01-56266; 01-56379

In the United States Court of Appeals

of the Ninth Circuit

Wen-Wan CHANG, et. al.
Appellants

v.

United States of America
Appellee

Appeal

On Appeal from the United States District Court for the Central District of California
Case No.: CV 99-10518-GHK(AJWx)

PLAINTIFFS/APPELLANTS' INITIAL BRIEF

Ira J. Kurzban, Esq. (State Bar No.: 71563)
Kurzban, Kurzban, Weinger & Tetzeli PA
2650 SW 27th Avenue, 2nd floor
Miami, FL 33133
Tel: 305.444.0060; Fax. 305.444.3503

Marc Van Der Hout, Esq. (State Bar No.: 80778)
Van Der Hout, & Brigagliano
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
Tel. (415) 981-3000; Fax. (415) 981-3003

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Plaintiffs/Appellants assert that there are no nongovernmental corporate parties to this appeal. In addition, the Partnership Plaintiffs/Appellants have neither parent corporations nor a publicly held company with an ownership share of more than ten percent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT

COURT OF APPEALS

DISTRICT COURT

ADMINISTRATIVE MATERIALS

STATUTES

REGULATIONS

RULES AND OTHER MATERIAL

JURISDICTIONAL STATEMENT

The district court's subject matter jurisdiction over this action is predicated on 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 28 U.S.C. § 1346. This Court has subject matter jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The district court's order [DE 58] granting in part and denying in part the Defendant's motion to dismiss the first amended complaint and for judgment on the pleadings was entered on May 3, 2001. Judgment was entered on May 7, 2001. [DE 59]. Both the Plaintiffs and Defendant filed cross motions to reconsider this judgment [DE 61, 63]. Both of these motions were denied in orders entered on June 14, 2001 [DE 70, 71].

The Plaintiffs filed their notice of appeal on July 2, 2001. [DE 72]. The Defendant filed a cross notice of appeal on July 24, 2001. [DE 73]. The Plaintiffs' notice of appeal is timely pursuant to Federal Rule of Appellate Procedure 4(1)(B).

ISSUES PRESENTED FOR REVIEW

Justiciability

I. Whether the district court erred in dismissing six of the seven named putative class representative's claims for lack of ripeness when Defendant's challenged conduct can be firmly predicted to operate to all of the Plaintiffs' disadvantage.

II. Whether the district court abused its discretion in not certifying a class action.

Merits of Claims

III. Whether the Plaintiffs properly alleged estoppel when it was affirmative misconduct for the Defendant to: (a) approve the individual Plaintiffs' "non-approvable" immigrant petitions and admit them to this country; (b) misinform the Plaintiffs that changes to the immigrant investor law would be made in a prospective manner through notice and comment rule making; and (c) conceal from the Plaintiffs the Defendant's true intent to retroactively apply the new criteria to the Plaintiffs' previously approved investments.

IV. Whether the Plaintiffs properly alleged that the Defendant violated the Administrative Procedures Act's (APA) notice and comment requirement by promulgating new criteria in "precedent decisions" and subsequently

applying this new criteria to the Plaintiffs who had already received official agency approval of their eligibility to become lawful permanent residents.

V. Whether the district court erred in denying injunctive and declaratory relief to the six dismissed Plaintiffs and the putative class because of the Defendant's retroactive application of the law.

STATEMENT OF THE CASE

The Plaintiffs in this action are challenging the Immigration and Naturalization Service's (INS) administration of the "Immigrant Investor Law."[1] With this law, Congress created a process for foreign nationals to obtain lawful permanent residence by making a qualifying investment with the goal of creating or preserving at least ten jobs for United States' workers.

The Plaintiffs include seven named individual immigrant investors and their families seeking to represent a class of investors who are all seeking to become lawful permanent residents by investing substantial sums of money in one of twenty-eight (28) similarly structured limited partnerships. [ER 7-11, 61; ¶¶11-19, 83].

The immigrant investors individually submitted extensive documentation fully disclosing the nature and structure of their investment and business plans to the INS in the hopes of qualifying for permanent residence [ER 61;¶ 83]. The INS reviewed and approved each of these submissions and determined that the investments and business plans qualified under the Immigrant Investor Law [E.R. 61, ¶83]. Based on these approvals, the INS granted each of the investors and their family members the right to live in the United States as lawful permanent residents on a conditional basis [ER 4, ¶3]. The INS is supposed to remove the condition

[1] 8 U.S.C. §§ 1153(b)(5), 1186b, INA §§ 203(b)(5), INA § 216A, 8 C.F.R. §§ 204.6, 216.6.

two years after admitting each of the immigrant investors based on a showing that the investor "in good faith, substantially met the capital investment requirement" of the previously approved investment during this period. 8 C.F.R. § 216.6(c)(iii).

Relying on the INS' official determination that their investment plans complied with existing law, the investors and their families fundamentally changed their lives. [ER 13-14; ¶¶ 31-32]. They quit their old jobs, sold their businesses and homes, and pulled their children out of schools in order to move to this country and integrate themselves into our communities. [ER 13-14; ¶¶ 31-32][ER 84-85]. They expended substantial economic and personal resources by buying new homes, putting their children in new schools, and pursuing new career paths. [ER 13-14; ¶¶ 31-32][ER 84-85]. They have adapted to American life over the more than five years that most have lived in this country. [ER 7-10, 13-18; ¶¶ 11-17, 32.];[ER 95]. As such, many of the investors and their young children would find life in their native countries foreign - this country is now their home. [ER 7-10, 13-14, ¶¶ 11-17, 31].

Seven years of consistent application and agency assurances concerning the nature and structure of the Plaintiffs' investments were brushed aside when the INS radically and abruptly altered its criteria for approving qualifying investment and business plans. [ER 63-70; ¶ 104]. This new criteria was not announced in prospective notice and comment rule making - despite assurances to the contrary

and with full knowledge of the potential deleterious impact to the investors and their businesses. [ER 57; ¶ 88].[2] Rather the agency circumvented this participatory process and announced its new rules of general application in a series of "precedent decisions."[3] [ER 57-63; ¶¶ 88-103].

Now, more than five years after inviting the investors and their families into this country in order to invest in our economy, the INS has changed its mind. [ER 59, 63-70; ¶ 94, 104-104]. Under the INS' present view of the law, the Plaintiffs' investments no longer allow them to become permanent residents – and in fact in their opinion, their investments should never have been approved.

---

[2] As then INS General Counsel Paul Virtue stated:

> In 1996, I believed that the appropriate course for resolving lingering questions about this arrangement would be to publish a regulation to clearly establish our requirements. I advised counsel for AIS that that was our intended course. AIS and other companies including AEP, have relied on that determination to enter into business relationships, to make substantial commitments, and to file petitions with INS and applications for visas with the Department of State. We have not published a rule or issued a notice to the contrary.

[ER 149] (emphasis added); *see also* [ER 153]("this should all take effect prospectively. We are making an important agency correction in policy, and we need to do this in a very positive and forward looking manner and not take a position that will unnecessarily hurt individuals who have relied on the prior decisions.")

[3] *Matter of Soffici*, Int. Dec. No. 3359, 22 I & N Dec. 158 (Exam. Comm. 1998); *Matter of Izumii*, Int. Dec. No. 3360, 22 I & N Dec. 169 (Exam. Comm. 1998); *Matter of Hsuing*, Int. Dec. No. 3361, 22 I & N Dec. 201 (Exam. Comm. 1998); *Matter of Ho*, Int. Dec. No. 3362, 22 I & N Dec. 206 (Exam. Comm. 1998)[hereinafter "precedent decisions"].

Moreover, as a direct result of the new criteria and the ensuing questionable state of the law, the immigrant investors' qualifying investments have been prevented from attracting new investors and have been frustrated in their ability to promote the job creation anticipated in the investors' business plans. [ER 6,71-72; ¶¶ 6,112].

The INS is now in the process of retroactively revoking the immigrant investors' lawful residence. [ER 71; ¶¶ 108,110,111];[ER 101]. The INS is denying the Plaintiffs' applications to remove the conditions of their residency in proceedings that were designed simply to ensure that the investors "in good faith, substantially" sustained the previously approved planned investment and that the information submitted is "true." 8 C.F.R. § 216.6(c); 8 U.S.C. § 1186b(c)(3)(B), INA § 216A(c)(3)(B). The INS instead now seeks to re-adjudicate the propriety and structure of the investors' business and investment plans, which have been *res judicata* for more than five years.

Absent judicial intervention, the investors face expulsion and potential bars to reentering this country. [ER 5; ¶ 4]; [ER 100]. They will lose the significant financial resources that they placed in their investments. [ER 5-6; ¶5]. They will be forced to give up the professional and educational opportunities that they have enjoyed for the past five years. [ER 5-6, ¶5]. They will be uprooted from their now

familiar communities and suffer the shame in their own countries inherent from being ordered deported. [ER 5-6, ¶5];[ER 89, 94].

To challenge the INS' retroactive application of the law, the immigrant investors filed this action in the United States District Court for the Central District of California on October 12, 1999. [DE 1]. This action was brought by more than two hundred (200) immigrant investors and their family members (totaling well over 600). At the suggestion of the district court to pare down the case, the complaint was later styled as a class action with seven named investor plaintiffs and their families representing a putative class.

The Plaintiffs sought declaratory and injunctive relief preventing the Defendant from applying the precedent decisions to them based on: (1) violation of the APA; (2) abuse of discretion; (3) action exceeding statutory authority; (4) violation of due process and equal protection; (5) uncompensated taking; (6) estoppel; and (7) improper retroactive application. [ER 1-80].

On June 27, 2000, the Defendant moved for judgment on the pleadings. [DE 17]. This was granted in part and denied in part by the district court on May 7, 2001. [DE 59; ER 144-45]. The district court determined that six of the seven named Plaintiffs did not have ripe claims, because the INS had not yet denied their petition to remove the conditions on their residency. [ER 127-29]. The Court also

held that it had jurisdiction over denied petitions to remove the conditions of residency because Congress had not precluded review. [ER 129-30].

The district court then addressed the merits of the Defendant's motion as it applied to the one individual (Plaintiff Chiang) who had received a decision terminating his residency. [ER 100]. The district court held that the complaint failed to state a cause of action under the APA's notice and comment rule making. [ER 127-29]. The district court also denied the Plaintiff's estoppel claim for failure to allege affirmative misconduct. [ER 141].

The district court, however, denied the Defendant's motion with respect to the Plaintiff's retroactivity claim.[ER 138-39]. Rather than proceeding to the discovery phase on these counts, the Court remanded Plaintiff Chiang's petition to the INS for due consideration of the retroactivity analysis in *Montgomery Ward v. FTC*, 691 F.2d 1322 (9th Cir. 1982).

STATEMENT OF FACTS

A. The Immigrant Investor Law

The Immigrant Investor Law was promulgated on November 29, 1990. In order to obtain a visa under this law, an individual must: **(1)** establish a new commercial enterprise, 8 U.S.C. § 1153(b)(5)(A)(i), INA § 203(b)(5)(A)(i); **(2)** invest or be actively in the process of investing either $1,000,000 in capital in the enterprise or $500,000 in the case of an enterprise in a rural area or one experiencing high unemployment, 8 U.S.C. § 1153(b)(5)(A)(ii), (C), INA § 203(b)(5)(A)(ii), (C); and **(3)** create employment for at least 10 United States workers. 8 U.S.C. § 1153(b)(5)(A)(iii), INA § 203(b)(5)(A)(iiii).

Obtaining permanent residence through a qualifying investment is a two step process. 8 U.S.C. § 1186b, INA § 216A; 8 C.F.R. §§ 204.6, 216.6.

1. First Step: Initial Petition To Determine Eligibility (I-526)

In order to obtain the approval of conditional residency, an investor submits an I-526 petition, 8 C.F.R. § 204.6(a), accompanied by extensive documents, including: (i) the business organization document; (ii) certificates evidencing authority to do business; or (iii) evidence that "as of a date certain after November 29, 1990," the required amount of capital has been transferred to an existing

business resulting in a substantial increase in the net worth or number of employees. 8 C.F.R § 204.6(j)(1).

The petitioner may also submit evidence such as bank statements and promissory notes. 8 C.F.R. § 204.6(j)(2)(i)-(v). In order to prove that the petitioner has invested lawfully acquired capital, the petitioner must submit documents such as foreign business registration records, personal tax returns, and other evidence identifying sources of funds. 8 C.F.R. § 204.6(j)(3)(i)-(iv).

The regulations further recognize that partnerships consistent with the Uniform Limited Partnership Act are "permissible." 8 C.F.R. § 204.6(g); 8 C.F.R. § 204.6(j)(5)(iii); 8 C.F.R. § 204.6(e); 8 C.F.R. § 204.6(m)(3)(iii).

The petition must be filed with the INS Service Center having jurisdiction over the area in which the new commercial enterprise is or will be principally doing business. 8 C.F.R. § 204.6(b). These Centers were selected to provide consistency and to ensure that trained adjudicators reviewed the applications. 56 Fed Reg. 60897, 60902 (November 29, 1991)("The Service is concerned with uniformity of adjudication and is concentrating its training in this area at the Service Centers").

