UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FENG WANG, *et al.*, *Plaintiffs*, v. MICHAEL R. POMPEO, U.S. Secretary of State, *et al.*, *Defendants*.	Civil Action No. 18-1732 (TSC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Introduction

Plaintiffs – thirteen Chinese nationals who were beneficiaries of EB-5 immigrant visa petitions and their derivative family members, and American Lending Center, LLC – bring this action under the Administrative Procedure Act ("APA") in which they allege that the U.S. Department of State ("State") is failing to comply with Sections 203(b)(5) and (d) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1153(b)(5), (d), with respect to allocation of EB-5 immigrant investor visa numbers, which are subject to certain annual caps. *See* Compl. ¶¶ 1–11 (July 25, 2018) (ECF No. 1). Pursuant to the statute, State allocates the EB-5 visa numbers not only to the investors ("principals"), but also to their spouses and children ("derivatives"), which reduces the total number of EB-5 visa numbers available to individual investors annually. *Id.* ¶ 8. Plaintiffs contend, however, that State must allocate available EB-5 visa numbers only to the investors, and not count derivative EB-5 beneficiaries against the annual caps. Plaintiffs allege that State's counting policy violates the INA and that the resulting cut-off dates that State establishes constitute final agency action that is arbitrary and capricious under the APA.

Plaintiffs filed a motion for a preliminary injunction on July 25, 2018, asking the Court to prohibit State from counting spouses and children against the annual EB-5 visa number limit at INA § 203(b)(5) [8 U.S.C. § 1153(b)(5)] for purposes of establishing the visa "cut-off" dates. *See* Pl.'s Mot. Prelim. Inj. (ECF No. 2) (hereinafter, "Pls.' Mot."). Plaintiffs' Motion reflects the ultimate issues in the case and seeks substantially the same injunctive relief as the Complaint.

Plaintiffs' claim that State's allocation of EB-5 visa numbers violates the INA is invalid and injunctive relief is unwarranted. State's allocation of visa numbers under this statutory framework reflects Congress's judgment on how to balance competing priorities in allocating limited immigration benefits. State has adopted an interpretation of the derivatives provision in

INA Section 203(d), as it applies to EB-5 visas and other preference categories, that most faithfully administers Congress's immigration system consistently between family-based visas, employment-based visas, and diversity visas.

Plaintiffs cannot demonstrate that they meet any of the elements required to warrant the extraordinary and drastic remedy of preliminary injunctive relief. Plaintiffs fail to show a substantial likelihood of success on the merits, because they have not demonstrated that the INA unambiguously forecloses State's interpretation. Indeed, after exhausting the traditional tools of statutory construction, it is plain that the INA counts derivatives of preference categories, including EB-5 visas, towards the numerical caps. Moreover, a separate "country cap" in INA section 202(a)(2) limits the number of immigrant visas available to China in a given year. The country cap applies to all preference categories, including EB-5 visas. Even apart from the plain text of the INA, there are a number of additional reasons why State's counting policy embodies a permissible construction. State's long-standing interpretation finds abundant support in the legislative and regulatory history, which dates back nearly thirty years to the enactment of the 1990 Act.

Additionally, Plaintiffs fail to demonstrate any irreparable injury to the individual plaintiff investors or the regional center that serves them. Plaintiffs fail to offer any support for their claim that the individual plaintiffs are currently suffering, or that they will imminently suffer, the irreparable consequences of family separation. The remainder of their claims, as well as Plaintiff ALC's claims, refer to alleged monetary losses that do not warrant the issuance of an injunction.

Finally, Plaintiffs entirely fail to account for the harm that this extraordinary injunction would cause to the immigration system, to other unrepresented parties, and to the public's

interests. Because the INA's derivative provision at issue in this case applies not only to EB-5 visas but to all preference categories, issuing the injunction to State would dramatically increase the flow of immigration into this country in a single year by 150% or more, despite the carefully-considered numerical controls which Congress' placed on such immigration. Plaintiffs have not shown that their potential injuries outweigh the government's and other interested parties' substantial interests in maintaining the current system that has been in place for nearly 30 years since the passage of the 1990 Act.

Statutory and Regulatory Background

A. EB-5 Visa Program

Under the INA, Congress has granted State the authority to issue a type of immigrant visa known as the EB-5 employment creation visa, but set limits on the number of EB-5 visas that may be issued under this program worldwide each fiscal year. 8 U.S.C. § 1153(b)(5); *see also* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, tit. VI, § 610 (1992), 106 Stat. 1874, as amended (8 U.S.C. § 1153 note) (establishing EB-5 "regional center" investor program). This visa program is referred to as "EB-5" because it is the fifth employment-based preference category of visas.

By statute, the worldwide level of employment-based immigrants is capped each fiscal year. INA § 201(d). The fiscal year 2018 limit for employment-based immigrants calculated under INA § 201(d) is 140,292. State Visa Bulletin, Sept. 2018, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-september-2018.html. Within this limit, INA section 202(a)(2) establishes worldwide "per country limits" for employment based immigrants. It states that "the total number of immigrant visas made available to natives of any single foreign state . . . under [sections 203(a) and (b) of the INA] in any fiscal year may not

exceed 7 percent . . . of the total number of such visas made available . . . in that fiscal year." 8 U.S.C. § 1152(a)(2). This limits visas across all family preference and employment based immigrant visa categories for Chinese nationals (or nationals of any other country) to approximately 25,620 per year.[1] "Because China and India are so populous, applicants from those countries are far more likely to be blocked by the country cap than those from other lands." *Xie v. Kerry*, 780 F.3d 405, 406 (D.C. Cir. 2015).

INA section 203(b)(5)(A) [8 U.S.C. § 1153(b)(5)(A)] further provides that visa numbers "shall be made available in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . ." Of the 7.1 percent of the worldwide level, "[n]ot less than 3,000" visa numbers are reserved each fiscal year for qualified immigrants who invest in a new commercial enterprise in a targeted rural or high-unemployment area. INA § 203(b)(5)(B). Section 610 of Pub. L. 102-395 requires 3,000 visa numbers to be set aside for qualified immigrants who are investing in commercial enterprises associated with regional centers.

Additionally, the Chinese Student Protection Act of 1992, PL 102–404, Oct. 9, 1992, 106 Stat 1969, requires that beginning with Fiscal Year 1993, the per-country statutory limit for the People's Republic of China be reduced by 1,000 visa numbers annually to compensate for adjustment of status cases processed by USCIS under this law. 8 U.S.C. § 1255, note 6. In accordance with Section 2(d) of the Chinese Student Protection Act, a total of 300 visa numbers

[1] This figure represents 7% of the current family preference cap (226,000) and employment-based cap (140,000). Section 202 of the INA contains additional provisions regarding so-called "fall across" between categories, among other factors, that can lead to variances in the actual number of available visas per country per preference category in a given year, but the overall number of visas available to a single country across all categories cannot exceed 7%.

are deducted from the Employment Third preference (EB-3) limit and 700 visa numbers from the Employment Fifth preference (EB-5) limit. *Id.*

Under INA section 203(d) derivative spouses and children of employment-based immigrants, including EB-5 principals, who are accompanying or following to join the principal immigrant are "entitled to *the same status*, and the same order of consideration" as the principal. 8 U.S.C. § 1153(d) (emphasis added). State has always interpreted this statute as meaning that an eligible spouse or child can be issued one of the 9,960 annual visa numbers available worldwide for the EB-5 program on the same terms as a principal. For all numerically limited visa categories, which includes all employment-based, family preference, and diversity categories, visas issued to derivatives are counted toward the annual immigrant visa caps. *See* 22 C.F.R. §§ 41.31(b); 42.31(a)(2), (b)(2); 42.32; *see also* 9 Foreign Affairs Manual ("FAM") 503.1-2(A)(a).[2]

B. The Path to Lawful Permanent Residence for Approved EB-5 Investors and Their Derivative Spouses and Children

The path to lawful permanent residence through the EB-5 visa program involves several steps. The first step is for the EB-5 principal applicant to file a Form I-526 visa petition with USCIS seeking classification as an EB-5 immigrant investor. 8 C.F.R. § 204.6(a). If USCIS approves the petition, it forwards the petition to State for immigrant visa pre-processing. Upon the petition's approval, it is accorded a priority date. 22 C.F.R. § 42.53(a). The priority date is the date the petition was properly filed with USCIS. 8 C.F.R. § 204.6(d).

[2] Immigration legislation establishes annual limits on the number of family-sponsored preference, employment-based preference and diversity immigrants who may be issued immigrant visas or otherwise obtain Lawful Permanent Resident ("LPR") status based on those classifications (no limits exist for immediate relatives or certain special immigrants). Each classification has its own numerical limit, and for many of the classifications the numerical limits will vary slightly from year to year. Every 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.

Upon admission to the United States, the alien entrepreneur and his or her spouse and child derivatives are accorded conditional resident status. *See* 8 U.S.C. § 1186b(a). The conditional basis may be removed if the individuals file a Form I-829 and meet certain statutory and regulatory requirements relating to the qualifying commercial enterprise are met. *See* 8 U.S.C. § 1186b(c); 8 C.F.R. § 216.6.

C. State's Implementation of the INA

State's Visa Office ("VO") calculates, for both State and USCIS, how many visa numbers are available for issuance. *See* 8 U.S.C. § 1153(g) (empowering State to "make reasonable estimates of the anticipated numbers of visas to be issued"). At the beginning of each month, VO receives a report from each consular post worldwide listing totals of documentarily qualified immigrant visa applicants in categories subject to numerical limitation. Charles Oppenheim Decl. ¶ 3 (Aug. 24, 2018) (Ex. 1). Cases are grouped by foreign state chargeability, preference categories and priority date. *Id.* Similarly, USCIS demand for adjustment of status cases awaiting forward movement of the applicable final action date is reported to VO as the cases are adjudicated by USCIS. *Id.* During the first week of each month, this documentarily qualified demand is tabulated. *Id.*

VO subdivides the annual preference and foreign state chargeability limitations specified by the INA into monthly allotments. *Id.* ¶ 4. The totals of documentarily qualified applicants which have been reported to VO by consular posts worldwide and USCIS are compared each month with the numbers available for the next regular allotment. *Id.* State's determination of how many visa numbers are available requires consideration of several variables, including: past number use; estimates of future number use and return rates; and estimates of additional USCIS demand for adjustment of status cases based on final action date movements. *Id.*

Once a visa number becomes available, based on the classification of an approved petition and foreign state chargeability, the beneficiary of the approved petition may decide to complete the second step in the process. If the beneficiary is physically located within the United States, he or she may file an application for adjustment of status to that of a lawful permanent resident (Form I-485) with USCIS.[3] If the beneficiary of the petition is not located in the United States, he or she may file an application for an immigrant visa, which is adjudicated by a consular officer at State overseas at the time of a statutorily mandated in-person interview. INA § 222(a), (h). Thus, both aliens physically present in the United States (who apply for adjustment of status with USCIS) and aliens located outside of the United States (who apply for an immigrant visa with State) draw from the same "pool" of visa numbers. *See* 22 C.F.R. § 42.51(b); *see also* 8 U.S.C. § 1255(b) (providing that, upon the approval of an adjustment of status application, "the Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 1152 and 1153 of this title within the class to which the alien is chargeable for the fiscal year then current").[4]

Whenever the total of documentarily qualified applicants in a visa category exceeds the supply of visa numbers available for allotment for the particular month, the category is considered to be "oversubscribed" and State must establish and publish a cut-off date, which is referred to as a final action date. Oppenheim Decl. ¶ 5. The final action date is the priority date,

[3] Aliens who are approved for EB-5 status while present in the United States also apply for adjustment of status by filing a Form I-485, but they are accorded permanent resident status through the conditional status process described in 8 U.S.C. § 1186b, not through adjustment of status under 8 U.S.C. § 1255(a). *See* 8 U.S.C. § 1255(f).

