UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|---|---|
| FENG WANG, and his child,<br>GUANYU WANG<br>19 Aigehao Rd.<br>Xiangcheng District, Suzhou City<br>Jiangsu Province, China<br><br>YU QIAN, and her child,<br>MENGYU MA<br>Bldg. 18, Jianguandi, Qujiang<br>Yannan 5th Rd., Yanta District<br>Xian City, Shaanxi Province, China<br><br>HUI SUN, her spouse,<br>LINSHENG XU, and her children,<br>YAOTIAN XU,<br>L.T.X., a minor, through his mother<br>Hui Sun, and<br>B.T.X., a minor, through her mother<br>Hui Sun<br>202, Unit 1, #35 Cuobuling Third Road<br>North District, Qingdao, Shandong,<br>China<br><br>FUBAO WANG, and his child,<br>NAIXIN WANG<br>Room 2-5-7 G<br>Guanshanyuan, Landian Chang<br>Haidian District, Beijing, China<br><br>HONGMEI XIAO, her spouse,<br>LIANG LI, and her child,<br>JIAJUN LI<br>Apt. 14B, Bldg. 4, No. 3 Rose Garden<br>Shekou District, Shenzhen City<br>Guangdong Province, China<br><br>JIANHONG YANG, her spouse,<br>YONG LIU, and her child,<br>ZIJING LIU<br>189 Qianhai Rd., Nanshan District<br>Shenzhen City, Guangdong Province,<br>China | CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF<br><br>Case No.: 18-cv-1732 |

GUONONG CHEN, and her child,
HAIPENG LU
6169 Princeton St., Chino, CA 91710

TONG CHEN, his spouse,
LING LI, and his child,
YIWEI CHEN
18537 Arbor Gate Lane,
Yorba Linda, CA, 92886

YONGJUN LI, his spouse,
QING LIU, and his child,
XIN LI
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JINGPO WANG, his spouse,
GUISHUANG LI, and his child,
HAIXIN WANG
Jingpo Wang
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JIN ZHU, her spouse,
DEPING YE, and her child,
TIANZE YE
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NING DENG, his spouse,
JING YANG, and his child,
K.L.D., a minor, through her father
Ning Deng
Bailizhuang Xili 52-6-901
Chaoyang, Beijing, China

FANG ZHAO
1942 New Scotland Rd.
Slingerlands, NY, 12159

AMERICAN LENDING CENTER LLC
1 World Trade Center
Suite 1130
Long Beach, CA 90831,

Plaintiffs,

v.

MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State
2201 C Street, N.W.
Washington, D.C. 2052;

EDWARD J. RAMOTOWSKI, in his official capacity as Deputy Assistant Secretary of State for Visa Services
2201 C Street, N.W.
Washington, D.C. 2052;

UNITED STATES DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520;

UNITED STATES OF AMERICA
950 Pennsylvania Avenue
Washington, D.C. 20530,

Defendants.

**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. When Congress created the EB-5 Immigrant Investor Program in 1990, it established an annual quota of visas for foreign investors who contribute substantial capital to job-creating U.S. businesses. The Program has enjoyed considerable success: From the Program's inception until 2014, the EB-5 Program brought in more than $11.2 billion in capital investments for U.S. companies and added more than 70,000 jobs to the U.S. economy.

2. This lawsuit challenges an unlawful Government policy that is undercutting the EB-5 Program's growth and the economic benefits to the U.S. economy that result. Specifically, although Congress intended that the EB-5 visa numbers it set aside be used for qualifying *investors*, the Department of State has systematically diluted this visa pool by individually

counting the spouses and children of investors against the EB-5 quota. This "Counting Policy" unlawfully erodes the number of visas available for actual investors, prolongs wait times, separates immigrant families, and undermines the U.S. economy.

3. Plaintiffs include individual EB-5 investors ("Individual Plaintiffs") and the class members they seek to represent, children of investors who have or will age out and the class members they seek to represent, as well as American Lending Center LLC ("ALC"), a Government-approved "regional center" sponsor of EB-5 investments.

4. In 1990, Congress established a quota of EB-5 visas for foreign entrepreneurs who invest a designated amount of capital in a new U.S. business, and who demonstrate that their investment will create ten or more jobs for qualified U.S. workers. *See* section 203(b)(5) of the Immigration and Nationality Act ("INA"); 8 U.S.C. § 1153(b)(5). To qualify, an applicant generally must invest $1,000,000 in the U.S. business, but this amount is reduced to $500,000 if the investment project is in a rural area or an area of high unemployment.

5. When Congress created the Program, it mandated that 7.1% of the annual worldwide quota for employment-based visas (which amounts to just under 10,000 visas) be set aside for foreign applicants who meet the EB-5 statute's capital investment and job-creation requirements. An investor's spouse and children also qualify to immigrate to the United States by virtue of their relationship with their EB-5 investor relative. INA § 203(d); 8 U.S.C. § 1153(d). While investors' spouses and children are "entitled to the same status, and the same order of consideration" as the investors themselves, *id*., no provision of the INA requires that EB-5 visa numbers be reduced when an investor's spouse or child immigrates to the United States. To the contrary, both the EB-5 statute and the INA as a whole make plain that EB-5 visa

numbers are reserved for *investors*, with spouses and children eligible to immigrate as derivatives of the investors themselves.

8. By counting spouses and children against the EB-5 visa quota, the Department of State has drastically limited the number of EB-5 visas available to investors. Because most EB-5 investors choose to immigrate to the United States with their spouse and/or children, the Department's Counting Policy results in approximately *two thirds* of EB-5 visa numbers being expended on non-investors.

9. As a result of the Counting Policy, EB-5 visa backlogs have ballooned. Because most EB-5 investors are Chinese and Vietnamese, and the INA limits the number of visas that can be issued to the nationals of any one country, the backlog currently affects investors from China and Vietnam. As a result of the Counting Policy, Chinese investors who file an EB-5 visa petition now are expected to wait 16 years before they become eligible to immigrate to the United States. The Vietnamese backlog is also increasing substantially. Backlogs for EB-5 investors from India are also expected to be announced in the near future.

10. By creating lengthy backlogs in the EB-5 visa category, Defendants' Counting Policy suppresses the EB-5 Program's full potential for economic growth and job-creation. It threatens to shutter regional centers, like Plaintiff American Lending Center, that recruit EB-5 applicants and sponsor job-creating projects in the United States. And it needlessly harms EB-5 investors, who are forced to languish in ever-growing visa queues while their children grow up and "age-out" of eligibility to immigrate to the United States as their dependents.

11. Because these consequences are not what the INA provides nor what Congress intended, Plaintiffs seek declaratory and injunctive relief to remedy Defendants' unlawful Counting Policy. Plaintiffs seek this Court's intervention to compel Defendants to comply with

INA §§ 203(b)(5) and (d) by allocating EB-5 visa numbers to actual *investors*, while according the spouses and children the same status as the EB-5 investor for purposes of the visa quota.

## JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), as a civil action arising under the laws of the United States, and 28 U.S.C. § 1346 (United States as defendant). Declaratory judgment is sought pursuant to 28 U.S.C. § 2201-02. The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702.

13. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because Defendants, officers or employees of the United States or agencies thereof acting in their official capacities, reside in this District.

## PARTIES

14. Plaintiff **Feng WANG** ("Mr. Feng Wang") is a citizen of the People's Republic of China ("China"). Mr. Feng Wang invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on October 10, 2014. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. Mr. Feng Wang decided to participate in the EB-5 program in order to provide his daughter, Plaintiff **Guanyu WANG**, born August 4, 1996, also a citizen of China, with a path to U.S. permanent residency. Mr. Feng Wang resigned from his job and sold an apartment to make his EB-5 investment. His daughter is now a senior in college in China and is nearing her "age-out" date, after which she will be ineligible to immigrate to the United States as a derivative. She is applying to U.S. graduate programs, but will be ineligible for tuition reductions and employment opportunities that are available with permanent residency.

15. Plaintiff **Yu QIAN** ("Ms. Qian") is a citizen of China. Her daughter, Plaintiff **Mengyu MA**, was born on January 2, 1997. Mengyu Ma is also a citizen of China and a resident

of Seattle, Washington, and will "age out," becoming ineligible to immigrate to the U.S. as a derivative, in November 2018. Ms. Qian invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on July 1, 2016. The Visa Bulletin showed a backlog for EB-5 applicants from China in 2016, but Ms. Qian did not know that the visa backlog was so extensive. Ms. Qian decided to participate in the EB-5 program in large part to provide Mengyu Ma with a path to U.S. permanent residency. Mengyu Ma is currently enrolled as a student at the University of Washington in Seattle.

