UNITED STATES DISRICT COURT
FOR THE DISTRICT OF COLUMBIA

HUASHAN ZHANG
Room 302, Unit 3, Building 1
Dongcun Yard of Xigongda
Yonyi Branch, No. 127
Yonyi West Road, BeiLin District
Xi'an City, Shaanxi Province
CHINA

MASAYUKI HAGIWARA
2-7-3 #402 Fujigaoka Aoba-ku
Yokohama-shi
Kanagawa, 227-0043
JAPAN

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
111 Massachusetts Avenue NW
MS 2260
Washington, D.C. 20529;
JEH JOHNSON, Secretary, U.S. Dep't of Homeland Security,
Department of Homeland Security
Washington, D.C. 20528;
LEON RODRIGUEZ, Director, U.S. Citizenship and Immigration Services,
111 Massachusetts Avenue NW
MS 2260
Washington, D.C. 20529;
NICHOLAS COLUCCI, Chief, U.S. Citizenship and Immigration Services
Immigrant Investor Program,
131 M Street NE
3d Floor, MS 2235
Washington, D.C. 20529,

Defendants.

Some food for thought:

If the source and path of the funds that actually go into the NCE are not fully disclosed, then what is going to prevent ill-gotten gains from criminal activities being laundered through them?

Nothing!

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Case No.: 15-CV-995

Whose Money Was It?

***Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998)**, held, in pertinent part:

> (2) **Loans obtained** by a corporation, secured by assets of the corporation, do **not** constitute capital invested **by** a **petitioner**. Not only is such a loan prohibited by 8 C.F.R. § 204.6(e), but the petitioner and the corporation are not the same legal entity.
>
> (3) A petitioner's **personal guarantee** on a business's debt does **not** transform the business's debt into the petitioner's personal debt.
>
> (4) A petitioner must present **clear documentary evidence of the source of the funds** that he invests. He must show that the **funds are his own** and that they were **obtained through lawful means**.

***Matter of Hsiung*, 22 I&N Dec. 201 (AAO 1998)**, held, in pertinent part:

> (1) A promissory **note secured by assets owned** by a petitioner can constitute capital under 8 C.F.R. § 204.6(e) **if**:
>
> **a)** the assets are specifically identified as securing the note;
> **b)** the security interests in the note are perfected in the jurisdiction in which the assets are located; and
> **c)** the assets are fully amenable to seizure by a U.S. note holder.
>
> (3) Whether a petitioner uses a promissory note as capital under 8 C.F.R. § 204.6(e) or as **evidence of a commitment to invest cash,** he must show that he has placed his assets at risk. **In establishing that a sufficient amount of his assets are at risk**, a petitioner must demonstrate, among other things, that the **assets securing the note are his,** that the **security interests are perfected**, that the assets are **amenable to seizure**, and that the assets have an adequate fair market value.

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Huashan Zhang and Masayuki Hagiwara sue Defendants United States Citizenship and Immigration Services, Jeh Johnson, Leon Rodriguez, and Nicholas Colucci, and allege as follows:

INTRODUCTION

1. This is a putative class action brought by immigrant investors who sought and were unlawfully denied the chance to immigrate to the United States pursuant to 8 U.S.C. § 1153(b)(5), known as the "Immigrant Investor Law" or "EB-5 Program."

2. The statute creates a path to U.S. permanent residency for intending immigrants who invest a designated amount of capital in a new commercial enterprise, and through that investment, create at least ten jobs for U.S. workers. *Id*. The regulations define "capital" to include "cash," *see* 8 C.F.R. § 204.6(e), so under the plain language of the statute and regulations, an investment of a qualifying amount of cash in a new commercial enterprise satisfies the statute's capital investment requirement.

3. Prior to filing their petitions for EB-5 classification, Plaintiffs each borrowed $500,000 in cash from a business they own, and invested that cash in an EB-5 qualifying U.S. commercial enterprise. Plaintiffs then petitioned United States Citizenship and Immigration Services ("USCIS") for the immigrant investor classification required to immigrate to the United States with their families.

4. Despite Plaintiffs' compliance with the statute's capital investment requirement, USCIS denied Plaintiffs' petitions. The denials do not dispute that Plaintiffs, as a factual matter, wired $500,000 in cash into bank accounts designated for the EB-qualifying new commercial enterprises. Nor is there any dispute that those new commercial enterprises would have used

Where did you get the cash? *Don't worry 'bout it!* I don't think that that will work, do you?

Plaintiffs' investments to create at least 10 jobs for U.S. workers. Instead, USCIS denied Plaintiffs' petitions on the sole basis that because Plaintiffs obtained the cash they invested in the new commercial enterprise through a loan, that cash was not "cash," but "indebtedness."

5. Under Defendants' regulatory definition of "capital," "indebtedness" is an *alternative* to cash. *See* 8 C.F.R. § 204.6(e). Unlike "cash," which *categorically* counts as "capital" under the regulatory definition, a petitioner's investment of "indebtedness" in a new commercial enterprise will count as capital only if it is secured by assets personally owned by the petitioner. *Id.*

Where did you get the cash? *From a loan.* **How did you secure the loan, what did you promise?** *None of your business!* I don't think that that will work, do you?

6. The premise that Plaintiffs' cash investments in a new commercial enterprise were investments not of cash, but of *indebtedness,* formed the cornerstone of Defendants' denials. USCIS relied on the classification of Plaintiffs' investments as "indebtedness" to scrutinize the terms of the loan agreements Plaintiffs entered to obtain their cash investments. USCIS determined that Plaintiffs' third-party loans were not collateralized by assets Plaintiffs personally owned, and thus failed to comply with the conditions on the use of "indebtedness" as a form of investment.