[4] A "visa" is different from a "visa number." A visa is a document issued by a consular officer to an alien that allows the alien to seek permission for admission to the United States from the Department of Homeland Security. *See* INA §§ 101(a)(16), 211(a), 221(a)(1)(A) [8 U.S.C. §§ 1101(a)(16), 1181(a), 1201(a)(1)(A)] (regarding immigrant visas). A visa number is simply a budgetary device used by State to avoid exceeding numerical limits established by Congress. A visa number is not a physical object given to aliens and does not confer legal status on an alien.

which is usually the date on which the petition was filed, of the first documentarily qualified applicant for whom no visa number is available based on allocating visa numbers in order of priority date. When visa numbers are "oversubscribed," not all beneficiaries of approved petitions who may seek adjustment of status or an immigrant visa can immediately be processed to conclusion. Only persons with priority dates earlier than a cut-off date are allotted a visa number and are thus eligible for final adjustment of status by USCIS or for the issuance of an immigrant visa by State. *See id.*; *Zixiang Li v. Kerry*, 710 F.3d 995, 997–98 (9th Cir. 2013). Persons with a priority date on or after the cut-off date must wait until future movement of the cut-off date allows numbers to be allocated. This process is applied to all final action dates established in each monthly Visa Bulletin, including those final action dates for all of the various family-sponsored or employment-based preference categories and subcategories which may be established for any country, including China. Oppenheim Decl. ¶ 5.

When demand for an employment-based visa application in a specific country exceeds supply (as in the present case, EB-5 visas for Chinese nationals), the beneficiary of an approved EB-5 petition is placed with others in his or her category in order of priority date. *See* 8 U.S.C. § 1153(b)(5); 22 C.F.R. § 42.53(a). Every month, State sets a "final action date" for each preference category in the published Visa Bulletin. The final action date indicates that "visa numbers" are immediately available for documentarily qualified applicants who were approved by USCIS and referred to State and who have a priority date earlier than the applicable final action date. *See* 8 C.F.R. § 245.1(g)(1); 22 C.F.R. § 42.32(e). Pursuant to INA § 202(b)(5) [8 U.S.C. § 1153(b)(5)], a single final action date is applied to all EB-5s, including those approved based on designated targeted areas and regional centers (subsets of the EB-5 immigrant visa classification). Oppenheim Decl. ¶ 11.

When a visa number is not yet available under this numerical control system, State is prohibited by law from issuing a visa to a beneficiary whose priority date is on or later than the final action date for that month. To do so would violate the statutory section controlling order of consideration of visa applicants set forth in 8 U.S.C. § 1153(e)(1). *See also* § 1255(a)(3) (conditioning eligibility for adjustment of status on the availability of an immigrant visa).

As noted above, a derivative "spouse or child" is entitled to the "same status" and the "same order of consideration" provided to the principal beneficiary of an EB-5 petition under INA section 203(d). *See* 8 U.S.C. § 1153(d). That section defines "spouse or child" according to 8 U.S.C. § 1101(b)(1)(A)–(E). *Id.* For a "child," that definition is limited to an unmarried person under twenty-one years of age. *Id.* § 1101(b)(1). When a derivative beneficiary child of the principal EB-5 investor's petition turns 21 prior to a visa number becoming available to the principal, the beneficiary ceases to meet the INA's definition of a child and "ages out" of being considered a derivative.[5] The date on which a visa number became available and thus authorized for issuance can be determined by reference to State's Visa Bulletin. *See* State Visa Bulletin, Sept. 2018.

D. The Visa Bulletin

In accordance with the INA, State publishes a monthly "Visa Bulletin" on its website that specifies the cut-off dates that govern final action on visa petitions during a specific month.

[5] Under the Child Status Protection Act of 2002, the INA was amended to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of 21. INA § 203(h)(1)(A)-(B), [8 U.S.C. § 1153(h)(1)(A)-(B)]. An individual eligible for permanent residence as a derivative beneficiary under INA § 203(d) [§ 1153(d)] who is over twenty-one years of age may still meet the definition of child provided that (1) he or she was a "child" (unmarried and under 21) on the date the immigrant visa became available for the principal applicant, (2) sought to acquire a visa or lawful permanent residence within one year of availability of the visa, and (3) "aged out" while waiting for his application to be adjudicated, as determined by a formula subtracting the number of days the petition was pending from the applicant's age at time of visa availability.

See generally Mehta v. State, 186 F. Supp. 3d 1146, 1150 (W.D. Wash. 2016) (describing this system). For employment-based immigrants (such as the plaintiffs in this case), the monthly Visa Bulletin contains two charts. The first chart ("Final Action Dates") contains visa number availability dates, which indicates that visa "numbers are authorized for issuance . . . for applicants whose priority date is earlier than the final action date listed" in the chart governing that month. A second chart containing a second set of dates is entitled "Dates for Filing Visa Applications." This second chart notifies beneficiaries of employment-based petitions that a visa number is likely to become available in the near future and that they can begin to prepare the necessary materials to apply for that visa. In other words, the "Final Action Dates" chart contains visa number availability information, whereas the "Dates for Filing Visa Applications" chart contains dates for beneficiaries to begin taking steps to apply. Thus, whether a visa number is available for a beneficiary of any preference category petition can be ascertained by referencing the monthly Visa Bulletin.

As of the current Visa Bulletin for September 2018, the final action date for EB-5 visa cases is August 8, 2014. *See* State Visa Bulletin, Sept. 2018. This indicates that consular officers are authorized to issue visa numbers for applicants whose priority date is earlier than August 8, 2014, without exceeding the statutorily mandated limits. The cut-off date for "Dates for Filing Visa Applications" for an EB-5 visa application is October 1, 2014. This indicates that applicants who have a priority date earlier than October 1, 2014, may assemble and submit required documents to State's National Visa Center.

The above-described system for processing visa petitions on a first-come first-served basis based on priority dates ensures compliance with the statutory limits on the number of employment-based preference immigrant visas established by Congress under INA § 201(a)(2)

[8 U.S.C. § 1151(a)(2)] (worldwide limits) and INA § 202(a)(2) [8 U.S.C. § 1152(a)(2)] (per-country limit), while also integrating the priority principle found in INA § 203(e) [8 U.S.C. § 1153(e)] (regarding the order of consideration). *See* Oppenheim Decl. ¶¶ 9–13; *see also Mehta*, 186 F. Supp. 3d at 1150.

Indeed, in 1991, State amended 22 C.F.R. §§ 42.51-42.54 to implement changes that Congress made to the INA when it enacted the 1990 Immigration Act (Pub. L. 101-649) (the "1990 Act") and requested public notice and comment on these changes. 56 Fed. Reg. 5117-01 (Oct. 10, 1991). In amending these regulations, State explained that:

> The Immigration and Nationality Act (INA) has long contained three standards for the distribution of immigrant visa numbers: (1) They must be allocated in the order in which petitions according status were filed—INA 203(c) which will become 203(e) on October 1, 1991 [pursuant to the 1990 Act]; (2) Natives of a single country may not receive more than 20,000 in a fiscal year—INA 202(a); and (3) Allocations to countries subject to INA 202(e) (i.e., those who had been allocated 20,000 the prior year) have to conform to the preference percentages.
>
> The latter two requirements were expressly designed to be a brake on the application of the first. The INA 202(a) provision dates to 1965, and the legislative history shows it was intended to prevent any country (or small group of countries) from pre-empting all the visa numbers as a result of huge backlogs that had developed during the operation of the national origins quota system.
>
> Thus, for example, even if, in strict chronological order, the first 40,000 applicants in a preference were the natives of Italy or China (both had large preference backlogs when the 1965 Act was under consideration), **the per-country limit alone effectively prevented the Department of State from allocating such preference numbers exclusively to natives of that country**. In other words, despite the generally-applicable absolute chronological requirement of INA 203(c), Congress also provided that, in certain circumstances, applicants with earlier priority dates would be bypassed so that others would be able to immigrate.

(Emphasis added.)

Factual and Procedural Background

A. The Demand for EB-5 Visas in China Exceeds Supply.

When the EB-5 immigration category was first enacted in 1990, the idea that someday there would be so many Chinese millionaires using it that they would need to seek class action

certification due to their numerosity would have been virtually inconceivable. Of course, having at least $500,000 to invest in a project remains very far beyond the means of the vast majority of people in America, let alone China or any other country. However, the explosive growth of the Chinese economy over the past several decades and the increasing number of high net worth individuals in China[6]—the absolute number of which results in part from China being the world's most populous country—combined with the aggressive marketing of EB-5 projects in China by entities such as Plaintiff ALC, has led to very high demand for EB-5 visas among Chinese nationals. Also fueling demand for EB-5 visas has been their falling cost in real terms; the required investment amounts are still frozen at 1990 levels, despite the significant effect of nearly three decades of inflation on the actual purchasing power of the investments.[7]

The demand for EB-5 visas among Chinese applicants exceeds the current supply for such visas. Oppenheim Decl. ¶¶ 11–12 (Aug. 24, 2018). On the supply side, the EB-5 annual limits for FY-2018 are as follows:

- Worldwide limit: 9,960 (7.1% of overall employment preference categories);
- Per-country limit: 697 (7% of EB-5 category);
- China limit: 697 (per-country) minus 700 (Chinese Student Protect Act offset) equals negative 3.

Id. ¶ 10.

Therefore, under INA § 202(a)(5)(A) China EB-5 number use is dependent upon the amount of otherwise unused worldwide EB-5 numbers available. *Id.* For FY-2018, all other

[6] According to a study, the number of Chinese with investable assets of at least $1.47 million (10 million yuan) increased from 180,000 in 2006 to 1.6 million in 2016. Reuters, *Wealthy Chinese Rise to 1.6 Million in Past Decade, Up Nearly 9 Times: Survey* (June 19, 2017), https://www.reuters.com/article/us-china-economy-wealthy-idUSKBN19B059.