Once the INS reviews this extensive documentation, it issues a decision approving or denying the I-526 petition. 8 C.F.R. § 204.6(k). A consular officer abroad or an INS officer in the United States again reviews the material and the

individual's eligibility as part of the immigrant visa or adjustment of status process before granting conditional residency. The immigrant investor and his family are thereafter admitted to the United States as conditional residents. 8 U.S.C. § 1186b(a)(1), INA § 216A(a)(1).

a. Reconsideration of the I-526 petition

Congress gave the INS a limited time period to reconsider and rescind its initial eligibility determination if it finds that the qualifying entrepreneurship is not proper. 8 U.S.C. § 1186b(b)(1), INA § 216A(b)(1). This authority is only valid for the first two years after the alien is first admitted. *Id.* Termination may occur if the INS determines that the establishment of the commercial enterprise was to evade immigration laws, the commercial enterprise was not established, the alien did not invest the requisite capital, or the alien did not otherwise conform to the requirements of 8 U.S.C. § 1153(b)(5), INA § 203(b)(5). *See* 8 U.S.C. § 1186b(b)(1)(A)-(C), INA § 216A(b)(1)(A)-(C).

2. Second Step: Petition to Remove Conditions (I-829)

The immigrant investor must file a second petition ("I-829 petition") to remove the "condition" on residency within the 90-days before the second anniversary of being admitted to the United States. 8 U.S.C. § 1186b(c)(1)(a), (d)(2)(a), INA § 216A(c)(1)(a), (d)(2)(a).

The I-829 adjudication is a limited proceeding because the INS carefully assesses and adjudicates all aspects of the nature and structure of the immigrant investors' business and investment plans at the initial stage. The I-829 proceeding is designed simply to determine if the investor "in good faith, substantially" "maintained" and "sustained" the qualifying investment throughout the alien's conditional residence. 8 U.S.C. § 1186b(d)(1)(C), INA §216A(d)(1)(C); 8 C.F.R. § 216(c)(1)(iii). The INS' statements in accompanying the proposed and final rules explain that whether the investment is "sustained" should be given a "liberal interpretation" that would "permit the Service *maximum flexibility* in determining whether the prerequisites for removal of conditions have been met." 59 Fed. Reg. 1317 (January 10, 1994).[4]

Rather than re-adjudicate the nature and structure of the investment, the INS must assess solely whether the supporting evidence and information is "true." If the facts in the petition are deemed to be "true," the attorney general is supposed to remove the conditions. 8 U.S.C. § 1186b(3)(B), INA § 216A(3)(B). If the facts

[4] The INS has acknowledged that "a bona fide and good faith investment may not, by the end of the two-year period, meet all the expectations envisioned when the alien entrepreneur obtained conditional resident status." 59 Fed. Reg. 26587, 26588 (May 23, 1994). In illustrating its "flexibility," the INS described a situation where the conditions would still be removed where the entire capital was not invested because of "circumstances beyond the alien's control." 59 Fed. Reg. at 1318. Conditions will still be removed if the individual demonstrates that he or she can and will invest the additional capital in a reasonable time. *Id.*

are found not to be true, residency is terminated as of the date of the decision. 8 U.S.C. § 1186b(3)C), INA § 216A(3)(C).

The distinct documentation requirements reflect the narrow and *pro forma* nature of the proceeding. For example, suggested evidence for the formation of the commercial enterprise is simply federal income tax returns. 8 C.F.R. § 216.6(a)(4)(i). This is in marked contrast to the extensive corporate documentation that is required for the initial approval. 8 C.F.R. § 204.6(j).

B. The Individual Immigrant Investor Plaintiffs

All immigrant investors share similar characteristics. They have all filed I-526 petitions based on investments in one of the Plaintiff partnerships. [ER55-56; ¶83]. Each of these petitions was accompanied by extensive documentation fully disclosing the nature and structure of the investment and business plan. [ER55-56; ¶83]. Each petition was reviewed by the INS and subsequently approved. [ER 4-5, 55-56; ¶¶3, 83]. They were all granted adjustment of status to that of lawful permanent resident on a conditional basis. [ER 4-5, 55-56; ¶¶3, 83]. The investors maintained in good faith their investments as set forth in their I-526 petitions. [E.R. 14, ¶33]. The INS never took any action during the two-year statutory period to rescind or revoke any of those approvals.

Most, if not all of the immigrant investors, sold homes and businesses, and liquidated assets to emigrate to the United States. [ER 13-14; ¶ 32]. Upon arrival,

the Investor Plaintiffs and their families found new residences, joined religious or charitable organizations, transferred foreign assets and investments, enrolled in schools, purchased automobiles, established new businesses, friendships, and social and professional relationships, obtained driver's licenses, social security cards, and bank accounts, actively participated in their schools and communities, and fulfilled their dream of lawfully residing in the United States. [ER 13-14, ¶ 32]

Many of the investors' children left school in their native countries. [ER 13-14, ¶ 32]. Due to the fundamental differences between the educational system of the United States and that of Korea, Taiwan, China, and the other countries from which these children came, it would be almost impossible for these children to re-adapt or reintegrate into the educational system of their native land. [ER 14, ¶33]. Many of these children are no longer fluent in their native tongues, but have now become fluent in English, complicating any possible return to an educational system outside the United States. [ER 14; ¶33]. All of the education received in America would thus be in vain, and this possibility has harmed, and continues to harm, the emotional and physical well-being of the children and their Investor Plaintiff parents. [ER 14, ¶ 33].

The immigrant investors all would never have made their substantial investments, uprooted their families, and immigrated to the United States had they

known that the INS would change its criteria after their arrival so that their investments would fail. [ER 57; ¶87].

All of the Plaintiffs timely filed their I-829 petitions to remove the conditions of their residence. [ER 14, 55-56; ¶¶ 33, 83]. Of the named Plaintiffs, only Plaintiff Chiang has received a denial of his I-829 petition to remove the conditions of his residency. [DE 41; ER 97-114]. Many putative class members likewise received denials. [DE 46, 52, 57, 60].

C. The Partnership Plaintiffs (i.e. the qualifying investments)

The investment vehicles were specifically designed by the Partnerships in order to comply with the existing law governing the approval of I-526 and I-829 petitions. [ER 54,56-57; ¶¶77,86]. The investments were designed after consultation with the INS and were repeatedly approved in adjudications where full disclosure was made about the nature of the Plaintiffs' investments. [ER 56; ¶ 84].[5]

[5] For example, in 1996, the Department of State asked the INS to review a number of petitions that were being submitted by immigrant investors related to the partnerships in which the plaintiffs invested. After several weeks of discussion with representatives of AIS and their counsel, the INS determined that a number of changes were required for compliance with the regulatory requirements. The partnerships were changed in order to ensure that they complied with the representations made by INS about the requirements of the existing regulatory structure. Once these changes were made, the petitions involving the partnerships were approved. [ER 148-49].

Immigrant investors who participated in the partnerships invested either $500,000 or $1,000,000. [ER 54; ¶78]. Typically, the investor would make a substantial initial cash payment of $125,000, $200,000, or $300,000, plus a promissory note for the remainder of the investment. [ER 54, ¶78]. The balance of the promissory note was generally required to be paid in four or five annual installments followed by a final balloon payment, which is paid after the two-year conditional period has expired and the immigrant investor has achieved lawful permanent resident status. [ER 54; ¶78].

Under most investor agreements, the partnership agrees to pay the immigrant investor a minimum annual return on the invested cash based upon the partnership having available funds. [ER 55; ¶ 81]. The immigrant investor is also granted an option to sell his limited partnership interest back to the partnership after the balance of the promissory note has been fully paid. [ER 55; ¶ 81]. The partnership has a corresponding option to buy back the immigrant investor's limited partnership interest at that time. [ER 57; ¶ 81].

D. The Defendant Issues "Precedent Decisions" Rather Than Proceed By Promised Notice and Comment Rule Making

In 1995, the INS officially announced in the Federal Register its intention to make changes in the adjudication of immigrant investor petitions through the participatory and prospective rule making process. 60 Fed. Reg. 29771, 29772 (June 6, 1995)("The Service will issue a separate proposed regulation on petitions

for employment creation aliens at a later date"). Further promises and proclamations of the intent to engage only in prospective notice and comment rule making were also made in 1996 and later throughout 1997. [ER 57; ¶ 88].[6]

The INS had drafted regulations in "final form" before December, 19 1997, amending the INS' criteria for approving investment petitions. [ER 58; ¶ 92]. The regulations were never published. Instead, the INS General Counsel's Office placed its new investment criteria in a memorandum dated December 19, 1997. [ER 58-59; ¶ 92-93]. All of the Plaintiffs' cases were then placed on hold because they involved pooled investments, a feature now repudiated by the memorandum. [ER 58-62; ¶ 90, 99]. The General Counsel memorandum was made public and attached to operating instructions on March 11, 1998. [ER 58-59; ¶ 93, 94].

The Service Centers were then instructed to forward cases to the Administrative Appeals Office that reflected all issues covered in the specific terms of the hold to serve as the "precedent decisions." [ER 62; ¶ 100]. On June 12, 1998, the Acting Associate Commissioner of Programs issued a memorandum explaining that the Administrative Appeals Office had received 19 immigrant investor petitions on certification from the four Service Centers (pursuant to the March 11, 1998, Operating Instruction), and was preparing decisions on these cases. [ER 62; ¶ 101].

---

[6] *See supra* note 2.

The INS then designated four "precedent decisions." [ER 62; ¶ 101]. These decisions were reviewed and approved the INS General Counsel before the Administrative Appeals Office issued them. [ER 62; ¶ 102].

E. The Precedent Decisions Radically Changed the INS' Criteria For Approving Investments

Prior to the issuance of the precedent decisions, each and every one of the following elements had been permitted by the regulations and the statute: (1) the establishment of a new commercial enterprise by multiple limited partners who invest in a limited partnership after the time the limited partnership was legally formed; (2) active management in the business in conformance with the Uniform Limited Partnership Agreement; (3) use of promissory notes without limitations; (4) redemption agreements; (5) guaranteed payments to investors; (6) the deduction of legitimate business expenses from the capital contribution; (7) the valuation of promissory notes at face value; (8) promissory notes without time limitations; (9) security for the promissory notes need not be perfected under the UCC's standards; (10) investments containing trust agreements; (11) holding companies make the full amount of capital available to the businesses responsible for creating the employment; (12) escrow accounts meet the qualifying capital contribution amount and are sufficiently "at risk" pending the approval of the I-526 petition. [ER 59, 63-70; ¶94, 104].

The apparent consistency of these pre-precedent decision features with the statute and regulations is confirmed by INS memoranda, consistent adjudication, and most importantly, the approval of each of the immigrant investors' own I-526 petitions. [ER 59,60-61,70; ¶ 94,96,105]. Indeed, these investment features are all present in each Plaintiff investors' previously approved investment and business plans. [ER 59; ¶ 94]. The above listed features are now all viewed as impermissible by the INS. [ER 63-70; ¶ 104, 105].

A review of the denial in Plaintiff Chiang's case illustrates that the INS applied the new criteria in the precedent decisions to deny his I-829 petition. [ER 101]("The INS published four precedent decisions . . . this petition has been reviewed in accordance with these decisions").

F. Procedural History

After filing of the original complaint on October 12, 1999, the district court held a scheduling conference on February 7, 2000, and requested that Plaintiffs file an amended complaint by March 22, 2000. [DE 11]. In an effort to focus the case more directly on Defendant's change in criteria, the Plaintiffs, at the district court's suggestion, filed a class action complaint on March 7, 2000. [DE 12].

Oral argument was held before this Court on October 16, 2000, on Defendant's Motion to Dismiss or in the Alternative for a Judgment on the Pleadings. [DE 17]. Pursuant to the Court's oral request at the October 16, 2000

hearing, the parties briefed the issue of retroactivity and applied the factors in *Montgomery Ward v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). [DE 37].

The Defendant then began denying the investors' I-829 petitions based on the criteria set forth in the precedent decisions. [ER 101]. In response, Plaintiffs sought a temporary restraining order to prevent the INS from denying the I-829 petitions of the immigrant investors. [DE 35]. In order to extend the protection of this temporary restraining order to all members of the putative class, Plaintiffs sought provisional class certification. [DE 42]. The Court denied the request for a temporary restraining order and deferred ruling on the Plaintiffs' request for class certification. [DE 39].

Additional oral argument was held on the Defendant's motion to dismiss on March 27, 2001. The issues before the Court primarily concerned the Plaintiffs' retroactivity based claims and the *Montgomery Ward* factors.

On May 7, 2001, the Court denied in part and granted in part the Defendant's motion. [DE 59]. The Court determined that, of the named plaintiffs, Plaintiff Chiang's claims were the only ones that were justiciable because he had received notice of denial of his I-829 petition. [ER 129]. As to Plaintiff Chiang, the district court denied Defendant's motion as to count VII (Retroactivity) and, insofar as they implicated retroactivity, count II (Abuse of Discretion) and count IV (Due Process). The Court however dismissed with prejudice count I (APA),

count III (Exceeding Statutory Authority), and count VI (Estoppel), and dismissed in part with prejudice count II (Abuse of Discretion) and IV (Due Process).

Furthermore, the order dismissed, without prejudice, six of the seven named Plaintiff Investors on grounds that their claims were not ripe for adjudication because they had not yet received a notice of denial of their I-829 petitions.