Where did you get the cash? *From my cousin Louie.* **Where did Louie get it?** *None of your business!* I don't think that that will work, do you?

7. USCIS's denials are fundamentally incompatible with the plain language of the statute and implementing regulations. The agency justified treating Plaintiffs' cash investments as "indebtedness" rather than "cash" because Plaintiffs obtained the cash they invested in their new commercial enterprises through a loan. But the fact that Plaintiffs obtained the cash they invested in the new commercial enterprise does not transform that cash into anything other than cash. And "cash" is unambiguously and unconditionally defined as a form of "capital" under Defendants' regulations. Plaintiffs therefore satisfied the EB-5 statute's capital investment requirement.

The above simplistic examples might seem laughable but if probative questions such as these can be legally resisted, blocked, or ignored then some very questionable transactions may be allowed to slip through our defenses.

8. In classifying Plaintiffs' cash investments as "indebtedness," Defendants have misapplied the regulatory definition of "capital." The statute requires an EB-5 investor to invest capital *in a new commercial enterprise*. And "indebtedness" as a form of capital refers to a promise by the investor to pay the new commercial enterprise cash at a later date. It is an *alternative* to investing "cash" in a new commercial enterprise to satisfy the statute's capital investment requirement. It has no application to Plaintiffs' cases because Plaintiffs do not seek EB-5 visas based on a promise to pay the qualifying new commercial enterprise cash at a later date. They have *already* invested the full amount of cash in the new commercial enterprise, and hence the restrictions on the investment of "indebtedness" are irrelevant to their cases.

9. Not only are USCIS's decisions incompatible with the plain language of the statute and regulations, they are based on a retroactive policy switch not publically announced until April of this year, long after Plaintiffs made their investments and filed their petitions with USCIS. Rather than publish their new collateralization rule in the Federal Register and apply it prospectively only after notice and opportunity for comment in compliance with the APA, Defendants applied the rule retroactively to Plaintiffs' cases. The retroactive application of this ~~new rule~~ blindsided Plaintiffs, who relied to their detriment on the plain language of Defendants' regulations and the agency's prior adjudicatory practices when structuring their EB-5 investments.

10. Plaintiffs have complied with the law as reflected in the plain language of the statute and regulations governing the EB-5 program, and as the statute and regulations were applied at the time they made their investments and filed their immigrant investor petitions. The agency cannot deprive Plaintiffs the chance to immigrate to the United States on the premise that cash is not really "cash." And it certainly cannot do so by abruptly adopting such a policy long

after Plaintiffs made their investments and filed their petitions, given the substantial burden retroactive application of the collateralization rule imposes. Basic principles of fairness and administrative law require the agency's denial of Plaintiffs' and class members' petitions for immigrant investor status be reversed.

They completely ignore: *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998) and *Matter of Hsiung*, 22 I&N Dec. 201 (AAO 1998).

STATEMENT OF FACTS

A. Statutory and Regulatory Background

11. The Immigration Act of 1990, Pub. L. No. 101-649, § 121(a), 104 Stat. 4978, 4989, created a new preference allocation of visas ("EB-5 visas") for immigrants who invest a designated amount of capital into a new commercial enterprise that will create at least ten jobs for U.S. workers. The statute outlines these twin capital investment and job-creation requirements, providing:

> Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . .:
>
> (i) in which such alien has invested . . . or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph C, and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States . . .

See 8 U.S.C. § 1153(b)(5). Only the first (capital investment) requirement is at issue in Plaintiffs' cases.

12. The minimum amount of capital an immigrant must invest in a new commercial enterprise to qualify is generally $1,000,000, but that minimum is reduced to $500,000 if the investment is made in a "targeted employment area" – that is, a rural area or in an area where the

unemployment rate is at least 150% of the national average. 8 U.S.C. § 1153(b)(5)(C)(i)-(ii); 8 C.F.R. § 204.6(f)(1)-(2).

13. The statute does not expressly define "capital," but the term is defined in the agency's regulations. *See* 8 C.F.R. § 204.6(e). The agency initially proposed defining "capital" such that only "cash, equipment, inventory, and other tangible property" could be invested in a new commercial enterprise to satisfy the statute's capital investment requirement. *See* Proposed Rule, 56 Fed. Reg. 30703, 30713 (July 5, 1991). The final rule, however, "expanded the definition of capital" to include "cash equivalents . . . and indebtedness" in addition to cash and tangible property. *See* Employment-Based Immigrants, Final Rule, 56 Fed. Reg. 60897, 60902 (Nov. 29, 1991). The agency explained its decision to add cash equivalents and indebtedness to the definition of capital in part because "the legislative history of the Act suggests that Congress intended the definition to be broad." *Id*.

14. By expanding the definition of "capital" to include indebtedness, the agency provided petitioners with an alternative to investing cash or tangible assets in a new commercial enterprise at the start of the petition process. In lieu of paying the full amount of required cash up front, the addition of "indebtedness" to the definition of "capital" allows petitioners to enter into an agreement with the new commercial enterprise to pay cash or other assets *in the future*. The expanded its definition of "capital" to permit such financing arrangements because "excluding debt from the definition of capital would ignore modern business practice and serverly [*sic*] limit the number of investors eligible or willing to apply under the employment creation provision." *Id*.

15. A petitioner's use "indebtedness" to satisfy the statutory capital investment requirement comes with restrictions. To qualify as capital, the petitioner's contractual promise to

pay the new commercial enterprise must make the petitioner "personally and primarily liable" in the event the petitioner defaults on the promised future payments. *See* 8 C.F.R. § 204.6(e). As a corollary to this requirement, a petitioner cannot use "the assets of the new commercial enterprise upon which the petition is based . . . to secure any of the indebtedness." *Id*. The agency required petitioners to secure their promise to pay the commercial enterprise with personally-owned assets in order "to ensure that . . . the alien entrepreneur has placed funds or other capital assets directly at risk." *See* Final Rule, 56 Fed. Reg. at 60902.

