UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FENG WANG, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	)	Case No.: 18-cv-1732

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Feng Wang et al. hereby move this Court for the issuance of a preliminary injunction pursuant to Fed. R. Civ. P. 65 and Local Rule 65.1(c)-(d).

Plaintiffs support this motion through the accompanying statement of points and authorities. Plaintiffs respectfully request an oral hearing on the motion.

Dated: July 25, 2018

Respectfully submitted,

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PLAINTIFFS' STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Congress created the EB-5 Immigrant Investor visa program in 1990 to help U.S. businesses raise investment capital, create new jobs, and bolster the American economy. Under the program, foreign investors who contribute substantial capital to U.S. companies and create at least 10 jobs per investment for U.S. workers are allowed to apply for permanent residency in the United States. The investors' spouses and children also qualify to immigrate through their relationship with the investor. The EB-5 law authorizes just under 10,000 visas to be issued to EB-5 investors each fiscal year. When operating at capacity, the program can annually inject more than $5 billion of investment capital into the U.S. economy and create new jobs for at least 100,000 U.S. citizens ("USCs") and lawful residents ("LPRs") each year because each investor must create at least 10 jobs for USCs and LPRs.

This lawsuit challenges the Department of State's ("Department") decision to discount the EB-5 Program's job creation and investment potential by unlawfully reducing the number of EB-5 visas that can be issued to investors each year. Rather than allocate 10,000 visas for EB-5 investors as the statute's plain language requires, the Department counts the spouses and children of investors against the annual visa allotment set aside for *investors*. As a result, more than half of the annual allotment of EB-5 visa numbers are expended on the spouses and children of investors rather than investors themselves. The Department follows this "Counting Policy" even though the statute provides that spouses and children do not use up EB-5 visa numbers.

The Department's Counting Policy undercuts the EB-5 Program's capital investment and job-creation purposes, harms U.S. businesses, forces *bona fide* foreign investors who have established their eligibility for U.S. residency to languish in unnecessarily long waiting lists for visas, and threatens to separate immigrant families by causing children to "age out" of eligibility.

In this motion, Plaintiffs – thirteen EB-5 investors with approved visa petitions and their spouses and children, and a U.S.-based "regional center" sponsor of projects funded with EB-5 investment capital – seek a preliminary injunction barring Defendants from counting visas issued to spouses and children of investors against the annual EB-5 visa allotment. Plaintiffs also request preliminary injunctive relief to order the Department to make immediately available all visa numbers which should have been assigned to EB-5 investors but were not because of the Department's unlawful Counting Policy. This preliminary relief is necessary to prevent irreparable harm to Plaintiffs, including Feng Wang, Hongmei Xiao, and Jianhong Yang, whose children will permanently and irrevocably "age out" of eligibility in the coming months absent relief from this Court.

BACKGROUND

A. The Immigration Process for EB-5 Investors

As part of the Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, § 121(a), 104 Stat. 4978, 4989, Congress established a new path to lawful permanent residency for foreign nationals who invest substantial capital in U.S. businesses that create jobs for U.S. workers. *See* 8 U.S.C. § 1153(b)(5). This "EB-5 Program" – so called because it is the fifth employment-based preference category under the Immigration and Nationality Act – was designed to stimulate the U.S. economy through job-creation and foreign capital investment. By the Government's own estimates, the program has brought in more than $10 billion in investment capital for U.S. businesses and helped create tens of thousands of new jobs from the Program's inception through 2014. *See* Carla N. Argueta and Alison Siskin, Cong. Research Serv., R44475, *EB-5 Immigrant Investor Visa* 15 (2016).

Regional centers, like Plaintiff American Lending Center, LLC, are critical to the EB-5 Program's success. In 1992, Congress amended the EB-5 statute to allow applicants to invest

through "regional center[s]" – entities organized "for the promotion of economic growth." Pub. L. 102-395, § 610, 106 Stat. 1828, 1874 (8 U.S.C. § 1153 note). The regional center provision, as amended, sets aside 3,000 EB-5 visa numbers for EB-5 applicants who invest through a regional center, as well as their spouses and children. *Id.*; Pub. L. No. 105-119, 111 Stat. 2440, 2467 (Nov. 26, 1997). Regional centers help maximize the EB-5 Program's impact by establishing projects in which multiple EB-5 applicants invest. EB-5 applicants can choose between investing through a regional center or making a "direct investment."

The path to lawful permanent residency through the EB-5 Program involves several steps. First, an EB-5 applicant must file a Form I-526 visa petition with the United States Citizenship and Immigration Services ("USCIS") seeking classification as an EB-5 investor. 8 U.S.C. § 1154(a)(1)(H); 8 C.F.R. § 204.6(a). Consistent with the EB-5 statute's capital investment and job-creation requirements, the I-526 petition must demonstrate that: (1) a "new commercial enterprise" in the United States has been established; (2) the applicant "has invested or is actively in the process of investing the required amount of capital" in that enterprise; (3) the investor obtained the capital through lawful means; and (4) the new commercial enterprise will create at least ten full-time positions for qualifying U.S. workers. 8 C.F.R. § 204.6(j). Normally, an applicant must invest $1,000,000 to qualify, but this amount is reduced to $500,000 when the investment is made within a "targeted employment area" ("TEA"). 8 U.S.C. § 1153(b)(5)(C)(i)-(ii), 8 C.F.R. § 204.6(f)(1)-(2).[1] When USCIS approves the Form I-526 petition, the applicant is classified as an "employment-based immigrant" under the EB-5 statute, 8 U.S.C. § 1153(b)(5). *Id*. § 1154(a)(1)(H).

[1] A TEA is "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." 8 U.S.C. § 1153(b)(5)(B)(ii).

Congress has established an annual quota of EB-5 visas that are available to investors. Overall, "[t]he worldwide level of employment-based immigrants [. . .] for a fiscal year is equal to [. . .] 140,000."[2] *Id.* § 1151(d). The EB-5 statute provides, in turn, that "[v]isas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants" who invest in job-creating U.S. businesses as specified by the statute. *Id.* § 1153(b)(5). Thus, the EB-5 statute authorizes visas to be issued annually to approximately 10,000 investors (9,940 to be precise) who satisfy the EB-5 Program's requirements. The statute also provides that of these visas, at least 3,000 should be reserved for qualifying investors in rural or high-unemployment TEAs. *Id.* § 1153(b)(5)(B)(i).

