reached its numerical limit of 9,940 for the first time. Consequently, a backlog of EB-5 applicants developed. As of April 20, 2018, there were 22,936 approved I-526 immigrant petitions awaiting a priority date, 97.7 percent for Chinese nationals, according to United States Citizenship and Immigration Services (Table 1). There were another approximately 14,662 spouses and 25,851 children of EB-5 principal applicants. Thus, an estimated total of 64,391 EB-5 applicants were waiting for a priority date based on the current DOS policy.

Table 1: Form I-526, Immigrant Petition by Alien Entrepreneur Count of Approved Petitions as of April 20, 2018 with Priority Date On or After May 2018 Department of State Visa Bulletin

	Principal Applicants	Spouses*	Children*	Total (Derivatives & Principal)
China	22,415	14,662	25,851	62,928
Vietnam	521	341	601	1,463
Total	22,936	15,002	26,452	64,391

*Source: U.S. Citizenship and Immigration Services (USCIS), 2018 *Estimated based on the average number of spouses and children of aliens receiving lawful permanent residence in the 5th preference category from 2014 to 2016 according to Department of Homeland Security Yearbooks of Immigration Statistics.*

5. This backlog would not have developed if the U.S. Department of State did not count the derivative beneficiaries (i.e., spouse and minor children) of EB-5 applications against the numerical limitation category. Table 2 shows approved I-526 petitions for EB-5 investors by fiscal year from 2014 to 2017, the number of EB-5 principals, and derivatives, receiving conditional lawful permanent residence during those years, and the difference between I-526 approvals and principals—these are the principal applicants entering the backlog (Table 1).

6. In every year, except for 2017, the number of EB-5 derivatives receiving permanent residence was greater than the number of principals entering the EB-5 backlog (Table 2). This means that if derivatives did not count against the EB-5 immigrant visa and conditional lawful permanent resident quotas, and those numbers were available for primary applicants with approved I-526 petitions, the backlog would have been only about 1,466 primary applicants at the end of FY 2017, and those applicants would likely have already received their conditional lawful permanent residence or “green cards” in the first part of FY 2018. Thus, all investors-plaintiffs whose I-526 petitions were approved before the end of fiscal year 2017 would have already received their green cards, including all derivative family members.

Table 2: I-526 Approvals and Investors Receiving Permanent Residence, FY 2014-2017

	2014	2015	2016	2017
Approved I-526 Petitions	5,115	8,761	7,632	11,321
Principals Receiving Permanent Residence	3,935	3,605	3,430	3,510*
Derivatives Receiving Permanent Residence	6,788	6,583	6,433	6,345*
Estimated Number of Principals Entering the Backlog**	1,180	5,156	4,202	7,811

Source: I-526 Approvals: U.S. Citizenship and Immigration Services, 2018; Principals and derivatives from Department of Homeland Security, 2014, 2015, 2016, 2017; *2017 derivative-primary shares estimated based on the average during the prior three years; **The difference between I-526 approvals and the number of principals receiving permanent residence

7. In reality, the government is not accepting immigrant visa or adjustment of status applications for EB-5 investors whose priority dates are before August 1, 2014, according to the August 2018 Visa Bulletin from the U.S. Department of State. Table 3 provides the projected number of approved Chinese EB-5 principals and derivatives—including those who currently have petitions pending—by the fiscal quarter in which they filed their I-526 petition as well as their projected waits as of July 2018.[†] Those who applied in FY 2018 will likely have to wait about 16 years to receive permanent residence.

[†] Because the date of filing—not approval—of the petition sets the priority date, it is not possible to estimate the wait times based on the number of current approved petitions, as the backlog will grow as more currently pending petitions are approved. Rather, the wait times will ultimately be based on the number of filed petitions for each year that are eventually approved. In order to produce the estimates in Table 3, the following steps were taken: 1) For each fiscal quarter, the number of receipts of I-526 were reduced by the number of denials to arrive at the number of estimated principal applicants; 2) This number was increased by the estimated number of derivatives based on the average share of derivatives for EB-5 immigrants receiving permanent residence from 2014 to 2016; 3) This figure was reduced by 15 percent to account for non-Chinese investors to arrive at the “projected approvals & estimated derivatives” row in Table 3; 4) The “projected number of years to wait” row in Table 3 was estimated by dividing the “projected approvals & estimated derivatives” by the number of Chinese who received EB-5 immigrant visas or adjusted status, according to the U.S. Department of State, in FY 2017 (7,567).

Table 3: I-526 Projected Approvals Based on Filing Date for Chinese EB-5 Investors


	Aug-Sep14	Oct-Dec14	Jan-Mar15	Apr-Jun15	Jul-Sep15	Oct-Dec15	Jan-Mar16	Apr-Jun16
Projected Approvals & Estimated Derivatives	5,753	7,701	5,624	6,088	16,890	16,688	596	3,052
Projected Number of Years to Wait	0.8	1.8	2.5	3.3	5.6	7.8	7.8	8.2
	Jul-Sep16	Oct-Dec16	Jan-Mar17	Apr-Jun17	Jul-Sep17	Oct-Dec17	Jan-Mar18	
Projected Approvals & Estimated Derivatives	14,741	11,699	4,301	11,578	3,987	7,198	3,636	
Projected Number of Years to Wait	10.2	11.7	12.3	13.8	14.4	15.3	15.8	

Source: Author’s calculations based on U.S. Citizenship and Immigration Services, 2018; U.S. Department of State, 2017

8. Interpolating these estimates down to the monthly level indicates that of those who provided the relevant information, 45 percent of the plaintiffs will have at least one child who will likely age out—that is, turn 21 years of age before becoming eligible to receive an immigrant visa through their parent’s participation in the EB-5 program.† Aging out will render them ineligible for derivative permanent residence. Another 11 percent have at least one child who could age out depending on how early they can apply for permanent residence in a given month. This means that 56 percent—a clear majority—of the plaintiffs have children at risk of aging out. Another 16 percent already have children who have aged out.

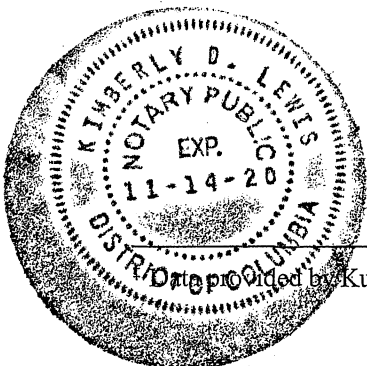
9. Aging out of children will reduce the wait times overall in ways that cannot be predicted without knowing the exact priority dates of those children. These estimates also cannot be precise without knowing exactly how many principals will be denied and how many principals will abandon their petitions during the next 16 years.

FURTHER AFFIANT SAYETH NOT



 DAVID J. BIER

Sworn and subscribed before me this 23 day of July, 2018.





 NOTARY PUBLIC

Prepared by Kurzban Kurzban Weinger Tetzeli & Pratt P.A.

KIMBERLY D. LEWIS
 NOTARY PUBLIC DISTRICT OF COLUMBIA
 My Commission Expires November 14, 2020