[7] To equal the buying power of a $500,000 investment in December 1990 would require an investment of $941,726 in July 2018, but the EB-5 amount is still $500,000. *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=500%2C000.00&year1=199012&year2=201807.

countries in the world together will use approximately 5,135 EB-5 visa numbers. *Id.* For FY-2018, China is the only country that has met its per-country cap for EB-5 visas. *Id.* As a consequence, China will be able to use approximately 4,825 numbers under this provision, which represents 48.4 percent of the worldwide limit of 9,960 EB-5s. *Id.*

Because there are fewer visa numbers available for Chinese applicants' use based on increased EB-5 demand by those applicants from other countries, applicants from China have a longer wait. *Id.* ¶ 12. This is illustrated by the fact that after the determination of the September 2018 China EB-5 final action date (August 8, 2014) there were over 6,825 applicants who had been reported documentarily qualified with priority dates after that final action date. *Id.* Those applicants, along with others who will be reported in future months, will be competing for any visa numbers which can be made available for use in FY-2019 and subsequent years. *Id.*

B. Plaintiffs' Class Action

The named individual plaintiffs are thirteen Chinese nationals who are beneficiaries of EB-5 immigrant visa petitions filed with USCIS. All of the named individual plaintiffs allege that they have children who have aged out, or are expected to age out, before a visa number becomes available. *See* Compl. ¶¶ 3, 14–26. Plaintiff American Lending Center LLC is a Government-approved "regional center" sponsor of EB-5 investments. *Id.* ¶¶ 3, 27.

In both the Complaint and Motion for Preliminary Injunction, Plaintiffs seek declaratory and injunctive relief "to compel Defendants to comply with INA §§ 203(b)(5) and (d) by allocating EB-5 visa numbers to actual investors, while according the spouses and children the same status as the EB-5 investor for purposes of the visa quota." *Id.* ¶ 11; *see also* Pl.'s Mot. at 34 & Prop Or. Plaintiffs contend that State's policy of counting the principals' derivative spouses and children against the EB-5 visa quota is arbitrary and capricious in violation of the

APA and exceeds Defendants' statutory authority under the INA. Compl. ¶¶ 111–134 (Counts 1, 2, and 3).

Plaintiffs also moved for class certification on August 6, 2018. ECF No. 6. Defendants filed a response to the motion for class certification on August 20, 2018. In their response, Defendants stated that they do not oppose granting class certification on a provisional basis for the purpose of resolving the motion for preliminary injunction only, but requested that the Court defer any further briefing or ruling until after dispositive motions are decided. ECF No. 10. Plaintiffs filed a reply on August 21 in which they confirmed that they do not oppose the entry of Defendants' proposed order granting provisional class certification. ECF No. 11.

Legal Standards

A. Preliminary Injunctive Relief

A preliminary injunction "is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("*Chaplaincy*") (internal quotation and citation omitted); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (preliminary injunction is an "extraordinary" and "drastic" remedy that should not be granted unless the movant carries the burden of persuasion by a "clear showing").

"To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Chaplaincy*, 454 F.3d at 297 (citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

"A district court must balance the strengths of the requesting party's arguments in each of the four required areas." *Chaplaincy*, 454 F.3d at 297 (quotation omitted). "If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *Id.* (quotation omitted).[8] "Despite this flexibility, though, a movant must demonstrate at least some injury for a preliminary injunction to issue." *Id.* (citing *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). "A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy*, 454 F.3d at 297 (citing *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1210–11 (D.C. Cir. 1989)).

The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits. *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). Other members of this Court have found that "in cases where, as here, 'a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo' during litigation, the party is held to a higher burden of proof." *Davis*, 76 F. Supp. 3d at 69 n.15 (quoting *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998)). "In other words, 'where an injunction is mandatory—that is, where its terms would alter, rather than preserve, the status quo by

[8] While courts in this Circuit traditionally have applied to these four elements this "sliding scale" framework—if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor[,]" *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009)—the Supreme Court's decision in *Winter*, 555 U.S. at 22, has called into question this approach. Indeed, *Winter* has "sparked disagreement over whether the 'sliding scale' framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of a factor simply because one or more other factors have been convincingly established." *12 Percent Logistics, Inc. v. Unified Carrier Reg. Plan Bd.*, 280 F. Supp. 3d 118, 121 (D.D.C. 2017) (*comparing Davis v. Billington*, 76 F. Supp. 3d 59, 63 n.5 (D.D.C. 2014) ("[B]ecause it remains the law of this Circuit, the Court must employ the sliding-scale analysis here."), *with ABA, Inc. v. Dist. of Columbia*, 40 F. Supp. 3d 153, 165 (D.D.C. 2014) ("The D.C. Circuit has interpreted *Winter* to require a positive showing on all four preliminary injunction factors[;]" citing *Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring))). The Court need not resolve this legal issue here because Plaintiffs cannot meet either standard.

commanding some positive act—the moving party must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that *extreme or very serious damage* will result from the denial of the injunction.'" *Id.* (emphasis in the original); *see also Aracely, R. v. Nielsen*, No. CV 17-1976 (RC), 2018 WL 3243977, at *5 (D.D.C. July 3, 2018) ("[I]f the requested relief would alter, not preserve, the status quo, the court must subject the plaintiff's claim to a somewhat higher standard.") (internal citation and quotation marks omitted).[9]

B. APA Review and General Principles of Deference to Agency Judgment

A district court may review a final agency action when challenged, but the action can only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," § 706(2)(C). In addition, APA § 706(1) gives courts authority to "compel agency action unlawfully withheld." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, (2004).

Principles of *Chevron* deference apply to State's interpretation of the immigration laws. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). "Indeed, 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality op.) (quoting *INS v. Aguirre-*

[9] Although it appears that this higher burden is consistent with the D.C. Circuit's admonition that "[t]he power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised," *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969), the standard has yet to be adopted—or rejected—by the Circuit. *See Davis*, 76 F. Supp. 3d at 69 n.15. Here, as in *Davis*, however, "the Court need not weigh in on the issue, because even if the Circuit were to decide that a higher burden is not applicable when mandatory relief is being sought, the plaintiff has failed to satisfy the standard otherwise applicable for entitlement to preliminary injunctive relief." *Id.*

Aguirre, 526 U.S. 415, 424–25 (1999)). "Under *Chevron*, the statute's plain meaning controls, whatever [State] might have to say." *Id.* (citing *Chevron*, 467 U.S. at 842–43). "But if the law does not speak clearly to the question at issue, a court must defer to [State's] reasonable interpretation, rather than substitute its own reading." *Id.*

In assessing State's consistent, long-standing interpretation of the INA, the Court should remain mindful that "an agency's power to regulate 'is limited to the scope of the authority Congress has delegated to it.'" *Petit v. DOE*, 675 F.3d 769, 778 (D.C. Cir. 2012) (quoting *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005)).

> Pursuant to *Chevron* Step One, if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent. If Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* Step Two.
>
> Under Step Two, [i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are . . . manifestly contrary to the statute. Where a legislative delegation to an agency on a particular question is implicit rather than explicit, the reviewing court must uphold any reasonable interpretation made by the administrator of [that] agency. But deference to an agency's interpretation of its enabling statute is due only when the agency acts pursuant to delegated authority.

Id. (quoting Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review—Review of District Court Decisions and Agency Actions* 141 (2007) (alternations in the original; internal citations and quotation marks omitted)).

Argument

The Court Should Deny the Motion for Preliminary Injunction

I. Plaintiffs Have No Likelihood of Success on the Merits.

Plaintiffs contend that State must allocate available EB-5 visa numbers only to the investors ("principals") and not count their spouses and children ("derivatives") against the annual caps. To demonstrate a likelihood of success on the merits, Plaintiffs must make a

"substantial indication of probable success." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Courts in this Circuit have noted that "it is particularly important for the movant to demonstrate a likelihood of success on the merits." *See Konarski v. Donovan*, 763 F. Supp. 2d 128, 132 (D.D.C. 2011) (citing *Benten v. Kessler*, 505 U.S. 1084, 1085 (1992)). Absent a "substantial indication" of likely success on the merits, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 38 F. Supp. 2d 114, 140 (D.D.C. 1999) (internal quotation omitted); *accord New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) ("The *sine qua non* of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.").

A. State's Policy of Counting Derivatives Is Not Contrary to the Plain Language of the INA.

Following the familiar two-step framework from *Chevron*, Plaintiffs fail to show a likelihood of success on the merits of their claim that derivative spouses and children should not be factored into the annual cap for EB-5 visas. "[T]o prevail under *Chevron* step one, [Plaintiffs] must do more than offer a reasonable or, even the best, interpretation" of the INA. *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011). Instead, they "must show that the statute *unambiguously* forecloses the [agency's] interpretation." *Id.* (citation omitted; emphasis in the original). "Put another way, [Plaintiffs] must demonstrate that the challenged term is susceptible of 'only [one] possible interpretation.'" *Petit*, 675 F.3d at 781 (quoting *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1015 (D.C. Cir. 1999)).

"Moreover, at step one, a court must 'exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue.'" *Id.*

(quoting *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997))). "The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." *Id.*; *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004)) (confirming that the Court may look to the "text, structure, purpose, and history" of an agency's authorizing statute to determine whether a statutory provision admits of congressional intent on the precise question at issue).

Although the Court's analysis should begin with the INA's text, the meaning the Court ascribes to the statutory text must reflect the statute's "context." *Id.* (citing *Nat. Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995)), *Bell Atl. Tel.*, 131 F.3d at 1047)). For as the D.C. Circuit has explained, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." *Bell Atl. Tel.*, 131 F.3d at 1047; *see also PDK Labs. Inc. v. DEA*, 362 F.3d 786, 794 n.1 (D.C. Cir. 2004)) ("[O]ne cannot understand a statute merely by understanding the words in it."); *Cnty. of L.A.*, 192 F.3d at 1014 ("[T]o prevent statutory interpretation from degenerating into an exercise in solipsism, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law."). Here, too, in interpreting the INA's annual EB-5 visa number limits in INA sections 202(a)(2), 203(b)(5) and (d), the Court should consider not only the ordinary meaning of the terms in those sections, but also, among other things, "the problem Congress sought to solve" in enacting the statute in the first place." *PDK Labs.*, 362 F.3d at 796.

1. The 1965 Act Counted Derivative Spouses and Children of Preference System Immigrants Toward Numerical Caps.

For nearly a century—beginning with the Emergency Quota Act of 1921 and continuing through the Immigration and Nationality Act of 1952 to the present day—Congress has carefully

regulated the number of people allowed to obtain LPR status and thereby get on the path to U.S. citizenship. Congress has tightly and specifically managed immigrant numbers through successive legislation. In the landmark Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (the "1965 Act"), Congress replaced the former "quota system" based on individual per-country quotas, with the "preference system" that remains to this day the cornerstone of U.S. immigration law and policy. *See Fed'n for Am. Imm. Reform, Inc. v. Reno*, 93 F.3d 897, 906 (D.C. Cir. 1996) (summarizing the legislative history, context, and purpose of the system of preferences established in the 1965 Act); Compl. ¶ 43 (alleging that the 1965 Act "established a worldwide numerical quota on immigrant visas, which applied to *all* applicants, with certain specified exceptions . . . .").

Section 203(a) of the INA, as amended by the 1965 Act, established seven preference categories of principal aliens, adding up to 100 percent of the total number of available immigrant visas (which was 170,000 per year). The eighth category was a catch-all category for any other qualified immigrants if visas in the first seven categories were not used. The ninth category pertained to spouses and children:

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

Section 203(b) then stated as follows:

> (b) In considering applications for immigrant visas under subsection (a), consideration shall be given to applicants in the order in which the classes of which they are members are listed in subsection (a).