In addition to the worldwide cap on employment-based visas, Congress also imposed a 7% per-country cap on the total number of visas that may be issued to the nationals of any single foreign state. *Id.* § 1152(a)(2). This cap impacts applicants for a particular visa category when that category is "oversubscribed" – that is, when there are more qualified applicants seeking permanent residency based on their qualifications in that preference category than there are visa numbers available. *Id*. § 1152(a)(5)(A) (providing that "[i]f the total number of visas available" under any of the employment-based preference categories, including EB-5, "exceeds the number of qualified immigrants who may otherwise be issued such visas," then the per-country cap does not apply).

EB-5 visas, like all employment-based immigrant visas, "shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed." *Id.* § 1153(e)(1). Thus, the limited supply of EB-5 visas must be issued to applicants in the order in

[2] In fact, the amount is 140,000 plus any unused visas from the family-based preference categories. *See* 8 U.S.C. § 1151(d)(1)(B), (d)(2). But because all family-based visas are used up every year, this "recapture" provision has no practical effect.

which their Form I-526 visa petitions were filed, after accounting for any backlogs specific to an individual country as a result of the per-country quota.

The INA and implementing regulations charge the Department of State with allocating visa numbers consistent with these worldwide and per-country quotas. *Id.* § 1153(e)(3) (requiring the Secretary of State to establish regulations to maintain "[w]aiting lists of [visa] applicants"); § 1153(g) (authorizing the Secretary of State "to make reasonable estimates of the anticipated number of visas to be issued" and to "rely upon such estimates in authorizing the issuance of visas"); 22 C.F.R. § 42.51(a) ("Centralized control of the numerical limitations on immigration specified in INA 201, 202, and 203 is established in the Department"). To fulfill this mandate, the Department's Visa Office uses an Immigrant Numerical Control System. By comparing visa demand with the total visa numbers available, the system establishes a "Final Action Date" (known as a "cut-off" date) that is communicated to U.S. Embassies and consulates abroad and published in the Department's Visa Bulletin on a monthly basis. If the supply of visa numbers for a particular preference category exceeds demand, the category is deemed "current." If demand exceeds supply based on either the worldwide or per-country quotas, the category is deemed "oversubscribed" and subject to a cut-off date. In the EB-5 context, only investors with approved I-526 petitions which were filed *before* the present cut-off date are eligible to obtain U.S. residency based on their investment.

EB-5 investors may apply for U.S. residency in two ways. If abroad, an investor must file an immigrant visa application at a U.S. embassy or consulate. *See* 8 U.S.C. §§ 1201, 1202. If in the United States, the investor must file an application to adjust status with USCIS. *Id*. § 1255. Neither a visa application nor an application to adjust status can be approved unless the Department determines that a visa number is available to the applicant based on the applicant's

priority date. *Id*. § 1255(a)(3) (USCIS cannot grant an applicant adjustment of status unless "an immigrant visa is immediately available to him at the time his application is filed"); 8 C.F.R. § 245.1(g)(1) (USCIS consults the Visa Bulletin "to determine whether an immigrant visa is immediately available"), *id*. § 245.2(a)(5)(ii) ("[a]n application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State"); 7 USCIS Policy Manual, Part A, Chap. 6, § C.4 ("USCIS . . . uses [the Visa Bulletin] to determine whether an Application to Register Permanent Residence or Adjust Status may be accepted for filing and receive final adjudication…. A visa must be available both at the time an applicant files Form I-485 and at the time USCIS approves the application.").

When an investor is admitted to the United States using an EB-5 visa issued abroad or USCIS approves the investor's application for adjustment of status, the investor becomes a lawful permanent resident on a conditional basis. *See* 8 U.S.C. § 1186b(a)(1). Within ninety days of the two-year anniversary of an investor's admission as a conditional resident, the investor must file a petition to remove the "conditions," demonstrating that he or she continues to satisfy the EB-5 Program's capital investment and job-creation requirements. *Id*. § 1186b(d)(1); 8 C.F.R. § 216.6(a). If the petition to remove conditions is approved, the investor becomes a full lawful permanent resident. 8 C.F.R. § 216.6(d)(1).

B. Provision for the Spouses and Children of EB-5 Investors

Immigration law authorizes the spouses and children of EB-5 investors to immigrate to the United States. Pursuant to 8 U.S.C. § 1153(d):

> A spouse or child … shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa … , be entitled to the same status and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

Under this provision, a "spouse" or "child" of an EB-5 investor is accorded the same "status and the same order of consideration" as the EB-5 investor herself. *Id*.

This provision gives an investor's spouse or child 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. *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). Alternatively, an EB-5 investor's spouse or child may "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").

In order to qualify to immigrate to the United States under § 1153(d), an EB-5 investor's spouse or child must continue to meet the INA's definition of "spouse" or "child" at the time he or she applies for an immigrant visa or adjustment of status. A child must be under 21 years of age to qualify. 8 U.S.C. § 1101(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" during the pendency of the parent investor's I-526 petition, provided that a visa number is available to the parent investor when the I-526 petition is approved. 8 U.S.C. § 1153(h)(1); *see also* 3 Charles Gordon et al., *Immigration Law & Procedure*, § 36.04[2][c] (2015 ed.) (CSPA "freezes the son or daughter's 'age' for eligibility purposes as of an earlier date in the application process, thus preserving the status of 'child'"). By contrast, if a visa number is not available at the time the parent investor's I-526 petition is approved, the child's age "unfreezes" upon approval of the petition and begins to accrue until an immigrant visa becomes available to the parent investor. *Id*. To obtain the CSPA

benefit, a child must seek permanent residency within one year of the time a visa number becomes available to his or her investor parent. 8 U.S.C. § 1153(h)(1)(A).

C. The Department of State's Policy of Counting Spouses and Children Against the Worldwide EB-5 Visa Quota

Nothing in the EB-5 statute, or any other provision of law, provides that visas issued to the spouses or children of EB-5 investors should count against the approximately 10,000 visa numbers set aside for actual EB-5 investors. Nevertheless, the Department has implemented a policy and practice of deducting visa numbers for spouses and children from the allotment set aside for EB-5 investors. This "Counting Policy" provides that "*[e]very* individual (whether a principal beneficiary *or derivative*) who is issued an immigrant visa or who adjusts status to LPR in a particular classification counts against its numerical limit." 9 Foreign Affairs Manual 503.1-2(A)(a) (emphasis added). The Department applies this policy when determining the "cut-off" dates applicable to EB-5 investors.