The Court also ruled that, in light of its order, Plaintiffs' Motions for Class Certification and to set Discovery Schedule were moot. The Court essentially considered the Plaintiffs' claims only with respect to the seven named individual plaintiffs.

SUMMARY OF ARGUMENT

The district court erred in drawing a distinction in its ripeness analysis between plaintiffs who have pending I-829 petitions and those who have received denials. This Court does not require Damocles' sword to fall before accepting jurisdiction in actions for declaratory relief. *City of Auburn v. Qwest Corporation*, 260 F.3d 1160, 1171 (9th Cir. 2001). This is particularly so where it can be firmly predicted that the challenged agency action to retroactively apply new criteria will eventually operate to deny all of the Plaintiffs' pending petitions because they are all based on similarly structured but now disfavored investments. *Freedom to Travel v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1994).

The district court also abused its discretion in failing to certify the Plaintiffs' action as a class action as a result of its ripeness ruling. The Plaintiffs satisfy all requirements for maintaining a class action which would efficiently bring all Plaintiffs within the purview of the court.

The district court also erred in denying Plaintiff Chiang's claim of estoppel on a motion for judgment on the pleadings where the complaint alleges affirmative misconduct and where the Plaintiffs were not afforded any opportunity to conduct discovery to support their claim. Furthermore, affirmative misconduct is evident in this case by the fact that the INS: (1) approved the individual Plaintiffs' "non-approvable" immigrant petitions and admitted them to begin new lives in this

country; (2) actively misinformed the Plaintiffs that any changes to the immigrant investor law would be made in a prospective manner through notice and comment rule making; and (3) actively concealed from the Plaintiffs the Defendant's true intent to retroactively apply the new criteria to the Plaintiffs' previously approved investments. *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989)(en banc); *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982); *Sun Il Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *Gestuvo v. District Director, INS*, 337 F.Supp. 1093, 1094 (C.D. Cal. 1971).

The district court also erred in dismissing the Plaintiffs' claim that the INS was required to comply with notice and comment. The precedent decisions do amend and add new criteria to the regulations and statute. This is particularly true with respect to the rule established in the precedent decisions that no longer permitted partners in ULPA partnerships if the partner entered the partnership subsequent to the formation of the partnership. The defendant likewise amended the statute and regulations by expanding the narrow scope of the I-829 adjudication to essentially re-adjudicate the investors' initial eligibility. Furthermore, this Court's jurisprudence holds that rules announced in adjudications are not immune from notice and comment where the proceedings were designed to circumvent notice and comment and where the new rules would unsettle vested equitable interests leading to hardship. *Paff v. HUD*, 88 F.3d 739 (9th Cir. 1996); *Ford Motor*

Co. v. FTC, 673 F.2d 1008, 1009-10 (9th Cir.1981); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994); *Patel*, 638 F.2d 1199, 1203-05 (9th Cir.1980); *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir.1978). Finally, the precedent decisions contradict long standing administrative practice and therefore necessitate notice and comment rulemaking. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C.Cir. 1999); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001).

The district court's errors prevented hundreds of investors from obtaining injunctive and declaratory relief to protect their judicially cognizable interests. Indeed, without question, this Court's jurisprudence squarely disfavors an agency's attempt to apply retroactively a new standard of law, where the resulting harm will devastate hundreds of immigrant investors and their families who uprooted their lives at the formal invitation of the INS - and who are now subject to expulsion simply because the INS has changed its mind.

ARGUMENT

I. ALL PLAINTIFFS HAVE RIPE AND JUSTICIABLE CLAIMS

The district court determined that only one of the seven named plaintiffs (Plaintiff Chiang) had claims that were ripe for adjudication. This holding is predicated on the erroneous notion that an immigrant investor's claim is only ripe when the INS denies an I-829 petition, and that an investor is only harmed when the application is denied.

A. Standard of Review

A district court's determination of whether a claim is ripe for adjudication is reviewed *de novo*. *Freedom to Travel v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1994)("The ripeness of a claim is reviewed de novo").

B. All Individual Plaintiffs Claims Meet the Criteria for Ripeness

The question of whether a claim is ripe for adjudication depends on both constitutional and prudential considerations. *City of Auburn v. Qwest Corporation*, 260 F.3d 1160, 1171 (9th Cir. 2001); *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000)(en banc).

The constitutional component is generally framed as "whether the plaintiffs face a realistic danger of sustaining a direct injury" as a result of the challenged act. *Thomas*, 220 F.3d at 1139; *Qwest,* 260 F.3d at 1171. The prudential considerations consist of two factors: (1) whether the issue is fit for judicial

decision and (2) whether the parties will suffer hardship if the court declines to consider the issue. *Qwest,* 260 F.3d at 1171; *Thomas*, 220 F.3d at 1141.

1. All Individual Plaintiffs' Claims Are Ripe Because They All Face A Realistic Danger Of Sustaining A Direct Injury

The existence of the precedent decisions and the INS' clear threat and history of unlawfully enforcing them against the Plaintiffs are sufficient to create a ripe controversy. *Qwest*, 260 F.3d at 1171; *accord Thomas*, 220 F.3d at 1139-40 (analyzing criteria for establishing a realistic threat of direct injury); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1968).

This Court "does not require Damocles' sword to fall before [it] recognize[s] the realistic danger of sustaining a direct injury." *Qwest*, 260 F.3d at 1172; *see also Thomas v. Union Carbide Agriculture Products Company*, 473 U.S. 568, 581 (1985)("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough").

The new criteria announced in the precedent decisions have a direct and deleterious effect on the Plaintiffs. There is no question that the individual Plaintiffs' participation in the partnerships no longer qualify under the new criteria. This is evidenced by the fact that the precedent decisions now reject several key features of the method and structure of the Plaintiffs' previously approved investments. To illustrate, all of the denials in this case issued to date were denied because: (1) the investor was not a partner at the inception of the partnership [ER

102-03]; (2) the promissory note was insufficient because it was valued at face value and the note did not adequately demonstrate the personal assets securing the note [ER 104-05]; (3) the partnership agreement contains a redemption agreement [ER 105-07]; (4) the partnership agreement contains a guaranteed return on investment [ER 106-07]; (5) the partnership agreement permits payment of the promissory note beyond the two-year conditional residency period [ER 107-08); (6) the investment agreement made by the partnership provides for trusts or cash reserve payments [ER 108-09]. Each of these are common features of all of the Plaintiffs' investments, and all were previously approvable features that were subsequently rejected in the precedent decisions. [ER 59, 63-70; ¶¶94,104,105].

Thus, there is no question that the INS will use the new criteria to deny their petitions to remove the conditions of their residency. The denial terminates their lawful status in the United States, 8 U.S.C. § 1186b(c)(3)(C), INA § 216A(c)(3)(C), and thus subjects them to imminent deportation, which has long been considered a very serious and harsh consequence. *Bridges v. Wixon*, 326 U.S. 135, 154, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945)("that deportation is a penalty-at times a most serious one-cannot be doubted")

Furthermore, it can be "firmly predicted" that absent judicial intervention, the INS will unlawfully retroactively apply the precedent decisions to re-adjudicate the propriety of the Plaintiffs' investments in assessing the I-829 petitions. All

Plaintiffs have filed I-829 petitions to remove the conditions on their residency, [ER 14; ¶33]. By statute, the INS thus must adjudicate them. 8 U.S.C. § 1186b(c)(3)(A)(ii), INA § 216A(c)(3)(A)(ii).

The INS' past adjudication of the immigrant investors' I-829 petitions reveals that the INS is clearly applying the precedent decisions in all decisions involving partners in the plaintiff partnerships. Thus, it can be firmly predicted that INS will continue to do so to the Plaintiffs.

Moreover, in order to quell the uncertainty in their status, Plaintiffs are faced with a choice of abandoning their hopes at residency with their previously approved investment and beginning the lengthy process anew with a new business plan and investment that may or may not be approved.[7] Their other option is to simply remain in their precarious unsettled immigration status awaiting the inevitable unlawful denial which will subject them to deportation and a bar from reentering the United States. As this Court noted in *Qwest*, such a "Hobson's Choice" puts the Plaintiffs "in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Qwest*, 260 F.3d at 1172.

a. The district court's reliance on *Catholic Social Services* is misplaced

[7] The Plaintiffs will lose the substantial time accrued toward eligibility for citizenship.

In finding that the claims of the Plaintiffs with pending I-829 applications were not yet ripe, the district court placed unwarranted reliance on *Reno v. Catholic Social Services*, 509 U.S. 43 (1993). *Freedom to Travel*, 82 F.3d at 1436 (distinguishing *Catholic Social Services* and expressly adopting Justice O'Connor's "firm prediction" rule).

In *Catholic Social Services,* the Supreme Court stated that a claim is "ordinarily" ripe when the challenged regulation has been applied to deny a plaintiff the benefit that she sought. *Catholic Social Services*, 509 U.S. at 60.[8] The district court's reliance on this statement in *Catholic Social Services* failed to take account of this Circuit's express adoption of Justice O'Connor's "firm prediction" rule in *Freedom to Travel*, 82 F.3d at 1436.

The "firm prediction" rule pragmatically eliminates the need to await an inevitable application of a regulation to a plaintiff prior to determining that a challenge is justiciable. *Id., quoting, Catholic Social Services*, 509 U.S. at 69

[8] In *Catholic Social Services*, the Supreme Court, in assessing the ripeness of the plaintiffs claims made a distinction between regulations that create an "immediate dilemma" that force the individual to pay the cost to comply with the regulation, or suffer penalties for failure to comply and those that confer a benefit. The Court opined that those that created an "immediate dilemma" tended to give rise to ripe claims prior to enforcement whereas benefit conferring regulations required enforcement. The instant challenge is more analogous to an "immediate dilemma" situation than rules concerning a benefit. This is because the Plaintiffs in this case, unlike the plaintiffs in *Catholic Social Services*, already have been conferred a benefit in the form of conditional residence. The Plaintiffs are thus challenging the application of the precedent decisions which will operate to inflict a harm - being stripped of their lawful status and deported.

(O'Connor, J., concurring)("If it is 'inevitable' that the challenged rule will 'operat[e]' to the plaintiffs disadvantage – if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule – then there may be a justiciable controversy that the court may find prudent to resolve").

When applying the *Freedom to Travel* decision to the instant case, it is clear that the district court erred in determining that all individual claims were not ripe. Indeed, in *Freedom to Travel*, the Court found a justiciable controversy notwithstanding the fact that the plaintiff - a tour operator challenging the Cuban Asset Control Regulation's licensee scheme for travel to Cuba - had not yet been denied, let alone applied for a license for travel to Cuba. *Freedom to Travel*, 82 F.3d at 1436.

The Court was able to firmly predict that if the plaintiff applied it would be denied because none of the plaintiffs' travel activities were covered by the regulation. *Id.* In the instant case, the INS will deny all of the Plaintiffs' I-829 petitions because several key elements of the structure of the previously approved investments were expressly rejected in the precedent decisions and held unapprovable. Thus, because all Plaintiffs have pending I-829 petitions and share the same unapprovable features, the district court clearly could have made a firm

predication that the unchecked application of the precedent decisions would have resulted in a denial.

2. All Individual Plaintiffs' Claims Are Ripe Because The Disputed Issues Are Primarily Legal

Issues which are purely legal and require little factual development are more likely to be ripe. *Qwest*, 260 F.3d at 1172. The individual Plaintiffs' claims present essentially legal questions, *inter alia*: (a) whether the INS' has legal authority to promulgate new criteria in "precedent decisions" and to apply that criteria retroactively to the immigrant investors with a previously approved I-526 petition; (b) whether the Defendant's conduct violates the APA's notice and comment requirements; and (c) whether applying the new criteria announced in the precedent decisions to the Plaintiffs contradicts the regulations and statute; (d) and whether the Defendant's conduct gives rise to the elements of estoppel. The nature of these issues are no different in scope from the legal questions presented in *Freedom to Travel*, 82 F.3d at 1434 (whether regulations contradict an international treaty); *Union Carbide*, 473 U.S. at 581 (constitutionality of remedial scheme); *Qwest*, 260 F.3d at 1172 (preemption of city ordinances).

3. All individual Plaintiffs' claims are ripe because they will suffer hardship if the court declines to consider the issue

Furthermore, both the agency and the plaintiffs clearly suffer a hardship in light of the uncertainty that exists as to the propriety of applying the precedent

decisions to the Plaintiffs' I-829 petitions. In *Union Carbide*, the Supreme Court held that the uncertain state of the law was a sufficient hardship to prompt judicial review: "[t]o require the industry to proceed without knowing whether the [arbitration scheme] is valid would impose a palpable and considerable hardship." *Union Carbide*, 473 U.S. at 581. Indeed as the Court further stated that " . . . each appellee . . . suffers the continuing uncertainty and expense of depending for compensation on a process whose authority is undermined because its constitutionality is in question." *Union Carbide,* 473 U.S. at 581 (internal citations omitted).

Just as the Supreme Court held in *Union Carbide*, it is true here that "nothing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution" of the propriety of the INS' actions. *Id.* at 582.