In other words, the phrase "the same status, and the same order of consideration" meant that a derivative spouse or child of a principal immigrant in one of the other preferences was, by virtue of paragraph (9), able to immigrate in the same category (i.e., one of paragraphs (1)–(8)), at the same time, and using one of the visa numbers available to the principal category. Plaintiffs appear to agree that the 1965 Act counted derivative spouses and children against the cap applicable to the principal. *See* Compl. ¶¶ 43–44. The 1965 Act was implemented this way, and universally understood to apply that way, for the next quarter century.

2. The 1990 Act Continued to Count Derivatives of Preference Categories, Including the New EB-5, Toward Numerical Caps.

It was against this well-understood backdrop that Congress in 1990 considered, and ultimately enacted, some significant changes to the immigration laws in the law known as the Immigration Act of 1990 (the "1990 Act"), Pub. L. No. 101–649, Nov. 29, 1990, 104 Stat 4978. The changes in the 1990 Act included revisions to the categories and numbers for preference system immigration. But the 1990 Act retained the basic structure of immigration law from the 1965 Act, including (1) specific exclusions to caps for groups (especially immediate relatives of U.S. citizens) not counted toward any cap; (2) a preference system capping the total numbers of other immigrants, and dividing them into a number of preferences each receiving a percentage of the total number; and (3) a provision for derivative spouses and children of principal aliens in the preference categories.

The 1965 Act, as noted above, had included all the immigration preferences—whether family- or employment-based—as separate paragraphs of one subsection of section 203 of the INA, relating back to a single cap for all preference system immigrants in section 201. The derivatives were the last paragraph of section 203.

The 1990 Act modified the organization of INA section 203 to divide the preference categories into three subsections each with a number of paragraphs, rather than the previous single set of paragraphs in one subsection. Per the 1990 Act, INA section 203 now divided the preference categories into a set of family-based preferences in subsection 203(a); a set of employment-based preferences in subsection 203(b) (including EB-5, called that because it is paragraph 203(b)(5)); and a new "diversity immigrant" category in subsection 203(c). These preference categories all continue to tie back to cap numbers in section 201 of the INA, but these also were divided into separate caps for family-based immigrants (§ 201(a)(1)), employment-based immigrants (§ 201(a)(2)), and diversity immigrants (§ 201(a)(3)).

Although the 1990 Act revised the immigrant visa preference system by dividing it into separate family-based and employment-based preferences, the 1990 Act's treatment of derivatives remained the same. That is, the spouse and children of a preference immigrant were still entitled to the "same status" and the "same order of consideration" as the principal immigrant, if not otherwise qualified for an immigrant visa. The new subsection 203(d) stated:

> (d) Treatment of family members. A spouse or child . . . shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), 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.

The language in Section 203(d) was substantively identical to the 1965 Act. It accomplished precisely the same thing, with respect to the revised preference categories, including the new EB-5 preference category. Thus, although the categories were revised and the distribution of principal visas within them modified by the 1990 Act, the treatment of derivatives remained the same. The derivative provision (whether it was INA § 203(a)(9) as in the 1965 Act, or INA § 203(d) as in the 1990 Act) was not a separate visa category or allocation. In other words, derivatives did not receive a "Section 203(d) visa." Rather, Section 203(d) is a means by

which a derivative spouse or child can obtain a visa under their principal's applicable category in Section 203(a), (b) or (c).

Plaintiffs contend that the restructuring of Section 203 in the 1990 Act had huge substantive effects by taking EB-5 investors' spouses and children (and for that matter, all the other family-based, employment-based, and derivative spouses and children, as the statutory structure is the same for all of them as it is for EB-5), completely out of the preference system altogether. To accept Plaintiffs' theory, one would have to assume that Congress intended to drastically increase immigration flows because such a reading of the 1990 Act would have doubled or even tripled the number of available visas. But the 1990 Act contained exactly the same language as the 1965 Act. And in 1990 it was well understood that the unchanged language regarding derivatives being entitled to the "same status" and "the same order of consideration" as the principal immigrant in Section 203(d) required counting derivatives towards the annual caps.

When Congress repeats language with a well understood construction in a new statute, it is presumed to intend to continue that same construction. As stated by the Supreme Court:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard v. Pons, 434 U.S. 575, 581 (U.S. 1978) (citations omitted); *see also Negusie v. Holder*, 555 U.S. 511, 546 (2009) (citing *Traynor v. Turnage*, 485 U.S. 535, 546 (1988), 2B N. Singer & J. Singer, Sutherland on Statutory Construction § 49.9, pp. 127–133 (7th ed. 2008)); *Haig v. Agee*, 453 U.S. 280, 297 (1981) (in the absence of evidence of any intent to repudiate the

longstanding administrative construction of a statute, a court will presume Congress had adopted the longstanding construction when it uses identical language).

The 1990 Act thus replicated the plain language of the 1965 Act, which unambiguously evinced Congress's intent to count both principals and derivatives toward preference system caps. *See* Cong. Research Serv., *U.S. Family-Based Immigration Policy* 7-8 (Feb. 9, 2018) (construing INA § 203(d) as meaning that "derivative immigrants count equally as principal immigrants within the numerical limits of each immigration category"). After considering the statutory text as well as the traditional tools of statutory construction, including canons of construction and the broader statutory context, it is readily apparent that Congress "directly addressed the precise question at issue."[10] *Chevron,* 467 U.S. at 842–43.

3. The "Country Cap" in the 1990 Act Explicitly Applies to Derivatives.

Plaintiffs claim that State's policy of counting derivatives towards the annual allotment for EB-5 visas violates the INA fails for an additional reason. Under INA section 202(a)(2), "the total number of immigrant visas made available to natives of any single foreign state . . . under [sections 203(a) and (b) of the INA] in any fiscal year may not exceed 7 percent . . . of the total number of such visas made available . . . in that fiscal year." As explained above, this limits

[10] In addition, derivatives are not among the classes of aliens whom Congress expressly exempted from "direct numerical limitations" in INA § 201(b), 8 U.S.C. § 1151(b). If Congress intended to exempt derivatives from visa limits, it likely would have provided for the exemption in section 201(b) and certainly would have done so in a far less oblique fashion. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2414-15 (2018) ("Had Congress . . . intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end. The fact that Congress did not adopt a readily available and apparent alternative strongly supports the conclusion that § 1152(a)(1)(A) does not limit the President's delegated authority under § 1182(f)." (quotation marks, citations, and brackets omitted)). In fact, at least two recent, yet unsuccessful bills sought to amend INA § 201(b) to exempt aliens who are the spouse or a child of an alien admitted as an employment-based immigrant under section 203(b). *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong., § 2307(b)(1) (2013); I-Squared Act of 2013, S.169, 113th Cong. § 303. And, as discussed further below, Congress also has expressly exempted derivative spouses and children from statutory nonimmigrant visa caps. *See, e.g.*, INA § 214(g)(2) (explicitly excepting spouses and children from H-1B numerical limitations), (p)(2) (same – U nonimmigrants); 8 U.S.C. § 1184(g)(2), (p)(2)(B).

visas across all family preference and employment based immigrant visa categories for Chinese nationals (or nationals of any other country) to approximately 25,620 per year. As a result of the country cap, visa application wait times differ between nationalities for some preference categories. The following countries have "country cap" backlogs in one or more family or employment-based immigrant visa categories, according to the State Visa Bulletin for September 2018: China, India, Mexico, the Philippines, El Salvador, Guatemala, Honduras, and Vietnam. For EB-5, visa numbers are immediately available for nationals of all countries except China and Vietnam. For these two countries, because of the country cap, visa numbers are currently available only for those whose petitions were filed on or before August 8, 2014. *See* Visa Bulletin, Sept. 2018.

Plaintiffs' filings briefly touch on the country cap as a reason for their visa delays (*see* Compl. ¶ 9), but they mostly ignore this provision and focus only on the overall EB-5 cap number, which is only part of the story. The country cap also explicitly applies to derivatives, as stated in INA section 202(b), the statutory directive on "chargeability," *i.e.*, to which country an immigrant will be "charged" for purpose of the country cap. As stated above, INA section 202(a)(2) [8 U.S.C. § 1152] provides that the total number of family and employment-based immigrant visas made available to nationals of any foreign state may not exceed 7 percent of the total number. Section 202(b) then states (emphasis added):

> **(b) Rules for chargeability**
>
> Each independent country . . . shall be treated as a separate foreign state for the purposes of a numerical level established under subsection (a)(2) . . . . For the purposes of this chapter the foreign state to which an immigrant is chargeable shall be determined by birth within such foreign state **except that (1) an alien child, when accompanied by or following to join his alien parent or parents, may be charged to the foreign state of either parent if such parent has received or would be qualified for an immigrant visa, if necessary to prevent the separation of the child from the parent or parents, and if immigration charged to the foreign state to which such parent has been or would be chargeable has**

> **not reached a numerical level established under subsection (a)(2) for that fiscal year; (2) if an alien is chargeable to a different foreign state from that of his spouse, the foreign state to which such alien is chargeable may, if necessary to prevent the separation of husband and wife, be determined by the foreign state of the spouse he is accompanying or following to join,** if such spouse has received or would be qualified for an immigrant visa and if immigration charged to the foreign state to which such spouse has been or would be chargeable has not reached a numerical level established under subsection (a)(2) for that fiscal year . . . .

If – as it has – Congress provides a rule for determining to which country an accompanying or following to join spouse or child shall be assigned for purposes of the country cap, then it must be that the country cap applies to such spouses or children. And since the country cap is a subset of the overall family and employment-based caps, then equally clearly, if the country cap applies to derivatives, then so too do the overall caps. Plaintiffs cannot make any logical argument that the country cap does not apply to derivatives, as the plain text of section 202 confirms that it does. Nor can Plaintiffs make any logical argument as to why Congress would have counted derivatives toward a limitation within the overall cap, but not toward the overall cap itself. "Statutory construction is a 'holistic endeavor.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). As here, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (quoting *United Sav. Ass'n of Tex.*, 484 U.S. at 371). And thus, State's policy of counting derivatives towards both the annual allotment of 10,000 visas and the 7 percent country cap is mandated by the plain language of the statue and Plaintiffs' claims cannot prevail under *Chevron* Step One.

B. State's Counting Policy Embodies a Permissible Construction of the INA

Even if the Court were to find a conflict or ambiguity in the statutory text, which the Court should not for the reasons above, State's policy of counting derivative EB-5 beneficiaries against the annual caps is based on a permissible construction of the statute. *Chevron,* 467 U.S. at 843. At Step Two, the Court focuses on "whether the [agency] has reasonably explained how the permissible interpretation it chose is 'rationally related to the goals of' the statute." *Petit*, 675 F.3d at 785 (quoting *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (citation omitted)); *see also Northpoint Tech.*, 412 F.3d at 151 ("A 'reasonable' explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a 'permissible' construction is made . . . ." (citations omitted)); *Bell Atl. Tel.*, 131 F.3d at 1049 ("[W]e will defer to the [agency's] interpretation if it is reasonable and consistent with the statutory purpose and legislative history." (citations omitted)). In order for Plaintiffs to prevail on their *Chevron* step-two claim, the Court must find that State's policy of counting derivatives towards the EB-5 annual cap is "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844 (citations omitted). Plaintiffs fail to establish that the Court could make such a finding in this case.