The result of the Counting Policy is to reduce the number of visas made available to EB-5 investors well below the allotment Congress established. EB-5 visa numbers are to "be made available […] to qualified immigrants" who invest in a job-creating new commercial enterprise. 8 U.S.C. § 1153(b)(5). The Department's policy diminishes this number substantially by expending the majority of EB-5 visa numbers on the spouses and children of investors who do not meet the definition of an investor at § 1153(b)(5).

The reduction of EB-5 visa numbers available to investors that results from this Counting Policy has created a severe backlog in the EB-5 preference category for Chinese investors. The backlog began in May 2015, when the Department first concluded that demand for EB-5 visas outstripped supply. Because the majority of EB-5 applicants come from mainland China, the Department imposed a cut-off date only for Chinese investors. *See* Dep't of State, Visa Bulletin

May 2015, *available at* http://bit.ly/2I0uig4. The Visa Bulletin established a May 1, 2013, "cut-off" date, making investors who had filed I-526 petitions later ineligible to immigrate to the United States. *Id*. According to the Department, imposition of this cut-off date for Chinese investors was necessary "to hold number use within the maximum level of numbers which may be made available for use by such applicants during FY-2015." *Id*. Ever since May 2015, every Department Visa Bulletin has included a "cut-off" date for Chinese investors. Because the Counting Policy causes the cut-off date to move forward at a glacial pace, Chinese EB-5 investors with approved I-526 petitions must wait ever longer for a visa number to become "available" before they can seek lawful permanent residency based on their investment.

This backlog is directly attributable to the Department's Counting Policy. Government data shows that in FY 2015 – the first year the Government imposed a cut-off date for Chinese investors – only 3,605 EB-5 investors became conditional residents. *See* Exhibit 1, Affidavit of David J. Bier ("Bier Aff."), ¶6, Table 2. Thus, in FY 2015, more than *half* of the 10,000 visa numbers allotted to EB-5 investors (approximately 6,583 in total) were expended by non-investor spouses and children. *Id*. Since that time, the backlogs have ballooned. By the Government's best estimates, Chinese investors who filed an I-526 petition in 2017 will need to wait over a decade before the Department of State allows them to immigrate to the U.S. based on their investments. *See* USCIS Ombudsman, *Annual Report 2017* 32-33 (June 29, 2017). And Chinese investors who file I-526 petitions in Fiscal Year 2018 will likely be forced to wait approximately 16 years before they qualify to obtain permanent residency based on their investments. *See* Bier Aff., ¶7.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Doe v. Mattis*, 889 F.3d 745, 751 (D.C. Cir. 2018). Because Plaintiffs satisfy each of these four requirements, the Court should award Plaintiffs preliminary injunctive relief.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT THE DEPARTMENT OF STATE'S COUNTING POLICY IS UNLAWFUL.

A. The Department's policy runs counter to the plain language of the INA and is therefore arbitrary and capricious in violation of the APA and *ultra vires*.

Plaintiffs are likely to succeed on the merits of their claim that the Department's Counting Policy is *ultra vires* and runs counter to the plain language and structure of the Immigration and Nationality Act ("INA"). Simply put, nothing in the INA's plain language justifies Defendants' decision to reduce the allotment of visas allocated to EB-5 investors by expending visa numbers on investors' spouses and children.

1. The APA provides Plaintiffs with a cause of action to challenge Defendants' unlawful Counting Policy, and the policy is also independently reviewable as *ultra vires* of the INA.

The Administrative Procedure Act ("APA") authorizes courts to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). This provision applies "where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis omitted).

Here, the Department has a mandatory duty under the INA to allocate visa numbers and establish cut-off dates consistent with the visa quotas Congress established. The EB-5 statute provides that "[v]isas *shall* be made available" to EB-5 investors in an amount that corresponds to just under 10,000 per fiscal year. 8 U.S.C. § 1153(b)(5) (emphasis added). Pursuant to this statute and § 1153(d), only visas issued to EB-5 *investors* count against this annual quota; the

spouses and children of investors are "entitled to the same status" as the investor, but their immigration to the United States does not erode EB-5 visa numbers. The Department is required to establish "[w]aiting lists of applicants" and cut-off dates for the EB-5 visa category consistent with this statutory scheme. *See id.* § 1153(e). By counting spouses and children against the annual allotment of EB-5 visa numbers in violation of the INA, the Department has withheld advancement of cut-off dates for Chinese EB-5 applicants in contravention of its obligations under the INA. *See Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (APA provided cause of action to review Department of State's alleged establishment of visa cut-off dates in violation of INA).

Alternatively, the Department's establishment of cut-off dates in violation of the INA constitutes final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). "As a general matter, two conditions must be satisfied for agency action to be 'final': First the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted); *see also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016).

Here, the Department's "cut-off" date for Chinese investors in the EB-5 visa category is final agency action reviewable under the APA. First, the establishment of a cut-off date "mark[s] the consummation of the agency's decision making process." The date is established through a formal agency process, authorized by statute and overseen by the Department's Visa Office, to estimate visa availability. *See* 8 U.S.C. § 1153(g); U.S. Dep't of State, *The Operation of the*

Immigrant Numerical Control System, *reprinted in* 87 Interpreter Releases 299-303 (Feb. 1, 2010) (No. 5). Second, the imposition of a cut-off date is plainly action "by which rights or obligations have been determined" and "from which legal consequences [] flow." A consular officer cannot issue a visa to an EB-5 investor (or her spouse or child, under § 1153(d)) unless the priority date on the investor's I-526 petition falls *before* the cut-off date the Department has established. Likewise, USCIS is prohibited from accepting or approving an application for adjustment of status based on an approved I-526 petition unless, at the time of filing and adjudication, the applicant's priority date is earlier than the cut-off date the Department's Visa Office has established. *See* 8 U.S.C. § 1255(a)(3); 8 C.F.R. §§ 245.1(g)(1), 245.2(a)(5)(ii); 7 USCIS Policy Manual, Part A, Chap. 6, § C.4.

Finally, apart from the APA, the Department's unlawful decision to count spouses and children of EB-5 investors against the allotment of visas for investors themselves is also reviewable as a non-statutory claim that the Department's application of the INA is *ultra vires*. *See Trudeau v. FTC*, 456 F.3d 178, 189–90 (D.C. Cir. 2006); *Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (recognizing that under longstanding Supreme Court precedent, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority"). Thus, whether it be under 5 U.S.C. § 706 or a non-statutory *ultra vires* claim, Plaintiffs have a cause of action to challenge the Department's misapplication of the INA in allocating EB-5 visas.