16. Plaintiff **Hui SUN** ("Ms. Sun") is a citizen of China. Her spouse is Plaintiff **Linsheng XU**. Ms. Sun invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on May 27, 2015. Ms. Sun decided to participate in the EB-5 program to provide her children, all of whom are also citizens of China, with a path to U.S. permanent residency. Her eldest daughter, Plaintiff **Yaotian XU**, born August 17, 1998, will "age out," becoming ineligible for an EB-5 derivative visa, in September 2019. Her son, Plaintiff **L.T.X.**, born July 27, 2006, and her younger daughter, Plaintiff **B.T.X.**, born September 27, 2010, may "age out" before visa numbers become available as well. The backlog has thrust Yaotian Xu into educational and career limbo. She is currently studying at Berkeley City College in Berkeley, California on a student visa and is a resident of Oakland, California. Ms. Sun's son is enrolled in an international school in China. Ms. Sun herself has put her career on hold to learn English and prepare for a move to the United States.

17. Plaintiff **Fubao WANG** ("Mr. Fubao Wang") is a citizen of China. Mr. Fubao Wang invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on May 20, 2015. The Visa Bulletin showed no backlog for EB-5 applicants from China in March 2015. Mr. Fubao Wang decided to participate in the EB-5 program in large part to provide his

daughter, Plaintiff **Naixin WANG**, born September 24, 1998, also a citizen of China, who has been studying in the U.S. as a high school and college student since 2013, with a path to U.S. permanent residency. But Naixin Wang will "age out" in February 2021, becoming ineligible to immigrate to the United States as a derivative, while Mr. Fubao Wang waits for visa numbers to become available, due to the backlog. Naixin Wang is currently enrolled at Stanford University.

18. Plaintiff **Hongmei XIAO** ("Ms. Xiao") is a citizen of China. Her spouse is Plaintiff **Liang LI.** Ms. Xiao invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on January 28, 2015. The Visa Bulletin showed no backlog for EB-5 applicants from China in January 2015. Ms. Hongmei Xiao decided to participate in the EB-5 program in large part to provide her son, Plaintiff **Jiajun LI**, born September 30, 1996, also a citizen of China and a student at the University of Illinois, Urbana-Champaign, with a path to U.S. permanent residency. But Jiajun Li will "age out," becoming ineligible for an EB-5 derivative visa, in November 2018, while Ms. Xiao waits for visa numbers to become available, due to the backlog.

19. Plaintiff **Jianhong YANG** ("Ms. Yang") is a citizen of China. Her spouse is Plaintiff **Yong LIU**. Ms. Yang invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on September 29, 2014. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. Ms. Yang decided to participate in the EB-5 program in order to provide her son, Plaintiff **Zijing LIU**, born December 8, 1995, also a citizen of China, with a path to U.S. permanent residency. Zijing Liu is enrolled as a graduate student at the University of Southern California and remains a resident of Los Angeles. But he now risks being separated from the rest of the Yang family because he will "age out," becoming ineligible to immigrate to

the United States as a derivative, in October 2018, while Ms. Yang waits for visa numbers to become available due to the backlog.

20. Plaintiff **Guonong CHEN** ("Ms. Guonong Chen") is a citizen of China. Ms. Guonong Chen invested $500,000 in an EB-5 regional fund and filed a successful I-526 petition on June 16, 2014. In December 2017, she and her husband moved to the United States as conditional permanent residents. They reside in Chino, California. Ms. Guonong Chen decided to participate in the EB-5 program in order to provide her son, Plaintiff **Haipeng LU**, born June 16, 1995, also a citizen of China, with a path to U.S. permanent residency. Haipeng Lu has been studying in the U.S. as a high school and college student since 2013 and is currently a student at the University of California, Riverside, and resides with his parents in Chino. When Ms. Guonong Chen submitted her I-526 petition in 2014, and when it was approved in 2015, her son was eligible to follow to join Ms. Guonong Chen as her child. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But absent relief from this Court, Haipeng Lu is ineligible to immigrate to the United States as a derivative because under the existing cut-off dates, he "aged-out" while Ms. Guonong Chen and her husband were still waiting for visa numbers to become available.

21. Plaintiff **Tong CHEN** ("Mr. Tong Chen") is a citizen of China. His spouse is Plaintiff **Ling LI**. Mr. Tong Chen invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on July 17, 2014. In April 2018, Mr. Tong Chen moved to the United States as a conditional permanent resident. He resides in Yorba Linda, California. Mr. Tong Chen decided to participate in the EB-5 program in large part to provide his son, Plaintiff **Yiwei CHEN**, born December 27, 1994, also a citizen of China, with a path to U.S. permanent residency. When Mr. Tong Chen submitted his I-526 petition Yiwei Chen was eligible to

immigrate to the United States as Mr. Tong Chen's child. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But Yiwei Chen, currently a student enrolled at the University of Texas at Arlington and resident of Arlington, Texas, now risks being separated from the rest of the Wang family because under the Department's existing cut-off dates, he has "aged out," becoming ineligible to immigrate to the United States as a derivative, while Mr. Tong Chen was still waiting for visa numbers to become available.

22. Plaintiff **Yongjun LI** ("Mr. Li") is a citizen of China. His spouse is Plaintiff **Qing LIU**. He invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on July 10, 2014. Mr. Li and his wife moved to the U.S. as conditional permanent residents in March 2018. They reside in Chino Hills, California. Mr. Li decided to participate in the EB-5 program in order to provide his daughter, Plaintiff **Xin LI**, born April 24, 1995, also a citizen of China, with a path to U.S. permanent residency. When Mr. Li submitted his I-526 petition, Xing Li was eligible to follow to join Mr. Li as his child. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But Xin Li, who is currently a postgraduate student at Cornell University, now risks being separated from the rest of her family because under the Department's existing cut-off dates, she "aged out," becoming ineligible to immigrate to the United States as a derivative, while Mr. Li was waiting for visa numbers to become available.

23. Plaintiff **Jingpo WANG** ("Mr. Jingpo Wang") is a citizen of China. His spouse is Plaintiff **Guishuang LI**. Mr. Jingpo Wang invested $500,000 in an EB-5 regional center fund and submitted a successful I-526 petition on March 13, 2014. Mr. Jingpo Wang and his wife moved to the U.S. as conditional permanent residents and reside in New Jersey. Mr. Jingpo Wang decided to participate in the EB-5 program in order to provide his son, Plaintiff **Haixin WANG**, born 28 December 1993, also a citizen of China, who has been a student in the U.S.

since 2011 and is currently enrolled at Pennsylvania State University and is a resident of University Park, Pennsylvania, with a path to U.S. permanent residency. When Mr. Jingpo Wang submitted his I-526 petition, Haixin Wang was eligible to immigrate to the United States as Mr. Jingpo Wang's child. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But Mr. Jingpo Wang's son now risks being separated from the rest of the Wang family because under the Department's existing cut-off dates, he has "aged out," becoming ineligible to immigrate to the United States as a derivative, while Mr. Jingpo Wang waited for visa numbers to become available.

24. Plaintiff **Jin ZHU** ("Ms. Zhu") is a citizen of China. Her spouse is Plaintiff **Deping YE**. Ms. Zhu invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on October 10, 2014. When she submitted her I-526 petition in 2014, and when her I-526 petition was approved in 2016, Ms. Zhu's son, Plaintiff **Tianze YE**, born March 22, 1996, also a citizen of China, was eligible to immigrate to the United States as Ms. Zhu's child absent the backlog then in effect. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But Ms. Zhu's son, a graduate student at Columbia University and resident of New York City, now risks being separated from the rest of the Zhu family because under the cut-off dates the Department has established, he "aged out," becoming ineligible to immigrate to the United States as a derivative, while Ms. Zhu was waiting for a visa number to become available.

25. Plaintiff **Ning DENG** ("Mr. Deng") is a citizen of China. His spouse is Plaintiff **Kailin DENG**. Mr. Deng invested $500,000 in an EB-5 regional center fund and filed a successful I-526 petition on December 29, 2014. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. Mr. Deng decided to participate in the EB-5 program in large part to provide his daughter, Plaintiff **K.L.D.**, who was born on September 8, 2002 and is also a

citizen of China, with a path to U.S. permanent residency. Mr. Deng has expended considerable resources educating K.L.D. at an international school in China in anticipation of her eventually studying in the U.S. But K.L.D. now faces an extremely uncertain educational and professional future. She is off the mainstream Chinese track for educational and professional advancement, and she will "age out" in October 2023, becoming ineligible for an EB-5 derivative visa, while Mr. Deng waits for visa numbers to become available.

