Nos. 01-56266 & 01-56379

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WEN-WAN CHANG, et al.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA

Defendant-Appellee.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR DEFENDANT-APPELLEE

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Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States
District Court for the Central District of California
CV 99-10518-GHK (AJAx)

BRIEF FOR DEFENDANT-APPELLEE[1]

INTRODUCTION AND STATEMENT OF JURISDICTION

This case requires the Court to revisit section 203(b)(5) of the Immigration

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[1] Plaintiffs and Defendant filed cross-appeals from the District Court's Decision of May 7, 2001. Plaintiffs filed their opening brief on June 13, 2002. The instant brief constitutes Defendant's cross-appeal and response to Appellant's brief.

and Nationality Act ("INA"). First enacted in 1990 and known colloquially as the "EB-5" program, this statute offers preference visas and possible lawful permanent resident ("green card") status to aliens who are willing to act as "immigrant investors" by investing specified amounts of capital in the United States and creating specified numbers of full-time jobs.

In the summer of 1998, the Immigration and Naturalization Service ("INS" or "Service") issued four adjudicatory decisions interpreting section 203(b)(5) and its implementing regulations as they applied to a number of issues that had arisen during the course of the INS's administration of the statute. These decisions were published and therefore became binding "on all Service employees in the administration of the [INA]." 8 C.F.R. § 103.3(c) (2002). Subsequently, several lawsuits were brought challenging the INS's decisions on substantive and procedural grounds. In R.L. Investment Limited Partners v. INS, 273 F.3d 874 (9th Cir. 2001), *adopting* 86 F. Supp.2d 1014 (D. Hi. 2000) ("RLILP"), this Court, in a sweeping opinion, affirmed summary judgment for the government in one of those cases.[2]

The Court now has before it an appeal and cross-appeal from orders by the

[2] For ease of reference, RLILP will generally be cited only by the adopted district court opinion.

U.S. District Court for the Central District of California issued before RLILP. Plaintiffs consist of seven individual aliens (and their dependants) and twenty-eight limited partnerships. (Excerpts of Record ("E.R.") at 4, ¶3). They brought suit arguing that application of the precedent decisions to the adjudication of their visa petitions would result in denial of the petitions and would be impermissibly "retroactive," and that the INS should be estopped from denying them lawful permanent residency. (E.R. at 75-77).

Plaintiffs appeal, and the United States cross-appeals, from an order entered by the district court on May 7, 2001, granting in part and denying in part the United States's motion under Fed . R. Civ. P. 12(c) to dismiss plaintiffs' First Amended Complaint, or, in the alternative, for judgment on the pleadings. (E.R. 121-45). Plaintiffs also appeal and the United States also cross-appeals from orders entered by the district court on June 14, 2001, denying plaintiffs' motion to amend the Complaint to add additional named plaintiffs (or in the alternative for class certification), and denying the United States's motion pursuant to Fed. R. Civ. P. 59(e) to alter or amend the court's previous order. (E.R. 155-58). The notices of appeal were timely filed on July 2, 2001, and July 24, 2001, respectively. This Court's jurisdiction arises under 28 U.S.C. § 1291 (Supp. II 2002).

DEFENDANT'S STATEMENT OF THE ISSUES

1. Whether the district court erred in finding jurisdiction to review the INS's denial of plaintiff Yi Yuan Chiang's petition for permanent resident status under section 216A of the INA, where that statute provides that Chiang has the right to full *de novo* review of the INS's action in any subsequent removal proceeding, with the burden of proof lying with the INS; and where, in the event that a final order of removal is entered against him, Chiang would have the right under section 242 of the INA to seek review by a circuit court of appeals.

2. Whether, having found jurisdiction, the district court also erred in remanding the denial of Plaintiff Chiang's petition for permanent resident status to the INS for a "retroactivity" analysis pursuant to Montgomery Ward v. FTC, 691 F.2d 1322 (9th Cir. 1982), where this Court has already held in RLILP that Matter of Izumii and the other EB-5 precedent decisions did not effect a "new rule" in the Montgomery Ward sense, where INA § 216A requires a fresh demonstration of compliance with the immigrant investor statutes before an I-829 petition can be granted, and where INA § 216A does not empower the INS to consider "degree of burden" or any of the other Montgomery Ward factors in considering Chiang's petition.

3. Whether the district court correctly determined that six of the seven plaintiffs' claims were not ripe for review, and properly denied them injunctive and declaratory relief, given that the six plaintiffs had not had their I-829 petitions adjudicated by the INS.

4. Whether the district court properly determined that plaintiffs' motion for class certification was moot, where plaintiffs failed to timely file an application for class certification to the district court, and where, in any event, plaintiffs failed to demonstrate that their claims were typical of the class and where class treatment of plaintiffs' claims is unnecessary.

5. Whether the district court correctly determined that estoppel did not apply to bar the application of the precedent decisions where there was absolutely no evidence of affirmative misconduct on the part of the government.

6. Whether the district court correctly found that the issuance of the precedent decisions did not violate the notice and comment requirements of the Administrative Procedures Act ("APA") or promulgate new EB-5 investment criteria, given this Court's holding in RLILP that the precedent decisions did not amend or change the existing statutory and regulatory requirements for the EB-5 program.

STATEMENT OF THE CASE

I. Governing Statutory and Regulatory Provisions

In order to qualify for preferred visa status under section 203(b)(5), the alien must be seeking to enter the United States "for the purpose of engaging in a new commercial enterprise," 8 U.S.C. § 1153(b)(5)(A) (Supp. II 2002), "which the alien has established," id. § 1153(b)(5)(A)(i), and "which will . . . create full-time employment for not fewer than 10 United States citizens" or lawful aliens, id. § 1153(b)(5)(A)(iii). The alien must have invested or be "actively in the process of investing," id. § 1153(b)(5)(A)(ii), at least $1,000,000 in the new commercial enterprise, unless the investment is to be made in a "targeted employment area," in which case the investment must be at least $500,000. Id. § 1153(b)(5)(C)(i)-(ii).

Aliens may qualify for EB-5 preferred visa status by investing in a "regional center" and demonstrating by "reasonable methodologies" their compliance with the job-creation requirements. Pub. L. No. 102-395, § 610(a), 106 Stat. 1874 (1992), as amended by Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 402 (a), 114 Stat. 1637 (2000). The statute does not define "reasonable methodologies," but the minimum of ten full-time jobs may include "jobs which are estimated to have been created indirectly through revenues generated from increased exports." 106 Stat. 1874; *see* RLILP, 86 F. Supp.2d at 1017.

Obtaining lawful permanent residence in the United States under the EB-5 program is a two-stage process. The alien must first file an "I-526" petition setting forth information about himself and his proposed qualifying investment. *See* 8 C.F.R. § 204.6(j) (2002). If the petition is approved, the alien is notified, the petition is forwarded to the appropriate U.S. consulate, and an interview with a consular officer is held. *See* id. § 204.6(l) (2002). If a preference visa is granted, the alien (and his or her dependents) are admitted to the United States for permanent residence, but on a conditional basis. 8 U.S.C. § 1186b(a)(1) (Supp. II 2002); RLILP, 86 F. Supp.2d at 1017. Under section 216A of the INA, the alien is required to file an "I-829" petition with the INS to remove the condition within the 90-day period before the second anniversary of his admission. *See* 8 U.S.C. § 1186b(a)(1) (Supp. II 2002); id. § 1186b(d)(2). The petition will be granted if the INS determines that the alien, throughout the period of his residence in the United States, met and sustained the statutory requirements of establishment of a commercial enterprise, investment of the required amount of capital, and creation of ten full-time jobs. *See* id. § 1186b(d)(1); 8 C.F.R. § 216.6(a)(4) (2002). The conditional status is then removed, and the alien receives full permanent resident status as of the second anniversary of his admission. *See* 8 U.S.C. § 1186b(c)(3)(B) (Supp. II 2002); 8 C.F.R. § 216.6(d)(1) (2002).