2. Defendants' Counting Policy is not entitled to deference.

Defendants' Counting Policy is not entitled to judicial deference. While an agency's considered interpretation of a statute it is charged with administering is generally reviewed under the two-step analysis in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837

(1984), no *Chevron* deference is warranted where an agency merely espouses its interpretation of a statute in an agency manual. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (noting that "agency manuals" are "beyond the *Chevron* pale") (citing *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000)).

Here, the Department's view that the spouses and children of EB-5 investors count against the annual quota of EB-5 visas is not entitled to deference because the sole source of authority for this interpretation appears in the Department's Foreign Affairs Manual ("FAM"). *See* 9 Foreign Affairs Manual 503.1-2(A)(a). Because the FAM is nothing more than a guidance manual for Department employees, the statutory interpretations it contains are not entitled to *Chevron* deference. *See Scales v. INS*, 232 F.3d 1159, 1165-66 (9th Cir. 2000) (rejecting the Government's claim that statutory interpretations in the FAM are entitled to *Chevron* deference). "With *Chevron* inapplicable, [this Court] must decide for [itself] the best reading of the statutory provisions at issue in this case," without any deference to the agency's interpretation. *Global Tel*Link v. FCC*, 866 F.3d 397, 408 (D.C. Cir. 2017) (alterations and citation omitted).

3. The plain language of the INA establishes that spouses and children do not count against the annual allotment of EB-5 investor visas.

The language and structure of the INA is clear: the spouses and children of EB-5 investors who choose to accompany or follow to join an EB-5 investor do not count against the allotment of employment-based visas Congress set aside for EB-5 investors.

Under the plain language of the EB-5 statute, "[v]isas shall be made available, in a number not to exceed 7.1 percent of [the 140,000 employment-based] worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise…in which such alien has invested" a qualifying amount of capital, and which will create at least 10 jobs for U.S. workers. 8 U.S.C. § 1153(b)(5). The statute

unambiguously provides that the 7.1% of employment-based visas which "shall be made available" pursuant to this subsection are allocated to EB-5 *investors* who satisfy the statute's capital-investment and job-creation requirements. Nothing in the language of the EB-5 statute authorizes the Department to reduce the allocation of EB-5 visas for investors by expending visa numbers on an investor's spouse or child.

Instead, the INA provides for the immigration of spouses and children in a separate subsection of the statute, 8 U.S.C. § 1153(d). Pursuant to this subsection, "[a] spouse or child … shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa" under the INA's preference categories, "be entitled to the same status and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent." *Id*. Section 1153(e) explains what the "order of consideration" means: "Immigrant visas made available under subsection (a) [family-based preference categories] or (b) [employment-based preference categories] shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General … as provided in section 1154(a) of this title." In other words, § 1153(e) requires that the annual quota of 10,000 visas for EB-5 investors be issued to investors in priority-date order. And the *spouses and children* of investors who seek to immigrate by virtue of § 1153(d) must be accorded "the same status and the same order of consideration" as their EB-5 investor parent or spouse.

Several provisions of the INA confirm that spouses and children who immigrate to the United States as derivatives of an EB-5 investor do not count against the allotment of visas for EB-5 investors. First, this reading reconciles the requirement under § 1153(d) that spouses and children be accorded "the same order of consideration" as the EB-5 investor herself with § 1153(b)(5)'s allocation of visa numbers for EB-5 investors. Section 1153(e)(1) clarifies that the

"order of consideration" for a principal investor means that visas "shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant" is filed with the Government. When spouses and children are accorded "the same status" as the EB-5 investor for purposes of the EB-5 visa quota, there is no difficulty in implementing § 1153(d) – when a visa number becomes available to the EB-5 investor, the spouse or child may accompany or follow to join that investor at any future time, thereby receiving the same order of consideration.

By contrast, the Department's Counting Policy guarantees that some spouses and children will *not* be accorded "the same order of consideration" provided to their EB-5 investor relative, in violation of § 1153(d). Under the INA, a spouse or child need not seek to immigrate to the United States at the same time as his or her EB-5 investor relative; rather, section 1153(d) permits spouses and children to "follow to join" the EB-5 investor *any time* after the investor obtains U.S. residency. But if spouses and children expend visa numbers independent from the visa number allocated to the investor relative, as occurs by use of the Counting Policy, then these spouses and children will not receive "the same order of consideration" as their EB-5 investor relative in cases where the annual visa allotment has been exhausted by the time they seek to immigrate. This problem is particularly clear when there is "visa retrogression" – that is, when the Department establishes a cut-off date that is earlier than the cut-off date for the previous month. *See* 7 USCIS Policy Manual, Part A, Chap. 6, § C.5 (describing retrogression). Under the Department's Counting Policy, spouses and children will be ineligible to join their EB-5 investor relative in the United States if the cut-off date retrogresses to become earlier than the EB-5 investor's I-526 petition priority date, after the investor has immigrated to the United States. As a result, the spouse or child will not be accorded "the same order of consideration" as the EB-5

investor herself, in contravention of § 1153(d)'s express requirements.[3] The only way to eliminate this tension is by grouping spouses and children with the EB-5 investor for purposes of the EB-5 visa quota. Once a visa number is allocated to the EB-5 investor, the investor's spouse and children will be free to join their investor relative at any time, fulfilling § 1153(d)'s mandate that they receive the same order of consideration as the investor herself.

It is a fundamental principle of statutory construction that Courts should "interpret Congress' statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that "[a] court must ... interpret [a] statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole'") (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)). Here, that principle rules out Defendants' Counting Policy. By counting the spouses and children of EB-5 investors against the visa allocation for EB-5 investors themselves, Defendants create a situation where spouses and children may be deprived of "the same order of consideration" as the principal EB-5 investor – contrary to what § 1153(d) requires. Simply put, it is not possible to count spouses and children separately and yet still ensure that they will be accorded the "same order of consideration" as the EB-5 investor herself. That conflict is avoided by following the plain language of § 1153(d) and according spouses and children "the same status" as EB-5 investors for purposes of the EB-5 visa quota, thereby giving the statute as a whole a harmonious reading.

[3] Visa retrogression is not a new or uncommon phenomenon; various visa preference categories have experienced retrogression since at least the late 1980's. *See*, *e.g.*, "May Visa Numbers Stall," 65 Interpreter Releases 382 (April 11, 1988) (No. 14) (describing retrogression in various visa preference categories). Congress, therefore, was aware of the potential for retrogression in the EB-5 preference category when it enacted the EB-5 Program in 1990.