II. THE PLAINTIFFS' CLASS SHOULD BE CERTIFIED

A. Standard of Review

A district court's denial of class certification is reviewed for abuse of discretion. *Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 816 (9th Cir. 1997).

B. The District Court Abused Its Discretion In Denying Plaintiffs' Motion For Class Certification Where The Ripeness Ruling Was In Error

The district court abused its discretion in failing to certify the Plaintiffs' putative class where the district court's ripeness ruling was in error and where the error led the court to deny certification. *Knight*, 131 F.3d at 816-871 (abuse of discretion where erroneous ruling on mootness resulted in failure to address request for class action).

In addition, the Plaintiffs' complaint sufficiently alleges all necessary requirements to sustain a class action. The proposed class include more than 250 immigrant investors and their beneficiaries. [ER 11; ¶20]. This is a number sufficiently numerous to make joinder impracticable. *Jordan v. Los Angeles County*, 669 F.2d 1311, 1320 (9th Cir. 1982)(citing cases) *vacated on other grounds*, 459 U.S. 810 (1982). The Plaintiffs also alleged that sufficient commonality exists among the class members' claims to warrant class treatment. [ER 12,¶22, 28-33]; *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). A finding of commonality generally supports a finding of typicality. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

There are common legal questions concerning whether: (1) the Defendant may apply the precedent decisions retroactively to immigrant investors who have received approved I-526 petitions; (2) the Defendant's actions legally constitute affirmative misconduct; and (3) the Defendant was required to proceed by notice and comment under the APA before issuing the precedent decisions and/or

applying them to the adjudication of an I-829 petition. [ER 11, 50-72; ¶¶21, 63-112].

The Plaintiffs' complaint is also replete with factual allegations attesting to: (1) the identical structures of the investment vehicles [ER 54-57; ¶77-87]; (2) the similar procedural posture of each Plaintiff; (3) the similar burdens, harms, and hardships that each face [ER 12-14, ¶¶29-33]; (4) the similar unlawful conduct of the Defendant [ER 57-72, ¶¶88-112]; and (5) the similar remedies that each Plaintiff seeks. [ER 77-80].

The Plaintiffs are likewise seeking identical declaratory and injunctive relief in order to prevent the Defendant from denying their I-829 petitions because of its improper administration of the Immigrant Investor Law and its unlawful retroactive application of new criteria. [ER 57-80, ¶¶88-112]. Thus, the action would satisfy Federal Rule 23(b)(2). *Walters,* 145 F.3d at 1046-1047.

Failure to certify will necessarily result in more than 250 immigrant investors and their beneficiaries filing repeated separate lawsuits against the Defendant and, unless consolidated, could result in disparate rulings.

III. THE DISTRICT COURT ERRED IN DISMISSING THE PLAINTIFFS' CLAIM OF ESTOPPEL FOR FAILURE TO DEMONSTRATE AFFIRMATIVE MISCONDUCT

A. Standard of Review

A district court's determination of whether the Plaintiff stated a claim upon which relief may be granted is reviewed *de novo*. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). Review is limited to the contents of the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Furthermore, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Burget v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000) A complaint must not be dismissed unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Williamson v. General Dynamic Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

B. The Plaintiffs Have Properly Asserted A *Prima Facie* Claim For Estoppel

It is well established in this Circuit that the doctrine of estoppel may be applied to the government. *Watkins*, 875 F.2d 699. In order to assert a claim of estoppel against the government, a party must establish the following special elements: (a) affirmative misconduct; (b) serious injustice; and (c) the public interest will not suffer undue damage. *Watkins*, 875 F.2d at 707. These latter two elements are often balanced against each other. *Id.* at 708-09. These special elements are in addition to the traditional elements of estoppel:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the

latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Watkins, 875 F.2d at 709, *quoting United States v. Wharton*, 514 F.2d 406, 412 (9th Cir. 1975).

In dismissing the Plaintiffs' claim of estoppel, the district court addressed only the element of affirmative misconduct. The district court's assessment of the element of affirmative misconduct failed to properly apply this Court's analysis to determine what constitutes affirmative misconduct. Moreover, the Plaintiffs meet all other elements required for estoppel.

1. The Plaintiffs' Complaint Sufficiently Alleges Misconduct To Overcome a Motion For Judgment on the Pleadings Where No Discovery Was Permitted

The district court erred when it dismissed Plaintiff Chiang's estoppel claim when the complaint averred that the Defendant had engaged in affirmative misconduct. [ER 76,¶142](Defendant should be estopped as its wrongful acts and affirmative misconduct have caused and will continue to cause a serious injustice to the Plaintiffs and the imposition of liability will not damage the public interest"). In light of the procedural posture of the case, such an allegation is clearly sufficient to sustain a complaint in the wake of a motion for judgment on the pleadings. This is particularly true where the district court did not permit the Plaintiffs any discovery - particularly where the Plaintiffs called the court's attention to the need to set a discovery schedule [ER 115-20]. *Metabolife Intern.,*

Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001)("the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'"), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

2. The INS Engaged In Affirmative Misconduct

Under this Court's jurisprudence, it was affirmative misconduct for the Defendant to: (a) approve the individual Plaintiffs' "non-approvable" immigrant petitions and admit them to begin new lives in this country; (b) misinform the Plaintiffs that any changes to the immigrant investor law would be made in a prospective manner through notice and comment rule making; and (c) conceal from the Plaintiffs the Defendant's true intent to retroactively apply the new criteria to the Plaintiffs' previously approved investments.

Affirmative misconduct has been described as requiring "an affirmative misrepresentation or affirmative concealment of a material fact by the government." *Watkins*, 875 F.2d at 707. Affirmative misconduct does not require an intention to mislead the party. *Id.*

A careful review of the analysis undertaken in *Watkins* by this Court (en banc) illustrates that the INS engaged similarly in affirmative misconduct in this case. In *Watkins*, the Court held that the Army was estopped from applying its

valid rules prohibiting the re-enlistment of homosexuals to the plaintiff. *Watkins*, 875 F.2d at 711. In *Watkins*, the affirmative misconduct was simply the act of classifying the plaintiff as eligible for enlistment with knowledge that he was a homosexual when the applicable rules prohibited re-enlistment of homosexuals. *Cf. Johnson*, 682 F.2d 868 (estoppel where government granted parole to an individual who in light of his offense was statutorily barred from receiving parole).

This Circuit reached a similar result in finding misconduct in *Wharton*. In that case, affirmative misconduct had been proven when the Bureau of Land Management issued a letter informing an individual that there was nothing that he could do to obtain a patent to the land on which his family had a farm. *Wharton*, 514 F.2d at 408, 412. The Bureau's statement was inconsistent with the state of the law, and the individual in reality had five months to apply for a patent under the Desert-Land Entry Act. *Id; cf. Johnson*, 682 F.2d at 872 (active misadvice regarding eligibility parole).

Thus, under this Circuit's analysis in *Watkins* and *Wharton*, the act of issuing or making a formal determination constitutes the "affirmative act," which is then characterized as misconduct when it is inconsistent with the law.

The INS' actions in this case are no different from the Army's actions in *Watkins* or the Bureau of Land Management's in *Wharton*. The individual investor Plaintiffs in this case were all affirmatively classified as eligible under the

Immigrant Investor Law after a review of their business and investment plans. They were all issued approved I-526 petitions and were admitted to the United States as lawful residents. These acts are equally, if not more, affirmative than the act of classifying the plaintiff in *Watkins* as eligible for re-enlistment in the Military's records.

Furthermore, if indeed the manner and structure of the individual investors' investments and business plans never complied with the Immigrant Investor Law - as the INS contends – then the approval of the Plaintiffs' I-526 petitions and their admission as residents may be characterized for estoppel purposes as affirmative misconduct. *Watkins*, 707-708 (affirmative act is classifying the plaintiff as eligible to re-enlist; misconduct found because it is against rules to classify homosexuals as eligible); *Wharton*, 514 F.2d at 408, 412 (affirmative act is issuing letter stating that individual could do nothing to obtain a patent; misconduct found because the law still provided five months to obtain a patent).

Thus, under the *Watkins* and *Wharton* analysis, it is clear that the district court erred in determining that the Plaintiffs did not establish the INS' affirmative misconduct.

The Defendant also engaged in affirmative misconduct when it actively misled the public that it intended to make changes to the Immigrant Investor Law in prospective participatory rule making procedures when instead it devised a

strategy to retroactively deny the Plaintiffs' I-526 petitions. [ER 57-58; ¶¶ 88, 90, 92]. Indeed, the INS knew that it was not permissible to apply the changes of the type it envisioned retroactively, and spoke repeatedly of the need to apply the law prospectively.[9] Notwithstanding, they engineered a process to circumvent the participatory notice and comment process that they had been actively holding out to the public they planned to use. [ER 57-58; ¶88, 90, 92]. *cf. Sun Il Yoo .v INS*, 534 F.2d 1325 (9th Cir. 1976)(alien was told to file new petitions rather then appeal adverse decision, but under law at new filing did not qualify); *see also Wharton*, 514 F.2d at 408, 412 (affirmative misconduct to give misleading information).

3. The Impending Deportation Of The Plaintiffs Or Any Other Serious Injustice That Will Result If The Defendant Is Not Estopped Outweighs Any Potential Damage To The Public Interest

If the Plaintiffs' I-829 petition is denied, they will immediately lose their lawful status in this country, which subjects them to deportation and possible bars to re-entry. Affirmative misconduct which threatens deportation is considered a serious injustice sufficient to estop the INS. *Sun Il Yoo,* 534 F.3d at 1329 (deportation viewed as a profound and unconscionable injury); *Gestuvo v. District*

---

[9] [ER 149]("In 1996, I believed that the appropriate course for resolving lingering questions about this arrangement would be to publish a regulation to clearly establish our requirements"); [ER 153]("this should all take effect prospectively. . . we need to do this in a very positive and forward looking manner and not take a position that will unnecessarily hurt individuals who have relied on the prior decisions")

Director, INS, 337 F.Supp. 1093, 1094 (C.D. Cal. 1971)("This case is before the court because the Immigration and Naturalization Service changed its mind: as a result, petitioner faces deportation); *Patel v. INS*, 638 F.2d 1199, 1205 (9th Cir. 1981); *Maceren v. District Director, INS*, 509 F.2d 934, 940 (9th Cir. 1975); *cf. Johnson*, 682 F.2d 871-72 (serious injustice to revoke parole of a statutorily un-parolable convict after several reviews indicating his eligibility and 15 months of parole release).

As a result of their loss of status and deportation, the Plaintiffs will suffer the injustice of losing all the time, energy, and assets that they have expended over the last five to six years in immigrating to this country and integrating into their local communities. [ER 5; ¶ 5]. They will lose their new careers and educational opportunities. [ER 13; ¶ 30, 31]. Furthermore, after several years of schooling in the United States, their young children will be forced to re-adapt to a now unfamiliar or unknown system. [ER 13; ¶ 31].

These losses are compounded by the fact that the Plaintiffs in many cases left successful careers and liquidated substantial assets in their native countries in order to pursue a new life in the United States. [ER 13-14; ¶ 32]. Losses of this type are well recognized as serious injustices. *Johnson*, 682 F.2d at 872 (serious injustice to revoke parole after 15 months of successful reintegration); *Wharton*, 514 F.2d at 412 ("Governmental conduct would work a serious injustice if this

family were divested of the home in which they have invested so much of themselves").

Furthermore, there simply is no injury to the public interest if the Plaintiffs are allowed to remain in this country as lawful permanent residents. The proposition is illustrated by the case of *Gestuvo*, 337 F.Supp. 1093 (C.D. Cal. 1971). In that case, then district court Judge Pregerson held that the INS was estopped from denying the intending immigrant's adjustment of status, when the service first approved his application for labor certification, but later effectively reversed that decision during his adjustment of status interview where essentially nothing factually had changed – except that the INS' mind had changed. As the court stated,

> The national interest lies in a conscientious review by the Service of the applications that are submitted to it at the time of their submission: it does not lie in sacrificing a man's efforts and hopes to a mechanical and inhuman application of administrative regulations. People . . . rely on the Service to reach accurate rulings on which they can base their plans.

Id. at 1102-1103 (emphasis added); *see also Watkins*, 875 F.2d at 709 ("When the government deals carefully, honestly and fairly with its citizens, the public interest is likewise benefited")(internal quotations omitted).

4. The INS Was Fully Aware Of The Structure Of The Plaintiffs' Investments When They Were First Approved And Granted Residency

The INS was fully aware of the structure of the Plaintiffs when they were first approved and granted residency. The I-526 petitions require that the immigrant investor fully document the structure of the investment and provide the business plans. 8 C.F.R. § 204.6(a)(1). The Plaintiffs have alleged that they fully disclosed all aspects of their investment structures. [ER 55; ¶83]; *Guestavo*, 337 F.Supp. at 1101 (Service is aware of all facts submitted with the petition). Moreover, the Partnerships themselves were repeatedly engaged in dialogue with the INS in order to ensure that they would satisfy the Immigrant Investor Law.

5. The Plaintiffs Are Entitled To Rely On Their Approved I-526 Petitions

The Plaintiffs have a substantial reliance interest in their official determination of eligibility to become permanent residents because they all received an adjudicated and approved I-526 petitions. *Gestuvo,* 337 F.Supp. at 1102 ("Gestuvo had a right to believe that the Service intended its [approval of the labor certification] to be acted upon").