26. Plaintiff **Fang ZHAO** ("Mr. Zhao") is a citizen of China. Mr. Zhao invested $500,000 in a regional center fund and filed a successful I-526 petition on September 14, 2015. Mr. Zhao is currently a resident of New York City, having graduated from the State University of New York at Albany this spring, and is preparing to enroll as a graduate student at California Northstate University in Elk Grove, California, this fall. He has been a student in the U.S. since 2010. He is acculturated to the U.S. and has lost many personal connections to his home country. The long wait time for visa numbers has harmed his career, as it is much more difficult for Mr. Zhao to find meaningful and remunerative employment on a student visa.

27. Plaintiff **American Lending Center LLC ("ALC")** is a regional center designated by United States Citizenship and Immigration Services ("USCIS"), and is organized in the State of California and headquartered in Long Beach, California. The visa backlog created by Defendants' Counting Policy has caused ALC severe economic losses and its continued enforcement threatens the very existence of the company's business. ALC sues on its own behalf and on behalf of its potential EB-5 investor clients.

28. Defendant **Michael R. POMPEO** is the Secretary of State of the United States. He is sued in his official capacity. As Secretary of State, Defendant Pompeo has ultimate

responsibility for the Department of State's ("DOS") allocation of immigrant visa numbers consistent with the requirements of federal immigration law.

29. Defendant **Edward J. RAMOTOWSKI** is the Deputy Assistant Secretary of State for Visa Services. He is sued in his official capacity. As Deputy Assistant Secretary, Defendant Ramotowski heads DOS's Visa Office and is responsible for administering and formulating regulations, policies, and procedures relating to visa issuance and refusal. As head of the Visa Office, Defendant Ramotowski is responsible for administering immigrant visa number allocation through the Immigrant Visa Allocation Management System.

30. Defendant **U.S. Department of State ("DOS")** is an executive agency of the United States. DOS is the federal agency responsible for overseeing, monitoring, and allocating immigrant visa numbers consistent with the numerical limitations imposed by Congress in the Immigration and Nationality Act.

31. Defendant **United States of America** is a sovereign sued under the Administrative Procedure Act ("APA"), under which the United States has waived its sovereign immunity in suits brought by parties who have suffered a legal wrong because of, or who have been adversely affected or aggrieved by, a federal agency action.

## STATEMENT OF FACTS

### The EB-5 Program

32. The Immigration Act of 1990 ("IMMACT90"), Pub. L. No. 101-649, § 121(a), 104 Stat. 4978, 4989, created a new preference allocation of visas for immigrants who have invested, or are in the process of investing, a designated amount of lawfully obtained capital in a commercial enterprise, and can demonstrate that the investment will create ten or more jobs for

qualified U.S. workers. Under this "EB-5" program, qualified immigrant investors may obtain lawful permanent resident status in the United States for themselves and their derivatives.

33. The law is intended to attract foreign capital, encourage economic development, promote job creation in a new enterprise or job retention in the case of a "troubled business," and generally benefit the U.S. economy and labor market. To qualify for an EB-5 visa, an applicant must invest the requisite amount of capital in a "new commercial enterprise" which creates full-time employment of 35 hours per week for ten or more qualifying U.S. workers. The foreign national generally must invest $1,000,000 in the U.S. business, but may invest $500,000 if the investment project is in a rural area or an area of high unemployment, identified as a Targeted Employment Area ("TEA"). Moreover, his or her investment must be "at risk," 8 C.F.R. § 204.6(j)(2), meaning that the amount the foreign national can eventually recover from the investment must depend on the economic performance of the company in which he or she invests, with no guaranteed return if the company fails.

34. In 1992, Congress established the Regional Center Program, which modified the EB-5 statute to allow immigrants to invest through "regional centers," entities organized "for the promotion of economic growth." Department of Justice and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, § 610, 106 Stat. 1828, 1874; *see also* 8 C.F.R. § 204.6(m). United States Citizenship and Immigration Services designates entities as regional centers, each of which is established to increase employment and generally benefit the economy of a specific geographic area.

The EB-5 Petition Process

35. To obtain the status of a lawful permanent resident through the EB-5 Program, an immigrant investor must first file a visa petition on Form I-526, which identifies the investor and

describes the qualifying investment and job creation requirements. 8 U.S.C. § 1145(a)(1)(H); 8 C.F.R. § 204.6(a). If the I-526 petition establishes that the investor satisfies the statutory and regulatory requirements for classification as an EB-5 investor, USCIS "shall [ . . . ] approve the petition." 8 U.S.C. § 1154(b).

36. The I-526 petition must be accompanied by evidence that the applicant has: (1) invested, or is "actively in the process of investing," the required amount of lawfully obtained capital in a new commercial enterprise in the United States; and that (2) the investment create at least 10 new jobs. If USCIS determines the immigrant investor has met the requirements of INA § 203(b)(5), the I-526 petition is approved.

37. Upon approval of the I-526 petition, the immigrant investor and his or her derivatives become eligible for lawful permanent resident status on a conditional basis for a period of two years. An immigrant investor who is outside the United States must apply to DOS for an immigrant visa and acquires conditional residency upon entry to the United States. A foreign investor who is already in the United States may seek adjustment of status from USCIS. The foreign investor can apply for a visa or adjust status only if a visa number is available; the same is true for the investor's derivatives. *See* 8 C.F.R. §§ 245.1(a), (g)(1).

38. The Department of State annually and quarterly assesses the numbers of visas that will be available to investors and publishes those numbers in a monthly Visa Bulletin. The Visa Bulletin also designates whether certain countries, today China and Vietnam, experience greater waiting time than other countries because of the high demand for such visas by investors in these countries. The place any individual investor maintains on the waiting lists is determined by the date his or her I-526 petition was filed with USCIS – known as a "priority date." The long

waiting times or "backlogs" today result directly from the Department of State's policy of counting derivative family members against the quota of visas allocated for EB-5 investors.

39. Before issuing a visa or granting adjustment of status, DOS and USCIS conduct a background check to confirm that the foreign investor and any derivatives are admissible to the United States.

40. Foreign investors who obtain visas from DOS obtain conditional permanent residence once they have been admitted to the United States. Those within the United States receive conditional permanent residence once USCIS approves their applications for adjustment of status. The same is true for the investor's spouse and children. The period of conditional permanent residence lasts for two years.

41. During this two-year period, the investment must continue to satisfy the requirements of the EB-5 program (namely, the petitioner must not withdraw his investment from the U.S. enterprise and must demonstrate that the investment created, or will create within a reasonable period of time, ten full-time jobs for U.S. workers).

42. At the conclusion of the two-year conditional residence period, the investor files a second petition (Form I-829) demonstrating continued compliance with the EB-5 statute and regulations. 8 U.S.C. § 1186b(c)-(d). The investor's derivatives are automatically included in this petition. 8 C.F.R. § 216.6(a). If USCIS determines that the investor has satisfied EB-5 requirements for the two-year period, then it removes the conditions on the investor's permanent resident status, and the investor and his or her derivatives become full-fledged lawful permanent residents of the United States with a path to U.S. citizenship.

Statutory Framework for EB-5 Visa Quotas

43. The Immigration Act of 1965 established a worldwide numerical quota on immigrant visas, which applied to *all* applicants, with certain specified exceptions that are not relevant here:

> Sec. 201. (a) Exclusive of special immigrants defined in section 101(a)(27), and of the immediate relatives of United States citizens specified in subsection (b) of this section, *the number of aliens* who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted for permanent residence, or who may, pursuant to section 203(a)(7) enter conditionally, (i) shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

Pub. L. 89-236 (Oct. 3, 1965), 79 Stat. 911 § 201 (emphasis added).

44. The 1965 Act addressed the eligibility of derivatives for immigrant visas in another provision that explicitly referenced the numerical limitations in Section 201(a):

> Sec. 203. (a) Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> (9) A spouse or child . . . shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa or conditional entry under paragraphs (1) through (8), be entitled to the same status, and the same order of consideration[as the principal applicant], if accompanying, or following to join, his spouse or parent.

*Id.* § 203.

45. The statute which created the EB-5 classification, IMMACT90, moved the "entitled to the same status" language out of Section 203(a), which referenced the provision containing the worldwide numerical quota, and into a separate subsection, which is now INA § 203(d).

46. Under INA § 203(d), the only employment-based immigrants currently eligible to apply for immigrant visas or otherwise acquire lawful permanent residence are those "described in" INA § 203(b). *See* INA § 201(a)(2).

47. Section 203(b), in turn, describes various categories of employees sponsored by U.S. employers or, in the case of the EB-5 classification, investors, and indicates the number of such visas available to each category on an annual basis. Unlike the pre-IMMACT90 version of INA § 201(a), which referenced the *total* number of immigrant visa applicants, INA § 203(b) references only the primary immigrant visa applicants in each category—not their spouses or minor children, who are the subject of INA § 203(d).