1. State's Interpretation of the 1990 Act Finds Abundant Support in the Legislative History.

When one thoroughly reviews the course of the legislation that became the 1990 Act, it is apparent beyond all doubt that Congress intended to count EB-5 and other derivatives toward applicable caps. The bill that was ultimately enacted was S. 358 in the 101st Congress. Immigration Act of 1990, S. 358, 101st Cong., Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat 4978. As is typical, the House and Senate passed different versions of the bill, which were reconciled by a Conference Committee. The Conference Committee product was then passed by

both houses in identical version, and signed into law by President George H.W. Bush on November 29, 1990.

(a) The Senate Bill

S. 358, as initially passed by the Senate on July 13, 1989, included the EB-5 provision among a set of preferences in Section 203 of the INA. The Senate bill referred to "Independent Immigrants" (which was the equivalent of the employment-based immigrants in the final version of the bill). Immigration Act of 1989, S. 358, 101st Cong. § 203(b) (as passed by Senate, July 13, 1989), 135 Cong. Rec. S8639-04, 1989 WL 181548. The Senate bill set the "Independent Immigrant" cap at 150,000 visas annually, plus unused family-based visas. *Id.* § 201(d). It did not exclude derivatives from applicable caps by including them in INA section 201 among the other specific cap exceptions, such as immediate relatives of U.S. citizens, or provide any other language excluding them from caps. The Senate bill's version of INA § 203 included a subsection 203(c) repeating the 1965 Act's language on derivatives, and applying it to each of the bill's preference categories. *Id.* § 203(c).

(b) The House Bill

The House bill, as passed on October 3, 1990, as a substitute version of S. 358, took a different approach. S. 358, 101st Cong. (as passed by House, Oct. 3, 1990), 136 Cong. Rec. H8712-05, 1990 WL 144626. There was no EB-5 investor provision but, like the Senate bill, the House bill included a series of "Employment Based Immigrant preferences" in section 203(b) of the INA roughly paralleling the Senate's "Independent Immigrants." *Id.* § 102(b) (amending INA § 203(b)). The House cap for employment-based immigrants in section 201 of the INA, as it would have been amended by section 101 of the House bill, was significantly lower than the Senate version: 65,000 for each of the first several fiscal years after enactment, and 75,000 annually thereafter. *Id.* § 101(a)(2) (amending INA § 201(a)(2)).

Crucially, though, the House bill specifically exempted derivative spouses and children of employment-based immigrants from that cap:

> (b) ALIENS NOT SUBJECT TO NUMERICAL LIMITATIONS.- The following aliens are not subject to the worldwide levels or numerical limitations of subsection (a): . . .
>
> (3) An alien who is provided immigrant status under section 203(d) as the spouse or child of an immigrant under section 203(b).

Id. § 101 (amending INA § 201(b)). The *House Judiciary Committee Report* confirmed that the derivatives were not included in the numbers of the original House bill:

> As amended, H.R. 4300[11] would increase the number of immigrants (exclusive of refugees) admitted each year from the current level of about 530,000 to about 770,000. The Committee is convinced that this increase is well within this nation's absorptive capacity and that each of the component programmatic increases that comprise this overall increase will serve the economic, social, and cultural interests of the United States.
>
> **Under H.R. 4300, as amended, the 54,000 visas now allocated under the employment based preferences is now capped at 75,000 principals. Those family members accompanying or following to join are not included in this cap.** The effect of this change would be to increase the proportion of employment-based immigration within our total immigration system. Thus, whereas under current law fewer than 10 percent of all immigrants are admitted under the employment preferences, under H.R. 4300, as amended, that percentage would increase to about 25 percent.

H.R. Rep. 101-723(I) (Sep. 19, 1990), 1990 U.S.C.C.A.N. 6710, 6716, 1990 WL 200418 (emphasis added).

In other words, the House bill explicitly counted only principals against the employment-based cap, but had a much lower cap (65,000 to 75,000 principals only, depending on the year). The Senate bill had a much higher cap, but counted derivatives toward that cap (150,000 principals and derivatives). Assuming on average one or two derivative spouses or children per

[11] The House later substituted the text of H.R. 4300 into S. 358.

principal, the overall total number of employment-based immigrants was comparable (although not identical) under both bills.

(c) The Conference Committee

The compromise Conference Committee version adopted the Senate language, including the EB-5 provision despite significant House hostility to it expressed on the floor, with an employment-based cap of 140,000 – close to the level included in the Senate bill. H. Rep. 101-955, 136 Cong. Rec. H13203-01, 1990 WL 290409 (Oct. 26, 1990). The Conference Report describes the two approaches to employment-based counting, and how the Conference Committee resolved it:

> The Senate bill allocated 150,000 employment-based visas annually, as follows: (1) special immigrants, 4,050, (2) medical personnel for rural areas, 4,950, (3) members of the professions with advanced degrees or of exceptional ability, 40,200, (3) skilled workers, 40,200, (4) employment creation investors, 6,750, and (5) selected immigrants, 53,850 plus any unused independent numbers, to be distributed according to a point system.
>
> **The comparable House number for employment-based immigrants was 187,500, based on 75,000 principals.** The House amendment allocated 65,000 employment-based visas during FY1991-96 and 75,000 thereafter **(not including numerically exempt derivative spouses and children),** as follows: (1) aliens with extraordinary ability, (2) outstanding professors and researchers, (3) certain multinational executives, (4) aliens with business expertise, 2,000, and (5) shortage workers.
>
> The Conference substitute provides (1) 40,000 visas for priority workers (extraordinary ability, managers & university professors); (2) 40,000 for exceptional ability and advanced degrees or the equivalent; (3) 40,000 visas for skilled and unskilled workers with 10,000 limit for unskilled; (4) 10,000 for investors; and (5) 10,000 special immigrants.

Id. (emphasis added).

The Conference Committee's version, which became the final enacted bill, did not include the House's language specifically exempting employment-based spouses and children from the cap. Instead, the Committee adopted the Senate's methodology for counting while

altering the description of the categories and the distribution of visas in those categories, to come to 140,000 visas, just slightly lower than the number of 150,000 employment-based visas previously proposed by the Senate. As reflected by the Committee's reference to the "comparable House number" of 187,500, based on 75,000 principals, that figure was understood to include 112,500 derivatives (187,500 total minus 75,000 principals), at a ratio of 1.5 derivatives per principal (112,500 divided by 75,000). In order for 187,500 visas including derivatives to be "comparable" to 150,000, the latter figure in the Senate's bill obviously had to include derivatives too. If the Senate number was also just principals, then the comparable number would have been the 75,000 House principals, not 187,500. The Committee used the Senate's methodology, while only altering the description of the categories and the distribution within the slightly lower allotment. Just as the original Senate bill counted derivatives, the final bill also did so.

(d) Plaintiffs' Claim Simply Does Not Add Up.

Plaintiffs contend that what Congress actually intended, and did, was to not only enact an employment-based cap of 140,000, but also to exempt derivatives. Assuming a ratio of 1.5 derivatives per principal (which is the ratio that the Conference Committee used), that would have resulted in an additional 225,000 employment-based visas annually, for a total of 375,000 employment-based visas (including principals and derivatives).[12] That would have been wildly different and far in excess of the figures included in the bill as passed by either house. As

[12] Plus similar doubling or more of the family-based and diversity immigrant numbers. For example, as described by the Conference Report, the House and Senate bills only differed by 1,000 in their diversity immigrant numbers—54,000 for the Senate bill versus 55,000 for the House bill. The Conference Committee went with the latter. If diversity immigration, which is subject to exactly the same derivative provision as EB-5 (INA § 203(d)) did not count derivatives, then the actual number would be about 137,500 (55,000 principals plus 1.5 derivatives per principal, or 82,500). There is no indication that Congress intended to more-than double the number of visas across all employment, family, and diversity immigrant categories.

described in the Conference Report, the total maximum annual preference category immigrant number for the long term established by the 1990 Act is 675,000.[13] According to Plaintiffs' theory, when Congress said 675,000, it actually meant 1,687,500 (675,000 principals and 1.5 additional uncapped derivatives for each principal). Congress neither said, nor did, any such thing. No legislative history or other evidence supports this "best of both worlds" exercise in wishful thinking.

As the foregoing discussion illustrates, the 1990 Act was a carefully negotiated and drafted, comprehensive set of immigration amendments. Where Congress excepted immigrant categories from caps, it was explicit about that, as in INA section 201 as enacted by the 1990 Act. As Justice Scalia famously said, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had intended to abandon the 1965 Act's inclusion of derivatives in relevant caps, and in so doing double or triple the annual allotment of visas across all categories, Congress would have made that intention absolutely clear. And if Congress had really intended to do that it certainly would not have used the 1965 Act's identical language with its long-standing and well-understood construction that derivatives be included in the caps. *See* Part I.A.2, *supra*.

Plaintiffs' legislative history is limited to three floor statements indicating that the EB-5 immigrant classification could lead to up to 10,000 investors receiving visas. *See* Pls.' Mem. at

[13] Under section 201 of the INA, this consists of 480,000 family-based immigrants, 140,000 employment-based immigrants, and 55,000 diversity immigrants. However, as also described in the conference report, the number of uncapped "immediate relatives" of U.S. citizens for the previous year is subtracted from the family-based number, but the family-based number must be at least 226,000. If, as is normally the case in recent years because of large numbers of immediate relatives, the family-based number is at the 226,000 floor, then the total number of immigrants is 421,000 (226,000 family-based, 140,000 employment-based, and 55,000 diversity). The diversity immigrant number is currently reduced by 5,000 by another law in order to offset adjustments of status under the Nicaraguan Adjustment and Central American Relief Act. *See* Sec. 203(d) of Pub. L. 105-100, as amended (8 U.S.C. § 1141 note).

19. While it is literally true that "up to 10,000 people" who, in theory, could all be principals could receive visas, these isolated floor statements were exaggerated and misinforming in light of derivatives' access to EB-5 visas on the same terms as principals. Such a statement necessarily assumes that none of the 10,000 principals have accompanying spouses or children, which obviously will never be the case. Furthermore, the isolated floor statements in Plaintiffs' Motion are limited to the EB-5 provision. But if the Court were to accept the argument, the same rationale would extend to all other family or employment-based categories, as well as to the diversity immigrant category, because the provision concerning derivatives applies equally to those other preference categories.

As a matter of statutory interpretation, the D.C. Circuit has cautioned that "legislative posturing serves no useful purpose and indeed thwarts effective judicial review of agency action." *State of Colo. v. DOI*, 880 F.2d 481, 490 (D.C. Cir. 1989). This Court should "not alter [its] interpretation of [a statute] based on floor statements that are unconnected with the passage of relevant legislation." *Id.*; *see also Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 12 (D.C. Cir. 2009) (quoting *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 456–57, (2002)) ("Floor statements from members of Congress, even from a bill's sponsors, 'cannot amend the clear and unambiguous language of a statute.'"); *United Mine Workers of Am. v. Fed. Mine Safety & Health Review Comm'n*, 671 F.2d 615, 623 (D.C. Cir. 1982) (Congressman's statement on floor of House of Representatives was not entitled to decisive weight in construction of statute's meaning); 2A Sutherland Statutory Construction § 48:13 (7th ed.). The isolated floor statements that Plaintiffs cite thus carry little weight in constructing the meaning of the INA's provisions respecting counting derivatives towards the annual allotments of EB-5 visas.