The Department's Counting Policy also conflicts with other aspects of the statutory language. As noted above, EB-5 investors and their spouses and children enter the United States as "conditional" permanent residents – approximately two years after admission, they must file a petition showing that they continue to satisfy the EB-5 statute's investment and job-creation requirements. *See* 8 U.S.C. § 1186b. This provision offers further confirmation that Congress did not intend to classify the spouses and children of investors as *investors themselves*, subject to the visa quota which applies to EB-5 investors at 8 U.S.C. § 1153(b)(5) or employment-based immigrants generally at § 1153(b). In relevant part, the removal of conditions provision states:

> In this section:
>
> (1) The term "alien entrepreneur" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) *under section 203(b)(5)*.
>
> (2) The term "alien spouse" and the term "alien child" mean an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) *by virtue of being the spouse or child, respectively*, of an alien entrepreneur.

8 U.S.C. § 1186b(f) (emphasis added). Notably, this provision draws a clear distinction between "alien entrepreneur[s]" – the actual EB-5 investors who obtain residency "under section 203(b)(5)" on the one hand, and the *spouses and children* of these EB-5 investors, who obtain their residency "by virtue of being the spouse or child" of an EB-5 investor, on the other. That Congress did *not* view spouses and children as having obtained their permanent residency "under section 203(b)(5)" defeats the Counting Policy's premise that spouses and children of EB-5 investors obtain residency under 8 U.S.C. § 1153(b)(5), INA § 203(b)(5), and are subject to the same 10,000 numerical limitation which attaches to EB-5 investors.[4]

[4] Indeed, multiple sections of the INA refer to the spouses and/or children of preference immigrants as obtaining immigrant visas under § 1153(d), which contains no visa cap, rather

Further confirmation of Congress' intent can be discerned from the provisions of the EB-5 statute itself. Of the approximately 10,000 visas allocated to EB-5 investors under § 1153(b)(5), Congress specified that "[n]ot less than 3,000…[be] made available…for qualified immigrants who invest in a new commercial enterprise…which will create employment in a *targeted employment area*." 8 U.S.C. § 1153(b)(5)(B)(i) (emphasis added).[5] Congress created this special set-aside to encourage investments in rural or high-unemployment areas. *Id*. § 1153(b)(5)(B)(ii). But Congress gave no indication that all (or nearly all) investments must be in TEAs – to the contrary, the EB-5 statute allows investments in non-TEAs and even areas of especially *high* employment, provided the EB-5 applicant contributes a correspondingly greater amount of capital to the new U.S. business. *Id*. § 1153(b)(5)(C)(i), (iii). But if the spouses and children of EB-5 investors count against the EB-5 visa quota, virtually all EB-5 visa numbers may be expended on TEA investments, given that historically approximately two derivative spouses/children accompany each EB-5 investor. *See* Bier Aff., ¶¶4, 6. By authorizing

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than the preference categories themselves at §§ 1153(a) and (b), which are subject to the worldwide visa caps. *See* 8 U.S.C. § 1101(a)(15)(V) (providing immigration status to certain family-based preference immigrants with pending immigrant visa petitions as well as "a child of the principal alien, if eligible to receive a visa *under section 203(d)*") (emphasis added); *id*. § 1154(l)(2)(C) (allowing the spouse or child of an employment-based immigrant to adjust to lawful permanent resident status even when the qualifying principal dies and describing such spouse or child as "a derivative beneficiary of a pending or approved petition for classification under section 203(b) (*as described in section 203(d)*)") (emphasis added); *id*. § 1255(i)(1)(B) (creating a special adjustment-of-status provision for the beneficiaries of certain visa petitions as well as "a spouse or child of the principal alien, if eligible to receive a visa *under section 203(d)*") (emphasis added).

[5] As noted above, Congress later set aside 3,000 visa numbers for EB-5 applicants who invest in a regional center. But unlike the TEA set-aside, which by its terms applies only to *investors themselves*, the regional center set-aside applies to investors who are "eligible for admission under section 203(b)(5) of the [INA] [8 U.S.C. § 1153(b)(5)]" *and* "spouses and children which [*sic*] are eligible....to accompany or follow to join such aliens." *See* Pub. L. 102-395, § 610, 106 Stat. 1828, 1874 (8 U.S.C. § 1153 note). This contrast demonstrates that when Congress intended for visa allocations to apply to the spouses and children of investors, it did so explicitly.

investments in non-TEAs and high employment areas, Congress plainly intended to give EB-5 investors a choice: invest in a TEA in exchange for a comparatively smaller qualifying capital investment amount, or invest a larger amount of capital outside of a TEA. Yet if spouses and children expend visa numbers set aside for investors, the 3,000 allotment for TEA investments could deplete virtually all 10,000 EB-5 visas – with 3,000 used for TEA investments and nearly all of the remaining 7,000 for the spouses and children of TEA investors. There would then be virtually no visas remaining for investors in areas that do not qualify as a TEA, leaving such investors with an approved I-526 petition that is essentially worthless because no EB-5 visa will ever be available; the investor would thus never be allowed to immigrate to the United States. This absurd result is clearly not what Congress intended.

Indeed, contemporaneous statements by Members of Congress confirm that the 10,000 EB-5 visa numbers were created for *investors*, and were not intended to be depleted by spouses and children. 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). As these statements make clear, Congress expected that the 10,000 visas allocated for the EB-5 program would be issued to EB-5 *investors*, each of whose investments would create at least 10 jobs for U.S. workers and bring in up to $1,000,000 of investment capital through each investment. Defendants' Counting Policy contravenes the intent expressed by these Members of Congress and embodied in the plain language of § 1153(b)(5).

Congress' intent not to count the spouses and children of EB-5 investors against the EB-5 visa allotment is further revealed when the statutory framework implementing the EB-5 Program is contrasted with other sections of the INA. For instance, when Congress enacted the Refugee Act of 1980, it established numerical quotas for the number of refugees who may be admitted to the United States annually. *See* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157(a), (b)). Just as it ultimately did with EB-5 investors, Congress authorized the spouses and children of refugees to immigrate along with the person actually designated as a "refugee" for purposes of the Act, as follows:

> A spouse or child … of any refugee who qualifies for admission … shall, if not otherwise entitled to admission [as a refugee] … be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee….*Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.*

8 U.S.C. § 1157(c)(2) (emphasis added). The first part of this provision is nearly identical in language and structure to § 1153(d), the provision that authorizes the spouses and children to accompany or follow to join EB-5 investors and other preference immigrants. Yet the Refugee Act contains what § 1153(d) conspicuously does not: an express requirement that the admission of a refugee's spouse or child "shall be charged against the numerical limitation" that applies to

the child or spouse's refugee relative. Defendants' position that the spouses and children of EB-5 investors should nevertheless be charged against the allocation of EB-5 visas for investors established at § 1153(b)(5), would mean that the Refugee Act's express requirement that spouses and children count against refugee quotas was mere surplusage – a violation of a basic canon of construction. *See Bailey v. United States*, 516 U.S. 137, 145 (1995); *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