An individual's reliance interest in her own eligibility determination is so strong that that it cannot be defeated even where the decision was issued under the government's own mistaken view of the law. *Watkins*, 875 F.2d 699 (strong reliance interest in eligibility determination to re-enlist even where the determination is inconsistent with law); *Johnson*, 682 F.2d at 872 (prisoner had right to believe that he was eligible for parole when he was repeatedly told he was

eligible, even thought statute forbid parole); *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997)(prisoner issued eligibility determination indicating possibility for early release had reliance interest in that determination even if it was based on an potentially erroneous reading of law). Indeed, in *Cort,* so strong was the expectation created by the Bureau's eligibility determination, that this Court rejected the government's assertion that it should be permitted to revoke it as a mistake issued on an erroneous interpretation of the law. *Cort*, 113 F.3d at 1085-1086. This Court was "unwilling to apply so novel a principle of law," which it characterized as "confusing" and "unique." *Id.* at 1085-1086.

6. The Plaintiffs Were Unaware That Their Investments Did Not Comply With The Immigrant Investor Law

The Plaintiffs fully and justifiably believed that that their investments complied with the law. [ER 57; ¶ 87]. The averment of good faith compliance is further buttressed by the very fact that the INS officially sanctioned them when they approved the I-526 application. *Watkins*, 875 F.2d at 711(Army's repeated re-enlistment of un-enlistable service man makes it impossible to charge the individuals with knowledge that his enlistment did not comply with the law), *citing Johnson*, 682 F.2d at 872 (government's active misadvice to prisoner regarding his

eligibility for parole prevented court with charging the prisoner with even constructive knowledge of the proper statute in question).[10]

7. The Plaintiffs' Actually Relied On Their Approved I-526 Petitions To Their Detriment

It is also clear that the Plaintiffs' actually relied to their detriment on the INS' approval of their investment plan. [ER 56-57; ¶ 86, 87]. As discussed above, the Plaintiffs have sufficiently averred sufficient hardship flowing from the re-adjudication of their investment precedent decisions. They are now subject to deportation, potential bars to re-entry, being uprooted from their new communities and lives, and the loss of their significant investment. *Johnson*, 682 F.2d at 873 (detrimental reliance on parole decision where there is successful reintegration with family and a new business has been established); *Patel v. INS*, 638 F.2d 1199, 1205 (9th Cir. 1981)(deportation); *Wharton*, 514 F.2d at 412 (loss of family farm).

These harmful effects all could have easily been avoided had the INS respected the settled expectations it created in a relatively small number of previously approved cases, had it honored its public and private assurances to

---

[10] This reliance is also based on thousands of adjudications, general counsel memorandum, [ER 59, 60-61; ¶ 94, 96], and representations of INS. [ER 59; ¶ 88]; [ER 149]("I advised counsel for [the partnerships] that [rulemaking] was our intended course."). *See Microcomputer Technology Institute v. Riley*, 139 F.3d 1044, 1051 (5th Cir. 1998)(regulated entity could "reasonably rely" on statement in a General Counsel memo that any changes to policy would be made by prospective regulations); *See also McDonald v. Watt*, 653 F.2d 1035, 1044-1045 (5th Cir. 1981)(rule not applied retroactively because it was reasonable to rely on a four year agency practice following a particular interpretation).

make any changes in criteria through a public and participatory process, or had it not acted carelessly in placing its official imprimatur of approval on petitions and investments it would later disavow. Indeed, the immigrant investors would never have uprooted their families from their lives to immigrate, only to be expelled more than five years later. [ER 57; ¶87]

8. *R.L. Investment* Is Not Applicable to the Plaintiffs' Estoppel Claim

This Court's affirmance in *R.L. Investment v. INS*, 278 F.3d. 874 (9th Cir. 2001), *adopting* 86 F.Supp.2d 1014 (D. Haw. 2000) does not control this case. There, the district court determined that a *prospective* immigrant investor could not estop the INS based simply on the evidence of four other approved petitions. *R.L. Investment*, 86 F.Supp.2d at 1027. Furthermore, the district court determined that there was little injustice, where the individual's investment remained in escrow pending the approval and where the individual could take that money and re-apply. *Id.* This case is notably different. Here, as discussed above, the Plaintiffs may justifiably rely on their own I-526 approvals. *Gestuvo,* 337 F.Supp. at 1102; *Watkins*, 875 F.2d 699; *Johnson*, 682 F.2d at 872; *Cort*, 113 F.3d 1081; *Izumii* 21 I & N Dec. at 197("only way to obtain a determination on eligibility for immigrant-investor classification is to file a petition"). Moreover, the degree of injustice is notably greater here, where the Plaintiffs are not able to simply reapply or continue

with their life in their native country, as in *R.L. Investment*. They have uprooted their lives in reliance on the INS' approval and now they are subject to expulsion.

IV. THE DEFENDANT VIOLATED THE APA'S NOTICE AND COMMENT REQUIREMENT BY PROMULGATING THE PRECEDENT DECISIONS AND APPLYING THEM TO RE-ADJUDICATE THE PLAINTIFFS' I-829 PETITIONS

The criteria announced in the precedent decisions - particularly as applied to individuals with approved I-526 petitions - violates the APA's notice and comment requirement because: (1) the criteria constitute rules of general prospective application which upset settled expectations; (2) the new criteria amend or add additional elements to the regulations and statute; and (3) the criteria represent changes to a long-standing practice or policy.

A. Notice and Comment is Required Where Rules Announced in Adjudications Unsettle Legitimate Reliance Interests

As this Court held in *Paff v. HUD*, 88 F.3d 739 (9th Cir. 1996), an agency may not announce new rules in adjudications "where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application." *Pfaff*, 88 F.3d at 748.

In *Pfaff,* this Court invalidated a new rule that HUD had announced by adjudication because the rule was found to be broad, general, and prospective in application, and because it was inconsistent with and departed abruptly from HUD's previous *interpretations*. *Pfaff,* 88 F.3d 739. The Court was especially troubled in *Pfaff* that HUD, like the INS here, had made "inconsistent and misleading representations to those regulated . . . and, in so doing, has led them down the garden path." *Id.* at 747. The Court reasoned:

> Adjudication is best suited to incremental developments to the law, rather than great leaps forward. The APA contains numerous mechanisms, such as the notice and comment rulemaking procedure, by which the public is given notice of proposed changes before they occur. For this reason, the Supreme Court has concluded that "rulemaking is generally a better, fairer, and more effective method" of announcing a new rule than ad hoc adjudication.'

Id. at 748 (citations omitted).

The Plaintiffs' challenge in this case fits squarely within this line of cases represented by: *Pfaff*, 88 F.3d 748; *Ford Motor Co*, 673 F.2d at 1009-10; *Yesler*, 37 F.3d at 449; *Patel*, 638 F.2d at 1203-05; *Ruangswang*, 591 F.2d at 44. Indeed, these cases are on point and indistinguishable. They stand for the proposition, applicable here, that where an individual conforms his conduct to a given regulation or statute, an agency may not subsequently in an adjudication, without prior notice, unsettle a legitimate expectation that the individuals have based on their good faith attempt to comply with the legislative rule. This is especially true

where agency interpretations are conflicting and would cause hardship or burden. *Patel v. INS*, 638 F.2d at 1205.

1. The Criteria Announced In The Precedent Decisions Depart Radically From The Agency's Previous Application Of The Immigrant Investor Law To The Plaintiffs I-526 Approvals

The new criteria announced in the precedent decisions represent a radical departure from its previous application of the law in the immigrant investor's I-526 adjudications. [ER 63-70; ¶ 104, 105]. The INS, operating under its standards prior to the precedent decisions, approved each of the Plaintiffs' similarly structured investments in more than 200 different I-526 petitions. [ER 59; ¶ 94]. Then, in evaluating these same investments again, the defendant has begun denying the Plaintiffs' I-829 petitions, claiming they failed to comply with the standards that were announced for the first time in the precedent decisions. *Pfaff*, 88 F.3d at 748 ("compelling business necessity" rule departs abruptly from preexisting "reasonableness standard"); *see, also, Oil, Chemical and Atomic Workers v. NLRB*, 842 F.2d 1141, 1144-1145 (9th Cir. 1988)(abrupt departure to shift a party's burden of proof); *see also Guy Atkinson*, 195 F.2d at 149 (NLRB could not reverse its "administrative choice" of not assuming its jurisdiction over a particular industry retroactively).

2. The Immigrant Investors' I-526 Approvals Give Rise To A Settled Interest In The Application Of The Prior Criteria

Each of the immigrant investors have a settled interest in their eligibility for permanent residence based on their authoritative I-526 approval. *Cort v. Crabtree*, 113 F.3d 1081; *Watkins*, 875 F.2d 699; *Johnson*, 682 F.2d at 872. Indeed, each of these cases reflects the strong reliance that one has in their own agency approval.

Here, the Plaintiffs are asserting a settled expectation based first and foremost upon their own individually and previously approved investment plans (I-526). [ER 13; ¶ 33]. The precedent decisions themselves support the proposition that the Plaintiffs have a vested reliance interest in that decision. The Associate Commissioner in *Izumii* has already indicated that an approved I-526 petition gives rise to "reasonable" and "justifiable" reliance. *Izumii*, I & N Dec. at 197. The Associate Commissioner plainly stated, "it is basic immigration law that the only way to obtain a determination on eligibility for immigrant-investor classification is to file a petition with the Service." *Id.*, *citing* 8 C.F.R. 204.6(a), which refers to the filing of an I-526 petition along with all required documentation. It is thus *basic immigration law* that the INS' approval of the immigrant investors' I-526 petitions authoritatively indicated that their investments - at least as to them – gave rise to a reasonable expectation of their continued eligibility under the Immigrant Investor Law.

3. The New Criteria Would Subject the Immigrant Investors To Substantial Harm

It is without question that the immigrant investors are subject to substantial harm if the precedent decisions are applied to terminate their status. Threats of deportation have consistently been held by this Court as sufficient harm to prevent the application of questionably applicable law. In light of the radical shift in policy and clear hardship, this Court should be guided by its decision in *Patel*, 638 F.2d 1199. In that case, this Court held that it was an abuse of discretion to apply a particular criterion announced in adjudication where "the INS had been sending aliens confusing signals" and the application would work "substantial hardship" (i.e. deportation). *Id.* at 1205; *Maceren*, 509 F.2d at 940 ("The unfair prejudice to the holder of the previously issued labor certificate is manifest . . . Retroactive application of § 60.5(b) would make deportation a certainty for those, like Maceren, who are unable to obtain revalidation of their certificates due to a change in labor conditions.")

4. The Precedent Decisions Are Broad and General In Scope and Prospective In Application

It is clear from both the manner in which the INS rules were promulgated in the precedent decisions, and the nature of the rules announced that they were to be general and prospective rules that sought to circumvent the APA. Indeed, the INS itself believed that notice and comment was required, but rather engineered a novel process to circumvent the APA by issuing precedent decisions.

The INS initially intended to publish regulations in "final form." [ER 58; ¶ 92].[11] Instead of publishing the regulations and giving the public an opportunity to comment, they put all matters on hold until the General Counsel could issue a memorandum. [ER 58-59; ¶ 92-93]. Once the General Counsel issued the memorandum, INS headquarters established a process where the issues raised in the memorandum would be funneled to the Administrative Appeals Office by having the regional directors certify cases to it. [ER 62; ¶100]. It is important to note that the Administrative Appeals Office is not an independent body and rarely issues "precedent decisions." The Administrative Appeals Office then chose the certified cases that could be used to develop the rules established in the four precedent decisions. [ER 62; ¶ 101]. Different branches of the INS, including the General Counsel's office that had originated the December 17, 1997 memorandum reviewed and approved the draft and were involved in the decision making process concerning the precedent decisions. [ER 62; ¶ 101].

This process is hardly the type of "exception" through "adjudication" to public rulemaking envisioned in cases such as *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Here, there was not an "adjudication" of a case in a quasi-judicial

[11] 60 Fed. Reg. at 29772; [ER 149] ("In 1996, I believed that the appropriate course for resolving lingering questions about this arrangement would be to publish a regulation to clearly establish our requirements. I advised counsel for AIS that that was our intended course. . . We have not published a rule or issued a notice to the contrary").

or judicial sense, but rather a pre-arranged process where the agency channeled certain cases to the Administrative Appeals Office which itself did not decide the cases but rather accepted and obtained the "okay" from various departments of INS including the General Counsel before the Associate Commissioner for Examinations issued the decision. Such conduct eviscerates the purpose of the APA's notice and comment provisions. *Cf. Shell Offshore v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001)("it is similarly clear that Interior's new policy was the basis for the adjudication, rather than the facts of the particular adjudication causing Interior to modify or re-interpret its rule. Interior did not apply a general regulation to the specific facts of Shell's case. Rather, it established a new policy and then applied that new policy to several OCS producers, including Shell.").