16. In addition to specifying the types of investments which constitute "capital," the agency also *excluded* from the definition of capital any "[a]ssets acquired, directly or indirectly, by unlawful means." *See* Final Rule, 56 Fed. Reg. at 60910; 8 C.F.R. § 204.6(e) (defining "capital"). Thus, whatever type of capital a petitioner chooses to invest in the new commercial enterprise – be it cash, tangible property, or indebtedness – the petitioner must demonstrate that such capital derived from a lawful source.

They ignore interpretations from the 1998 Precedent Decisions and claim abrupt, unlawful departures!?

B. The Agency's Abrupt Policy Shift ???????

17. At its core, this case presents a simple question of statutory and regulatory interpretation: when an EB-5 investor borrows cash from a third party (e.g. a bank, friend, or family member) and invests that cash in an EB-5 qualifying new commercial enterprise, is that cash properly considered "cash" or "indebtedness" for purposes of the regulatory definition of "capital"?

18. Consistent with the plain language of the regulatory definition of "capital," USCIS and its predecessor, the Immigration and Naturalization Service, historically treated cash obtained through the proceeds of a loan no differently than cash obtained through any other means. Regardless whether the petitioner obtained the cash as a gift, through wage earnings, or

as the proceeds of a loan from a third-party, cash invested into a new commercial enterprise was treated as "cash." The agency historically approved petitions based on investments of cash the petitioner obtained through a loan, even if the loan was not collateralized by the petitioner's personal assets, so long as the job-creation and related EB-5 eligibility criteria were satisfied.

19. On April 22, 2015, USCIS's Immigrant Investor Program Office announced an abrupt change to this longstanding adjudicatory policy. Under USCIS's new collateralization rule, the cash "[p]roceeds from a loan may qualify as capital used for EB-5 investments" only if "the requirements placed upon indebtedness by 8 C.F.R. § 204.6(e) are satisfied." In other words, under USCIS's new rule, the cash proceeds of a loan a petitioner obtains from a third-party are not "cash," but "indebtedness." Based on this premise, USCIS announced a rule whereby the cash a petitioner obtains through a loan and subsequently invests in a new commercial enterprise will qualify as "capital" only up to the value of the assets the petitioner personally owns and has used as collateral for the loan.

20. USCIS's new collateralization rule was announced not in the Federal Register, but during a telephonic "stakeholder engagement" hosted by USCIS's Immigrant Investor Program Office and subsequently published on USCIS's website. The announcement was preceded by no notice or opportunity for public comment. USCIS's announcement offered no linguistic or legal explanation for why the cash proceeds of a loan are not "cash," and therefore "capital" under the plain meaning of 8 C.F.R. § 204.6(e). Nor did it acknowledge the rule's abrupt departure from its past adjudicatory practice.

C. Plaintiffs' Investments and the Agency's Denials

21. Plaintiffs are intending immigrant investors who seek to immigrate to the United States and their families through the EB-5 Program. Prior to petitioning USCIS for EB-5

classification, Plaintiffs borrowed money from companies they own, and invested the cash proceeds from the loans into EB-5 qualifying new commercial enterprises based in the United States. After making their investments, Plaintiffs filed Form I-526 petitions seeking classification as EB-5 investors.

22. As described below, USCIS applied its collateralization rule to Plaintiffs' petitions, classified their cash investments as "indebtedness," and denied Plaintiffs' petitions on the sole ground that the loan agreements between the Plaintiffs and the entities from which they borrowed the cash (here, business in which Plaintiffs own a majority stake) were not adequately secured by capital personally owned by the Plaintiffs.

23. **PLAINTIFF HUASHAN ZHANG** is a native and citizen of the People's Republic of China. He seeks to immigrate to the United States with his wife, Ping WANG, and his three children, Yifan (born Jan. 15, 1993), Zhibo (born July 31, 1996), and Zhening (born Feb. 27, 2000).

24. Mr. Zhang is the President of the Shaanxi Northwest Textile Printing and Dyeing Company ("Shaanxi Textile"), a textile manufacturing company. Shaanxi Textile is entirely owned by Mr. Zhang (who has a 99.2% interest), and his wife, Ping Wang (who has a 0.8% interest). On November 18, 2013, Shaanxi Textile – through Mr. Zhang and his wife, the sole two shareholders – executed a resolution to provide Mr. Zhang with a 3,500,000 RMB loan for Mr. Zhang to invest in an EB-5 project. The resolution indicated that the loan was to be repaid through Mr. Zhang's "future payable benefit allocation" in the company.

25. After Shaanxi Textile wired the loan proceeds into Mr. Zhang's personal account, Mr. Zhang converted the cash into U.S. dollars and wired the funds into an escrow account earmarked for a new commercial enterprise established to help finance the renovation and

repositioning of a hotel in Las Vegas, Nevada. Mr. Zhang filed his Form I-526 petition based on this investment on December 23, 2013. Mr. Zhang's investment was expected to create more than 20 jobs for U.S. workers.

26. On February 4, 2015, USCIS sent Mr. Zhang a Request for Evidence. The RFE indicated that USCIS considered Mr. Zhang's cash investment in the new commercial enterprise to be "indebtedness" rather than cash, because Mr. Zhang obtained the cash through a loan. Starting from this premise, the RFE insisted that Mr. Zhang needed to show that the loan "from his company is secured by [Mr. Zhang's] own assets," but that he had ostensibly failed to do so because "[t]he shareholder resolution" signed by Mr. Zhang and his wife "does not address any assets that may be securing the loan." The RFE thus asked Mr. Zhang to submit evidence that the loan he took out from his company satisfied the regulatory restrictions on "indebtedness" established by regulation.