48. Section 203(d) provides that the spouses and minor children of employment-based immigrants (as well as family-sponsored and diversity immigrants) are eligible for immigrant visas and are "entitled to the same status, and the same order of consideration provided in [subsections (a), (b), and (c)], if accompanying or following to join, the spouse or parent." This provision does not impose any numerical limits or suggest that the number of derivatives admitted should be deducted from the relevant worldwide quotas.

49. An investor's spouse or child has a choice about when to immigrate to the United States. The spouse or child may choose to "accompany" the investor at or around the time the investor immigrates to the United States. *Id.*; *see also* 22 C.F.R. § 40.1(a)(1) (explaining that spouses and children are considered to "accompany" a principal visa petitioner if they seek permanent residency within six months of the principal's admission). But an EB-5 investor's spouse or child may also choose to "follow to join" the EB-5 investor *any time* after the investor obtains lawful permanent residency. *See* 9 Foreign Affairs Manual 503.2-4(A)(c)(1) (a spouse or

child may follow to join "regardless of the time which may have elapsed since the principal alien's admission to the United States").

50. In order to qualify to immigrate the United States under INA § 203(d), an EB-5 investor's spouse or child must continue to meet the INA's definition of "spouse" or "child." A child must be under 21 years of age to qualify. *Id*. INA § 101(b)(1). But under the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002), a child's age is "frozen" from the time the parent files an I-526 petition until the time the petition is approved. INA § 203(h)(1). To obtain the benefit of the CSPA, a child must seek permanent residency within one year of the time a visa number becomes available to his or her investor parent. INA § 203(h)(1)(A).

Impact of Defendants' Counting Policy and Practice on EB-5 Investors and Derivatives

51. Defendants' Counting Policy dictates that immigrant visas issued to EB-5 investors and each of their derivatives are individually counted against the annual EB-5 quota of approximately 10,000 visa numbers. Thus, the total number of immigrants admitted annually through the EB-5 program does not reflect the actual number of investors.

52. In FY 2015, the large majority of EB-5 visas went to Chinese nationals (84%), followed by Vietnamese nationals (3%) and Taiwanese nationals (1%).

53. Since May 2015, visa numbers have been backlogged for China in the EB-5 category. Consequently, both EB-5 investors with approved I-526 petitions and their derivatives may be unable to obtain conditional permanent residence because no visa number is available. As of July 2018, DOS was processing visas for Chinese EB-5 applicants whose I-526 petitions had been approved on August 1, 2014 or before. However, current estimates would require

citizens of China who have already made a job-creating investment under the EB-5 Program to wait 16 years because of the backlogs that result from Defendants' Counting Policy.

54. As a result of these backlogs, investors who have given up their livelihoods in China, left their jobs, enrolled their children in English language schools that have taken them off the standard educational track for advancement in Chinese society, and sold their assets in anticipation of moving to the United States now find themselves languishing in an artificially congested visa queue.

55. The Child Status Protection Act (CSPA), Pub. L. No. 107-28 (Aug. 6, 2002), was enacted to provide relief to children who "age-out," or lose their preferential immigration status as a "child," due to visa backlogs or USCIS processing delays. Under the CSPA, the time period during which the I-526 petition is pending is deducted from the child's age. Once USCIS approves the I-526 petition, however, the clock begins to run again until a visa number becomes available to the child's EB-5 investor parent.

56. As a result, many children of EB-5 investors who were under 21 and therefore eligible to immigrate to the United States with their EB-5 parent, are now shut out of the immigration system. Because the Counting Policy has resulted in a backlog at the time their parent investor's I-526 petition is approved, their age under the CSPA "unfreezes" and they have or will "age-out" while their parent waits in the visa line for a number to become available.

57. Thus, a 20-year-old who is the son or daughter of an investor will not age-out while the petition is pending. However, once the petition is approved, if a visa number does not become available by the time the child turns 21, she will become ineligible to immigrate to the United States with her parent. Given the over 10 year wait in the current backlog, a child from China, for example, whose parent files an I-526 investor application today will age-out if he or

she is 11 years old if the agency promptly adjudicates her petition. Even if the agency took two years to adjudicate the I-526 and those two years are deducted from the child's age under the CSPA, a 13-year-old child today would age out by the time a visa was available.

58. Defendants' unlawful policy and practice results in irreparable harms for investors and their children. Above all, the new lives that EB-5 investors seek in the U.S. are tragically incomplete if their families are unable to join them, but the current backlog has already harmed many investors by causing their children to age-out. And the backlog virtually guarantees that many children of investors who have not yet received visa numbers will age-out.

59. In addition to the fundamental harm to the integrity of investors' families, children aging-out due to Defendants' unlawful counting policy irreparably harms family finances and career prospects. Many investors spend hundreds of thousands of dollars on educating their children in the United States with the expectation that their children will become permanent residents under EB-5 and be able to stay and work in the U.S. after they graduate. When children age-out, these investments in their children's futures are not just wasted; the children are worse off than if they had never been spent in the first place. Children in U.S. schools become acculturated to the U.S. and removed from educational and career networks in their home countries. They are at a distinct disadvantage compared to their peers who never left. And yet if they age-out, they must return to countries they often barely recognize while their parents move childless to the U.S.

60. The backlog also irreparably harms the career prospects of the investors themselves. Given the significant financial resources required to invest under EB-5, many EB-5 investors are middle-aged or older; they have enjoyed investment and career success in their home countries and are seeking to open a new career chapter in the United States. But the

backlog means that a middle-aged investor today will be near or at retirement age by the time his or her EB-5 visa number becomes available. Such investors are deprived of the time necessary to build new professional networks in the U.S., and, in many cases, improve their English skills. Finding new employment will be exceedingly difficult for investors newly-arrived in the U.S. in their seventies lacking English skills. Meanwhile, many investors, in anticipation of their move and in order to handle the logistics of choosing an appropriate EB-5 investment, have already left jobs in their home countries. That lost income cannot be recovered even if, in the face of the backlog, investors manage to find new jobs while they wait.

61. Defendants' Counting Policy also irreparably harms the integrity of EB-5 *investments*. Investors make their investments up-front but then, because of the backlog, are unable to go to the U.S. to monitor their investments for a decade or more. They are unable to visit project sites, meet with investment managers, or otherwise actively oversee the companies in which they have invested considerable capital. What's more, for investors to obtain lawful permanent residence and thus realize the promise of the EB-5 program, their capital must remain invested until the end of the two-year conditional residency period. 8 CFR §§216.6(c-d). The backlog, with that requirement in mind, means investors are unable to reclaim any part of their principal for a decade or more. This seriously harms their finances, preventing them from participating in any new investment opportunities that would have been available to them if wait times were reduced.

62. If EB-5 derivatives were not individually counted toward the annual worldwide quota, many more EB-5 visa numbers would be available and wait times would be significantly reduced, with the result that fewer children of EB-5 investors would age-out before their

immigrant visas were processed, and irreparable harm to families, careers, finances, and EB-5 investments would be prevented.

Irreparable Harm to Plaintiffs

63. Defendants' counting policy has caused grave hardships to the Individual Plaintiffs and their families, as well as the Organizational Plaintiff.

64. Defendants' policy and practice has caused grave hardships for Plaintiff **Feng Wang** ("Mr. Feng Wang") and his family. In 2014, Mr. Feng Wang expended considerable money, time, and effort to contribute $500,000 to an EB-5 regional center fund, which was invested in a real-estate project in Houston. At the time, the Visa Bulletin was current for Chinese investors, and his daughter, Plaintiff **Guanyu Wang**, was a senior in high school. In order to participate in the EB-5 program, Mr. Feng Wang made sacrifices. To research investment projects, he left his job as marketing director for Volkswagen's joint venture in China after twenty years with the company. To afford his EB-5 investment, he mortgaged, and later sold, his apartment. He also opted to forego similar immigration investment opportunities in Canada and Greece.

65. Six months after making his investment, Mr. Feng Wang learned of the new backlog for Chinese EB-5 applicants. As time dragged on, his plans to move his family to the United States unraveled. Unable to remain unemployed while waiting for his priority date to become current, Mr. Feng Wang moved across China to start a new job. Guanyu Wang is now a junior in college in China and is nearing her age-out date. She is applying to U.S. graduate programs, but will be ineligible for tuition reductions and employment opportunities that would have been available with lawful permanent residency. And for Mr. Feng Wang, moving to the

U.S. later in his career than he had anticipated only for his daughter to be forced to return to China is a nightmare scenario.

66. Defendants' unlawful counting practice has derailed Mr. Feng Wang's career, endangered his finances, harmed his daughter's educational and career prospects, and threatens to split his family.