On the other hand, if the INS finds that the alien did not comply with the statutory requirements throughout the period of his conditional residence in the United States, the I-829 petition must be denied and the alien's permanent resident status must be terminated. *See* 8 U.S.C. §§ 1186b(c)(3)(C) and (d)(1) (Supp. II 2002). The alien is then placed in removal (deportation) proceedings. 8 C.F.R. § 216.6(d)(2) (2002). In such proceedings, the burden is on the INS to show by a preponderance of the evidence that the denial of the I-829 petition was correct. 8 U.S.C. § 1186b(c)(3)(D) (Supp. II 2002); 8 C.F.R. § 216.6(d)(2) (2002).

II. The EB-5 Precedent Decisions

As the Court stated in RLILP, the INS began to experience a sharp increase in the number of I-526 petitions in FY 1996. 86 F. Supp. 2d at 1017. This was attributed by the Service to the liberalized standards of the regional center alternative and to marketing efforts overseas by American private sector promoters like American Immigration Services (AIS).[3] Id. As in this case (E.R. at 14-50, ¶¶ 34-61, and 53-56, ¶¶ 77-83), many of the new I-526 petitions did not set forth proposals by individual aliens to invest in a business that they would start up and run themselves, but rather reflected efforts by U.S.-based organizations such as

[3] According to the Amended Complaint (E.R. at 71, ¶ 109), the individual investor Plaintiffs invested in the limited Partnership Plaintiffs through programs established by AIS.

AIS to recruit aliens to invest in them, typically as limited partners, and who proposed to use the aliens' capital in projects that would be controlled, not by the aliens, but by the organizations' general partners. RLILP, 86 F. Supp. 2d at 1017-18.

The immigrant investor regulations permit this type of relationship, and INS adjudicators approved some of these new-style applications, as they appeared to hold out the promise of more extensive employment creation by enabling companies to amass pooled capita. However, by late 1997, the INS had become aware that some of the proposals set forth in I-526 petitions contained features that appeared to be contrary to the immigrant investor regulations. These included "buy-back" or redemption provisions that gave the alien the right to ask for the return of his investment after a designated period of time. RLILP, 86 F. Supp. 2d at 1018. In order to prevent any more approvals that might be contrary to the EB-5 statute and its regulations, the INS placed an administrative hold on the adjudication of all EB-5 petitions with problematic features until it could complete a full review of the situation. Id. As a result of its review, and in order to address a number of substantive issues that had arisen under the EB-5 program, the AAO published the precedent decisions in the summer of 1998. Id. Subsequently. the administrative hold was lifted and the EB-5 petitions that were subject to that hold

were adjudicated under the guidance of the precedent decisions. Id.

Although the relief sought by Plaintiffs from this Court encompasses most, if not all, of the precedent decisions, the most significant for this case is Matter of Izumii, Int. Dec. No. 3360, 22 I & N Dec. __, 1998 WL 483977 (Exam. Comm. July 13, 1998). The immigrant investor regulations state that "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 purposes of this part." 8 C.F.R. § 204.6(e) (2002) (defining "invest"). The central holding of Izumii is that, for purposes of meeting the statutory and regulatory definition of "invest" (or "contribution of capital"), an alien may not enter into an agreement, prior to the end of his two-year period of conditional residence, that grants him the right to sell his interest back to the partnership or other enterprise. 1998 WL 483977 at 14 (printed version). Such an agreement, it was held, converts the alien's capital from the required equity investment into a loan to the commercial enterprise. Id. Izumii also found that a promise that the alien will receive a return on his money similarly indicates that the alien has made a loan to the enterprise rather than an equity investment. Id. at 10 (printed version) n.10.

III. The Complaint

As noted above, plaintiffs consist of seven individual aliens (and their dependents) and twenty-eight limited partnerships.[4] The individual plaintiffs claimed to have invested in the partnership plaintiffs, had their I-526 petitions approved, and were granted conditional permanent residency sometime in either 1996 or 1997, before the four precedent decisions were issued. (E.R. at 7-11, ¶¶ 11-17). Plaintiffs claimed that they relied upon the INS's interpretation of the statute, as established by unpublished decisions, letters, and an unpublished General Counsel opinion, when they structured their investment plans and applied for their conditional residency under the EB-5 program, and that as a result of the precedent decisions their investment programs are now "inoperable and unapprovable." (E.R. at 5, ¶ 5; E.R. 55, ¶ 81; *see* Plaintiffs/Appellants' Initial Brief ("App. Brf.") at 16-17). They further claimed that because the precedent decisions represented a sharp departure from this previous interpretation and imposed new requirements, the changes that the INS sought to impose through these decisions could only be made through notice-and-comment rulemaking.

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[4] Plaintiffs filed their amended complaint as a class action on March 8, 2000, but failed to seek certification of the proposed class. The district court determined that plaintiffs' motion for class certification was moot in light of its decision with respect to the United States's motion for judgment on the pleadings.

Plaintiffs asked the district court to declare the four precedent decisions invalid because the INS's issuance of the precedent decisions amounted to rulemaking without notice and comment and was a violation of the APA, constituted an abuse of discretion, exceeded the INS's statutory authority, and violated the due process and equal protection clauses of the Fifth Amendment (claims 1-4). (E.R. at 72-74). They further argued that application of the precedent decisions to the adjudication of their I-829 petitions would be "retroactive" and that the INS should be estopped from denying them lawful permanent residency (claims 6-7). (E.R. at 75-77). The partnership plaintiffs, in addition, sought an estimated $17.5 million in damages under the takings clause of the Fifth Amendment (claim 5). (E.R. at 74-75).

IV. The District Court's Order

The district court first held that the partnership plaintiffs lacked standing under Article III of the Constitution. (E.R. at 125-126). Specifically, the court stated that "it may reasonably be said that the Partnerships' interests fall outside the zone of interests." (E.R. at 126). Further, the district court noted that, given its determination that the precedent decisions were validly issued, and "[w]here, as here, the INS has determined in the Precedent Decisions that the structure of these business entities does not fulfill the purposes of the statute, then it can fairly be

said that the Partnerships' interests are inconsistent with the purposes of the EB-5 statute. This being the case, and particularly since Congress did not provide for any administrative remedy for business entities such as the Partnerships, it is unreasonable to assume that Congress intended to permit this suit on behalf of the partnerships." Id.

The district court further held that six of the seven individual plaintiffs' claims were not ripe for review, as the INS had not yet denied their I-829 petitions. (E.R. at 127-129). As only plaintiff Yi Yuan Chiang had actually received a denial of his I-829 petition, only his case was properly before the district court. Id. The district court therefore granted the United States's motion for judgment on the pleadings as to the six individual plaintiffs whose I-829s had not yet been adjudicated. (E.R. at 129).