27. Mr. Zhang responded to the RFE on April 15, 2015. Given USCIS's stated conclusion in the RFE that his contribution of cash to the new commercial enterprise was subject to the restrictions on indebtedness, Mr. Zhang included a written acknowledgment showing that his RMB 3.5 million loan from Shaanxi Textile is secured by his undistributed profit in the company. He also included evidence to show that his 99.2% share of the company's undistributed profit was worth RMB 6,691,150 – nearly double the amount necessary to secure his RMB 3.5 million loan. Thus, Mr. Zhang argued, even if the collateralization rule were proper, the loan he obtained from his company satisfied USCIS's requirements.

28. On May 28, 2015, USCIS denied Mr. Zhang's Form I-526 petition. USCIS reaffirmed that the cash Mr. Zhang contributed to the new commercial enterprise was indebtedness because Mr. Zhang obtained it through a loan. And it also rejected Mr. Zhang's

argument that the loan in fact was properly collateralized under USCIS's collateralization rule. The agency held that Mr. Zhang could not secure his loan from Shaanxi Textile with his share of the company's undistributed profits because such profits are "merely a balance sheet item" and "belong to the Company until the time Petitioner formally receives a distribution." Having concluded that Mr. Zhang's loan from his company was not adequately collateralized, and that the "shareholder loan proceeds do not constitute qualifying capital pursuant to 8 C.F.R. § 204.6(e)," USCIS denied Mr. Zhang's petition.

29. **PLAINTIFF MASAYUKI HAGIWARA** is a native and citizen of Japan. He seeks to immigrate to the United States with his wife, Eiko Hagiwara.

30. Mr. Hagiwara owns 81.25% of the shares of J. Kodama, Inc., a Hawaii-based corporation which owns and operates a 10-unit apartment building in Honolulu. The remaining 18.75% of the company's shares are owned by Mr. Hagiwara's father-in-law.

31. On July 1, 2013, Mr. Hagiwara executed an agreement with J. Kodama, Inc. to borrow $545,000 to make an investment in a new commercial enterprise established to help finance the construction and development of a solar power-generating facility in Tonopah, Nevada. Pursuant to the terms of Mr. Hagiwara's loan agreement with J. Kodama, Inc., the latter transferred $545,000 in cash on Mr. Hagiwara's behalf into an escrow account earmarked for the new commercial enterprise on July 10, 2013. On March 24, 2014, Mr. Hagiwara filed a Form I-526 petition based on his investment. His investment was expected to create more than 20 jobs for U.S. workers.

32. On November 17, 2014, USCIS sent Mr. Hagiwara a request for additional evidence ("RFE"). The RFE noted USCIS's position that Mr. Hagiwara's investment was considered "indebtedness," and that Mr. Hagiwara therefore needed to demonstrate that the loan

he obtained from J. Kodama, Inc. was secured by assets Mr. Hagiwara personally owned. Since Mr. Hagiwara's loan from J. Kodama, Inc. did not provide such collateral, the RFE stated, Mr. Hagiwara could not be considered to have invested any capital and therefore did not establish his eligibility as an EB-5 investor. In view of this supposed defect, the RFE asked Mr. Hagiwara to submit evidence that he had invested other capital in the new commercial enterprise.

33. On February 19, 2015, Mr. Hagiwara responded to the RFE. His response challenged the premise of USCIS's RFE that the cash he had invested in the new commercial enterprise was "indebtedness," a form of capital in which "no real money passes from the investor to the [new commercial enterprise]" prior to the petitioner filing the Form I-526. In contrast, Mr. Hagiwara explained, he "paid his capital contribution" in the new commercial enterprise "with real money," so there was no basis for USCIS to treat his investment in the new commercial enterprise as indebtedness.

34. On March 27, 2015, USCIS denied Mr. Hagiwara's Form I-526 petition. The denial did not dispute that the cash proceeds he received from his loan from J. Kodama, Inc. were lawfully obtained. But USCIS, applying the collateralization rule, reaffirmed the positon expressed in its RFE that the cash Mr. Hagiwara contributed to the new commercial enterprise was indebtedness. According to USCIS, "the investment of cash obtained as a loan from a third party is not simply an investment of cash that need not be examined further." Rather, "third party loans, such as the loan from [J. Kodama, Inc.], must be included as indebtedness. Therefore, for the loan from [J. Kodama, Inc.] to count as capital, Petitioner must demonstrate that the loan was secured by his assets." Since Mr. Hagiwara's loan from J. Kodama, Inc. was not, according to USCIS, backed by collateral Mr. Hagiwara personally owned, USCIS denied Mr. Hagiwara's petition on the ground that he failed to satisfy the EB-5 statue's capital investment requirement.

D. Plaintiffs' Reliance on USCIS's Former Adjudicatory Practice & the Effect of USCIS's Denials on Plaintiffs and their Families

35. As noted above, USCIS historically treated cash invested in a new commercial enterprise as "cash" for purposes of the regulatory definition of capital at 8 C.F.R. § 204.6(e) regardless of its source, so long as the petitioner obtained the cash through lawful means. Cash proceeds of a loan were treated no differently; USCIS applied no special rule for cash investments where the petitioner obtained the invested cash through a third-party loan. USCIS historically scrutinized the terms of loan agreements in such cases only to ensure that the cash distributed to the petitioner and ultimately invested in the new commercial enterprise was lawfully obtained. Absent a finding that a petitioner obtained the cash proceeds of a loan unlawfully, a petitioner's investment of the cash proceeds of a third-party loan into a new commercial enterprise was categorically understood by the agency to satisfy the EB-5 statute's capital investment requirement. USCIS maintained this adjudicatory practice through the time Plaintiffs took out their loans and made their cash investments in their respective new commercial enterprises.