67. Defendants' policy and practice has caused grave hardships for Plaintiff **Yu Qian** ("Ms. Qian") and her family. Ms. Qian expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in a stadium project for the Sacramento Kings basketball team, in October 2012. She filed her I-526 petition on July 1, 2016. Ms. Qian was aware that there was a visa backlog for Chinese citizens under the EB-5 program, but she did not know that the visa backlog was so extensive.

68. Ms. Qian's daughter, Plaintiff **Mengyu Ma**, is currently enrolled as a student at the University of Washington in Seattle. Ms. Qian's daughter will age out, becoming ineligible for an EB-5 derivative visa, in November 2018.

69. Defendants' unlawful counting policy has jeopardized Ms. Qian's finances, career, and her daughter's education and well-being. Ms. Qian decided to participate in the EB-5 program in large part to provide her daughter with U.S. permanent residency. Defendants' unlawful policy and practice will prevent Ms. Qian from realizing that goal.

70. Defendants' policy and practice has caused grave hardships for Plaintiff **Hui Sun** ("Ms. Sun") and her family. Ms. Sun expended considerable money, time, and effort to place $500,000 in an EB-5 regional center investment. She filed her first I-526 petition on December 28, 2012. The petition was denied on November 13, 2013 due to the job creation methodology utilized by the project the EB-5 regional center fund invested in. Ms. Sun filed a new petition on

June 18, 2014. But, with a group of other investors, she also sued USCIS over the denial of her first petition, and reached a settlement agreement effective October 15, 2014. Under the terms of that agreement, the group was promised expedited adjudication of I-526 petitions based on approved projects. The second project in which Ms. Sun had invested was approved by USCIS on May 20, 2015. Per the settlement agreement, Ms. Sun withdrew her 2014 petition and filed a new one for the same project on May 27, 2015. It was approved the next month.

71. Both Ms. Sun's earlier priority dates are now current under the Visa Bulletin, but her new date is not. Her eldest daughter, Plaintiff **Yaotian Xu**, will age out in a year. Her son, Plaintiff **L.T.X.**, and her younger daughter, Plaintiff **B.T.X.**, may age out as well. Ms. Sun's EB-5 funds, which she raised by selling five properties in China, are tied up indefinitely. Yaotian Xu has been in educational and career limbo since 2012. She is currently studying at a U.S. community college on a student visa. L.T.X. is enrolled in an expensive international school in China. Ms. Sun herself put her career on hold to learn English and prepare for a move to the United States.

72. Defendants' unlawful counting policy has jeopardized Ms. Sun's finances, career, and her daughter's education and well-being. The family is six years into their EB-5 journey which has no end in sight. Ms. Sun decided to participate in the EB-5 program in order to provide her children with U.S. permanent residency. Defendants' unlawful policy and practice will prevent Ms. Sun from realizing that goal.

73. Defendants' policy and practice has caused grave hardships for Plaintiff **Fubao Wang** ("Mr. Fubao Wang") and his family. Mr. Fubao Wang expended considerable money, time, and effort on his investment in 701 Seventh Avenue, a mixed-use development near Times Square in New York City, and on his EB-5 application. When Mr. Fubao Wang submitted his I-

526 petition in March 2015, and when his I-526 petition was approved in 2016, Mr. Fubao Wang's daughter, Plaintiff **Naixin Wang**, was eligible to immigrate to the United States with Mr. Fubao Wang as his child. The Visa Bulletin showed no backlog for EB-5 applicants from China in March 2015. But Mr. Fubao Wang's daughter now risks being separated from the rest of her family because she will turn 21 while Mr. Fubao Wang waits for visa numbers to become available, due to the backlog. Mr. Fubao Wang decided to participate in the EB-5 program in order to provide his daughter, who has been studying in the U.S. as a high school and college student since 2013, with U.S. permanent residency. Defendants' unlawful policy and practice will prevent Mr. Fubao Wang from realizing that goal.

74. Defendants' policy and practice has caused grave hardships for Plaintiff **Hongmei Xiao** ("Ms. Xiao") and her family. Ms. Xiao expended considerable money, time and effort to place $500,000 in an EB-5 regional center fund, which was invested in a real estate development in Maryland. When Ms. Xiao submitted her I-526 petition in January 2015, and when her I-526 petition was approved in March 2016, Ms. Xiao's son, Plaintiff **Jiajun Li**, was eligible to immigrate to the United States with Ms. Xiao as her child. But Ms. Xiao's son now risks being separated from the rest of the Xiao family because he will "age out" while Ms. Yang waits for visa numbers to become available, due to the backlog. Jiajun Li will "age out," becoming ineligible for an EB-5 derivative visa, in November 2018. Ms. Xiao decided to participate in the EB-5 program in order to provide her son with U.S. permanent residency. Defendants' unlawful policy and practice will prevent Ms. Xiao from realizing that goal.

75. Defendants' policy and practice has caused grave hardships for Plaintiff **Jianhong Yang** ("Ms. Yang") and her family. Ms. Yang expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in a real estate development

in New York City's Tribeca district. When Ms. Yang submitted her I-526 petition in September 2014, and when her I-526 petition was approved in August 2016, Ms. Yang's son, Plaintiff **Zijing Liu**, was eligible to immigrate to the United States to join Ms. Yang as her child. The Visa Bulletin showed no backlog for EB-5 applicants from China in September 2014. But Ms. Yang's son now risks being separated from the rest of the Yang family because he will "age out" of eligibility while Ms. Yang waits for visa numbers to become available, due to the backlog. Ms. Yang's son will age out, becoming ineligible for an EB-5 derivative visa, in October 2018. Ms. Yang decided to participate in the EB-5 program in order to provide her son with a path to U.S. permanent residency. Defendants' unlawful policy and practice will prevent Ms. Yang from realizing that goal.

76. Defendants' policy and practice has caused grave hardships for Plaintiff **Guonong Chen** ("Ms. Guonong Chen") and her family. Ms. Guonong Chen expended considerable money, time, and effort to place $500,000 in an EB-5 regional fund, which was invested in the Great Wolf Lodge Resort in Anaheim, CA. When she submitted her I-526 petition in 2014, and when her I-526 petition was approved in 2015, Ms. Chen's son, Plaintiff **Haipeng Lu**, would have been eligible to immigrate to the United States with Ms. Guonong Chen had there not been a backlog in effect at the time Ms. Guonong Chen's visa petition was approved. But Ms. Guonong Chen's son "aged out" while Ms. Guonong Chen and her husband were still waiting for visa numbers to become available, due to Defendants' unlawful Counting Policy. Therefore, absent intervention from this Court, he will be ineligible to join his parents in the United States as a derivative. Ms. Guonong Chen and her husband have since received their visas to immigrate to the U.S. Ms. Guonong Chen decided to participate in the EB-5 program in order to provide her son, who has been studying in the U.S. as a high school and college student since 2013, with

U.S. permanent residency. Defendants' unlawful policy and practice has prevented Ms. Guonong Chen from realizing that goal.

77. Defendants' policy and practice has caused grave hardships for Plaintiff **Tong Chen** ("Mr. Tong Chen") and his family. Mr. Tong Chen expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in the mixed-use redevelopment of historic O Street Market in Washington, D.C. When Mr. Tong Chen submitted his I-526 petition in July 2014, and when his I-526 petition was approved in 2015, Mr. Tong Chen's son, Plaintiff **Yiwei Chen**, was eligible to immigrate to the United States with Mr. Tong Chen as his child. The Visa Bulletin showed no backlog for EB-5 applicants from China in July 2014. But absent relief from this Court, Mr. Tong Chen's son will be separated from the rest of the Wang family because he "aged out" while Mr. Tong Chen waited for visa numbers to become available, due to the backlog. Mr. Tong Chen has now received his visa and immigrated to the U.S. in April 2018. He is a resident of Yorba Linda, California. Mr. Tong Chen decided to participate in the EB-5 program in large part to provide his son, who has been studying in the U.S. as a college student since 2015, with U.S. permanent residency. Defendants' unlawful policy and practice has stymied that goal. The family has been paying tuition for Mr. Tong Chen's son at community college, at tens of thousands of dollars a year-- tuition would be significantly reduced if Mr. Tong Chen's son were already a U.S. resident.

78. Defendants' policy and practice has caused grave hardships for Plaintiff **Yongjun Li** ("Mr. Li") and his family. Mr. Li expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in the Great Wolf Lodge Resort in Anaheim, CA. When Mr. Li submitted his I-526 petition in 2014, and when his I-526 petition was approved in 2015, his daughter, Plaintiff **Xin Li,** was eligible to immigrate to the United

States with Mr. Li as his child. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But Mr. Li's daughter now risks being separated from the rest of the Li family because she "aged out" while Mr. Li was waiting for a visa number to become available. Mr. Li and his wife received conditional residency in March 2018. They are currently residents of Chino Hills, California. Their daughter, meanwhile, is enrolled in a graduate program at Cornell University with uncertain job prospects due to her lack of work authorization.