However, the district court held that because Chiang had received an actual denial of his I-829 petition, his claims were ripe for review. (E.R. at 129). Further, the district court determined that it had jurisdiction to review Chiang's case, given that "Congress has chosen to explicitly limit jurisdiction for review in certain administrative schemes, but it has not done so with respect to the Immigrant Investor Program. As such, we conclude that we may exercise jurisdiction over Plaintiff Chiang's APA claims." (E.R. at 130).

After assuming jurisdiction over Chiang's claims, the district court held that, contrary to Chiang's arguments, the precedent decisions amounted to an interpretive, rather than a legislative rule. (E.R. at 130). Moreover, "the Precedent Decisions did not change or add to any requirements of the EB-5 statute as set forth in the federal regulations. . . . Thus, the Precedent Decisions were not inconsistent with a regulation having the force of law." (E.R. at 133-134). As a result, the district court found that "the fact that the INS did not engage in notice and comment rulemaking was not a violation of the APA, an abuse of discretion, an action exceeding statutory authority or a violation of Due Process and Equal Protection." (E.R. at 136).

In addition, the district curt held that the precedent decisions did not conflict with, or amend, any prior interpretive rule in violation of the APA. (E.R. at 138). "In the present case . . . neither the General Counsel opinions nor the prior AAO decisions had ever been published. They had not been held out to be a precedential interpretation of the regulation. Therefore the precedent decisions could not be construed to amend a prior interpretive rule." (E.R. at 138). As such, the district court granted judgment on the pleadings as to plaintiffs' Counts One, Two, Three, and Four, except to the extent those Counts incorporated the plaintiffs' claim of improper retroactive effect. Id.

With respect to Chiang's claim of improper retroactive effect, the district court denied the United States's motion, holding that "[i]n effect, having already approved Plaintiff Chiang's investment program by virtue of its approval of his I-526 petition, the INS effectively changed the rules of the game by judging Plaintiff Chiang's [I-829] petition under the Precedent Decisions even though Plaintiff Chiang had not altered his previously approved investment program, and had not acted in a way which would otherwise justify denial of the I-829, but for the Precedent Decisions." (E.R. at 138-139). As such, the district court concluded that retroactivity analysis pursuant to this Court's decision in Montgomery Ward, 691 F.2d at 1333, was warranted in Chiang's case. (E.R. at 139). In sum, the district court held that "[a]lthough we conclude that the Precedent Decisions did not generally alter prior official action so as to require notice and comment rulemaking, there has been an official ruling as to Plaintiff Chiang, when his I-526 petition was approved . . . . as such, we hereby remand Plaintiff Chiang's I-829 denial to the INS for it to consider and compile an administrative record as to whether application of the Precedent Decisions to Plaintiff Chiang's I-829 petition would result in an improper retroactive application of law under the Montgomery Ward five factor analysis." (E.R. at 139).

The district court concluded its decision by rejecting Plaintiffs' estoppel

claim and granting judgment on the pleadings for the United States with respect to that issue, as it noted that there had been no showing of affirmative misconduct on the part of the government. (E.R. at 141.) The district court further determined that it lacked jurisdiction over the partnership plaintiffs' Takings claim because "the Court of Federal Claims has exclusive jurisdiction over claims under the Tucker Act where the amount in controversy exceeds $10,000." (E.R. at 142). The court therefore granted judgment on the pleadings with respect to Count Five as to plaintiffs' claim for monetary damages. Id. Finally, the district court noted that in light of its ruling, plaintiffs' motions for class certification and to set a discovery schedule were mooted. Id.

SUMMARY OF ARGUMENT

The district court erred in finding that it had jurisdiction over Plaintiff Chiang's claims. In INA § 216A, Congress clearly and expressly provided aliens with an avenue of judicial review for I-829 denials. As such, any review of such denials lies in removal proceedings and not in district court. Congress never intended for district courts to review the merits of I-829 denials; instead, an alien is required to initially exhaust his administrative remedies with a request for review in removal proceedings before an immigration judge and the BIA. Thereafter, if necessary, an alien is entitled to seek judicial review in the courts of

appeals.

The district court further erred in determining that a retroactivity analysis pursuant to Montgomery Ward was warranted in plaintiff Chiang's case, and in remanding Chiang's I-829 denial to the INS for an assessment of burden. The Montgomery Ward test is inapplicable to this case because the granting of permanent residency under INA § 203(b)(5) is a two-step process. The initial I-526 approval does not in any way guarantee, or even predict, I-829 approval, and indeed, each petition undergoes an entirely separate and independent review, negating the possibility of retroactivity. Even if a Montgomery Ward analysis were appropriate, however, Chiang's I-829 should not have been remanded to the INS. Instead, Chiang should be required to develop his arguments during the course of his removal hearings. Then, and only then, would the Montgomery Ward factors potentially come into play, should Chiang appeal any adverse BIA decision.

The district court correctly found, however, that it lacked jurisdiction over six of the seven plaintiffs' claims because they had not received a denial of their I-829 petitions. Because their I-829 petitions had not been denied, these plaintiffs lacked standing to attack the precedent decisions, given that the basis for any future I-829 denial was purely speculative. Nor did the district court err in

determining that plaintiffs' motion for class certification was moot. Indeed, plaintiffs failed to timely file their motion, failed to demonstrate that their claims were typical of the class, and class treatment of plaintiffs' claims is unnecessary. Moreover, the district court correctly determined that estoppel did not apply, as there was absolutely no evidence of affirmative misconduct on the part of the government.

In addition, contrary to plaintiffs' assertions, the district court correctly found – and this Court confirmed in RLILP – that the INS's issuance of the precedent decisions was a legitimate and proper exercise of the agency's authority, exempt from APA rulemaking and notice and comment requirements. Prior to the publication of the precedent decisions, the INS had issued no published decisions or taken any other action that established binding policy with respect to immigrant investor visas. That plaintiffs had received approved I-526 petitions did not constitute a binding decision by the INS, given the two-step, independent approval process involved in the EB-5 program.

Furthermore, as an examination of the statutory and regulatory language at issue demonstrates, the precedent decisions did not create new regulatory requirements, but rather applied existing requirements to specific sets of facts. As such, the precedent decisions have no retroactive effect. Equally, the normal

application of an adjudicatory decision is fully appropriate here, as the Plaintiffs had no judicially cognizable right to rely on the unpublished, non-binding decisions that had been issued prior to the precedent decisions.

ARGUMENT[5]

I. Standard of Review

The appropriate standard of review of a district court's grant of judgment on the pleadings is *de novo*. Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir.), cert. denied, 506 U.S. 1020 (1992). Claims under the APA are also reviewed *de novo*. *See* Air North America v. Department of Transportation, 937 F.2d 1427, 1436-37 (9th Cir. 1991). However, to the extent that plaintiffs also seeks to attack the precedent decisions on the merits, *see, e.g.*, App. Brf. at 45-60, the Court must afford deferential review to the INS's interpretations of the EB-5 statute and accompanying regulations. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984); Jang v. Reno, 113 F.3d 1074, 1076-77 (9th Cir. 1997) (Chevron deference applicable where statutory language is "silent or ambiguous," and "considerable weight should be accorded to an executive department's construction of a statutory

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[5] In the Argument section, the United States incorporates both its cross-appeal arguments as well as its response to plaintiffs' opening brief filed with the Court on June 13, 2002.

scheme it is entrusted to administer."). *See also* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.").