36. Plaintiffs relied on this unbroken adjudicatory practice when they decided to fund their EB-5 investments through the cash proceeds of a loan. Plaintiffs' investments were approvable under the adjudicatory practices and policies in place at the time Plaintiffs made their investments in their respective qualifying new commercial enterprises. And they relied on the fact that the agency considered the cash proceeds of a loan to be "cash" in both deciding to use a loan to obtain the requisite investment capital, and in structuring the terms of those loans.

37. USCIS did not publically announce the change in its adjudicatory policy until April 22, 2015 – long after Plaintiffs took out their loans, made their cash investments, and filed their Form I-526 petitions. Yet USCIS applied the collateralization rule described in its April 22,

2015 announcement to Plaintiffs' petitions even though Plaintiffs were never given fair notice of the agency's change in adjudicatory practice and policy. Defendants' retroactive application of this policy blindsided Plaintiffs, who structured their investments in compliance with the plain meaning of USCIS's regulations and adjudicatory practice as it existed at the time they submitted their Form I-526 petitions.

38. Plaintiffs have suffered extraordinary hardship as a result of the agency's denials. Plaintiffs and their families have made extensive preparations to uproot from their home countries to immigrate to the United States. They structured their investments consistent with the plain language of Defendants' own regulations and the agency's contemporaneous adjudicatory practice, only to have their petitions denied many months later based solely on a policy announced long after their petitions were filed. This retroactive application of agency policy has thrown a wrench in Plaintiffs' immigration, career, and life plans, despite their full compliance with the agency's policy at the time they made their investments and petitioned USCIS for EB-5 classification.

39. Plaintiffs cannot mitigate the burdens imposed by Defendants' retroactive application of law by making a new investment and re-filing their Form I-526 petitions. Relying on a *new* investment and a *new* Form I-526 petition would delay Plaintiffs' ability to immigrate to the United States by many months, and possibly years. A number of factors would contribute to such delay. To start, the agency's current processing timeframe for Form I-526 petitions is 13.4 months from the date of filing. In addition, retrogression in the cut-off date for Chinese investors threatens additional months or years of delay for Chinese investors like Plaintiff Zhang, because filing a new petition entails moving to the back of the backlogged visa line. And on top

of all of those delays is the additional time and substantial financial expense that comes with making a new investment and filing a new Form I-526 petition from square one.

40. In addition, some investors who relied on Defendants' prior policies, like Plaintiff Zhang, have children who turned 21 awaiting a decision from USCIS, or are approaching 21 years of age now. These children have or will soon "age-out" as derivative beneficiaries of their parents' petitions. If these investors' *original* I-526 petitions were approved, their children may be eligible to immigrate to the United States as derivatives. But by immigrating to the U.S. through a *new* I-526 petition based on a new investment, these "aged-out" children will no longer be considered derivatives and will not be eligible to immigrate with their parents. Moreover, even if the child is under 21 years of age at the time the new petition is filed, retrogression in the current priority date may render the child ineligible to immigrate when the Form I-526 petition is approved. Even if these investors were to make new investments and file new Form I-526 petitions, immigration to the United States would entail separating their families.

PARTIES

41. Plaintiff Huashan ZHANG is a native and citizen of the People's Republic of China. Mr. Zhang is an entrepreneur and owner of a textile manufacturing company. He seeks to immigrate to the United States with his wife, Ping WANG, and his three children, Yifan (born Jan. 15, 1993), Zhibo (born July 31, 1996), and Zhening (born Feb. 27, 2000). In preparation to move to the United States, Mr. Zhang enrolled his children in English courses to prepare them for their move to the United States. His primary goals for immigrating to the United States are to provide his family with a better living environment, and to provide his children with the best educational and employment opportunities possible.

Mr. Zhang filed his Form I-526 petition on December 23, 2013 (receipt no. WAC1490085382), and USCIS denied the petition on May 28, 2015. The denial of Mr. Zhang's Form I-526 petition has had serious adverse consequences for Mr. Zhang and his family. Mr. Zhang passed up several business opportunities in China to prepare for what he believed would be his family's imminent immigration to the United States, and USCIS's denial of his Form I-526 petition has rendered those preparations worthless. Worse, Mr. Zhang's daughter turned 21 during the pendency of the Form I-526 petition, and she has therefore "aged-out" and will be ineligible to immigrate to the U.S. as a derivative on Mr. Zhang's petition absent intervention from this Court to reverse USCIS's erroneous denial.

42. Plaintiff Masayuki HAGIWARA is a native and citizen of Japan. He seeks to immigrate to the United States with his wife, Eiko HAGIWARA. Mr. Hagiwara filed his Form I-526 petition on March 24, 2014 (receipt no. WAC1490181016), and USCIS denied the petition on March 27, 2015.

Mr. Hagiwara and his wife, Eiko, have long desired to move to Hawaii, and Mr. Hagiwara made his EB-5 investment to help realize that dream. In preparation to move to the United States, Mr. Hagiwara quit his job as an event sales promoter and began preparations to work in real estate management. To further this objective, Mr. Hagiwara's father-in-law gave Mr. Hagiwara a majority stake in J. Kodama, Inc., a company that owns and operates a 10-unit apartment building in Honolulu. Mr. Hagiwara planned to take over management of the apartment building upon his arrival in Hawaii, and has been studying real estate management in preparation for his new career.