79. Defendants' policy and practice has caused grave hardships for Plaintiff **Jingpo Wang** ("Mr. Jingpo Wang") and his family. Mr. Jingpo Wang expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which invested in 65 Bay Street, a rental tower in Jersey City, New Jersey. When Mr. Jingpo Wang submitted his I-526 petition in March 2014, and when his I-526 petition was approved in 2015, Mr. Jingpo Wang's son, Plaintiff **Haixin Wang**, was eligible to follow to join Mr. Jingpo Wang as his child. The Visa Bulletin showed no backlog for EB-5 applicants from China in March 2014. But Mr. Jingpo Wang's son now risks being separated from the rest of the Wang family because he "aged out" while Mr. Jingpo Wang waited for his visa number to become available, due to the backlog. Mr. Jingpo Wang is now a resident of New Jersey. He decided to participate in the EB-5 program in large part to provide his son, who has been studying in the U.S. as a high school and college student since 2011, with U.S. permanent residency. Defendants' unlawful policy and practice has prevented Mr. Jingpo Wang from realizing that goal.

80. Defendants' policy and practice has caused grave hardships for Plaintiff **Jin Zhu** ("Ms. Zhu") and her family. Ms. Zhu expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in the expansion of Steiner Studios, a film and television complex in Brooklyn, New York. When she submitted her I-526

petition in 2014, and when her I-526 petition was approved in 2016, Ms. Zhu's son, Plaintiff **Tianze Ye**, was eligible to immigrate to the United States with Ms. Zhu as her child. The Visa Bulletin showed no backlog for EB-5 applicants from China in 2014. But, absent relief from this Court, Ms. Zhu's son will be separated from the rest of the Zhu family because he "aged out" while Ms. Zhu was waiting for a visa number to become available. Ms. Zhu decided to participate in the EB-5 program in order to provide her son, who has been educated in the U.S., with U.S. permanent residency. Defendants' unlawful policy and practice has prevented Ms. Zhu from realizing that goal.

81. Defendants' policy and practice has caused grave hardships for Plaintiff **Ning Deng** ("Mr. Deng") and his family. Mr. Deng expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in a building in San Diego, CA, housing a regional office of the Federal Bureau of Investigations. Mr. Deng's EB-5 experience has been a long one. He first submitted an I-526 petition in 2011, based on a regional center investment in a different project. He, his wife, and his daughter, Plaintiff **K.L.D.**, received conditional green cards in 2014. Months later, however, the regional center through which Mr. Deng had made his investment had to shut down the project, meaning the Deng family had to return to China from the U.S., give up their conditional green cards, and start over again.

82. Mr. Deng invested in his current project and submitted a new I-526 petition in December 2014, which was approved in January 2015. At the time, the Visa Bulletin showed no backlog for EB-5 applicants from China. But the wait time has since dashed Mr. Deng's plans. Accepting his bad luck with the failure of his first EB-5 investment, Mr. Deng enrolled K.L.D. in international school in China when the family returned, reasoning that they would only have to wait a few years before receiving new visa numbers and he could enroll his daughter in U.S. high

school. But with no end to their wait in sight, K.L.D. faces an extremely uncertain educational and professional future. She is off the mainstream Chinese track for educational and professional advancement, and she will turn 21 while Mr. Deng waits for visa numbers to become available, due to the backlog. Mr. Deng decided to participate in the EB-5 program in order to provide his daughter with U.S. permanent residency. Defendants' unlawful policy and practice will prevent Mr. Deng from realizing that goal. In April 2017, Mr. Deng's wife, Plaintiff **Jing Yang**, resigned her job as a state employee to study English and prepare to accompany K.L.D. to the U.S. Jing Yang coped with onerous requirements placed on state employees seeking to emigrate. As a result of the backlog, her lack of employment, and uncertainty regarding her future, Jing Yang is suffering from depression.

83. Defendants' policy and practice will cause grave hardships for Plaintiff **Fang Zhao** ("Mr. Zhao") and his family. Mr. Zhao, who has studied at the State University of New York at Albany and is preparing to enroll in California Northstate University, expended considerable money, time, and effort to place $500,000 in an EB-5 regional center fund, which was invested in the renovation of the historic Century Plaza Hotel in Los Angeles, California. Mr. Zhao filed his I-526 petition in September 2015, and the petition was approved in 2016.

84. The funds Mr. Zhao used for his EB-5 investment were a gift from his parents. His parents sold a property in China in order to provide Mr. Zhao with the funds for his investment. Since Mr. Zhao's parents sold the property, its valuation has risen significantly, meaning Mr. Zhao's parents have lost several hundred thousand dollars in investment value. Despite this, due to the backlog, Mr. Zhao faces a wait time of over a decade before he can obtain a provisional green card. Defendants' unlawful policy and practice will harm Mr. Zhao's career prospects in the U.S., as he will be unable to work in the U.S. after he graduates. Mr. Zhao

has been a student in the U.S. since 2010, is acculturated to the U.S. and has lost many personal connections to his home country. As a result of the Counting Policy, he now faces the prospect of being forced to return to China to wait for a decade or more for a visa to become current, even while his half million dollar investment is actively creating jobs for U.S. workers.

85. Plaintiff American Lending Center LLC ("ALC") is a USCIS-designated regional center headquartered in Long Beach, California. ALC serves immigrant investors by facilitating capital investments in job-creating new commercial enterprises. In addition to operating as a regional center for EB-5 investment projects in California, ALC also serves as the general partner for new commercial enterprises funded by immigrant investors that invest in projects across the United States through ALC-affiliated regional centers in seventeen states and the District of Columbia. The new commercial enterprises fund the construction and operation of a diverse array of projects including hotels, residential communities, and assisted living facilities. The projects funded by ALC new commercial enterprises have created over 6,000 jobs for U.S. workers.

86. ALC generates revenue by charging immigrant investors an administrative fee for providing its regional center investment services, and through interest payments on loans its new commercial enterprises extend to job-creating development projects. Defendants' unlawful Counting Policy has had, and continues to have, serious, direct negative impacts on ALC's business. Historically, most of ALC's clients have been Chinese citizens. The visa retrogression and associated wait time for EB-5 petitioners from China caused by Defendants' Counting Policy has stopped many potential Chinese investors from participating in the EB-5 Program, and as a result deprived ALC of numerous clients and the revenue and business opportunities they generate. In the last year alone, the number of new investors signed by ALC has declined

by almost 80 percent, and the company has lost over one million dollars in management income. Due to the lack of investors, ALC and its affiliated regional centers have been forced to abandon multiple new development projects that would have created jobs for 2,200 U.S. workers and injected $80,000,000 in new capital into the U.S. economy. The effects of Defendants' Counting Policy directly threatens ALC's entire business model and its ability to continue operating as a business.

87. ALC also asserts harm as a third party on behalf of its potential clients as a vendor of EB-5 regional center services. At the current rate of economic loss ALC continues to suffer due to Defendant's Counting Policy, ALC will be forced out of business, thereby depriving potential Chinese EB-5 investors from utilizing, and realizing the benefits of, ALC's services. Additionally, numerous potential EB-5 investors from China have refrained from pursuing ALC's services solely and specifically due to the visa backlog caused by Defendants' Policy. The interests of ALC and its potential clients affected by Defendants' Counting Policy are closely related – ALC has an interest is selling its services to EB-5 investors from China and the company's potential clients from China have an interest in using and paying for ALC's services in order to promptly obtain conditional permanent residence in the U.S. along with their families. Defendants' Counting Policy directly frustrates both of these closely related objectives.

## CLASS ACTION ALLEGATIONS

88. Individual Plaintiffs seek class-wide injunctive and declaratory relief, pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2), on behalf of a class and two subclasses.

Overall Class

89. The overall class represented by all of the Individual Plaintiffs is defined as:

> Investors with approved or pending I-526 petitions (and their spouses and children), who have filed or will file applications for immigrant visas or

adjustment of status that were not or will not be adjudicated in accordance with INA §§ 203(b)(5), (d) and the applicable regulations as a result of the Defendants' Counting Policy, and who are or will be harmed as a result.

***Numerosity***

90. The class meets the numerosity requirement of Rule 23(a)(1). The class is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the precise number of potential class members because Defendants are in the best position to identify such persons. Upon information and belief, there are thousands of persons for whom Defendants have failed or will fail to properly and timely adjudicate their applications for immigrant visas or adjustment of status. Plaintiffs' counsel alone represents over 270 EB-5 investors who are dramatically affected and whose children will age-out, have aged-out, or will be subject to significant waiting times that negatively impact their lives.