Congress' intent can similarly be discerned by several amendments it made to the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 ("IMMACT90") – the same statute that created the EB-5 Program and established § 1153(d). Section 124(a)(1) of IMMACT90 authorized the immigration of employees of U.S. businesses operating in Hong Kong, subject to a numerical quota of 12,000 immigrant visas. Again, using language nearly identical to that at § 1153(d), Congress provided that the spouses and children of qualifying immigrants would also be eligible to immigrate. *See* IMMACT90, § 124(a)(2). In 1991, Congress amended this provision to specify that the 12,000 immigrant visa set-aside created by that section applied not only to qualifying Hong Kong employees, but *also to their spouses and children*. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 302, 105 Stat. 1733.[6] Congress made similar modifications to other provisions of

[6] Specifically, the amendment modified the original provision by adding in the language underlined below:

> In the case of any alien described in paragraph (3) [defining the qualifying Hong Kong employees] **(or paragraph (2) as the spouse or child of such an alien)** with respect to whom a classification petition has been filed and approved under subsection (b), there shall be made available, in addition to the immigrant visas otherwise available in each of fiscal years 1991 through 1993 and without regard

IMMACT90 that created special visa allocations and authorized the immigration of spouses and children using similar language. *See* IMMACT90, § 132 (transitional diversity visas); § 134 (displaced Tibetans); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 302, 105 Stat. 1733 (modifying these provisions in a similar way). Crucially, however, Congress did *not* amend § 1153(d) or the provisions establishing numerical quotas for EB-5 investors or other preference immigrants to include spouses and children; instead, it left the plain language of the numerical quotas as applying solely to actual EB-5 investors and other preference immigrants, *to the exclusion* of spouses and children.

* * *

In sum, Defendants' Counting Policy runs contrary to the plain language, structure, intent, and legislative history of the EB-5 Program and relevant INA provisions. Congress intended 10,000 visas to be allocated to foreign *investors* whose capital contributions would bolster the U.S. economy and create jobs –not for the goals of the Program to be diluted by counting the spouses and children of investors against this quota.

B. The Department's Counting Policy is a Legislative Rule Subject to the APA's Notice and Comment Requirements.

Defendants' Counting Policy is also invalid because it does not comply with the APA's procedural notice-and-comment requirements.

The Administrative Procedure Act "imposes a procedural requirement on federal agencies when promulgating, amending, modifying, or repealing a rule." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Fed. Highway*

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to section 202(a) of the Immigration and Nationality Act, up to 12,000 additional immigrant visas.

See IMMACT90, § 124(a)(1); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 302, 105 Stat. 1733.

Admin., 151 F. Supp. 3d 76, 85 (D.D.C. 2015) ("*United Steel*"); *see also* 5 U.S.C. § 553. These requirements, commonly known as the APA's "notice and comment" provisions, require agencies to "publish '[g]eneral notice of proposed rule making . . . in the Federal Register' and 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id*. (quoting 5 U.S.C. § 553(b)-(c)). The "notice and comment requirement serves the dual purpose of: (1) reintroducing public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies and (2) assuring that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *Id*. (citing *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987)).

The APA establishes several exceptions to the notice and comment requirements, which include "interpretative rules, general statements of policy, or rules of agency organization, practice or procedure." *See* 5 U.S.C. § 553(b)(A); *Nebraska, Dep't of Health & Human Servs. v. HHS*, 340 F. Supp. 2d 1, 17 (D.D.C. 2004). "The exceptions, however, are to be 'narrowly construed and only reluctantly countenanced.'" *United Steel*, 151 F. Supp. 3d at 86 (quoting *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)); *see also Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). When an agency has failed to undertake notice and comment procedures in implementing a rule (as is undisputedly the case with the Counting Policy), the operative question is whether the rule is a "legislative" or "substantive" rule subject to notice and comment, or whether it is merely an "interpretive" rule and hence exempt. *See EPIC v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011). If the former, the rule is invalid and cannot lawfully be applied to the detriment of the regulated party. In conducting this analysis, "courts

[do] not ... defer to an agency's own characterization of a rule as interpretative, but rather ... engage in their own inquiry[.]" *United Steel*, 151 F. Supp. 3d at 86 (quoting *UPMC Mercy v. Sebelius*, 793 F. Supp. 2d 62, 69 (D.D.C. 2011)).

Agency action is a substantive rule if it (1) "alter[s] the rights or interests of parties," (2) cabins the agency decisionmakers' discretion, and (3) has a "present binding effect." *EPIC*, 653 F.3d at 5-7; *Alaska v. DOT*, 868 F.2d 441, 447 (D.C. Cir. 1989). Under this standard, Defendants' Counting Policy is a substantive rule that did not go through the required notice-and-comment procedures.

First, the Counting Policy plainly affects Plaintiffs' interests. The current and ever-growing backlog for Chinese investors in the EB-5 Program is directly attributable to Defendants' policy of using up visas that Congress allocated to EB-5 *investors* for those investors' spouses and children. Backlogs have ballooned as a direct result, forcing Plaintiff-investors to wait *years* longer than they otherwise would to immigrate to the United States, despite having made substantial capital contributions to and created jobs with U.S. businesses.

Second, the Counting Policy plainly operates with binding force on agency employees, leaving them no discretion to depart from the policy. Once the Department's Visa Office establishes a cut-off date, consular officers lack any discretion to issue an EB-5 visa to an investor if the priority date of the investor's I-526 petition falls before the established cut-off date. Similarly, USCIS officials are prohibited from accepting or approving an application for adjustment of status. And Defendants' Counting Policy results directly in the establishment of cut-off dates that fall significantly earlier than they otherwise would if only visas and adjustment approvals issued to EB-5 investors were counted against the annual EB-5 visa quota. *See Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C.

Cir. 1978) (a "so-called policy statement" that "narrowly limits administrative discretion … will be taken for what it is—a binding rule of substantive law").

Third, the Counting Policy has a present binding effect. The backlogs the policy has directly created *presently* bar Plaintiffs from obtaining EB-5 visas or adjustment of status, despite their undisputed qualification as EB-5 investors. Similarly, the Policy is directly responsible for the *present* aging-out of many investors' children, who would have qualified to immigrate to the United States along with their parent investors had the early cut-off dates not been artificially imposed as a result of the Counting Policy.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY ABSENT A PRELIMINARY INJUNCTION.