The denial of Mr. Hagiwara's Form I-526 petition dealt a serious setback to Mr. Hagiwara's life and career plans. Unless and until he is able to immigrate to the United States,

Mr. Hagiwara cannot effectively take over management of the apartment building he owns through J. Kodama, Inc., and his efforts to study U.S. real estate management have been rendered worthless. As a result of his inability to immigrate to the United States, Mr. Hagiwara has been forced to retain a company to handle the day-to-day management of the Honolulu apartment building until such time as he is able to immigrate to the U.S. and take over management of the apartment. Meanwhile, Mr. Hagiwara's career plans have stagnated, as he has been unable in good faith to begin work for a Japanese company given his plans to leave Japan. The denial of his petition has had other adverse consequences as well. Mr. Hagiwara and his wife had arranged to move into a condominium in Hawaii owned by his wife's family, but given the condominium remains vacant as a result of USCIS's legally erroneous denial. Throughout this ordeal, the couple been unable to travel to visit Hawaii given the immigrant intent reflected in Mr. Hagiwara's petition for an EB-5 immigrant visa. For Mr. Hagiwara and his wife, the most significant cost of all of USCIS's denial has been the deferral of their dream to make a new life in the United States.

43. Defendant UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES ("USCIS"), a subdivision of the U.S. Department of Homeland Security, is the U.S. government agency responsible for adjudicating Form I-526 petitions.

44. Defendant Jeh JOHNSON is the Secretary of the Department of Homeland Security ("DHS"). He is sued in his official capacity. As the Secretary of DHS he oversees and has ultimate responsibility for the actions of USCIS in denying Plaintiffs' Form I-526 petitions.

45. Defendant Leon RODRIGUEZ is the Director of USCIS. He is sued in his official capacity. In his capacity as Director, he has the ultimate responsibility within USCIS for denying Plaintiffs' Form I-526 petitions.

46. Defendant Nicholas COLUCCI is the Chief of USCIS's Immigrant Investor Program. He is sued in his official capacity. As Chief of the Immigrant Investor Program, he has the responsibility within USCIS's Immigrant Investor Program Office for denying Plaintiffs' Form I-526 petitions.

JURISDICTION

47. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), as it arises under the laws of the United States, particularly the Immigration and Nationality Act ("INA") and related agency regulations, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq*. This action is also brought under 28 U.S.C. § 1346 (United States as a defendant).

48. Plaintiffs exhausted their administrative remedies. USCIS has issued final denials of their Form I-526 petitions, and there is no statutorily-mandated appeal from those decisions.

VENUE

49. Venue properly lies in the District of Columbia pursuant to 28 U.S.C. § 1391(e)(1)(A), as Defendant USCIS's headquarters is located in in the District of Columbia and Defendants Johnson, Rodriguez, and Colucci are deemed to reside in the District for venue purposes. Venue is also proper under § 1391(e)(1)(B) because USCIS's Immigrant Investor Program Office, the office within USCIS responsible for adjudicating Plaintiffs' Form I-526 petitions, is located in the District of Columbia.

CLASS ACTION ALLEGATIONS

50. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. The class consists of the following ascertainable members:

> All Form I-526 petitioners who: (1) invested cash in a new commercial enterprise in an amount sufficient to qualify as an EB-5 investor; (2) obtained some or all of the cash invested in the new commercial enterprise through a loan; (3) filed a Form I-526 petition prior to April 22, 2015 based on that investment; and (4) received or will receive a denial of their I-526 petition on the ground that the loan used to obtain the invested cash fails the collateralization test described in the announcement made by USCIS during its April 22, 2015 EB-5 stakeholder engagement.

51. The precise number of investors who fall within the class definition is known only to Defendants, but likely consists of hundreds of investors, making joinder of all members impracticable.

52. A community of interest exists between the named plaintiffs and members of the class in that there are questions of law and fact which are common to all Plaintiffs and class members. All Plaintiffs and class members have been subject to denials, Requests for Evidence ("RFEs"), or Notices of Intent to Deny ("NOIDs"), on their Form I-526 petitions based on the same impermissible interpretation of the EB-5 statute and implementing regulations. In addition, all Plaintiffs and class members were blindsided by the same impermissible retroactive application of agency policy, as USCIS announced the policy applied to deny their cases only *after* they made their investments and filed their Form I-526 petitions.

53. The claims or defenses of the representative Plaintiffs and of Defendants are typical of the claims or defenses of the class. Although the relevant parties (investor, new commercial enterprise, and lender) in each plaintiff and class member's case are different, the identity of the parties is irrelevant to Plaintiffs' claims. Whether USCIS's collateralization rule survives judicial review does not depend on any investor-specific facts. The specific identities of the investor, new commercial enterprise, or lending entity have no bearing on the decisions challenged.

54. The named plaintiffs will fairly and adequately protect the interests of the class because they, like all class members, are subject to the same unlawful collateralization rule which has resulted in the issuance of denials on their Form I-526 petitions. Defendants applied the same impermissible rule to all Plaintiff investors, and the legal outcome – denial of Plaintiffs' Form I-526 petitions – is identical to that which the members of the class have been or will be subjected.

55. Individual suits by each member of the class would be impracticable because they would create a risk of inconsistent or varying adjudications and would establish incompatible standards of conduct for the parties opposing the class.

56. The number of individual suits would impose an undue burden on the courts as it would require the adjudication of potentially hundreds of separate lawsuits.

57. A class action is superior to other available methods because the joinder of so many individual cases with dependents would be unwieldy and would "trickle-in" as USCIS decides pending cases with features impermissible under its collateralization rule. The central issue presented in Defendants' denials and intended denials is not dependent on investor-specific facts, but turns principally on questions of statutory and regulatory interpretation that can be adjudicated by reference to representative examples like those of the named plaintiffs. All parties would benefit from uniform review of Defendants' conduct.