***Commonality***

91. The class meets the commonality requirement of Rule 23(a)(2). Questions of law and fact presented by the Individual Plaintiffs are common to members of the class and predominate over any questions affecting only the named Individual Plaintiffs. These common questions of fact and law turn on the legality of Defendants' Counting Policy, including whether it is supported by the Immigration and Nationality Act and whether it is being applied in violation of the Administrative Procedure Act's notice and comment requirements.

***Typicality***

92. The class meets the typicality requirement of Rule 23(a)(3). The claims of the Individual Plaintiffs are typical of those of the class as a whole because they are all EB-5 investors with approved or pending I-526 petitions, or their derivatives, who are currently

foreclosed from obtaining immigrant visas abroad or adjusting their status to lawful permanent residence in the United States due to the visa backlog caused by Defendants' Counting Policy.

***Adequacy of Representation***

93. The Individual Plaintiffs are adequate class representatives and thus meet the requirements of Rule 23(a)(4). The Individual Plaintiffs will fairly and adequately protect the interests of the proposed class members because they seek relief on behalf of the class as a whole, understand their responsibilities as class representatives, and have no interests antagonistic to other class members.

94. Plaintiffs' lead counsel, Ira J. Kurzban, has a 38-year history of experience in immigration-related class action cases and can adequately represent the interests of class members as well as the named Individual Plaintiffs.

First Subclass

95. The First Subclass is defined as:

> Children of investors who have or will age-out of eligibility to immigrate to the United States with their investor parent as a result of defendant's Counting Policy, along with the investor parents of such children.

The First Subclass is represented by Plaintiffs Feng Wang, Guanyu Wang, Yu Qian, Mengyu Ma, Hui Sun, Yaotian Xu, L.T.X., B.T.X., Fubao Wang, Naixin Wang, Hongmei Xiao, Jiajun Li, Jianhong Yang, Zijing Liu, Guonong Chen, Haipeng Lu, Tong Chen, Yiwei Chen, Yongjun Li, Xin Li, Jingpo Wang, Haixin Wang, Jin Zhu, Tianze Ye, Ning Deng, and K.L.D. ("First Subclass Plaintiffs"). The legal issues in the class and First Subclass are identical although the injury to the Plaintiffs and the class members as a whole may vary depending upon the posture of their case.

***Numerosity***

96. The allegations of paragraph 90 are incorporated herein with respect to the First Subclass. Additionally, upon information and belief, there are thousands of persons whose children have aged out or will age out due to Defendants' Counting Policy.

***Commonality***

97. The allegations of paragraph 91 are incorporated herein with respect to the First Subclass. Additionally the questions of fact and law presented by the First Subclass Plaintiffs are common to members of the subclass and predominate over any questions affecting only the named First Subclass Plaintiffs in that the children have aged out or will age out due to Defendants' Counting Policy.

***Typicality***

98. The allegations of paragraph 92 are incorporated herein with respect to the First Subclass. Additionally, the claims of the First Subclass Plaintiffs are typical of the subclass as a whole because their children have aged out or will age out due to Defendants' Counting Policy.

***Adequacy of Representation***

99. The allegations of paragraphs 93 and 94 are incorporated herein with respect to the First Subclass.

Second Subclass

100. The Second Subclass is defined as:

> Plaintiffs and their derivatives who have suffered substantial loss of income, education, and educational opportunities as a result of the inability to obtain current priority dates due to the Defendants' Counting Policy. Plaintiff Fang Zhao represents this subclass.

The Second Subclass is represented by Plaintiff Fang Zhao. The legal issues in the class and Second Subclass are identical although the injury to the Plaintiffs and the class members as a whole may vary depending upon the posture of their case.

***Numerosity***

101. The allegations of paragraph 90 are incorporated herein with respect to the Second Subclass. Additionally, upon information and belief, there are thousands of persons who have suffered substantial loss of income, education, and educational opportunities as a result of the inability to obtain current priority dates due to the Defendants' Counting Policy.

***Commonality***

102. The allegations of paragraph 91 are incorporated herein with respect to the Second Subclass. Additionally the questions of fact and law presented by Plaintiff Fang Zhao are common to members of the subclass and predominate over any questions affecting only himself he and the members of the Second Subclass have suffered substantial loss of income, education, and educational opportunities as a result of the inability to obtain current priority dates due to the Defendants' Counting Policy.

***Typicality***

103. The allegations of paragraph 92 are incorporated herein with respect to the Second Subclass. Additionally, the claims of Plaintiff Fang Zhao are typical of the subclass as a whole because he has suffered substantial loss of income, education, and educational opportunities as a result of the inability to obtain a current priority date due to the Defendants' Counting Policy.

***Adequacy of Representation***

104. The allegations of paragraph 93 and 94 are incorporated herein with respect to the Second Subclass.

**Declaratory and Injunctive Relief Allegations**

105. An actual and substantial controversy exists between the Individual Plaintiffs, the proposed class and the Organizational Plaintiff, and the Defendants as to their legal rights and duties. Plaintiffs contend that Defendants' actions violate Plaintiffs' rights and the rights of the proposed class.

106. Defendants' Counting Policy has caused and will continue to cause irreparable injury to the Individual Plaintiffs, the proposed class and the Organizational Plaintiff. Injuries include: separated families, damaged career, educational, and financial prospects, and loss of business. Plaintiffs have no adequate remedy at law.

107. EB-5 visas for Individual Plaintiffs and the proposed class have been or will be withheld due to Defendants' Counting Policy challenged herein.

108. The INA and applicable regulations provide for no administrative appeal from the withholding of EB-5 visas. Accordingly, the agency actions in this case are final within the meaning of 5 U.S.C. § 704, and Plaintiffs have exhausted their administrative remedies.

109. Under 5 U.S.C. §§ 702 and 704, the Individual Plaintiffs, the proposed class, and the Organizational Plaintiff have suffered a "legal wrong" and have been "adversely affected or aggrieved" by agency action for which there is no adequate remedy in a court of law.

110. Based on the foregoing, the Court should grant declaratory and injunctive relief under 28 U.S.C. § 2202 and 5 U.S.C. § 702.

## CAUSES OF ACTION

### COUNT ONE

### (Violation of the APA)

111. Plaintiffs incorporate paragraphs 1 through 110, as if fully stated in this Count.

112. The Administrative Procedure Act ("APA") authorizes courts to "compel agency action unlawfully withheld[.]" 5 U.S.C. § 706(1).

113. The Department of State has a mandatory duty under the INA to allocate visa numbers and establish cut-off dates consistent with the visa allocations Congress established.

114. By counting the spouses and children of EB-5 investors against the allocation of visa numbers reserved for investors under INA § 203(b)(5), the Department has acted contrary to the dictates of the statue, which does not authorize the counting of derivatives against the EB-5 visa quota.

115. Defendants are required to allocate visa numbers and establish cut-off dates consistent with the visa quotas Congress established under the INA – namely, *without* counting spouses and children against the EB-5 visa quota.

116. In addition, Defendants' establishment of visa cut-off dates in the EB-5 category constitutes final agency action that violates the INA and the APA as a result of Defendants' application of the Counting Policy, and should be set aside pursuant to 5 U.S.C. § 706(2)(A) as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and pursuant to 5 U.S.C. § 706(2)(D) as without observance of procedures required by law.

117. The Department's Counting Policy contravenes the requirement in the INA that EB-5 visa numbers be allocated to investors, while the spouses and children of investors are

accorded the same status and order of consideration as investors without expending EB-5 visa numbers.

118. The Counting Policy contravenes the mandate in INA § 203(d) that a spouse or child is entitled to "the same status, and the same order of consideration" as the immigrant investor. If spouses or children are allocated separate visa numbers from the principal EB-5 investor, there is no guarantee that they will get the same "order of consideration" as the principal in various circumstances because a visa number may not be available at the time the derivatives want to "follow to join" the investor in the United States.

119. If, as INA § 203(d) states, derivatives accompanying or following to join a spouse or parent are "entitled to the same status, and the same order of consideration" as the primary applicant, each derivative's place in line must be controlled by the date of the primary applicant's petition. In other words, every spouse and minor child must occupy the same place in line as his or her spouse or parent, respectively, and should be allowed to immigrate at the same time. This can be guaranteed only by counting the EB-5 investor and his or her derivatives as a single family unit and expending a single visa number on all of them.

120. If spouses or children are allocated separate visa numbers, they may not get the same order of consideration as the principal in various circumstances. For example, if a visa number is presently available to a principal investor, he can immigrate to the United States immediately. If his spouse wants to "follow to join" subsequently, the spouse will be unable to do so if a visa number is no longer available. Under these circumstances, the spouse or child will not receive the same "order of consideration."