"The party seeking a preliminary injunction must make two showings to demonstrate irreparable harm. First, the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm.' Second, the harm 'must be beyond remediation.'" *League of Women Voters of United States v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). The injuries suffered by both the individual investor Plaintiffs and the regional center Plaintiff as a result of Defendants' Counting Policy meet this irreparable injury standard.

A. Irreparable Harms to the Plaintiff-Investors

Plaintiff-investors face myriad harms because of the backlogs created by Defendants' Counting Policy. Perhaps the most severe among these is the separation of families caused by the backlog. As noted above, the Child Status Protection Act ("CSPA") provides investors' children with limited protection against "aging out" by freezing their age for purposes of immigration law during the pendency of their parent's I-526 petition. Crucially, however, the CSPA "freezes" or

tolls a child's age only during the time the I-526 petition remains *pending*. Once the I-526 petition is approved, the child's age continues to run until such time as a visa number becomes available to the child's investor parent. When a parent investor's I-526 petition is approved while a backlog is in effect, the child's age beings to run from the time the petition is approved until the Department determines that a visa is available to the parent based on the priority date of the parent's petition. If a child's age (as calculated under the CSPA) reaches 21 while the child's investor parent waits in the visa queue, that child has "aged-out" and no longer qualifies to immigrate to the United States as the investor's child under 8 U.S.C. § 1153(d). The parent investor must then face the prospect of immigrating to the United States without her entire family or give up the prospect of immigrating to the United States altogether.

Specific Plaintiffs' cases illustrate the irreparable consequences of family separation that occur due to Defendants' unlawful Counting Policy. Plaintiff Fang Wang filed his I-526 petition on October 8, 2013, and USCIS approved it on April 20, 2016. *See* Exhibit 2, Affidavit of Feng Wang ("Wang Aff."), ¶ 5. Mr. Wang's daughter turned 21 in August 2017. *Id.* at ¶ 2. Plaintiff Hongmei Xiao filed her I-526 petition on January 28, 2015, and USCIS approved it on March 14, 2016. *See* Exhibit 3, Affidavit of Hongmei Xiao ("Xiao Aff."), ¶ 4. Ms. Xiao's son turned 21 in September 2017. *Id.* at ¶ 2. Plaintiff Jianhong Yang filed her I-526 petition on September 29, 2014, and USCIS approved it on August 10, 2016. *See* Exhibit 4, Affidavit of Jianhong Yang ("Yang Aff."), ¶ 4. Ms. Yang's son turned 22 in December 2017. *Id.* at ¶ 2. Although all three of these children are currently under 21 years old for CSPA purposes because of the long period of time during which their parents' I-526 petitions were pending, the projected wait times for visa numbers to become available to these families is between 8 and 10 years, meaning that all three of the children will without a doubt age out by the time the visa numbers become

available. *See* Bier Aff., ¶7. Moreover, out of 318 putative class members represented by undersigned counsel, 56 percent have children who are at risk of aging out and another 16 percent have children who already have aged out. *See id.* at ¶ 8. The family separations that will result from Plaintiffs' children aging out constitute irreparable harm. *See Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (recognizing that "separated families" among other injuries "are substantial injuries and even irreparable harms").

In addition to the fundamental harm to the integrity of investors' families, children aging-out due to Defendants' unlawful Counting Policy irreparably harm family finances and career prospects. Many investors spend hundreds of thousands of dollars on educating their children in the U.S. 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. *See, e.g.*, Xiao Aff., ¶ 9. When children age-out, those monies are not just wasted; 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, if their EB-5 numbers are released, move alone to the U.S.

The backlog also irreparably harms the investors' career prospects. In anticipation of their move to the U.S. and in order to handle the logistics of choosing an appropriate EB-5 investment, many have already left jobs in their home countries. For instance, Plaintiff Feng Wang resigned in November 2013 from his marketing director position at FAW-Volkswagen Sales Company, where he had worked for 20 years, in order to dedicate himself to researching EB-5 projects in which to invest. *See* Wang Aff., ¶ 4. Given his lack of income during the

unforeseen prolonged wait for a visa number to become available, Mr. Wang had to take another job in a city away from his wife. *Id.* at ¶ 9. Plaintiff Hongmei Xiao also retired from her job as a schoolteacher five years early while her husband shifted to freelance work in order to provide them the necessary flexibility to prepare for their immigration to the United States. *See* Xiao Aff., 7. The family's income has declined as a result. *Id.* That lost income cannot be recovered even if, in the face of the backlog, investors manage to find new jobs while they wait.

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. 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, to improve their English skills. Finding new employment will be exceedingly difficult for investors newly-arrived in the U.S. in their seventies and lacking English skills. Given that many Plaintiffs have given up their jobs in China in order immigrate to the United States, this permanent damage to their career prospects is irreparable.

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 participate in their investments. What's more, for investors to obtain lawful permanent residency 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 investment opportunities that would have been available to them if wait times were reduced.

B. Irreparable Harms to the Regional Center Plaintiff

Defendants' Counting Policy threatens to cause irreparable harm to Plaintiff American Lending Center LLC ("ALC") because the resulting loss of Chinese clients threatens the very existence of ALC's business. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business."). Plaintiff American Lending Center LLC ("ALC") was designated as an EB-5 regional center in April 2010 and currently operates across the United States with 11 sister regional centers. *See* Exhibit 5, Affidavit of John Shen ("Shen Aff."), ¶ 3. ALC serves immigrant investors by investing their capital in job-creating new commercial enterprises. The overwhelming majority of ALC's investor clients are Chinese nationals. *Id.* at ¶ 6. 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 who invest in projects across the U.S. through ALC-affiliated regional centers. *Id.* at ¶¶ 4-5. The projects funded by ALC's new commercial enterprises have created more than 6,000 jobs for U.S. workers to date. *Id.* at ¶ 4.

ALC obtains its revenue by charging immigrant investors an administrative fee for providing its regional center investment services and through interest on loans its new commercial enterprises provide to EB-5 funded development projects. *Id.* at ¶ 5. Although ALC has not recorded any financial losses in the past five years, the lack of demand for its services by Chinese nationals created by Defendants' unlawful Counting Policy has caused the company to

suffer net losses for the three most recent quarters. *Id.* at ¶¶ 7-8. ALC's income from administrative fees charged to EB-5 investors dropped by over $1,000,000 in the first quarter of 2018 compared to the same period in 2017, resulting in a net loss for the company of $600,000. *Id.* at ¶¶ 9. The company has also been forced to cancel multiple projects due to the lack of investor demand caused by Defendants' Counting Policy—these projects would have resulted in the investment of $80,000,000 in the U.S. economy and 2,200 jobs created for U.S. workers. *Id.* at ¶¶ 10-11.