No legislative history even remotely supports the proposition that Congress meant to exclude all derivatives from applicable caps nor overcomes the considered Conference Committee report discussed above. Nor do the floor statements support an interpretation that Congress intended, uniquely, to exempt only EB-5 derivatives from the applicable cap, without including any language in the statute that in any way differentiated EB-5 derivatives from other numerically controlled categories. In particular, the single statement by Rep. Smith cited by Plaintiffs (Pls.' Mem. at 19–20) was in the context of broad-based hostility expressed by a number of House members to the idea of EB-5 in the first place, which they felt was being forced on them by inclusion in the bill as passed by the Senate. Typical of legislative floor debate on a very controversial provision, there was significant hyperbole on both sides, with neither having an interest in tempering the predicted effects of the bill with clarifying facts about derivatives. The reaction of some House members to the EB-5 provision was outright revulsion, viewing it as the sale of U.S. citizenship to millionaires.[14] Rep. Smith, defending the bill, magnified its positive effects in response.[15] Both sides used "10,000 millionaires" as a talking point, but this was mere floor debate that is not entitled to decisive weight in the construction of the statute. *See United Mine Workers of Am.*, 671 F.2d at 623.

[14] *See* 136 Cong. Rec. H12358-03, H12361, 1990 WL 164526 (Oct. 27, 1990) (Rep. Bryant: "A vote for this conference report is a vote for the sale of American citizenship to anyone with $1 million"); *id.* at H12362 (Rep. Campbell: calling EB-5 "a truly offensive provision, a fundamental breach of faith"); *id.* at H12366 (Rep. Bryant again: "I ask my colleagues, Have we lost all of our self-respect? Are we willing to sell our most prized possession just to get money?").

[15] If Rep. Smith's statement was taken as a literal guide to the bill's precise text, then none of the plaintiffs would be eligible for other reasons, as they have invested $500,000 each rather than $1,000,000, which is very far short of "a revenue up to $10 billion." Further, when Rep. Smith described EB-5 as a provision that "will produce revenue for the U.S. government . . . it will generate a revenue of up to $10 billion," 136 Cong. Rec. H12358-03, H12361, that was a wildly inaccurate description of the provision. EB-5 investments are not paid to the Government, so they are not "revenue for the U.S. government." Investors not only retain the investment, but if it is profitable, they obtain those returns as well as the green card.

2. Plaintiffs' Theory Runs Counter to Almost Thirty Years of Regulatory History.

Not once in thirty years has Congress ever taken action to correct State's supposed misinterpretation of the 1990 Act. *See Kirkhuff v. Nimmo*, 683 F.2d 544, 549 (D.C. Cir. 1982) ("[D]eference is due to an agency's construction of a statute when Congress becomes aware of, and fails to correct, that construction."); *Thompson v. Clifford*, 408 F.2d 154, 166 (D.C. Cir. 1968) (ratification of or acquiescence in an agency's construction of a statute by the legislature enhances the deference due that construction). Following the enactment of the 1990 Act, State properly promulgated regulations to implement the changes that Congress made to the INA. 56 Fed. Reg. 5117-01 (Oct. 10, 1991). The new regulations did not change the preexisting State regulatory implementation of the clear and universally accepted provisions of the 1965 Act counting derivatives along with principals in the preference categories. Of course, State had no cause to adopt new regulations on that particular part of the INA because, as explained above, the provision in the 1990 Act pertaining to derivatives contained the same language as the 1965 Act. *Compare* 1965 Act, Sec. 203(a)(9), *with* 1990 Act, Sec. 203(d).

At the time and in the many years that followed, no one suggested that Congress had actually passed a law providing for hundreds of thousands more immigrant visas than the numbers actually provided in the statute and legislative history. Not once in the thirty years since the 1990 Act was passed has any court ever interpreted the INA in the way Plaintiffs now claim Congress intended all along. Nor, as far as Defendants are aware, has any litigant ever even argued in favor of Plaintiffs' interpretation of the 1990 Act until this lawsuit.

One would expect that if State had so fundamentally misapplied the intention of Congress after enactment of the 1990 Act, as Plaintiffs claim, there would have been some contemporaneous indication of that, such as subsequent Congressional action to correct the

supposed error. In fact, Congress did pass the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, the following year. Pub. L. No. 102–232, Dec. 12, 1991, 105 Stat 1733. That law made extensive corrections and clarifications to the immigration laws, as amended by the 1990 Act. If Congress had intended that derivative spouses and children should not be counted toward preference system caps, and desired to correct any perceived mistaken implementation of its intention—which would have been an overwhelmingly massive mistake, given the difference of hundreds of thousands of visas annually between counting and not counting derivatives—this corrective law would have been the obvious vehicle to fix that. Of course, Congress did no such thing, as State's implementation of the 1990 Act with respect to derivatives was consistent with the plain language of both the 1965 Act and the 1990 Act and the legislative history.

Additionally, Plaintiffs assert that State's construction of INA section 203 is invalid because it has not been implemented through informal rulemaking, but Plaintiffs are incorrect. *See* Pls.' Mem. at 22–24; 5 U.S.C. § 553(b)–(c). As a State visa regulation involving a foreign affairs function of the United States, the regulations were exempt from the notice-and-comment procedures. *See* 5 U.S.C. § 553(a)(1) (stating that the rule making section of the APA does not apply when the rule "involve[s] . . . a military or foreign affairs function of the United States"); *Raoof v. Sullivan*, 315 F. Supp. 3d 34, 6 (D.D.C. 2018) (State's regulations implementing INA sections 101 and 212 involved a foreign affairs function of the United States and thus the rulemaking requirements of the APA did not apply).

State implemented the 1965 Act, which Plaintiffs agree required derivatives to be counted, by amending its regulations in Part 22 of the Code of Federal Regulations. 30 Fed. Reg. 14,783 (Nov. 23, 1965). After the 1990 Act was enacted, State again revised its regulations

to incorporate the new provisions of law. Interim Rule, *Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended; Immigrants Not Subject to Numerical Limitations of INA 201 and 202; Immigrants Subject to Numerical Limitation*, 56 Fed. Reg. 49,675 (Oct. 1, 1991). As it did with other preference categories, the 1991 regulation specifically listed EB-5 derivatives within Subpart D, immigration subject to numerical limitation, and in section 42.32, as "Aliens subject to the worldwide level" of employment-based immigration specified in INA section 201(d). While reorganizing the regulations consistent with the 1990 Act's provisions, the regulations did not change the treatment of derivatives from what it had been under the 1965 Act. *See* 22 C.F.R. § 42.32.[16]

The 1991 regulation was an interim rule effective immediately (as it needed to be since its date of publication was the first day of the new fiscal year, which is when the 1990 Act's provisions became effective). Even though it was not required as a foreign affairs function, State provided a 30-day public comment period. Approximately two years later, State finalized the 1991 interim rule. Final rule, *Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended; Numerical Limitations*, 58 Fed. Reg. 48,446 (Sept. 16, 1993). Regarding the public comments, State stated that with the 1991 interim rule the Agency "invited interested persons to submit comments concerning the amendments" but that "[n]o comments were received." *Id.* "Accordingly, the Interim Rule's regulations and effective date of October 1, 1991 at part 42, FR 49675 [were] adopted without changes." *Id.* Therefore, contrary to Plaintiffs' claim, State provided notice and opportunity for comment on the rules implementing the 1990 Act. This included State's rule of continuing to count derivative spouses and children

[16] There have been various updating changes over the years, such as updating or removing references to the former INS, but the 1991 version of 22 C.F.R. § 42.32 is substantively the same with respect to treatment of EB-5 derivatives as today's.

toward preference system caps. Not only did no one from Congress or anyone else assert that State's implementation of the law in this (or any other respect) was "contrary to the plain language, structure, intent, and legislative history" of the law (Pls.' Mem. at 22), not a single member of the public commented on any aspect of the rule at all. If State had unlawfully reduced annual immigrant flows by hundreds of thousands of persons in flagrant violation of the law and the will of Congress, as Plaintiffs now claim thirty years after the fact, one would expect that someone may have provided a comment to that effect during the rulemaking process.

The above discussion of State's implementing regulations also shows that Plaintiffs are wrong in their assertion that "the sole source of authority" for State's view that spouses and children of EB-5 investors count against the annual allotment for EB-5 visas is the Foreign Affairs Manual ("FAM"). *See* Pls.' Mem. at 13. Although the FAM also reflects State's interpretation of the statute (*see* 9 FAM 503.1-2(A)(a)), State's counting scheme derives from formal rulemaking and can be found in its published regulations. *See* 22 C.F.R. §§ 40.1(q) (defining a "principal alien" as "an alien from whom another alien derives a privilege or status under the law or regulation"); 42.32(e) (entitlement to derivative status for EB-5); 42.51–42.55 (numerical controls and priority dates); 42.53(c) (stating that derivatives are entitled to the principal's priority date). Thus, the Court should reject Plaintiffs' argument that States' counting scheme is not entitled to *Chevron* deference. *See* Pls.' Mem. at 13.

3. Other Immigration Laws Specifically Exempt Derivatives.

Congressional intent is further demonstrated by the fact that when Congress exempts derivative spouses and children from an applicable numerical cap, it almost always does so explicitly. "'Statutory provisions in *pari materia* normally are construed together to discern their meaning.'" *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1257 n.12 (D.C. Cir. 2008) (quoting *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002)); *see also* 2B

Sutherland Statutory Construction § 51:1 (7th ed.) ("Other statutes dealing with the same subject as the one being construed, commonly called statutes *in pari materia*, are another extrinsic aid useful in questions of interpretation."). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted).

The immigration laws contain numerous examples of this:

- H-1B and H-2B nonimmigrants, 8 U.S.C. § 1184(g)(2);
- Chile/Singapore H1-B1 nonimmigrants, § 1184(g)(8)(i);
- Australian E-3 nonimmigrants, § 1184(g)(11)(C);
- T nonimmigrants, § 1184(o)(3);
- U nonimmigrants, § 1184(p)(2)(B);
- Voluntary departure pilot program, § 1229c(a)(2)(C);
- Special immigrant status for certain Iraqi and Afghani nationals working with the U.S. armed forces, Pub. L. No. 109–163, Jan. 6, 2006, 119 Stat 3136, *as amended by* Pub. L. No. 110–36, June 15, 2007, 121 Stat 227, 8 U.S.C. § 1101 note;
- Special immigrant status for certain Iraqi citizens or nationals who worked with the U.S. government in Iraq, Pub. L. No. 110–181, Jan. 28, 2008, 122 Stat 3, 8 U.S.C. § 1157 note;
- Soviet scientists, Pub. L. No. 102–509, Oct. 24, 1992, 106 Stat 3316, as amended, 8 U.S.C. § 1153 note.

Similarly, Congress routinely uses the standard form language from the 1965 Act and the 1990 Act about derivatives accompanying or following to join a principal in establishing special capped immigration provisions, without exception, when it intends derivatives to be included, and these provisions have universally been so interpreted and implemented. The notes to 8 U.S.C. § 1153 include a number of such provisions, such as employees of certain U.S. businesses in Hong Kong (a 1990 Act provision) and displaced Tibetans.