B. Plaintiffs' APA Claims Are Not Inconsistent With *Guernsey, Chief Probation Officers,* and *R.L. Investment*

In contrast to the district court's assessment, the Plaintiffs' APA claims are not inconsistent with either *Chief Probation Officer v. Shalala*, 118 F.3d 1327 (9th Cir. 1997), *Guernsey v. Shalala*, 514 U.S. 87, 115 S.Ct. 1232 (1995), or *R.L. Investment.*

The new criteria announced in the precedent decisions do amend and add to the controlling regulations and statute, and thus fall squarely within *Guernsey*'s line of cases. In holding that *Izumii* was consistent with the regulations, the district court simply addressed one aspect of the *Izumii* holding: the new definition of

"'invest' (or 'contribution of capital')." [ER 134]. The district court did not examine substantive changes such as the new rule that an investor may qualify only if he joins at the paper formation of the partnership. Furthermore, the district court's examined the consistency of the new definition of "investment" in the context 8 C.F.R. § 204.6 (I-526 proceedings), and not the provision applicable to the Plaintiffs in this case, 8 C.F.R. § 216.6 (I-829 proceedings). [ER 134].

The district court's failure to examine the criteria in the context of the regulation's I-829 proceedings is a fatal flaw. Unlike *R.L. Investment*, on which the district court relies, the immigrant investors in this case are petitioning to remove the conditions of their residency, and not seeking initial classification. As discussed below, the narrow scope of inquiry required by the statute and regulations during the I-829 proceedings do not permit a reexamination of threshold issues settled at the I-526 stage, such as the nature and structure of the investment. Thus, examining the nature and structure of the investment introduces a new element of proof into the I-829 proceedings, which is not permitted by the regulations or statute.

The district court also erred in relying on *Chief Probation Officer* and *Guernsey* to dismiss Plaintiffs' claim that the precedent decisions' radical departure from longstanding practice, including the Plaintiffs' own approvals, gave rise to notice and comment. Neither *Chief Probation Officer, Guernsey*, nor *R.L.*

Investment foreclose the need for notice and comment in a context other than where a rule amends a regulation or a statute. For example, in *Guernsey*, the Supreme Court never addressed this question. Its focus on whether an interpretive rule contradicts a regulation is exclusively a product of the question presented in that case, and it simply cannot be read to preclude the use of notice and comment in other contexts.

In contrast to *Guernsey*, *Chief Probation Officer* and *R.L. Investment* do address the question of whether notice and comment is required where a new interpretation conflicts with a prior policy evidenced by agency approvals. The rejection of notice and comment in both of these cases however is easily explained by their distinct factual backgrounds. In *Chief Probation Officer,* this Court expressly characterized the policy as "short lived." 118 F.3d at 1334. Furthermore, it pointed out that the agency's past practice could never be legislative because the operative regulation precluded a regulated entity from relying on previously approved plans. *Id.* at 1334-1335. ("future 'interpretations' may alter whether plans continue to be approved"). This case presents a very different factual scenario. Here, the regulatory framework envisions reliance once there is an approved I-526 petition. This is because the INS is only supposed to examine whether the

investment was *sustained* and whether the information in the petition is "true."[12] This important distinction likewise takes this case outside of the scope of *R.L. Investment.* Indeed, in that case the immigrant investor was still at the initial stage where the INS had very broad authority to question the nature and scope of the investment. Moreover, in contrast to this case, the immigrant investor supported his assertion of policy with only four other approvals which was easily dismissed as a "short lived." *R.L. Investment,* 86 F.Supp.2d at 1025-26. *Cf.* [ER 61, 63; ¶¶ 97, 104](". . . . until 1997, not a single immigrant investor petition . . . was ever denied . . . because of the use of one of the above stated program structures").

C. The Criteria Announced in the Precedent Decisions And Their Application to the Plaintiffs Amend the Statute And Regulations

The INS' amended the Immigrant Investor Law in two respects. First, the INS has made legislative changes to eligibility criteria for investments. Second, the INS has expanded the narrow scope of inquiry mandated by the statute and

---

[12] The Supreme Court has recognized that an administrative adjudication may have preclusive effect in subsequent proceedings involving the same parties. *See United States v. Utah Construction and Mining*, 384 U.S. 394, 421-422, 86 S.Ct. 1545, 1559, 1560, 16 L.Ed.2d (1966); *see also Safir v. Gibson*, 432 F.2d 137, 142-143 (2nd Cir. 1970)(Friendly, J.)(applying principles of *res judicata* to both issues of fact and law decided by one agency in a subsequent administrative proceedings before another agency). In light of the mutuality of parties, the Defendant should be collaterally estopped from re-adjudicating the propriety of the Plaintiffs' investments when adjudicating the I-829 petition. Indeed, the question of whether the Plaintiffs' investments comply with the requirements of the Immigrant Investor Law is adjudicated with the I-526 petition and the issue of whether that approved investment is sustained is the only matter legitimately considered in the I-829. *Cf.* 8 C.F.R. § 204.6(j) *with* 8 C.F.R. 216.6(a)(4), (c).

regulations that is to be undertaken in the adjudication of the I-829 petitions to include re-adjudication of the underlying investment.

1. The INS Has Legislatively Amended The Regulations And Created New Requirements For Investments To Qualify Under The Law

Even under *Guernsey*, the changes announced in the precedent decisions constitute legislative rulemaking because they add to, alter, amend or are inconsistent with either the regulations or the governing statute.

The current regulations recognize that a commercial enterprise includes a "partnership" (whether limited or general) and excludes only a "noncommercial activity." 8 C.F.R. §204.6 (e). The regulations provide that multiple investors may be considered to establish a new commercial enterprise "provided each petitioning investor has invested or is actively in the process of investing the required amount" [and that the investment] "results in the creation of at least ten full-time positions for qualifying employees." 8 C.F.R. §204.6(g)(1). They further recognize that "duties normally granted to limited partners under the Uniform Limited Partnership Act" will be considered sufficient to establish that the person is engaged in the management of the enterprise. 8 C.F.R. §204.6(j)(5)(iii). Finally, the regulations provide that the establishment of a new commercial enterprise includes the "creation of an original business." 8 C.F.R. §204.6 (h).

There is no requirement in any of these regulations that a limited partner would be ineligible if they became limited partners after the partnership was formed. Nor is the statute to the contrary. INA §203(b)(5)(A), 8 U.S.C. §1153(b)(5)(A). Here, the INS has simply legislated a new requirement that a person must not only be a limited partner, who is involved in the creation of an original business and who performs all the duties normally performed under the ULPA, but he must also have been a partner when the partnership was formed. This simply adds a new requirement not permissible under the APA without notice and comment rulemaking. *Patel v. INS* 638 F.2d 1199 (9th Cir. 1980); *Ruangswang v. INS,* 591 F.2d 39 (9th Cir. 1978).

The INS also adds new requirements not found in, and contrary to, the governing statute and regulations by prohibiting redemption agreements. The statute's focus is on the initial investment, the amount of capital required, and the number of jobs created. 8 U.S.C. § 1153(b)(5) INA §203(b)(5). The statute only requires the person to maintain the investment for a two year period after obtaining his conditional residency. The regulations, likewise, do not address redemption agreements. The regulation properly focuses on whether the purpose is investing or simply whether there is an intent to invest. 8 C.F.R. §204.6(j)(2). The investor under the regulation must have the "present commitment" to invest. The regulations do not bar a person who has the present intent to invest from pulling

out his investment as soon as he obtains his permanent residency and making an agreement to that effect. Indeed, even INS recognizes the validity of redemption agreements. However, they now seek to restrict such agreements by denying status to an investor who enters into the redemption agreement before obtaining permanent residency. This simply adds a new condition to the statute and regulations which currently do not bar divestiture before obtaining residency.

The refusal to permit guaranteed returns also constitutes legislative rulemaking requiring notice and comment. Neither the statute, nor the regulations prohibit guaranteed returns. The statute only requires that the person "has invested or is actively in the process of investing" the required amount of capital. INA §203(b)(5)(C). Similarly, the regulation requires only "evidence that the alien invested or was actively in the process of investing the required capital." 8 C.F.R.§216.6(a)(4)(ii). The determination to add this requirement indicates what a sharp departure this rule is from the statute and regulations which properly emphasize the initial investment and job creation.

2. The INS has amended the narrow scope of inquiry that is to be undertaken in the adjudication of an I-829 petition

It is clear that the INS is amending the regulations by broadening the scope of inquiry to be undertaken during the I-829 adjudication. Both the statute and the regulations provide for a very narrow scope of inquiry during the I-829 proceeding.

This is because the INS carefully assesses and adjudicates all relevant features of the immigrant investors' business and investment plans at the I-526 proceeding.

The regulatory provisions governing the adjudication of the I-526 petition require that the evidence submitted must show that "the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time jobs for not fewer than 10 qualifying employees." 8 C.F.R § 204.6(j). When an immigrant investor receives an I-526 approval, the INS must conclude based on a review of the exhaustive evidence required that the structure and nature of his business and investment plan: (a) met the definition of an active investment; (b) satisfied the capital requirement; (c) met the definition of a new commercial enterprise; and (d) would satisfy the job requirement.[13]

The I-829 adjudication does not proceed *ab initio*, and is not designed to second guess the first adjudication. It is intended simply to determine if the investor "in good faith, substantially" "maintained" and "sustained" the qualifying investment throughout the alien's conditional residence. 8 U.S.C. §

[13] During the initial process the INS is expected to review and approve extensive documentation, *inter alia*: (a) the business organization document or proof that the capital contribution will transform an existing business into a new business, 8 C.F.R § 204.6(j)(1)(i); (b) bank statements and promissory notes, 8 C.F.R. § 204.6(j)(2)(i)-(v), to reflect the active nature of the investment; and (c) the partnership agreement showing that the individual has the rights and duties normally accorded to limited partners under the Uniform Limited Partnership act, 8 C.F.R. § 204.6(j)(5).

1186b(d)(1)(C), INA §216A(d)(1)(C); 8 C.F.R. § 216(c)(1)(iii). The narrow scope of the INS inquiry is further apparent when comparing it to the far broader authority that the INS has in the first two years to reexamine the investment for any basis under the act in rescission proceedings – such authority is notably not granted in the I-829 proceedings. *cf.* 8 U.S.C. § 1186b(b)(1)(A)-(C), INA § 216A(b)(1)(A)-(C) *with* 1186b(d)(1)(A)-(C), INA 216A(d)(1)(A)-(C), 8 C.F.R. § 216.6(c).

The INS' authority in these proceedings is simply to assess whether the evidence determining that it was sustained and maintained in good faith is "true." If the facts in the petition are deemed to be "true," the INS is supposed to remove the conditions. 8 U.S.C. § 1186b(3)(B), INA § 216A(3)(B).

The distinct documentation requirements further reflect the narrow and *pro forma* nature of the proceeding. For example, suggested evidence for the formation of the commercial enterprise is simply federal income tax returns, which would reflect an on going business. 8 C.F.R. § 216.6(a)(4)(i). This is in marked contrast to the extensive documentation, such as the partnership agreement, that is required for the initial approval, which is intended to assess the propriety and structure. 8 C.F.R § 204.6(j)(1)(i).

The INS in applying the precedent decision to the immigrant investors has in violation of the statute and regulations, stepped outside of the intended narrow scope of inquiry at the I-829 stage. The INS' denial of Plaintiff Chiang's petition

arose because he joined the partnership after its paper formation [ER 103], reassessed the fair market value of his initial capital contribution [ER 104] and the terms of his promissory note did not constitute an "at risk" investment. [ER 105,107]. The INS' reassessment of the basic nature of these features went well beyond the flexible assessment of whether he "in good faith, substantially" "sustained" his investment or whether the documents he submitted were "true." Thus, the INS has amended its rules to circumvent the two year limit on rescinding I-526 approvals and has fundamentally broadened the scope of the I-829 proceedings to permit an *ultra vires* re-examination of the issues that are supposed to be settled in the I-526 adjudication. Such an amendment compels notice and comment rulemaking.

D. The INS Is Required To Engage In Rulemaking When It Contravenes a Long Standing Practice or Policy

The district court erred in determining that the INS was not required to engage in notice and comment because the precedent decisions conflicted with a longstanding practice and policy of the INS. Both the D.C. Circuit and the Fifth Circuit have expressly held that an agency may not violate a longstanding interpretive policy without engaging in notice and comment. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C.Cir. 1999); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001). This Court's jurisprudence is also consistent with this line of cases. While it has not directly confronted this issue, it has ruled

in a similar fashion that interpretive rules may give rise to notice and comment in light of the nature of the rule announced and where certain equitable and policy factors are present. *Pfaff*, 88 F.3d at 748.