An agency's interpretation of its own regulations is entitled to "substantial deference." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Jenkins v. INS, 108 F.3d 195, 201 (9th Cir. 1997). Accordingly, the precedent decisions challenged by Plaintiffs must be upheld if they were reasonable – that is – "based on a *permissible construction*" of the statute. Chevron, 467 U.S. at 843 (emphasis added) (footnote omitted). The Court may not reverse the decisions because another result might also have been reasonable, or because the Court itself would have decided the issues differently. Id. at 843 n.11; *see also* Department of Health and Human Services v. Chater, 163 F.3d 1129, 1135 (9th Cir. 1998) ("The question is not whether the interpretation represents the best reading of the statute, *but whether* it represents a reasonable one"); Chan v. Reno, 113 F.3d 1068, 1072 (9th Cir. 1997) ("Only a clear showing of a contrary congressional intent will justify overruling the agency's interpretation of the statute it is charged with administering") (internal quotation and citation omitted).

II. The District Court Erred in Finding Jurisdiction to Review Chiang's I-829 Denial.

The district court based its assertion of jurisdiction under the APA to review the INS's denial of plaintiff Chiang's I-829 petition on the observation that INA § 216A does not state that review of an I-829 denial must occur "exclusively" in removal proceedings. (E.R. at 130). However, the correct test is whether section 216A and related provisions of the INA provide adequate judicial review. If so, APA jurisdiction does not arise.

The APA states that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless there is an "absence or inadequacy thereof . . . ." 5 U.S.C. § 703 (Supp. II 2002); *see also* id. § 704 (Supp. II 2002) (judicial review available under the APA where "there is no other adequate remedy in a court"). Where special and specific review procedures are clearly available and are adequate to protect the rights of affected parties, the general authorization for review of agency action in the district courts under the APA is not available, and the specific procedures are considered exclusive notwithstanding that Congress did not provide for their exclusiveness. Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) ("When Congress enacted the APA to provide a general authorization

for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies"); United States v. Southern Railway Co., 364 F.2d 86, 91 (5th Cir. 1966) ; Rhode v. City of West Lafayette, Indiana, 850 F. Supp. 753, 756 (N.D. Ind. 1993) ("General jurisdiction was not intended to vest in district courts without a showing of the inadequacy of the prescribed statutory procedure"); Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 309 (N.D. Ohio 1974) ("if Congress has provided adequate procedures for judicial review within a given statutory scheme, the prescribed procedures are exclusive").

Here, INA § 216A clearly specifies that an I-829 denial is subject to *de novo* review in a subsequent administrative removal proceeding, and if that proceeding results in issuance of a final order of removal, under INA § 242 the order is subject to review by a circuit court of appropriate jurisdiction. Because Congress has thus provided adequate procedures for judicial review of an I-829 denial within the relevant statutory scheme, the district court erred in finding jurisdiction under the APA.

It must first be emphasized that Chiang's I-829 denial did not cause him to face removal from the United States. Rather, removal proceedings must be

instituted separately by issuance of a notice to appear, see 8 U.S.C. § 1229 (Supp. II 2002). Chiang's deportability will be decided in the first instance by an immigration judge, see id. § 1229a(a)(1), and, as section 216A plainly states, he will have the right to request the immigration judge to review the denial of his petition and the burden will lie with the INS to prove the correctness of the denial, id. § 1186b(c)(3)(D). The INS's regulations are consistent with the statutory scheme: an I-829 denial by a service center adjudicator may not be appealed within the Service, but "the alien may seek review of the decision in deportation proceedings." 8 C.F.R. § 216.6(d)(2) (2002). As in any removal proceeding, Chiang can appeal an adverse decision by the immigration judge to the Board of Immigration Appeals ("BIA"), id. §§ 3.1(b) & 240.53(a), and can seek review of any final order of removal in a circuit court of appropriate jurisdiction pursuant to section 242 of the INA, 8 U.S.C. § 1252 (Supp. II 2002).

The explicit linkage between an I-829 denial and a subsequent removal proceeding make inapposite those cases where this Court found APA district court jurisdiction over denials or revocations of other kinds of immigration petitions not linked to removal proceedings. See Abboud v. INS, 140 F.3d 843, 846-47 (9th Cir. 1998); Young v. Reno, 114 F.3d 879, 881-83 (9th Cir. 1997). Given the independence of immigration judges and the BIA from the INS, the INS's denial of

Chiang's I-829 petition is merely the functional equivalent of a denial by the INS of an asylum application filed by an alien who has not yet been placed in removal proceedings. See 8 C.F.R. § 208.9(a) (2002); Kashani v. Nelson, 793 F.2d 818 (7th Cir.), cert. denied, 479 U.S. 1006 (1986) (alien unable to seek district court review of district director's denial of his asylum claim, but instead required to renew his claim in deportation proceedings, and to exhaust administrative remedies before obtaining judicial review in the court of appeals). Under the regulations, the denial will cause Chiang to be placed in removal proceedings, but section 216A makes it clear that the immigration judge's review of the denial will be *de novo*, and the same would be true of the BIA. See Castillo v. INS, 951 F.2d 1117, 1120-21 (9th Cir. 1991) (BIA is empowered by Congress to "conduct a de novo review of the record, to make its own findings, and to determine independently the sufficiency of the evidence"). Chiang may raise issues of law as well as fact, and is free to argue that the holdings of Izumii were incorrect. If a disagreement should come about between the INS and the BIA over the rightness of Izumii, the Attorney General might be called upon to resolve the matter definitively under his general authority to administer and enforce the INA. See 8 U.S.C. § 103(a)(1) (Supp. II 2002); 8 C.F.R. § 3.1(h)(1) (2002) (describing different ways of referring case to Attorney General).

Because the INA §§ 216A/242 judicial review procedures are clearly adequate to re-examine and perhaps overturn any issue of fact or law that underlay Chiang's I-829 denial, all such issues must be raised in the context of those procedures and may not be raised in a lawsuit under the APA or any other general grant of federal jurisdiction. See City of Rochester v. Bond, 603 F.2d 927, 937 (D.C. Cir. 1979) ("all issues concerning the lawfulness of an order subject to statutory review must be raised within the statutory proceeding if that remedy is otherwise adequate"); Frito-Lay, Inc. v. FTC, 380 F.2d 8, 10 (5th Cir. 1967) ("Where Congress has provided for an adequate procedure for judicial review of administrative actions, that procedure must be followed"); Atlantic Richfield Co. v. FTC, 546 F.2d 646, 649 (5th Cir. 1977) (same); Pinkney, 375 F. Supp. at 309. Further, because the INA §§ 216A/242 procedures permit the specialized expertise of immigration judges, the BIA, and perhaps the Attorney General to be brought to bear on the complex issues posed by the immigrant investor program, under longstanding Supreme Court precedent this is another reason to consider these procedures to be the exclusive mechanism for seeking relief from an I-829 denial. See Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 420 (1965) ("where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those

procedures are to be exclusive").