The decline in ALC's revenues due to lack of Chinese national participation in the EB-5 program is directly attributable to Defendants' Counting Policy. In the first and second quarters of 2017, ALC signed investment agreements with 55 Chinese clients, the sole clients signed during that period. During the same period in 2018, however, ALC was able to sign only 12 Chinese clients and a single non-Chinese client. *Id.* at ¶ 11. This decline in Chinese demand for EB-5 participation is directly attributable to the visa backlog caused by Defendants' Counting Policy. *Id.* at ¶ 7, 14. Without demand for ALC's services from Chinese nationals, the company will be unable to stay in business. The lack of new clients means that there is no revenue from administrative fees. Moreover, the lack of new projects means that ALC will be unable to obtain new loan interest income as loans made to existing projects mature. *Id.* at ¶ 9. The current situation caused by Defendants' Counting Policy is rendering ALC's entire business model untenable and, without change, will force the company to go out of business. *Id.* at ¶ 16 ("Unless an injunction is issued in this case, American Lending Center will be unable to sustain its business and will son be forced to entirely close its operations . . . . Without investors to invest, American Lending Center cannot remain in business.").

While "economic loss does not, in and of itself, constitute irreparable harm", such loss "may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas*, 758 F.2d at 674; *see also Express One Int'l, Inc. v. USPS*, 814 F. Supp. 87, 91 (D.D.C. 1992) (irreparable harm where loss of profits and revenues would cause company to be completely "phased-out"). ALC has established that the lack of demand for its services by Chinese investors caused by the Counting Policy and the associated loss of revenues will force the company to go completely out of business, thus establishing irreparable harm. Moreover, the economic injury suffered by ALC is irreparable because its losses are not recoverable through litigation due to the fact that Defendants are protected by sovereign immunity from suits for money damages. *See Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) (plaintiff did not even have to show that its claimed monetary loss "threatens the very existence of the movant's business" because plaintiff's "monetary losses . . . are not recoverable, as the APA provides no damages remedy"); *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) ("But where, as here, the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity . . . any loss of income suffered by a plaintiff is irreparable *per se*.") (citing *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *United States v. State of New York,* 708 F.2d 92, 93–94 (2d Cir.1983)); *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (economic loss constituted irreparable harm where federal defendant was immune from suit for money damages under claims brought by plaintiff); *Hoffmann-Laroche, Inc. v. Califano*, 453 F. Supp. 900, 903 (D.D.C. 1978) (irreparable injury for economic harm where no "adequate compensatory or other corrective relief will be available at a later date").

III. THE REMAING FACTORS FAVOR GRANTING PRELIMINARY INJUNCTIVE RELIEF.

The final two elements of the preliminary injunction test—the balance of equities and the public interest—merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Mattis*, 889 F.3d at 766 ("When a private party seeks injunctive relief against the government, the final two injunction factors—the balance of equities and the public interest—generally call for weighing the benefits to the private party from obtaining an injunction against the harms to the government and the public from being enjoined."). These factors strongly support the entry of preliminary injunctive relief here.

First, Defendants' Counting Policy, and the extraordinary backlogs that result, have tremendous deleterious effects on the U.S. economy. By discouraging new EB-5 investments, the Policy costs the economy billions of dollars of foreign investment capital and hundreds of thousands of jobs for U.S. workers. The U.S. Department of Commerce has reported that for EB-5 funded projects active in fiscal years 2012 and 2013 alone, EB-5 investors contributed $5.7 billion to the U.S. economy which was projected to create over 174,000 jobs for U.S. workers. *See Estimating the Investment and Job Creation Impact of the EB-5 Program*, U.S. Department of Commerce Economics and Statistics Administration, 2, *available at* http://www.esa.doc.gov/sites/default/files/estimating-the-investment-and-job-creation-impact-of-the-eb-5-program_0.pdf. Enjoining the enforcement of the Counting Policy would serve the public interest by encouraging further foreign capital contributions to the U.S. economy and resulting job-creation benefits. *See Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1087 (10th Cir. 2004) (the "public interest is served by . . . increased economic development"); *Smart & Co. v. Food Sys. Glob. Co.*, 2008 WL 4381679, *7 (D. Minn. Sept. 26, 2008), *amended by* 2008 WL 4613744 (D. Minn. Oct. 15, 2008) (granting injunction in part due to "the obvious

public interest in . . . economic growth and job creation"); *W. Watersheds Project v. BLM*, 774 F. Supp. 2d 1089, 1103 (D. Nev.), *aff'd,* 443 F. App'x 278 (9th Cir. 2011) (creation of "over 220 new jobs" was in the public interest).

Second, the Counting Policy's stifling of foreign investment in the United States is directly at odds with Congress' clearly stated purpose for the EB-5 program. In enacting the EB-5 program, Congress mandated that qualifying investments must "benefit the United States economy and create full-time employment for not fewer than 10 United States workers." Immigration Act of 1990, Pub. L. 101–649, Nov. 29, 1990, 104 Stat. 4978. Moreover, Congress expressly created the regional center program "for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. 102–395, Oct. 6, 1992, 106 Stat. 1828. By reducing foreign capital investment in the United States, Defendants' Counting Policy frustrates the clear statutory purpose of the EB-5 program and is thus contrary to the public interest. *See Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984) ("Congressional intent and statutory purpose can be taken as a statement of public interest.")

On the other hand, the Government will suffer no injury if the Court issues an injunction against enforcement of its Counting Policy. The only action it will have to take is to revise the applicable visa cut-off dates in compliance with the INA. Doing so will enable investors with approved I-526 petitions who are currently subject to the visa backlog to apply for immigrant visas or adjustment of status, and allow the children of EB-5 investors who were erroneously deemed to have "aged-out" as a result of the unlawful Counting Policy to follow to join their investor parent in the United States.

CONCLUSION

For the reasons set forth above, the Court should issue a preliminary injunction prohibiting the Department of State from counting spouses and children against the annual EB-5 visa quota at § 1153(b)(5) for purposes of establishing the visa "cut-off" date, and order recalculation of the applicable cut-off dates without counting the spouses and children of investors against the EB-5 visa quota.

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Respectfully submitted,

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