Compared to this long history of consistent Congressional drafting, Plaintiffs point to a single allegedly contrary provision in the Refugee Act of 1980. *See* Pls.' Mem. at 20-21. This

provision specifies that derivative spouses and children of refugees are eligible to accompany or follow to join the refugee, but shall be charged against the applicable numerical limitation on the admission of refugees.[17] 8 U.S.C. § 1157(c)(2). There is a particular reason why Congress would have specified derivative counting in this way in the Refugee Act: unlike the caps at issue in this case, which are set by statute, the refugee cap is established by the President. *Id.* § 1157(a), (b). Thus, the specific derivative provision is a deliberate check on the very broad authority that Congress had otherwise delegated to the President in the Refugee Act. The President can set the refugee cap, but he cannot choose not to include derivatives in it. Similarly, the provision clarifies that in setting the refugee cap, the President should take expected numbers of derivatives as well as principals into account when doing so. The President has no authority along the lines of his authority over refugee numbers to change the EB-5 or other preference system caps statutorily set by Congress nor—consistent with the 1965 Act and subsequent consistent legislation—has he any authority to exclude derivatives from them. This specific derivative provision also eliminates the risk of ambiguity in how the President phrases or structures a particular annual determination on the refugee cap. While those annual determinations vary in wording and number allocation,[18] in contrast, the language of INA § 203 does not change from year to year, eliminating the need to specify that employment-based derivatives are charged against the numerical limitation.

[17] Congress has expressly exempted aliens admitted as refugees under 8 U.S.C. § 1157 from the worldwide levels and numerical limitations on immigrants, *see* INA § 201(b)(1)(B), 8 U.S.C. § 1151(b)(1)(B); and refugees do not require immigrant visas, *see* INA § 211(c), 8 U.S.C. § 1181(c).

[18] *Compare, e.g.*, Presidential Determination on Refugee Admissions for Fiscal Year 2018, 82 Fed. Reg. 49083 (Sept. 29, 2017), *with* Presidential Determination on Refugee Admissions for Fiscal Year 2015, 79 Fed. Reg. 69753 (Sept. 30, 2014).

4. State's Counting Policy Is a Reasonable Means of Accommodating the Regional Center Program Cap.

All the named plaintiffs are "regional center" investors in the EB-5 program. Compl. ¶¶ 14–26. This is not surprising as virtually all EB-5 activity involves regional center investments (approximately 9,104 of a total of 9,863 new EB-5 lawful permanent residents in FY 2016). DHS, *2016 Yearbook of Immigration Statistics*, https://www.dhs.gov/immigration-statistics/yearbook/2016. The regional center program was first enacted as a pilot program in 1992 (Sec. 610 of Title VI, Pub. L. 102–395) and has been extended for each subsequent fiscal year. Section 610(b), in its current form, states as follows:

> For purposes of the [regional center] pilot program . . . the Secretary of State, together with the Secretary of Homeland Security ["DHS'], shall set aside 3,000 visas annually . . . to include such aliens as are eligible for admission under section 203(b)(5) of the [INA] and this section, **as well as spouses or children** which are eligible, under the terms of the [INA], to accompany or follow to join such aliens.

See Immigration Program [8 U.S.C. § 1153 notes] (emphasis added). Thus, by its express terms, the INA includes within the subset of 3,000 visas set aside for the regional center program derivative spouses and children of EB-5 principals. Plaintiffs admit that the regional center provision is an example of "when Congress intended for visa allocations to apply to the spouses and children of investors." Pls.' Mem. at 18 n.5. This admission effectively concedes Plaintiffs' entire case because all of the named individual plaintiffs are regional center investors.

Plaintiffs argue that because of the possibility of "visa retrogression" – a movement of the visa number priority date back in time[19] – the statute must be read in a way that immunizes

[19] For example, if the State Visa Bulletin for a future month set the EB-5 final action date for Chinese nationals at June 1, 2014, rather than the current date of August 8, 2014, that would be a retrogression. Chinese nationals who had filed an EB-5 petition between June 1 and August 7, 2014, would no longer be immediately eligible to apply for or receive immigrant visas or adjustment of status. Retrogression occurs when State's consulates and USCIS report more documentarily qualified applicants in an already-backlogged preference than VO previously anticipated.

derivative spouses and children from future changes in the visa priority date for the EB-5 category. Plaintiffs say that would contradict the requirement to give spouses and children the same "order of consideration" as the principal. *See* Pls.' Mem. at 14–16.

That argument is meritless because if retrogression occurs it applies equally to principals and derivatives. When a principal's priority date becomes current, visa numbers are available to both the principal and all "accompanying or following to join" spouses and children. In order to use those visa numbers (especially since others are waiting in line), all beneficiaries must promptly apply for visas to ensure that they are able to immigrate as soon as those applications are processed. If the principal delays, then he or she is at some risk of a subsequent retrogression, which will remove eligibility of the principal and of any derivatives. If the principal does not delay and his or her visa is approved, then the derivatives also will be approved if they apply. If a principal is approved, but a derivative delays filing, and a retrogression happens, the derivative would be affected differently. But this is not because they have received a different "order of consideration" than the principal. Rather, it is the result of their choice not to take prompt advantage of the order of consideration they were granted or, to be more precise, the choice of the principal to use the visa number he or she was granted. For all of these reasons, Plaintiffs fail to demonstrate that they are likely to prevail in their challenge of State's policy of counting derivatives towards the annual allotment of EB-5 visas.[20]

[20] In passing, Plaintiffs also contend that Defendants have also violated APA § 706(1) because State "has a mandatory duty to allocate visa numbers and establish cut-off dates consistent with the visa quotas Congress established." Pls.' Mem. at 10-11. Under § 706(1), courts have the authority to "compel agency action unlawfully withheld or unreasonably delayed." As the Supreme Court explained in *Norton*, "the only agency action that can be compelled under the APA is action legally required," 542 U.S. at 63 (emphasis omitted), that is, "when the agency has failed to act in response to a clear legal duty," *CREW v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) (citing *Norton*, 542 U.S. at 7). The D.C. Circuit has further explained that "[w]hen agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates." *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). But such injunctive relief is only appropriate "if the court's study of the statute and relevant legislative materials cause[s] it to

II. Plaintiffs Fail to Demonstrate Any Irreparable Injury.

Nor can Plaintiffs establish, as is required, that they will suffer irreparable injury in the absence of injunctive relief. *See* Pls.' Mem. at 25–31. Parties moving for a preliminary injunction must demonstrate that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014). As with the other factors, the movants have the burden of making a "clear showing" that they face such injury. *Id.* As this Court has previously observed, "[t]he standard for irreparable harm is particularly high in the D.C. Circuit." *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017) (Chutkan, J.).

"Plaintiffs have the 'considerable burden' of proving that their purported injuries are 'certain, great and actual—not theoretical—and imminent, creating a clear and present need for extraordinary equitable relief to prevent harm.'" *Id.* (quoting *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005)). The Court may not issue "a preliminary injunction based only on a *possibility* of irreparable harm . . . [since] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added). To show irreparable harm, rather, a plaintiff must prove that its injury is "certain to occur in the near future" and that this harm could not be

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conclude that the defendant official ha[s] failed to discharge a duty that Congress intended him to perform." *Covelo Indian Cmty. v. Watt*, 551 F. Supp. 366, 381 (D.D.C. 1982), *aff'd as modified* (Dec. 21, 1982), *vacated as moot* (Feb. 1, 1983).

No such mandatory duty exists in this case. Plaintiffs' assertion to the contrary is based on their misguided belief that under the INA only EB-5 visas issued to investors count against annual quotas, but this is not the case, for reasons discussed above. And State has established a waiting list of applicants and cut-off dates for EB-5 visas. *See* Oppenheim Decl. ¶ 9. Plaintiffs may disagree with State's decision in this regard, but their disagreement does not give rise to a viable § 706(1) claim. *See Am. Ass'n of Retired Pers. v. EEOC*, 823 F.2d 600, 605 (D.C. Cir. 1987) ("Section 706[(1)] does not provide a court with a license to substitute its discretion for that of an agency merely because the agency is charged with having unreasonably withheld action.").

prevented without an injunction. *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating that plaintiff must meet the burden of showing that "the injury is both certain and great . . . actual and not theoretical).

If a party fails to make a sufficient showing of irreparable harm, the court may deny the motion for injunctive relief on that basis alone. *See Chaplaincy*, 454 F.3d at 297 ("A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief."); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) ("[Plaintiff] has made no showing of irreparable injury here, [and] that alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting [plaintiff's] request."); *Alcresta Therapeutics, Inc. v. Azar*, No. CV 18-243 (TJK), 2018 WL 3328577, at *2 (D.D.C. June 28, 2018) (even a strong likelihood of prevailing on the merits cannot make up for a deficient showing of irreparable injury).

A. There Is No Irreparable Injury to the Plaintiff-Investors.

Plaintiffs fail to establish irreparable harm, absent injunction, resulting from Defendants' policy of counting derivatives towards the annual allotment of 10,000 EB-5 visas. Plaintiffs claim that the "most severe" among their irreparable injuries is the separation of their families caused by the backlog. *See* Pls.' Mem. at 25. But Plaintiffs have not established that any of the named plaintiffs are currently suffering the irreparable consequences of family separation, or that separation is "certain to occur in the near future."

Plaintiffs offer three examples of cases that they say illustrate the irreparable consequences of family separation among the named plaintiffs. The first is plaintiff Feng Wang, who appears to be currently residing with his daughter and other family members in China. Compl. ¶ 4; Wang Decl., Ex. 2 to Pls.' Mot. There is no support in Wang's declaration for

Plaintiffs' contention that the Wang family is currently suffering or will imminently suffer the irreparable consequences of family separation. The second named plaintiff, Hongmei Xiao, also a resident and citizen of China, avers that she and her husband "wanted [their] son to enjoy a superior education and living environment" in the United States. Xiao Decl. ¶ 3, Ex. 3 to Pls.' Mot. Xiao's son was "fortunate to be admitted to, and has enrolled in, the University of Illinois, Urbana-Champaign, where he is now a senior." *Id.* A family's voluntary decision to send their child away to college in a foreign country does not constitute "substantial injury" or "irreparable harm" that can only be remedied through issuance of an injunction. *See* Pls.' Mem. at 27.[21] The third plaintiff, Jianhong Yang, is similarly situated to Xiao. Yang, who also resides in China, sent her son to the University of Southern California in 2014. Yang Decl. ¶ 3, Ex. 4 to Pls.' Mot. It appears that Yang's son continues to attend college at USC. Yang asserts that "my family and I will be irreparably harmed if my son [who is currently studying in the United States] ages out before our visa numbers become available . . . Keeping our family together is also of utmost importance to us. If my son ages out, we would have to split our family apart, moving to the U.S. around the same time that my son would likely be forced to return to China." *Id.* ¶ 10. Presumably, however, Xiao's and Yang's children can return to China after they graduate and their student visa expires – or at any earlier time – to avoid the irreparable consequences of family separation.