Applying *Shell* to the instant case, it is clear that notice and comment is required. *Shell* involved an agency practice spanning six years (1988-93) whereby, the Department of Interior permitted off-shore oil producers to utilize a Federal Energy and Regulatory Commission (FERC) tariff rate to calculate their royalty payments. *Shell,* 238 F.3d at 624-625. At some point in 1993, the agency questioned whether FERC had jurisdiction to approve the tariff rate, and thus instituted a new policy requiring the oil producers to petitions FERC for jurisdiction prior to using a FERC tariff rate to calculate royalties (previously a rate was valid when filed unless there was a protest). *Id.* The oil producers challenged this new "jurisdiction petition policy" violated notice and comment. *Id.*

The Fifth Circuit noted that "Interior's new practice may be a reasonable change in its oversight practices and procedures." *Id.* at 230. However, the court found that, "it places a new and substantial requirement on many OCS lessees, was a significant departure from long established and consistent past practice." *Id.* As such, the policy change "should have been submitted for notice and comment before adoption." *Id.*

Plaintiffs, in this case, have alleged that the INS over a seven-year course of consistently adjudicating petitions and issuing general counsel memoranda or other authoritative statements established a series of rules and criteria for approving Immigrant Investor petitions under the Immigrant Investor Law [ER 60-61, 63-70; ¶¶ 96, 104]. They have likewise alleged that the precedent decisions contradicted these prior rules, and that they essentially place new and substantial requirements on the immigrant investors [ER 63-70; ¶ 104]. Thus, when applying the rule of *Shell* and *Alaska Professional Hunters* to this case, it is clear that notice and comment rule making was required.

V. THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE AND DECLARATORY RELIEF TO THE SIX DISMISSED NAMED PLAINTIFFS BASED ON THEIR RETROACTIVITY CLAIMS

The district court erred in denying the immigrant investors and putative class members' request for injunctive and declaratory relief. As the district court properly determined, the Plaintiffs' complaint has alleged that the INS' promulgation of the precedent decisions and application to the immigrant investor's I-829 petitions would constitute a retroactive application of law. [ER 139]. As such, the district court held that the application of this Court's retroactivity analysis should be applied. *Montgomery Ward*, 691 F.2d 1322.

The district court's errors with respect to ripeness has eliminated from the purview of the court hundreds of Plaintiffs with ripe claims who are prevented

from obtaining injunctive and declaratory relief to prevent the unwarranted retroactive application of law. Indeed, without question, this Court's jurisprudence presumptively disfavors an agency's attempt to retroactively apply a new standard of law. *George v. Camacho*, 119 F.3d 1393, 1396-1397 (9th Cir. 1997)(en banc)("considerations of fairness . . . presumptively prohibit retroactive application of the law"); *Guy Atkinson*, 195 F.2d at 149 ("The inequity of such an impact of retroactive policy making . . . is the sort of thing our law abhors."). This is so particularly where the harm will devastate hundreds of immigrant investors and their families who uprooted their lives to invest in our economy at the formal invitation of the INS - and who are now subject to expulsion simply because the INS has changed its mind. As Judge Pregerson stated in *Gestuvo,*

> People like Gestuvo rely on the Service to reach accurate rulings on which they can base their plans. It was the Service that led Gestuvo down the path towards permanent residence. Having done so, it should not have shoved him into a ditch along the way. Its action was improper.

337 F.Supp. at 1103.

CONCLUSION

WHEREFORE, the Plaintiffs/Appellants respectfully request that this Honorable Court reverse in part the judgment of the district court and remand with instructions to reinstate all named individual Plaintiffs and to permit them to seek

class wide injunctive and declaratory relief on their APA, retroactivity, and estoppel claims.

DATE: June 13, 2002

Respectfully submitted,

Ira J. Kurzban, Esq. (State Bar No.: 71563)
Kurzban, Kurzban, Weinger & Tetzeli PA
2650 SW 27th Avenue, 2nd floor
Miami, FL 33133
Tel: 305.444.0060; Fax. 305.444.3503

Marc Van Der Hout, Esq. (State Bar No.: 80778)
Van Der Hout, & Brigagliano
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
Tel. (415) 981-3000; Fax. (415) 981-3003

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Plaintiffs/Appellants state that there are no known pending related cases.

CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 00-15627

I certify that: **(check appropriate option(s))**

___1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

X Proportionately spaced, has a typeface of 14 points or more and contains **13996** words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14, 000 words; reply briefs must not exceed 7, 000 words),

or is

__ Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14, 000 words or 1300 lines of text; reply briefs must not exceed 7, 000 words or 650 lines of text).

___2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

__ This brief complies with Fed. R. App. P. 32 (a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

__ This brief complies with a page or size volume limitation established by separate court order dated ___ and is

__ Proportionately spaced, has a typeface of 14 points or more and contains ____ words,

or is

__ Monospaced, has 10.5 or fewer characters per inch and contains ____ pages or __ words or ___lines of text.

__3. Briefs in Capital Cases.

__ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

__ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words),

or is

__ Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

__ 4. Amicus Briefs.

__ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

or is

__ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

or is

__ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

June 13, 2002
Date

Ira J. Kurzban, Esquire
Kurzban, Kurzban, Weinger & Tetzeli, P.A.
2650 S.W. 27th Avenue, 2nd Floor
Miami, Florida 33133
Tel. (305) 444-0060
Fax. (305) 444-3503

8 U.S.C. § 1153(b)(5), INA § 203(b)(5)

(5) Employment creation

(A) In general

Visas 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--

(i) which the alien has established,

(ii) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who establish a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) Targeted employment area defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) Rural area defined

In this paragraph, the term "rural area" means any area other than an area within

a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment--

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

8 U.S.C. § 1186b, INA § 216A

§ 1186b. Conditional permanent resident status for certain alien entrepreneurs, spouses, and children

(a) In general

(1) Conditional basis for status

Notwithstanding any other provision of this chapter, an alien entrepreneur (as defined in subsection (f)(1) of this section), alien spouse, and alien child (as defined in subsection (f)(2) of this section) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

(2) Notice of requirements

(A) At time of obtaining permanent residence

At the time an alien entrepreneur, alien spouse, or alien child obtains permanent resident status on a conditional basis under paragraph (1), the Attorney General shall provide for notice to such an entrepreneur, spouse, or child respecting the provisions of this section and the requirements of subsection (c)(1) of this section to have the conditional basis of such status removed.

(B) At time of required petition

In addition, the Attorney General shall attempt to provide notice to such an entrepreneur, spouse, or child, at or about the beginning of the 90-day period described in subsection (d)(2)(A) of this section, of the requirements of subsection (c)(1) of this section.

(C) Effect of failure to provide notice

The failure of the Attorney General to provide a notice under this paragraph shall not affect the enforcement of the provisions of this section with respect to such an entrepreneur, spouse, or child.

(b) Termination of status if finding that qualifying entrepreneurship improper

(1) In general

In the case of an alien entrepreneur with permanent resident status on a conditional basis under subsection (a) of this section, if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that--

(A) the establishment of the commercial enterprise was intended solely as a means of evading the immigration laws of the United States,

(B)(i) a commercial enterprise was not established by the alien,

(ii) the alien did not invest or was not actively in the process of investing the requisite capital; or

(iii) the alien was not sustaining the actions described in clause (i) or (ii) throughout the period of the alien's residence in the United States, or

(C) the alien was otherwise not conforming to the requirements of section 1153(b)(5) of this title,

then the Attorney General shall so notify the alien involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (and the alien spouse and alien child) involved as of the date of the determination.

(2) Hearing in removal proceeding

Any alien whose permanent resident status is terminated under paragraph (1) may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that a condition described in paragraph (1) is met.

(c) Requirements of timely petition and interview for removal of condition

(1) In general

In order for the conditional basis established under subsection (a) of this section

for an alien entrepreneur, alien spouse, or alien child to be removed--

(**A**) the alien entrepreneur must submit to the Attorney General, during the period described in subsection (d)(2) of this section, a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information described in subsection (d)(1) of this section, and

(**B**) in accordance with subsection (d)(3) of this section, the alien entrepreneur must appear for a personal interview before an officer or employee of the Service respecting the facts and information described in subsection (d)(1) of this section.

(2) Termination of permanent resident status for failure to file petition or have personal interview

(A) In general

In the case of an alien with permanent resident status on a conditional basis under subsection (a) of this section, if--

(**i**) no petition is filed with respect to the alien in accordance with the provisions of paragraph (1)(A), or

(***ii***) unless there is good cause shown, the alien entrepreneur fails to appear at the interview described in paragraph (1)(B) (if required under subsection (d)(3) of this section),

the Attorney General shall terminate the permanent resident status of the alien (and the alien's spouse and children if it was obtained on a conditional basis under this section or section 1186a of this title) as of the second anniversary of the alien's lawful admission for permanent residence.

(B) Hearing in removal proceeding

In any removal proceeding with respect to an alien whose permanent resident status is terminated under subparagraph (A), the burden of proof shall be on the alien to establish compliance with the conditions of paragraphs (1)(A) and (1)(B).

(3) Determination after petition and interview

(A) In general

If--

(i) a petition is filed in accordance with the provisions of paragraph (1)(A), and

(ii) the alien entrepreneur appears at any interview described in paragraph (1)(B),

the Attorney General shall make a determination, within 90 days of the date of the such filing [FN1] or interview (whichever is later), as to whether the facts and information described in subsection (d)(1) of this section and alleged in the petition are true with respect to the qualifying commercial enterprise.

(B) Removal of conditional basis if favorable determination

If the Attorney General determines that such facts and information are true, the Attorney General shall so notify the alien involved and shall remove the conditional basis of the alien's status effective as of the second anniversary of the alien's lawful admission for permanent residence.

(C) Termination if adverse determination

If the Attorney General determines that such facts and information are not true, the Attorney General shall so notify the alien involved and, subject to subparagraph (D), shall terminate the permanent resident status of an alien entrepreneur, alien spouse, or alien child as of the date of the determination.

(D) Hearing in removal proceeding

Any alien whose permanent resident status is terminated under subparagraph (C) may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that the facts and information described in subsection (d)(1) of this section and alleged in the petition are not true with respect to the qualifying commercial enterprise.

(d) Details of petition and interview

(1) Contents of petition

Each petition under subsection (c)(1)(A) of this section shall contain facts and information demonstrating that--

(A) a commercial enterprise was established by the alien;

(B) the alien invested or was actively in the process of investing the requisite capital; and

(C) the alien sustained the actions described in subparagraphs (A) and (B) throughout the period of the alien's residence in the United States.

(2) Period for filing petition

(A) 90-day period before second anniversary

Except as provided in subparagraph (B), the petition under subsection (c)(1)(A) of this section must be filed during the 90-day period before the second anniversary of the alien's lawful admission for permanent residence.

(B) Date petitions for good cause

Such a petition may be considered if filed after such date, but only if the alien establishes to the satisfaction of the Attorney General good cause and extenuating circumstances for failure to file the petition during the period described in subparagraph (A).

(C) Filing of petitions during removal

In the case of an alien who is the subject of removal hearings as a result of failure to file a petition on a timely basis in accordance with subparagraph (A), the Attorney General may stay such removal proceedings against an alien pending the filing of the petition under subparagraph (B).

(3) Personal interview

The interview under subsection (c)(1)(B) of this section shall be conducted within 90 days after the date of submitting a petition under subsection (c)(1)(A) of this section and at a local office of the Service, designated by the Attorney General,

which is convenient to the parties involved. The Attorney General, in the Attorney General's discretion, may waive the deadline for such an interview or the requirement for such an interview in such cases as may be appropriate.

(e) Treatment of period for purposes of naturalization

For purposes of subchapter III of this chapter, in the case of an alien who is in the United States as a lawful permanent residenton a conditional basis under this section, the alien shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence.

(f) Definitions

In this section:

(1) The term "alien entrepreneur" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) under section 1153(b)(5) of this title.

(2) The term "alien spouse" and the term "alien child" mean an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) by virtue of being the spouse or child, respectively, of an alien entrepreneur.

8 C.F.R. § 204.6

§ 204.6 Petitions for employment creation aliens.

(a) General. A petition to classify an alien under section 203(b)(5) of the Act must be filed on Form I-526, Immigrant Petition by Alien Entrepreneur. The petition must be accompanied by the appropriate fee. Before a petition is considered properly filed, the petition must be signed by the petitioner, and the initial supporting documentation required by this section must be attached. Legible photocopies of supporting documents will ordinarily be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required.

(b) Jurisdiction. The petition must be filed with the Service Center having jurisdiction over the area in which the new commercial enterprise is or will be principally doing business.

(c) Eligibility to file. A petition for classification as an alien entrepreneur may only be filed by any alien on his or her own behalf.

(d) Priority date. The priority date of a petition for classification as an alien entrepreneur is the date the petition is properly filed with the Service or, if filed prior to the effective date of these regulations, the date the Form I-526 was received at the appropriate Service Center.

(e) Definitions. As used in this section:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture,

corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. In the case of the Immigrant Investor Pilot Program, "full-time employment" also means employment of a qualifying employee in a position that has been created indirectly through revenues generated from increased exports resulting from the Pilot Program that requires a minimum of 35 working hours per week. A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

High employment area means a part of a metropolitan statistical area that at the time of investment:

(i) Is not a targeted employment area; and

(ii) Is an area with an unemployment rate significantly below the national average unemployment rates.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

New means established after November 29, 1990.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Regional center means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

Rural area means any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more.

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

(f) Required amounts of capital.

(1) General. Unless otherwise specified, the amount of capital necessary to make a qualifying investment in the United States is one million United States dollars ($1,000,000).

(2) Targeted employment area. The amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is five hundred thousand United States dollars ($500,000).

(3) High employment area. The amount of capital necessary to make a qualifying investment in a high employment area within the United States, as defined in section 203(b)(5)(C)(iii) of the Act, is one million United States dollars ($1,000,000).

(g) Multiple investors--

(1) General. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.