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter ought not to be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

The district court's finding of jurisdiction would allow Chiang to challenge his I-829 denial immediately under the APA (with circuit court review), and then, if he is unsuccessful, to try again in immigration court once he is placed in removal proceedings (again, with circuit court review). There is no indication that Congress intended to give aliens with I-829 denials the extraordinary privilege of two chances to overturn the denial, or the only slightly less extraordinary privilege of being able to choose whether to seek review in district court or immigration court. On the contrary, to quote again from Bowen, "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the

previously established special statutory procedures relating to specific agencies." 487 U.S. at 903. By the same token, the APA should not be read to provide a duplicative or alternate grant of jurisdiction to the subsequently established special statutory procedures relating to review of I-829 denials. The district court's finding of jurisdiction to review the denial of Chiang's I-829 denial should be reversed, and its order remanding the denial to the INS should be vacated.

III. The District Court Separately Erred By Remanding the Denial of Chiang's I-829 Petition for a "Retroactivity" Analysis Pursuant to Montgomery Ward.

Even if the district court were correct in asserting jurisdiction to review the INS's denial of Chiang's I-829 petition for permanent resident status, it separately erred by ordering the INS to consider on remand whether application of the Izumii holdings to Chiang would be unfairly "retroactive" under the factors enumerated in Montgomery Ward. This Court has already resolved that issue as a result of its holding (issued several months after the district court's order) in RLILP that Izumii and the other EB-5 precedent decisions did not effect a change in existing law. More generally, the retroactivity concerns addressed in Montgomery Ward are not applicable to the immigrant investor statutes, which require a fresh demonstration of compliance with the statutory standards at the I-829 stage and do not permit the INS to consider hardship and other equitable factors in determining whether to grant

permanent resident status.

It is an elementary fact that, by its nature and in contradistinction from a rulemaking, the final result of an adjudicatory proceeding will have a retroactive effect on the positions of the parties to that proceeding. The courts, moreover, have recognized that "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or an agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

Nevertheless, there is a line of agency review decisions that concerns whether an adjudicatory agency decision that announced an interpretation of a statute or regulation should be ruled inapplicable for equitable reasons to the losing party before the agency, notwithstanding that the agency's interpretation was reasonable, its findings of fact were supported by substantial evidence, and the decision did not represent an abuse of agency discretion and otherwise met all relevant standards for judicial affirmation. The leading case in this circuit is Montgomery Ward, which adopted a test articulated by the District of Columbia Circuit in Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972):

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule results in an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the

> degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

In Montgomery Ward, the court generally upheld an FTC decision that Ward's had violated the Magnuson-Moss Warranty Act and an implementing regulation, but found that enforcement of the FTC's remedy, a cease and desist order, would be unreasonably burdensome on the company. 691 F.2d at 1333-34.

Before the district court, the United States argued that the INS is not empowered under INA § 216A to take the Montgomery Ward factors into consideration in determining whether to grant an I-829 application. Without discussion, the district court rejected that argument. (E.R. at 139). In its motion under Fed. R. Civ. P. 59(e), the government additionally argued that, to the extent it is appropriate at all in the context of the EB-5 statute, the Montgomery Ward test should only be part of circuit court review of a final order of removal. The district court rejected that argument as well, again without discussion. (E.R. at 158).

Chiang was not a party to Izumii and for that reason alone Montgomery Ward is inapplicable. Without acknowledging that fact, the district court found that the INS "effectively changed the rules of the game" by adjudicating Chiang's I-829 petition under the guidance of Izumii. (E.R. at 138.) Subsequent to the district court's order, however, this Court held in RLILP that Izumii and the other EB-5

precedent decisions did not "effect a change in existing law[,]" 86 F. Supp.2d at 1024; that the holdings of the precedent decisions were analogous to interpretive rules "which merely clarify or explain existing law or regulations[,]" id., quoting Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983); that the unpublished immigrant investor adjudications and General Counsel memoranda which preceded the precedent decisions did not establish a policy binding upon the INS, 86 F. Supp. 2d at 1022; that the INS therefore did not abuse its discretion by disapproving an I-529 petition under the authority of the precedent decisions even though, prior to the issuance of the precedent decisions, it had approved four substantively identical petitions, id. at 1021-22; and that the four earlier approvals were mistakes which the INS was free to correct, id. at 1024-25.

Therefore, Chiang's I-829 denial did not represent the application of a "new rule" in the Montgomery Ward sense by being based on Izumii. Moreover, Montgomery Ward's concerns about a "retroactive" order are incongruent with the two-stage process of the immigrant investor statutes for obtaining unconditional lawful permanent resident status. Initial I-526 approval does not in any way guarantee, or even predict, final I-829 approval, and it does not represent a determination of eligibility that the alien is entitled to rely upon. The two petitions undergo entirely separate and independent adjudications, and section 216A of the

INA mandates denial of the I-829 petition if the Attorney General concludes that the alien did not invest the requisite capital or failed to maintain that investment throughout the period of his conditional residency. 8 U.S.C. § 1186b(c)(3)(C), (d)(1)(B) & (C) (Supp. II 2002). This provides clear notice to an alien like Chiang who obtains I-526 approval that he has been granted resident status on only a conditional basis and that he will have to demonstrate compliance with the *statutory* standards again – not just that he complied with the terms of his investment plan – when he files an I-829 petition for unconditional status. Where, prior to the filing of the I-829 petition, the Attorney General, acting through his delegates at the INS, publishes a binding interpretation of the statutory standards, which – as this Court found in RLILP – does not make new law or create new standards but merely explains existing law, the I-829 petition may be adjudicated under the guidance of the interpretation without raising concerns about unfair retroactivity. *See* Regions Hospital v. Shalala, 522 U.S. 448, 456 (1998) (HHS Secretary's "reaudit" regulation for certain Medicare costs not impermissibly retroactive, because it called for correct application of "cost-reimbursement principles in effect at the time the costs were incurred . . ., not the application of any new reimbursement principles"); *compare* Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994) ("The conclusion that a particular rule operates 'retroactively' comes at the end of a

process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event"); *see also* id. at 269 ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . .").[6]

To the extent that "burden" should be considered at all if there is no "new rule," it should first be noted that the burden of Chiang's I-829 denial is greatly alleviated by the fact that he can ask for his money back from the limited partnership, since RLILP and Izumii confirm that the relationship between Chiang and the partnership is that of lender and debtor. See 86 F. Supp. 2d at 1022-23. More generally, to the extent that Chiang and the other individual plaintiffs really did sever all their ties with their home countries and moved their families to the United States after receiving approval of their first-stage I-526 petitions, *see* App.

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[6] To obtain I-829 approval, the alien must show that his qualifying business enterprise succeeded long enough so that the required number of jobs were created over the two-year period of conditional residence. See 8 C.F.R. § 216.6(a)(4)(iv), (c)(1)(iv) (2002). Even if the alien tries his best, his I-829 petition must be denied if the statutory job-creation requirement was not sustained over the entire two-year period. This is another indication that obtaining I-526 approval does not create legitimate "reliance" on obtaining unconditional permanent resident status two years later. The future is even more unpredictable for aliens, such as Chiang, who entered the EB-5 program as limited partners, since such persons have limited influence, and no control, over the business enterprise.

Brf. at 2, they did not do so on the basis of any assurances from the INS that approval of their I-829 petitions was just a matter of time. The EB-5 program offers a significant reward – the right to jump ahead in the line for a visa to enter the United States – but its risk is commensurately significant. If the alien is unable to demonstrate compliance with the statutory standards when he files again at the I-829 stage, he must return home. Given that fact, any advice given to the individual plaintiffs that they could safely abandon their previous lives was very bad advice indeed, but it did not come from the INS.