[21] Plaintiffs cite *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017), for the proposition that they are suffering irreparable harm from family separation caused by State's policy of counting derivatives towards the annual allotment of EB-5 visas. In *Washington v. Trump*, the Ninth Circuit denied the Government's request to stay a nationwide temporary restraining order against enforcement of Executive Order 13769. The court found that the federal government failed to show that a stay was necessary to avoid unnecessary injury and that the States had offered ample evidence of irreparable harm, including separating families and stranding individuals traveling abroad. 847 F.3d at 1169. Here, Plaintiffs' evidence of irreparable harm does not even remotely resemble the injuries alleged by the States in *Washington v. Trump*. *See id.* Plaintiffs fail to establish that any of the named plaintiffs are currently suffering, or will imminently suffer, irreparable harm from family separation as a result of State's counting policy.

Plaintiffs further contend that the named plaintiffs have children who have or will "age out" by the time their visa numbers become available. But again, Plaintiffs fail to establish that this constitutes irreparable injury for the purposes of issuing an injunction. With respect to the three above-named individuals, Plaintiffs acknowledge that "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." Pls.' Mem. at 26. Moreover, as Plaintiffs Wang, Xiao, and Yang all admit, "as of this date, my family has not received visas, and it is unclear when visa numbers will become available for my family." *See* Wang Decl. ¶ 7; Xiao Decl. ¶ 8; Yang Decl. ¶ 8. Plaintiffs' own declarants' assertions thus undercut their claims that they are currently suffering, or will imminently suffer, irreparable harm from family separation caused by their children aging out after the visa numbers become available. Plaintiffs do not actually know when this will occur.

To even further illustrate the point, the lead plaintiff, Feng Wang, has a daughter who was born on August 4, 1996, which means she just turned 22 years old. Wang Decl. ¶ 2. Wang filed his I-526 petition on October 8, 2014, and the petition was approved by USCIS on April 20, 2016. *Id.* ¶ 5. As Plaintiffs note, the Child Status Protection Act "freezes" or tolls a child's age during the entire time that the principal's I-526 remained pending with USCIS. *See* Pls.' Mem. at 26; note 5, *supra*. In Wang's case, the Act tolled his child's age for 560 days (which is the difference between October 8, 2014, when the I-526 petition was filed and April 20, 2016, when the petition was approved). Therefore, Wang's daughter is not expected to "age out" for at least another six months (560 days minus the 383 days, which is the number of days since Wang's daughter turned 21). In Wang's case, six months is not "imminent." *See Chaplaincy*, 454 F.3d at 297 (quoting *Wisc. Gas Co.*, 758 F.2d at 674) ("The moving party must show '[t]he injury

complained of is of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'") (emphasis in the original).

Wang's declaration further provides that he filed his I-526 petition on October 8, 2014. State's Visa Bulletin for September 2018 reflects that applicants for EB-5 immigration visas who have a priority date earlier than October 1, 2014, may assemble and submit the required documents to State's National Visa Center. That means that Wang's particular I-526 petition is nearing the date on which he may apply to State for a visa. Whether or not Wang's daughter will age out before a visa becomes available depends on, among other factors, movement of final action dates over the next six months, which depends on several variables including past number use, estimates of future number use and return rates and estimates of additional USCIS demand. Oppenheim Decl. ¶ 4. As noted above, it also may depend on how quickly Wang and his daughter apply for their respective visas after a visa number becomes available. Thus, it is not, as Plaintiffs claim, a virtual certainty that Wang's daughter will age out. *See* Pls.' Mem. at 26 (asserting that the children of Wang, Xiao, and Yang will "without a doubt age out by the time the visa numbers become available"). Moreover, if, as Plaintiffs claim, it will be between "8 and 10 years" that visa numbers will become available to these families (Pls.' Mem. at 26), it necessarily follows that their claimed injuries are not "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297.

Nor can the individual plaintiffs' other claims concerning the potential harm to their families' finances, career prospects, and their investments sustain a preliminary injunction. *See* Pls.' Mem. at 27–29. "[W]hile loss so severe that it threatens the 'very existence of the movant's business' may constitute irreparable injury, a plaintiff must explain concretely why the specific action he challenges is highly likely (if not certain) to immediately cause that loss." *Id.*;

see also League of Women Voters of United States v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016). Plaintiffs here have simply failed to make that showing. For example, Plaintiffs unsupported and speculative claim that Chinese foreign exchange students who need to return home to China after graduation are worse off than if they never came here in the first place does not constitute irreparable injury that would justify an injunction. Nor is such an injury imminent, if the children are currently enrolled in college for at least this upcoming school year.

Moreover, Plaintiffs' claim that Defendants' counting policy irreparably harms the integrity of their investments refers to "injuries, however substantial, in terms of money, time and energy necessarily expended" that the D.C. Circuit has held are not sufficient to sustain a claim of irreparable injury. *Chaplaincy*, 454 F.3d at 297–98 (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)) (and further stating that a complaint of this nature "weighs heavily against a claim of irreparable harm"). If Plaintiffs were to prevail, corrective relief would be available at a later date in the ordinary course of litigation. *Id.* To meet the D.C. Circuit's "high standard for irreparable injury . . . the injury must be both certain and great; it must be actual and not theoretical." *Id.* (internal quotation marks and citation omitted). Plaintiffs fail to articulate any tangible injury to the individual plaintiffs that is either "certain and great" or irreparable.

Furthermore, due to the existence of the country cap issuance of an injunction will likely accomplish nothing. The individual plaintiffs claim that they are irreparably harmed due to the backlogs that occur as a result of State counting the derivatives towards the 10,000 annual cap on EB-5 visas. But as explained above, Plaintiffs' theory entirely fails to account for the 7% country cap, which is a separate limitation on the availability and wait times for EB-5 visas for investors and their derivatives. If the annually available number of EB-5 visas suddenly became

approximately 25,000 rather than 10,000 (i.e., 10,000 principals plus an average of 1.5 derivatives per principal, rather than 10,000 including both principals and derivatives), as Plaintiffs seek, then the vast majority of these individuals would likely remain backlogged just the same, as they are Chinese and the country cap would continue to limit them. The existence of the country cap and its application to derivatives renders the class-wide preliminary injunction impractical and ineffective, which further undercuts Plaintiffs' claim that the claimed equitable relief will prevent irreparable harm. *See Chaplaincy*, 454 F.3d at 297.[22]

B. There Is No Irreparable Injury to the Regional Center.

Plaintiff American Lending Center, LLC ("ALC") claims that it is suffering losses as a result of State's counting policy that "threatens the very existence of ALC's business." Pls.' Mem. at 29. Plaintiff ALC's claims do not constitute irreparable injuries that justify an injunction. First, the alleged harm to ALC as a result of a decrease in the Chinese national participation in the EB-5 program is no more than the immigrant visa allocation system working as it was designed to do. To the extent ALC is facing any harms at all, ALC is challenging the wrong aspect of the immigration system: any harms to ALC are caused by the country caps, which are established by statute, not by State's derivative counting policy.

Moreover, ALC cannot demonstrate a clear and present need for equitable relief. *Id.* at 297. Nor can ALC establish that the country caps are truly causing it any imminent, irreparable harm. *Id.* When the diversity of immigration to the United States is threatened by excessively

[22] Moreover, to properly allege standing Plaintiffs must show that they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). "[T]he plaintiff must demonstrate redressability, or "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 724 (D.C. Cir. 2015). In this case, Plaintiffs cannot demonstrate redressability as required to allege standing because of the continuing applicability and effect of the country cap.

high demand from a single country, the country cap wait times do indeed discourage nationals from that country from seeking to immigrate, as compared to other countries. But a sustained decrease in the demand for Chinese EB-5 visas will, over time, rebalance supply and demand levels and, as a result, reduce the backlogs and wait times. Other market forces may adjust to this circumstance, as well. For example, EB-5 regional centers such as ALC may refocus their efforts to non-backlogged countries. Or opportunities may be created for other regional centers to tap into different markets. In fact, Plaintiff ALC is doing exactly that. ALC announced earlier this year it was opening a new office in Taipei, Taiwan,[23] which ALC says "will be a key asset in the company's ongoing growth into new markets." Yahoo! Finance, *American Lending Center Announces Taiwan Expansion* (Apr. 16, 2018), https://finance.yahoo.com/news/american-lending-center-announces-taiwan-050000533.html. In the same news release, ALC touted forthcoming new offices later this year in India and Vietnam. Thus, its own recent actions belie ALC's claim that the company is on the brink of financial collapse and unable to invest in new markets as a result of the decrease in Chinese demand for EB-5 visas.

III. Injury to Other Interested Parties and the Public's Interest

In determining whether to grant a preliminary injunction "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation marks omitted) (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987)). "In exercising their sound discretion, courts . . . should [also] pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger v. Romero-*

[23] Taiwan is counted separately from mainland China for "country cap" purposes.

Barcelo, 456 U.S. 305, 312 (1982)). These considerations merge into one factor when the government is the non-movant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

The plaintiff investors and the regional center that serves these investors understandably want to receive lawful permanent residence immediately in return for the investments. However, that desire runs up against a basic principle of the U.S. immigration system: encouraging diversity of nationalities among new immigrants. Under U.S. immigration policy, Chinese nationals are welcomed, along with citizens of other countries of the world, into the EB-5 program. However, U.S. immigration law does not favor monopolization of immigration by a single country. And since the 1965 Act,[24] Congress has provided a significant safeguard against that in the form of the "country cap" under section 202 of the INA, applicable not just to EB-5 but to all the family and employment-based preference categories. A preliminary injunction, however, would effectively overrule this congressional scheme. *See INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893)) ("[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.").

Here, Plaintiffs make no showing that their alleged "irreparable injury" outweighs the threatened harm that an injunction would cause to the immigration system and to unrepresented third parties if the Court were to order State not to count derivative spouses and children towards the 10,000 annual EB-5 visa allotment. Plaintiffs fail to consider the effect such a ruling would have on unrepresented Chinese applicants seeking visas in other categories besides EB-5. If

[24] Before 1965 U.S. immigration law also limited immigration based on nationality, but in the form of discriminatory quotas that particularly disfavored Asians. The 1965 Act fundamentally changed this system by opening up immigration to all nationalities equitably, but to protect the resulting diversity, limited the total number of preference immigrants coming from any single country – regardless where in the world that country is located – by means of the country cap.

15,000 additional Chinese immigrant visas were somehow made immediately available just to EB-5 petitioners, then that number would be very close to the total number of immigrant visas available to Chinese in all preference categories under the country cap in a given year. That would likely result in longer visa backlogs and wait times for Chinese nationals seeking visas in any other category besides EB-5. If State is ordered to exempt derivatives from the annual caps for EB-5 visas, it would have to do the same for the other employment-based and family-based visa caps, because the derivative provision in Section 203(d) applies equally to the other categories. Oppenheim Decl. ¶ 13. In effect, such a ruling would increase the number of visas available in a given year, across all categories, by a magnitude of 150% or more (again, assuming an average of 1.5 derivatives per principal). Plaintiffs entirely fail to consider the economic, legal, and social consequences of such an abrupt and broad-sweeping change to U.S. immigration policy. Therefore, Plaintiffs fail to establish that the balance of the equities tip in their favor and that an injunction is in the public interest.

Conclusion

For these reasons, Defendants request that the Court deny Plaintiffs' Motion for Preliminary Injunction.

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Respectfully submitted,

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