(2) Employment creation allocation. The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

(h) Establishment of a new commercial enterprise. The establishment of a new commercial enterprise may consist of:

(1) The creation of an original business;

(2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or

(3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees

results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j) (2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

(i) State designation of a high unemployment area. The state government of any state of the United States may designate a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more within such state as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation, including a description of the boundaries of the geographic or political subdivision and the method or methods by which the unemployment statistics were obtained, may be provided to a prospective alien entrepreneur for submission with Form I-526. Before any such designation is made, an official of the state must notify the Associate Commissioner for Examinations of the agency, board, or other appropriate governmental body of the state which shall be delegated the authority to certify that the geographic or political subdivision is a high unemployment area.

(j) Initial evidence to accompany petition. A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. In the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center designated by the Service in accordance with paragraph (m)(4) of this section. The petitioner may be required to submit information or documentation that the Service deems appropriate in addition to that listed below.

(1) To show that a new commercial enterprise has been established by the petitioner in the United States, the petition must be accompanied by:

(i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement,

business trust agreement, or other similar organizational document for the new commercial enterprise;

(ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the State or municipality does not issue such a certificate, a statement to that effect; or

(iii) Evidence that, as of a date certain after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth, number of employees.

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

(4) Job creation--

(i) General. To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

(ii) Troubled business. To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

(iii) Immigrant Investor Pilot Program. To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

(5) To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of

the new commercial enterprise.

(6) If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 CFR 204.6(i).

(k) Decision. The petitioner will be notified of the decision, and, if the petition is denied, of the reasons for the denial and of the petitioner's right of appeal to the Associate Commissioner for Examinations in accordance with the provisions of part 103 of this chapter. The decision must specify whether or not the new commercial enterprise is principally doing business within a targeted employment area.

(l) Disposition of approved petition. The approved petition will be forwarded to the United States consulate selected by the petitioner and indicated on the petition. If a consulate has not been designated, the petition will be forwarded to the consulate having jurisdiction over the place of the petitioner's last residence abroad. If the petitioner is eligible for adjustment of status to conditional permanent residence, and if the petition indicates that the petitioner intends to

apply for such adjustment, the approved petition will be retained by the Service for consideration in conjunction with the application for adjustment of status.

(m) Immigrant Investor Pilot Program--

(1) Scope. The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section.

(2) Number of immigrant visas allocated. The annual allocation of the visas available under the Immigrant Investor Pilot Program is set at 300 for each of the five fiscal years commencing on October 1, 1993.

(3) Requirements for regional centers. Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by economically or statistically valid forecasting tools, including,

but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

(4) Submission of proposals to participate in the Immigrant Investor Pilot Program. On August 24, 1993, the Service will accept proposals from regional centers seeking approval to participate in the Immigrant Investor Pilot Program. Regional centers that have been approved by the Assistant Commissioner for Adjudications will be eligible to participate in the Immigrant Investor Pilot Program.

(5) Decision to participate in the Immigrant Investor Pilot Program. The Assistant Commissioner for Adjudications shall notify the regional center of his or her decision on the request for approval to participate in the Immigrant Investor Pilot Program, and, if the petition is denied, of the reasons for the denial and of the regional center's right of appeal to the Associate Commissioner for Examinations. Notification of denial and appeal rights, and the procedure for appeal shall be the same as those contained in 8 CFR 103.3.

(6) Termination of participation of regional centers. To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, the Assistant Commissioner for Adjudications shall issue a notice of intent to terminate the participation of a regional center in the pilot program upon a determination that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. The notice of intent to terminate shall be made upon notice to the regional center and shall set forth the reasons for termination. The regional center must be provided thirty days from receipt of the notice of intent to terminate to offer evidence in opposition to the ground or grounds alleged in the notice of intent to terminate. If the Assistant Commissioner for Adjudications determines that the regional center's participation in the Pilot Program should be terminated, the Assistant Commissioner for Adjudications shall notify the regional center of the decision and of the reasons for termination. The regional center may appeal the decision within thirty days after the service of notice to the Associate Commissioner for Examinations as provided in 8 CFR 103.3.

(7) Requirements for alien entrepreneurs. An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will

create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) Exports. For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States;

(ii) Indirect job creation. To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

(8) Time for submission of petitions for classification as an alien entrepreneur under the Immigrant Investor Pilot Program. Commencing on October 1, 1993, petitions will be accepted for filing and adjudicated in accordance with the provisions of this section if the alien entrepreneur has invested or is actively in the process of investing within a regional center which has been approved by the Service for participation in the Pilot Program.

(9) Effect of termination of approval of regional center to participate in the Immigrant Investor Pilot Program. Upon termination of approval of a regional center to participate in the Immigrant Investor Pilot Program, the director shall send a formal written notice to any alien within the regional center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b)(5) of the Act.

8 C.F.R. 216.6

§ 216.6 Petition by entrepreneur to remove conditional basis of lawful permanent resident status.

(a) Filing the petition--

(1) General procedures. A petition to remove the conditional basis of the permanent resident status of an alien accorded conditional permanent residence pursuant to section 203(b)(5) of the Act must be filed by the alien entrepreneur on Form I-829, Petition by Entrepreneur to Remove Conditions. The alien entrepreneur must file Form I-829 within the 90-day period preceding the second anniversary of his or her admission to the United States as a conditional permanent resident. Before Form I-829 may be considered as properly filed, it must be accompanied by the fee required under § 103.7(b)(1) of this chapter, and by documentation as described in paragraph (a)(4) of this section, and it must be properly signed by the alien. Upon receipt of a properly filed Form I-829, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition. The entrepreneur's spouse and children should be included in the petition to remove conditions. Children who have reached the age of twenty-one or who have married during the period of conditional permanent residence and the former spouse of an entrepreneur, who was divorced from the entrepreneur during the period of conditional permanent residence, may be included in the alien entrepreneur's petition or may file a separate petition.

(2) Jurisdiction. Form I-829 must be filed with the regional service center having jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States.

(3) Physical presence at time of filing. A petition may be filed regardless of whether the alien is physically present in the United States. However, if the alien is outside the United States at the time of filing, he or she must return to the United States, with his or her spouse and children, if necessary, to comply with the interview requirements contained in the Act. Once the petition has been properly filed, the alien may travel outside the United States and return if in possession of documentation as set forth in § 211.1(b)(1) of this chapter, provided the alien complies with the interview requirements described in paragraph (b) of this section. An alien who is not physically present in the United States during the

filing period but subsequently applies for admission to the United States shall be processed in accordance with § 235.11 of this chapter.

(4) Documentation. The petition for removal of conditions must be accompanied by the following evidence:

(i) Evidence that a commercial enterprise was established by the alien. Such evidence may include, but is not limited to, Federal income tax returns;

(ii)Evidence that the alien invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and

(iii) Evidence that the alien sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence. Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.

(iv) Evidence that the alien created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Forms I- 9.

(5) Termination of status for failure to file petition. Failure to properly file Form I-829 within the 90-day period immediately preceding the second anniversary of the date on which the alien obtained lawful permanent residence on a conditional basis shall result in the automatic termination of the alien's permanent resident status and the initiation of deportation proceedings. The director shall send a written notice of termination and an order to show cause to an alien entrepreneur who fails to timely file a petition for removal of conditions. No appeal shall lie from this decision; however, the alien may request a review of the determination during deportation proceedings. In deportation proceedings, the burden of proof

shall rest with the alien to show by a preponderance of the evidence that he or she complied with the requirement to file the petition within the designated period. The director may deem the petition to have been filed prior to the second anniversary of the alien's obtaining conditional permanent resident status and accept and consider a late petition if the alien demonstrates to the director's satisfaction that failure to file a timely petition was for good cause and due to extenuating circumstances. If the late petition is filed prior to jurisdiction vesting with the immigration judge in deportation proceedings and the director excuses the late filing and approves the petition, he or she shall restore the alien's permanent resident status, remove the conditional basis of such status, and cancel any outstanding order to show cause in accordance with § 242.7 of this chapter. If the petition is not filed until after jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the alien and the Service.

(6) Death of entrepreneur and effect on spouse and children. If an entrepreneur dies during the prescribed two-year period of conditional permanent residence, the spouse and children of the entrepreneur will be eligible for removal of conditions if it can be demonstrated that the conditions set forth in paragraph (a)(4) of this section have been met.

(b) Petition review--

(1) Authority to waive interview. The director of the service center shall review the Form I-829 and the supporting documents to determine whether to waive the interview required by the Act. If satisfied that the requirements set forth in paragraph (c)(1) of this section have been met, the service center director may waive the interview and approve the petition. If not so satisfied, then the service center director shall forward the petition to the district director having jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States so that an interview of the alien entrepreneur may be conducted. The director must either waive the requirement for an interview and adjudicate the petition or arrange for an interview within 90 days of the date on which the petition was properly filed.

(2) Location of interview. Unless waived, an interview relating to the Form I-829 shall be conducted by an immigration examiner or other officer so designated by the district director at the district office that has jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States.

(3) Termination of status for failure to appear for interview. If the alien fails to appear for an interview in connection with the petition when requested by the Service, the alien's permanent resident status will be automatically terminated as of the second anniversary of the date on which the alien obtained permanent residence. The alien will be provided with written notification of the termination and the reasons therefore, and an order to show cause shall be issued placing the alien under deportation proceedings. The alien may seek review of the decision to terminate his or her status in such proceedings, but the burden shall be on the alien to establish by a preponderance of the evidence that he or she complied with the interview requirements. If the alien has failed to appear for a scheduled interview, he or she may submit a written request to the district director asking that the interview be rescheduled or that the interview be waived. That request should explain his or her failure to appear for the scheduled interview, and if a request for waiver of the interview, the reasons such waiver should be granted. If the district director determines that there is good cause for granting the request, the interview may be rescheduled or waived, as appropriate. If the district director waives the interview, he or she shall restore the alien's conditional permanent resident status, cancel any outstanding order to show cause in accordance with § 242.7 of this chapter, and proceed to adjudicate the alien's petition. If the district director reschedules that alien's interview, he or she shall restore the alien's conditional permanent resident status, and cancel any outstanding order to show cause in accordance with § 242.7 of this chapter. If the interview is rescheduled at the request of the alien, the Service shall not be required to conduct the interview within the 90-day period following the filing of the petition.

(c) Adjudication of petition.

(1) The decision on the petition shall be made within 90 days of the date of filing or within 90 days of the interview, whichever is later. In adjudicating the petition, the director shall determine whether:

(i) A commercial enterprise was established by the alien;

(ii) The alien invested or was actively in the process of investing the requisite capital; and

(iii) The alien sustained the actions described in paragraphs (c)(1)(i) and (c)(1)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment

requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence.

(iv) The alien created or can be expected to create within a reasonable period of time ten full-time jobs to qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien maintained the number of existing employees at no less than the pre-investment level for the previous two years.

(2) If derogatory information is determined regarding any of these issues or it becomes known to the government that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs), the director shall offer the alien entrepreneur the opportunity to rebut such information. If the alien entrepreneur fails to overcome such derogatory information or evidence the investment funds were obtained through other than legal means, the director may deny the petition, terminate the alien's permanent resident status, and issue an order to show cause. If derogatory information not relating to any of these issues is determined during the course of the interview, such information shall be forwarded to the investigations unit for appropriate action. If no unresolved derogatory information is determined relating to these issues, the petition shall be approved and the conditional basis of the alien's permanent resident status removed, regardless of any action taken or contemplated regarding other possible grounds for deportation.

(d) Decision--

(1) Approval. If, after initial review or after the interview, the director approves the petition, he or she will remove the conditional basis of the alien's permanent resident status as of the second anniversary of the alien's entry as a conditional permanent resident. He or she shall provide written notice of the decision to the alien and shall require the alien to report to the appropriate district office for processing for a new Permanent Resident Card, Form I-551, at which time the alien shall surrender any Permanent Resident Card previously issued.

(2) Denial. If, after initial review or after the interview, the director denies the petition, he or she shall provide written notice to the alien of the decision and the reason(s) therefor, and shall issue an order to show cause why the alien should not be deported from the United States. The alien's lawful permanent resident status and that of his or her spouse and any children shall be terminated as of the date of the director's written decision. The alien shall also be instructed to surrender any

Permanent Resident Card previously issued by the Service. No appeal shall lie from this decision; however, the alien may seek review of the decision in deportation proceedings. In deportation proceedings, the burden shall rest with the Service to establish by a preponderance of the evidence that the facts and information in the alien's petition for removal of conditions are not true and that the petition was properly denied.

PROOF OF SERVICE

I, Matthew S. Carlson, the undersigned, say:

I am over the age of eighteen years and not a party to the within action or proceedings; my business address is: KURZBAN, KURZBAN, WEINGER & TETZELI, P.A., 2650 SW 27th Avenue, 2nd Floor, Miami, Florida 33133.

On June 13, 2002 I served the within:

PLAINTIFFS/APPELLANT'S INITIAL BRIEF

on the Office of Immigration Litigation by depositing two true copies, thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United States to each person listed below addressed as follows:

Heather Phillips, Esq.
Office of Immigration Litigation
Department of Justice/Civil Division
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Executed on June 13, 2002, at Miami, Florida. I declare under penalty of perjury that the foregoing is true and correct.

Matthew S. Carlson, Esq.
Declarant