58. Plaintiffs' counsel has a 36 year history of experience in immigration-related class action cases and can adequately represent the interests of class members as well as the named plaintiffs.

CAUSES OF ACTION

COUNT I

Arbitrary and Capricious Action in Violation of the INA and the APA

59. Plaintiffs incorporate paragraphs 1 through 58, as if fully stated in this Count.

60. Defendants' decisions to deny Plaintiffs' Form I-526 petitions violate the INA and the APA 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.

61. Defendants' denials rely on an interpretation of the regulation defining "capital" contrary to the plain text of the regulation and the statute it implements. The EB-5 statute provides in relevant part that "[v]isas shall be made available . . . 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 . . . or, is actively in the process of investing, capital** . . ." *See* 8 U.S.C. § 1153(b)(5) (emphasis added) The agency's regulations, in turn, define "capital" to include, among other things, "cash." Substituting this regulatory definition into the statute, the statute reads: "Visas shall be made available . . . 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 . . . or, is actively in the process of investing, **cash** . . ." (emphasis added). Plaintiffs have satisfied this requirement by investing cash into a qualifying new commercial enterprise. The fact Plaintiffs *obtained* the cash they invested in the new commercial enterprise through a loan does not transform the cash into something other than cash. Defendants' collateralization rule contravenes the plain language of USCIS's own regulations, which unambiguously define "capital" to include "cash."

62. Instead of treating the cash Plaintiffs invested in their new commercial enterprises as "cash," Defendants characterized it as "indebtedness" – an *alternative* to cash in the regulatory definition of capital.

63. Defendants' classification of Plaintiffs' cash investments as "indebtedness" is arbitrary and capricious for multiple reasons. First and foremost, calling the cash proceeds of a loan "indebtedness" rather than "cash" does violence to the English language. When someone borrows money, we refer to the cash proceeds of the loan as *cash*, not *indebtedness*. One does not tell a car dealership he will be paying for a new car with "*indebtedness*" because the cash used to pay for the car was borrowed from a bank. The fact that Plaintiffs obtained the cash they invested in their EB-5 qualifying new commercial enterprise by taking out a loan does not transform the cash they invested in a new commercial enterprise into anything other than *cash*.

64. Second, USCIS has fundamentally confused what "indebtedness" refers to in the regulatory definition of "capital." The inclusion of "indebtedness" in the definition of capital allows a petitioner to satisfy the statutory capital investment requirement by promising to provide the new commercial enterprise with cash at a future date. *See Matter of Hsiung*, 22 I. & N. Dec. 201, 202-203 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I. & N. Dec. 169, 191-92 (Assoc. Comm'r 1998). It is such a promise *to the new commercial enterprise* which must, under the regulations, be backed by assets the petitioner personally owns. Here, however, Plaintiffs entered into no such contractual relationship with the new commercial enterprise. Rather, they invested the requisite amount of capital in the new commercial enterprise *in the form of cash*. Plaintiffs did not seek EB-5 classification based on a promise to pay the new commercial enterprise at a later date, and there was therefore no occasion for USCIS to apply the restrictions accompanying the use of indebtedness to Plaintiffs' petitions.

65. Third, Defendants' collateralization rule cannot be squared with the regulatory history of 8 C.F.R. § 204.6(e)'s definition of capital. The agency recognized that Congress intended for the definition of "capital" to be broad, and added "indebtedness" to the regulatory definition of "capital" to *expand*, not limit, the ways in which an investor can satisfy the statute's capital investment requirement.

66. The agency's collateralization rule 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 in the United States; promote job-creation; and generally be of benefit to the United States economy and labor market. A requirement that investors who promise to pay a *new commercial enterprise* at a later date back that promise with personal assets – the rule USCIS historically imposed and the one consistent with the text of its regulations – furthers these statutory goals. It provides some assurances that a foreign national's *promise* to pay a new commercial enterprise in the future will actually result in a meaningful investment in a United States business. But applying a collateralization requirement to a petitioner's *private loan* from a third-party furthers no statutory objective. When an EB-5 petitioner invests cash in a new commercial enterprise, the *source* of that cash does not impact the new commercial enterprise's capacity to engage in job-creation and economic development. USCIS's extension of the restrictions on indebtedness when used as an investment in a *new commercial enterprise* to a petitioner's separate and independent third-party loan agreement furthers no statutory objective.

67. Additionally, USCIS applied this textually-unsupported and impermissible policy to Plaintiffs' petitions without considering the serious reliance interests Plaintiffs had in Defendants' longstanding prior policy. As described above, USCIS maintained a longstanding

adjudicatory practice of approving investment arrangements materially identical to Plaintiffs, and Plaintiffs relied on the policies and practices in place at the time they made their investments and filed their Form I-526 petitions. USCIS's failure to consider these reliance interests in choosing to apply its new policy retroactively is arbitrary and capricious.

COUNT II

Impermissible Retroactive Application of Agency Practice

68. Plaintiffs incorporate paragraphs 1 through 58, as if fully stated in this Count.

69. Defendants, through their agents, applied a new rule – *i.e.* that the cash proceeds from a loan may qualify as capital used for EB-5 investments only if the requirements placed upon indebtedness by 8 C.F.R. § 204.6(e) are satisfied – retroactively. At the time Plaintiffs invested capital in a new commercial enterprise and submitted their Form I-526 petitions, Defendants treated the investment of cash proceeds from a third-party loan as *cash*, not "indebtedness." Defendants abruptly departed from this policy in adopting their collateralization rule and applying it retroactively to pending petitions like Plaintiffs'.

70. Defendants' retroactive application of this new collateralization rule, even if regarded as an interpretation, is impermissible and may not be applied to the detriment of Plaintiffs and their families.