Furthermore, the district court's holding is tantamount to a finding that the Attorney General has discretion to waive a failure by the petitioning alien to meet the capital investment requirement of the immigrant investor statutes, if otherwise an undue burden would be placed on the alien. However, the strict wording of INA § 216A, which states that the Attorney General "shall" deny a deficient I-829 petition, is to the contrary. "Shall" denotes a mandatory intent on the part of Congress. See, e.g., United States v. Monsanto, 491 U.S. 600, 607 (1989); Anderson v. Yungkau, 329 U.S. 482, 485 (1947). No provision for a hardship waiver – or an accounting of "burden" – was included in the statute. By way of instructive comparison, Congress *has* provided for hardship waivers in a closely analogous context. Section 216 of the INA, 8 U.S.C. § 1186a (Supp. II 2002), the

provision governing permanent resident status for, among other things, alien spouses granted conditional permanent residency, provides for a hardship waiver in the event that the alien fails to meet certain marriage requirements. Id. § 1186a(c)(4) (Supp. II 2002); see also 8 C.F.R. § 216.5 (2002). Potential EB-5 applicants were warned by the INS in the proposed rulemaking for I-829 applications that this difference existed and that the INS lacked authority to grant hardship waivers for I-829 applicants. *See* 59 Fed. Reg. 1317 (1994).[7]

Arguably, this Court could consider the Montgomery Ward factors *de novo* if it is eventually called upon to review a final order of removal entered against Chiang. The courts have indicated that they act appropriately in that role but have never required agencies to undertake a Montgomery Ward analysis in the first instance. *See* Retail, Wholesale, 466 F.2d at 390 (striking balance between interest

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[7] 59 *Fed. Reg.* 1317 (1994), states, in pertinent part:

> The Service explored the possibility of establishing by regulation some form of hardship waiver similar to that set forth at 8 CFR 216.5 for removal of conditions for certain alien spouses and sons and daughters. The Service has concluded that such a waiver cannot, consistent with the statute, be created by regulation for alien entrepreneurs. Section 216A(c)(3)(C) of the Act sets out a mandatory instruction: The Attorney General shall terminate the permanent resident status of an alien entrepreneur who has failed to comply with the requirements for removal of conditions. Unlike section 216, section 216A of the Act does not provide for a waiver of these requirements in cases of hardship.

of party in avoiding application of agency's rule and interest of agency in applying rule "is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision . . ."). The district court clearly erred in requiring the INS to consider on remand the Montgomery Ward factors in determining whether Chiang's I-829 petition should be granted or denied. Since that was the only reason for the remand, this Court should vacate the remand order even if it should conclude that the district court had jurisdiction to issue the order.

IV. The District Court Correctly Determined That the Claims of Six of the Seven Named Plaintiffs Were Not Ripe for Review.

To date, of the seven named plaintiffs in the First Amended Complaint, only Chiang has actually received a denial of his I-829 petition. (App. Brf. at 13). For that reason, the district court correctly determined that "[the six remaining] Plaintiffs' APA claims are not ripe until completion of the administrative proceedings," and that "[r]efusing to review Plaintiffs' cases until their I-829 petitions are actually denied does not foreclose all avenues of review, as Plaintiffs may once again raise their claims if and when those I-829 petitions are denied." (E.R. at 129.)

It is well settled that the presumption of available judicial review under the

APA is subject to the prudential limitations of standing and ripeness. See Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). Moreover, where, as here, plaintiffs are seeking injunctive and declaratory judgment remedies, the Supreme Court has recognized that because such remedies "are discretionary ... courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution," which is to say that the effects of the administrative action challenged have been "felt in a concrete way by the challenging parties." Id. at 148-49.

In this case, there has been no concrete action applying the EB-5 regulations at issue in Izumii to the six plaintiffs' individual cases (other than Chiang) that is ripe for this Court to review. Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) (a controversy concerning a regulation is not ordinarily ripe for review under the APA until the regulation has been applied to the claimant's situation by concrete action). See also Reno v. Catholic Social Services, Inc., 509 U.S. 43, 58-59 (1993) (holding that class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him). In similar situations to these six plaintiffs, the Supreme Court has held that a challenge to a regulation, the impact of which could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs,"

would not be ripe before the regulation was actually applied to the complainant in a concrete fashion since "no irremediab[ly] adverse consequences flow[ed] from requiring a later challenge." Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 164 (1967).

At present, these six plaintiffs have the status of conditional permanent residents in the United States. It is only in the event that the INS applies the precedent decisions to deny an I-829 petition filed by one of these plaintiffs that the plaintiff will have the requisite "concrete action" and "injury" to make a "retroactivity" claim ripe. In the meantime, any ruling by this Court on whether whether the INS may or may not apply the precedent decisions to Plaintiffs' I-829 petitions would be an improper advisory ruling on a non-justiciable claim. *See* NLRB v. Food Store Employees Union, 417 U.S. 1, 10 n.10 (1974) (an agency entrusted with administration of a statute should decide questions of retroactivity in the first instance).

Plaintiffs attempt to distinguish their case from Catholic Social Services by citing Freedom to Travel v. Newcomb, 82 F.3d 1431 (9th Cir. 1994), and arguing that there is no doubt that their I-829 petitions will be denied under the precedent decisions, and that this certainty is "sufficient to create a ripe controversy." (App. Brf. at 24-25). This is incorrect. Plaintiffs cannot be certain that their I-829

petitions will be denied, and if so, of the basis for the denial. Although the INS may deny the plaintiffs' I-829 petitions based on the precedent decisions, the INS may alternatively base a denial on different grounds. See Catholic Social Services, 509 U.S. at 59 (possibility of alternative reasons for potential denials makes it much more difficult to predict firmly that the INS would deny a particular application by virtue of the challenged rule, and not by virtue of some other, unchallenged rule that it determined barred an adjustment of status.)

We demonstrated above that an adequate avenue for judicial review already exists (see Part II, infra). The appropriate role for this Court is to await the filing of a petition for review by an alien who received an I-829 denial and then a final order of removal. That person could be Chiang, or one of the other six plaintiffs, or perhaps someone else. The issues put before the Court would be delineated by the issues properly exhausted by the alien before the immigration judge and the BIA, and then raised in the alien's principal brief. A conclusion by this Court that the district court could hear the claims of the other six aliens would be based on speculative and assumed facts, would be contrary to the general principals of ripeness and standing described above, and would violate the doctrine of

administrative exhaustion of remedies.[8] Therefore, these plaintiffs' challenge to the "retroactive" application of the precedent decisions to their individual cases is not ripe, and the district court correctly determined that it lacked jurisdiction to entertain – let alone remedy – the claim. See Buckley v. Valeo, 424 U.S. 1, 114 (1976).