121. INA § 203(e) provides, in relevant part, that "[i]mmigrant visas made available under subsection (a) or (b) shall be issued to eligible immigrants in the order in which a petition

on behalf of each such immigrant is filed . . . ." The omission of any reference to subsection (d), which addresses immigrant visas for derivatives, can only mean that the "order of consideration" for derivatives of employment-based immigrants is based solely on the petitions filed by principal applicants under subsection (b).

122. The references to "qualified immigrants" in Section 203(a) and (b), together with the lack of any such reference in Section 203(d), further demonstrate that the worldwide quotas apply only to principal applicants who seek to enter for specific purposes — not their spouses, school-aged children, or toddlers. This distinction is particularly explicit in INA § 203(b)(5)(B), which provides that a minimum of 3,000 visas "shall be reserved for qualified immigrants who invest in a new commercial enterprise" related to a targeted employment area. Because derivatives do not have a separate basis for qualifying and will not independently invest in a new commercial enterprise, there is no provision for deducting immigrant visas they receive from the worldwide quotas. Given that principal EB-5 investors have generally used approximately one third of the 10,000 available EB-5 visas while their derivatives have used the remaining two thirds, there would be virtually no remaining visas available for those who choose to invest $1,000,000 outside of a targeted employment area. This result is clearly at odds with Congress's intent. Statements by Members of Congress following the issuance of the conference report on IMMACT90 provide additional evidence that the worldwide quotas were not intended to include immigrant visas issued to dependents of EB-5 investors. Notably, Senator Paul Simon (D-IL) stated, "We have an investor program that will permit up to 10,000 people to make investments here, to come to this country and create jobs." 136 Cong. Rec. 35,616 (1990). Senator Edward Kennedy (D-MA) likewise affirmed that "10,000 employment generating visas are provided for investors who invest in enterprises, especially in depressed or rural or urban areas, which create a

minimum of 10 new jobs for Americans." *Id.* at 35,610. And Representative Lamar Smith (R-TX) stated about the EB-5 Program:

> [T]his particular provision of the immigration bill is actually the only provision of the immigration bill that is absolutely guaranteed to create jobs and produce revenue for the U.S. Government. In fact, if these 10,000 investor visas are taken advantage of, it will create *a minimum of 100,000 jobs in the United States*, and it will generate a revenue of up to $10 billion [ . . . ] This provision, of course, says that 10,000 investors may come into the country if they are going to start a business that will employ at least a minimum of 10 employees. That is where the figure comes from of 100,000 guaranteed jobs.

136 Cong. Rec. 36,841 (1990) (emphasis added).

123. Members of Congress envisioned that the spouses and children of EB-5 investors would receive immigrant visas under INA § 203(d), not INA § 203(b). Their intent is clearly reflected in the plain language of the law.

124. Defendants' counting policy cannot be squared with the plain language of INA § 203(b)(5) or its legislative history, both of which indicate that Congress intended to allocate 10,000 visas to immigrant *investors*. INA § 203(b)(5) expressly allocates 3,000 of the approximately 10,000 available EB-5 visas to "qualified immigrants who *invest* in a new commercial enterprise" related to an EB-5 regional center. Assuming that this language must be construed to include only principal EB-5 investors and that such investors have generally used approximately one third of the 10,000 available EB-5 visas, while their derivatives have used the remaining two thirds, there would be virtually no remaining visas available for direct EB-5 investors. This result is clearly at odds with Congress's intent.

125. Defendants' Counting Policy is also arbitrary and capricious because it is unmoored from the purposes and concerns animating the EB-5 program. Congress enacted the EB-5 statute to attract foreign capital; encourage economic development, especially in rural or economically depressed areas of the United States; promote job creation; and generally be of

benefit to the U.S. economy and labor market. By severely limiting the number of EB-5 visas issued annually to investors, Defendants' counting policy undermines these goals.

126. The Defendant's actions in improperly counting derivatives as part of the investor quota only recently had an adverse effect known to the Plaintiff class and subclasses. It was only since 2015 that DOS first announced that there was a backlog in visas and even more recently that the backlog would adversely affect plaintiffs and plaintiff class and subclasses.

**COUNT TWO**

**(Exceeding Statutory Authority and *Ultra Vires* Action)**

127. Plaintiffs incorporate paragraphs 1 through 110, as if fully stated in this Count.

128. Pursuant to the Administrative Procedure Act, a reviewing court may set aside agency actions that are "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). A court may also exercise its equitable powers to declare an agency action *ultra vires* when it does not conform to the statutes which the agency is required to execute scrupulously.

129. Defendants have exceeded their statutory authority because there is no lawful basis under the INA or applicable regulations to authorize their practice of individually counting immigrant visas for spouses and children of EB-5 immigrant investors against the annual worldwide quota set forth in INA § 203(b). Defendants' counting policy is unlawful because, as implemented, it contravenes the mandate in INA § 203(d) that a spouse or child is entitled to "the same status, and the same order of consideration" as the immigrant investor. If spouses or children are allocated separate visa numbers from the principal EB-5 investor, there is no guarantee that they will get the same "order of consideration" as the principal in various circumstances because a visa number may not be available at the time the derivatives want to "follow to join" the investor in the United States.

130. Defendants' Counting Policy cannot be squared with the plain language of INA § 203(b)(5) or its legislative history, both of which indicate that Congress intended to allocate 10,000 visas to immigrant *investors*.

**COUNT THREE**

**(Violation of the Rulemaking Requirements of the Administrative Procedure Act)**

131. Plaintiffs incorporate paragraphs 1 through 110 herein, as if fully stated in this Count.

132. The Administrative Procedure Act, 5 U.S.C. § 553, requires that notice of a legislative rule be published in the Federal Register and that the agency provide an opportunity for public comment by interested persons. Further, such rules may only be applied prospectively under the APA. Defendants, in violation of 5 U.S.C. § 553, are applying their Counting Policy retroactively without observing the APA's notice and comment procedures.

133. A legislative rule or regulation is one that affects those outside of government, binds agency personnel, or modifies an existing regulation. Defendants' Counting Policy qualifies as a legislative rule and therefore requires rulemaking.

134. Defendants' Counting Policy was never subject to notice and an opportunity for comment as the APA requires.

**ATTORNEYS' FEES UNDER EAJA**

135. Plaintiffs incorporate paragraphs 1 through 110, as if fully stated in this Count.

136. As a result of Defendants' unlawful actions, Plaintiffs were required to retain counsel and pay counsel reasonable fees and expenses. Plaintiffs' counsel has expended time and resources in an effort to challenge Defendants' unlawful policy and practice of individually counting immigrant visas for spouses and children of EB-5 immigrant investors against the

annual worldwide quota set forth in INA § 203(b). As a result of Defendants' unlawful policy and practice, counsel expended time and resources to litigate the instant action.

137. Pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 28 U.S.C. § 2412, Plaintiffs' counsel are entitled to recover costs, expenses, and fees from Defendants, whose actions are not and have not been substantially justified.

**Request for Relief**

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

(1) Assume jurisdiction over this matter;

(2) Certify the case as a class action as proposed herein and in the accompanying motion for class certification and certify all classes and subclasses

(3) Declare that Defendant's imposition of its Counting Policy without engaging in rulemaking violates Section 553 of the APA;

(4) Order Defendants to establish visa cut-off dates for the EB-5 Program category without applying the Counting Policy in calculating visa number availability;

(5) Declare that Defendants' establishment of visa cut-off dates by counting immigrant visas for spouses and children of EB-5 immigrant investors against the annual worldwide quota set forth in INA § 203(b) violates the INA and applicable regulations; violates the Administrative Procedure Act; is *ultra vires*; and is arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with law;

(6) Declare Defendants' pattern and practice of individually counting immigrant visas for spouses and children of EB-5 immigrant investors against the annual worldwide quota set forth in INA § 203(b) to be in excess of statutory jurisdiction, authority, or limitations under 5 U.S.C. § 706(2), and *ultra vires* of the INA.

(7) Enjoin Defendants from continuing to implement their Counting Policy;

(8) Order Defendants to comply with INA § 203(b) and INA § 203(d) by counting primary EB-5 applicants and their dependents as a single family unit and adjudicating EB-5 petitions within a reasonable time period, both prospectively and retroactively from the date they first imposed a backlog;

(9) Order Defendant to count all derivative sons and daughters of Individual Plaintiffs who would not have aged-out but for Defendant's policy, as eligible to now accompany or follow-to-join their parents to receive their conditional residency status.

(10) Award reasonable costs and attorneys' fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and

(11) Grant such other and further relief as the Court deems just, equitable, and proper.

Dated: July 25, 2018

Respectfully submitted,

/s/ Ira J. Kurzban

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