71. The retroactive application harms and impermissibly burdens Plaintiffs and their families because Plaintiffs have detrimentally relied on Defendants' former adjudicatory policies and rules when they structured their EB-5 investments, including their decision to use the cash proceeds of a third-party loan as the capital for their investment in a new commercial enterprise. By applying the collateralization rule to Plaintiff's petitions, Defendants have denied Plaintiffs and their families the chance to obtain EB-5 classification and to seek lawful permanent residency on a conditional basis, despite Plaintiffs' compliance with all pre-existing standards.

72. Plaintiffs and their families relied substantially on the former policies and adjudicatory practices of the agency with respect to the regulatory definition of "capital" and the use of cash proceeds from a loan as an investment in a new commercial enterprise. Plaintiffs specifically relied on Defendants' prior rules, criteria, and policies in structuring their investments and petitioning USCIS for EB-5 classification based on their investments.

73. The agency's retroactive application of the new rule governing the investment of cash proceeds from a loan, even if regarded as an interpretation, fails the balancing test for retroactive application of agency policy outlined by *Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972). The inequity of applying USCIS's new rule to Plaintiffs' petitions outweighs any interest the agency may have in retroactive application.

COUNT III

Ultra Vires and Exceeding Statutory Authority

74. Plaintiffs incorporate paragraphs 1 through 58 herein, as if fully stated in this Count.

75. Defendants have exceeded their statutory authority under the INA in denying Plaintiffs' Form I-526 petitions. Defendants' denials fundamentally misconstrue the statutory scheme governing the EB-5 capital investment requirement. The statute requires that capital be invested *in the new commercial enterprise*, but it confers no authority on the agency to limit how investors may *obtain* lawfully-acquired capital. The EB-5 statute instructs that visas "shall" be made available to investors who satisfy the statutory requirements, and confers on Defendants no authority to impose additional non-statutory requirements like the collateralization rule applied to Plaintiffs' detriment. 8 U.S.C. § 1153(b)(5)

76. The agency's rule is *ultra vires* and exceeds the statutory authority conferred by statute because it impermissibly regulates a third-party transaction separate and apart from a

petitioner's investment of capital in a new commercial enterprise. USCIS has been given no authority under the statute to regulate a petitioner's private transactions with lenders, but that is the purpose and effect of the agency's collateralization rule.

COUNT IV

Improper Rulemaking Without Notice and Comment

77. Plaintiffs incorporate paragraphs 1 through 58 herein, as if fully stated in this Count.

78. Defendants' collateralization rule, publically announced for the first time on April 22, 2015, is a rule of general applicability that carries the force of law.

79. 5 U.S.C. § 553 requires that notice of the proposed rulemaking 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 this new collateralization rule retroactively without observing the APA's notice and comment procedures.

ATTORNEYS' FEES

80. Plaintiffs incorporate paragraphs 1 through 79 herein, as if fully stated in this Count.

81. As a result of Defendants' unlawful actions, Plaintiffs were required to retain legal counsel and to pay counsel reasonable attorneys' fees. Plaintiffs qualify for fees, expenses, and costs under the Equal Access to Justice Act.

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

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment on their behalf and:

a. Certify this action as a class action and award all relief to the Class as a whole;

b. Declare that Defendants' denial or intended denial of Plaintiffs' and class members' Form I-526 petitions violate the INA and its attendant regulations; violate the Administrative Procedure Act; are *ultra vires*; are arbitrary, capricious, and an abuse of discretion and not otherwise in accordance with law; and constitute an improper retroactive application of agency law;

c. Declare that the cash proceeds of a third-party loan must be treated as "cash" and not "indebtedness" under the regulatory definition of capital at 8 C.F.R. § 204.6(e);

d. Order Defendants and their agents to issue immediately all necessary and appropriate documents to Plaintiffs and class members to evidence the approval of their Form I-526 petitions, retroactive to the date the petitions were originally denied by Defendants;

e. Order Defendants and their agents promptly to provide documentation to all dependent children of Plaintiffs and class members who have "aged-out" during the pendency of this case so that they will continue to be treated as dependent children who are in-status, and to approve their parents' Form I-526 petitions to the date of original filing so that they are accorded protection under the Child Status Protection Act;

f. Order Defendants and their agents to withdraw the denial of Plaintiffs' and class members' Form I-526 petitions;

g. Order Defendants and their agents not to consider any Plaintiff's or class member's presence in the United States as unlawful for any purpose during the period of time between the denial of their Form I-526 petition and the disposition of this litigation;

h. Enjoin Defendants from placing any Plaintiff or class member in removal proceedings pending a final determination in this case;

i. Enjoin Defendants from taking any action to deport, remove, or deem inadmissible any Plaintiff, class member, or dependent of a Plaintiff or class member, from the United States pending a final determination in this case;

j. Enjoin Defendants from taking any action to deprive any Plaintiff or class member of their right to file an application for adjustment of status or to be employed in the United States on the ground that they were out-of-status from the denial of their Form I-526 petition to the disposition of this litigation;

k. Issue a mandatory injunction requiring the approval of Plaintiffs' Form I-526 petitions absent fraud;

l. Issue a prohibitory injunction preventing Defendants or their agents from applying the collateralization rule announced by USCIS on April 22, 2015, respecting the use of loan proceeds as qualifying capital;

m. Order that any substantive rule governing the EB-5 investor program be promulgated only in accordance with the notice and comment provisions of the Administrative Procedure Act and that any new rules, policies, or adjudicatory criteria may be applied only prospectively to Form I-526 petitions;

n. Grant Plaintiffs their attorney's fees and costs; and

o. Grant such other relief as the Court may deem just, equitable, and proper.

Dated: June 23, 2015

Respectfully submitted,

/s/John P. Pratt
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