V. The District Court Properly Determined that Plaintiffs' Motion for Class Certification Was Mooted.

In its decision, the district court determined that "[i]n light of our ruling, Plaintiffs' Motions for Class Certification . . . [is] mooted." (E.R. at 142-143; 155-156.) Because the district court correctly determined that only one plaintiff, Chiang, had ripe claims, it followed that plaintiffs' motion for class certification was moot. Absent actual injury in the form of an I-829 denial, the plaintiffs lacked standing to challenge the precedent decisions. *See* Part IV, *infra*. Further, plaintiffs concede that of the named plaintiffs, only "Plaintiff Chiang has received a denial of his I-829 petition." (App. Brf. at 13). Indeed, of the putative 250 class members, only a

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[8] Plaintiffs assert that their claims are ripe "because the disputed issues are primarily legal," and "because they will suffer hardship if the Court declines to consider the issue." (App. Brf. at 29.) These assertions, however, are irrelevant to whether ripeness has been achieved. Instead, as correctly held by the district court, "Plaintiffs' APA claims are not ripe until completion of the administrative proceedings [and a denial of their I-829 petition]." See Catholic Social Services, 509 U.S. at 42.

handful have received I-829 denials. Id.

Moreover, even if the district court had not held the motion for class certification to be moot, plaintiffs failed to satisfy the prerequisites for class certification.[9] In order to certify a class, all the prerequisites of Fed. R. Civ. P. 23(a) and at least one subsection of Rule 23(b) must be satisfied. To justify certification, Rule 23(a) requires that: (1) the class must be so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). The Court must conduct a rigorous analysis of these prerequisites before certifying a class, General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1983), and failure to satisfy any one of the prerequisites of Rule 23(a) requires denial of class certification, Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975). Plaintiffs must demonstrate that all of the prerequisites for class certification have been met. Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985).

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[9] It should also be noted that the motion for class certification was untimely under the district court's local rules, and plaintiffs failed to establish "excusable neglect" justifying their late motion. See Fed. R. Civ. P. 6(b)(2); Kyle v. Campbell Soup Co., 28 F.3d 928, 931-32 (9th Cir. 1994).

In this case, the named plaintiffs failed to demonstrate that their claims are typical of the class; thus, they cannot adequately represent the interests of the unnamed class members. A court must "carefully scrutinize the adequacy of representation in all class actions." Lubin v. Sybedon Corp., 688 F. Supp. 1425, 1461 (S.D. Cal. 1988) (citing Rutledge v. Elec. Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975)). Additionally, the named plaintiffs' interests must align with those of the proposed class in order to satisfy this requirement. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted).

Plaintiffs claimed that named and unnamed class members have in common their challenges to the validity of Izumii and the other three precedent decisions issued by the INS. (E.R. at 31-32). In essence, however, the plaintiffs are challenging the substantive holdings of the precedent decisions "as applied" to individual plaintiffs and the financing structure of their investment agreements with the partnership plaintiffs. In other words, not a single named plaintiff has standing to challenge the validity of those precedent decisions "as applied" to other individuals, as the application may vary in each case. The named plaintiffs therefore, do not have claims "typical" of the proposed class and are not adequate representatives who can vigorously pursue the interests of the proposed class members. Therefore, even if the district court had not determined that plaintiffs'

motion for class certification had been mooted by its decision, certification, in any event, should have been denied.

Furthermore, even assuming plaintiffs had satisfied the requirements of Rule 23, certification of the proposed class was still unwarranted. Simply meeting the technical requirements of Rule 23 does not entitle plaintiffs to certification of their proposed class; rather, the decision to grant or deny class action certification is committed to the court's discretion. See Bouman v. Block, 940 F.2d 1211, 1232 (9th Cir. 1991). Thus, in addition to Rule 23, the district court was required to consider the propriety of maintaining any proposed class.

Class certification as a matter of discretion was not warranted here because class treatment of plaintiffs' claims is unnecessary. In short, denying class certification would not deprive any of the individual plaintiffs of access to judicial review because they may still seek review of any future denial of their I-829 petitions in removal proceedings. *See* Part II, *infra*. Indeed, if plaintiffs wait until they are issued an actual denial, they may make better use of the judicial review process because they will know to a certainty the basis for the INS's denials of their petitions.

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The Court may end its consideration of this appeal and cross-appeal at this

point. Plaintiffs have not appealed the district court's conclusion that the partnership plaintiffs lacked standing; their arguments with respect to standing are concerned only with the individual alien plaintiffs. *See* App. Br. at 23-30. As demonstrated above, the claims of plaintiff Chiang should be considered by this Court if and when Chiang files a petition for review of a final order of removal entered against him, and the same is doubly true of the other six individual plaintiffs, who do not even have I-829 denials yet. The arguments that follow are, therefore, protective in nature and need not be considered at all if the Court agrees with our analysis.

VI. The District Court Correctly Determined that Plaintiffs' Estoppel Claim Failed Because There Was No Showing of Affirmative Misconduct by the Government.

The district court below stated that "the INS has in no way violated its own rules, nor has it made any affirmative misrepresentations or concealments." (E.R. at 141). The Court should affirm the district court's determination that plaintiffs' estoppel claim failed because they failed to demonstrate affirmative misconduct on the part of the Service.

"[I]t is well-settled that the Government may not be estopped on the same terms as any other litigant." Heckler v. Community Health Servs., 467 U.S. 51, 60 (1984). A party seeking to assert estoppel against the government must demonstrate

that the government engaged in some sort of "affirmative misconduct," that was beyond negligence, OPM v. Richmond, 496 U.S. 414, 421 (1990), and which requires "an affirmative misrepresentation or affirmative concealment by the government . . . ." Watkins v. United States Army, 875 F.2d 699, 707 (9th Cir. 1989) (per curiam), cert. denied, 498 U.S. 957 (1990). Even then, "estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." Wagner v. Director, Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988) (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)).

In this case, there is no allegation that the INS applied or will apply the precedent decisions to plaintiffs for an improper purpose or has acted wilfully or recklessly to deprive plaintiffs of any rights.[10] In RLILP, this Court reviewed the

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[10] Contrary to plaintiffs' assertion that they have "properly asserted a prima facie claim for estoppel" (App. Brf. at 33), plaintiffs put forth no claims in the First Amended Complaint, which, if taken as true, would establish affirmative misconduct on the part of the government. Bald claims that the INS engaged in "wrongful acts and affirmative misconduct," (E.R. at 76, ¶ 142) are insufficient to meet Plaintiffs' burden to survive a Motion for Judgment on the Pleadings. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981) (the Court need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations."); Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F.Supp. 1361, 1381 (N.D. Cal. 1995) ("The court need not accept as true conclusory allegations or legal characterizations.").

entire history of the EB-5 program and the INS's corrective measures culminating in the precedent decisions, and concluded that "[t]here is no showing that the INS acted wilfully or recklessly to deprive Plaintiffs of any rights." 86 F. Supp.2d at 1027; *see also* Mukherjee v. INS, 793 F.2d 1006, 1009 (9th Cir. 1986) (finding that an immigration official's assurance to plaintiff that he was not subject to a two-year residency requirement did not constitute affirmative misconduct when there was no indication that the official lied or there was a pattern of "affirmative misconduct"). The same result is warranted here.

Although the INS may have approved the I-829 petitions of other aliens with investment structures similar to Plaintiffs' prior to the issuance of the precedent decisions, those approvals were unpublished, had no precedential authority whatsoever, and did not create a reliance interest for which plaintiffs can seek judicial protection. *See* Burns v. United States, 974 F.2d 1064, 1067-68 (9th Cir. 1992) (discussing policy reasons for not publishing court decisions, and rejecting argument that an unpublished opinion was basis for "nonmutual offensive collateral estoppel" against government); cf. Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1135, 1137 (9th Cir. 1990) (no equitable estoppel against Secretary of Interior despite contrary written assurances from Undersecretary and Department Solicitor).

The most that can be said in this case is that, before Izumii and the other

precedent decisions, the INS failed to understand the true nature of some of the investment plans presented to it and mistakenly approved petitions based on those plans. Plaintiffs do not allege, and certainly there is no evidence, that the INS's errors were deliberately made in order to mislead anyone. Moreover, the Supreme Court has emphasized that administrative agencies must be left free to correct earlier mistakes. NLRB v. Seven-Up Co., 344 U.S. 344, 349 (1953) ("'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process"); see RLILP, 86 F. Supp. 2d at 1024-25 (commenting that the process of trial and error through unpublished adjudication "is precisely why unpublished decisions do not create precedent").

The fact that the INS, or individual agency officers, at one time considered promulgating new regulations, but then chose to proceed by way of adjudication does not constitute affirmative misconduct. Indeed, ultimately under the APA, it was within the INS's discretion to choose to administer the EB-5 statute via adjudication, rather than rulemaking. RLILP, 86 F. Supp.2d at 1026, *citing* NLRB v. Bell Aerospace, 416 U.S. 267, 294 (1974). Any opinions to the contrary or

private expressions of a preference for rulemaking by INS officials were never binding on the INS and therefore may not be claimed as a source of misleading assurances. RLILP, 86 F. Supp. 2d at 1022 ("General Counsel opinions are advisory in nature and do not bind the INS. * * *Even apart from its advisory nature, the General Counsel opinion referred to by Plaintiffs was not a statement on which Plaintiffs were entitled to rely"); *see also* Smiley v. Citibank (South Dakota), 517 U.S. 735, 743 (1996) (opinion letter of agency's deputy chief counsel insufficient to establish binding agency policy, even though letter was published in trade periodical); Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993) ("an Attorney General's opinion cannot by itself establish 'clearly established law'").

Finally, RLILP holds that the INS's precedent decisions did not effect a change in existing law. 86 F. Supp.2d at 1024. If, in reviewing the EB-5 program, considering the issues raised by the cases that formed the basis for the precedent decisions, and publishing those decisions, the INS "was not contravening any statute, regulation, or published decision[,]" id., then there is no basis for plaintiffs' contention that it was affirmative misconduct for the INS to "(a) approve the individual Plaintiffs' [I-526 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" (App. Brf. at 35). There were no "changes to the immigrant investor law" and there are no "new criteria."

VII. This Court Has Determined That the Issuance of the Precedent Decisions Did Not Violate the APA and Plaintiffs' Attempts to Distinguish Their Case Must Fail.

This Court's decision in RLILP unambigously stated that "the INS's issuance of the precedent decisions . . . [did not] involve[] rulemaking [subject to the APA's notice and comment requirements]." 86 F.Supp. 2d at 1024. Further buttressing the Court's decision was the fundamental premise that "it would be ridiculous to require the INS to grant a petition because it had previously granted a similar petition by mistake." Id.

Plaintiffs argue that RLILP is not applicable because it did not concern the application of the holdings of Izumii to persons whose financing arrangements received I-526 approvals before issuance of that decision. *See* App. Brf. at 52. Plaintiffs' radical position is that the INS is required under the APA to approve I-829 petitions that, under binding precedent, fail to fulfill the requirements of the EB-5 statute.

Plaintiffs' argument may be disposed of quickly. Section 203(b)(5) of the

INA and its implementing regulations have been in place, unchanged, since 1991. In RLILP, the Court held that the INS did not violate the APA when it explained and interpreted the requirements of section 203(b)(5) and its regulations in the precedent decisions. Section 216A of the INA states that adjudication of an I-829 petition requires an examination of the petitioner's compliance with the statutory requirements. However, section 216A does not contain its own requirements, but instead refers back to the underlying requirements of section 203(b)(5). If the INS did not violate the APA in clarifying and interpreting the requirements of section 203(b)(5) in the precedent decisions, it follows that it would not violate the APA by applying those same requirements – as interpreted and clarified – in adjudications under section 216A.

The government otherwise will not take up the Court's time by rearguing general APA issues that were thoroughly briefed – and decided – in RLILP. We rely on RLILP as controlling precedent for the propositions that the INS had legitimate discretion to explain the requirements of the EB-5 program through adjudication rather than further rulemaking, 86 F. Supp.2d at 1026; that the precedent decisions neither exceeded the scope of existing law nor contradicted binding precedent, id. at 1024; that the precedent decisions did not conflict or improperly expand the existing regulations but rather interpreted those regulations,

id. at 1022; that no "binding policy" existed before the precedent decisions other than the policy decisions represented by the existing statute and regulation, id. ; that unpublished adjudications of I-526 or I-829 petitions are not binding and have no precedential value, id. at 1024-25; and that internal INS memoranda and e-mails are not binding policy statements upon which the plaintiffs were entitled to rely, id. at 1022. In the remainder of this brief, we will concentrate on the one APA-related issue, already discussed in other contexts above , that was not directly present in RLILP: the nature and scope of I-829 approval.

VIII. The INS Did Not Amend the Scope of Inquiry To Be Undertaken in the Adjudication of an I-829 Petition.

Plaintiffs contend that the "INS is amending the regulations by broadening the scope of inquiry to be undertaken during the I-829 adjudication." (App. Brf. at 57). This statement is inaccurate. As noted above, the grant of permanent resident status under the EB-5 program is a two-step process. If an alien's I-526 petition is approved, the alien is granted conditional permanent resident status only. Thereafter, the alien is required to file an I-829 petition before the second anniversary of his admission. 8 U.S.C. § 1186b(a)(1). The petition will be granted if the INS determines that the alien met and sustained the required investment and entrepreneurial activities throughout the period of his residence in the United States.

Id. at 1186b(d)(1). Alternatively, if the INS determines that the alien did not invest the required capital, or did not invest a commercial enterprise, or failed to sustain both of these activities throughout the period of his conditional residence in the United States, the I-829 petition must be denied and the alien's permanent resident status must be terminated. 8 U.S.C. § 1186b(c)(3)(C) and (d)(1).

As such, the alien's investment must be fully assessed at each stage of the EB-5 program. Plaintiffs' argument that the "I-829 adjudication does not proceed *ab initio* and is not designed to second guess the first adjudication" (App. Brf. at 58) misses the mark and is based on the false premise that, having obtained approval of their I-526 petitions, plaintiffs inevitably would have obtained approval of their I-829 petitions (and removal of the condition on their lawful resident status), were it not for the issuance of the precedent decisions. This is not so. Approval of an I-526 petition does not predict, let alone promise, approval of an I-829 petition. Approval of the I-526 petition means only that the alien, at the start of his two-year period of conditional residency, was prepared to make the appropriate investment and had put together a complete and promising business plan for his "new commercial enterprise." *See generally* 8 C.F.R. § 204.6(j) (2002) (requirements for I-526 petition). However, if, subsequent to approval, the alien encounters adverse business conditions and, despite his best efforts, fails to maintain his investment

throughout his conditional residency or fails to create the statutorily required number of full-time jobs, his I-829 petition *must* be denied. *See* 8 U.S.C. § 1186b(b)(1), (c)(3)(C) (Supp. II 2002); 8 C.F.R. § 216.6(c) (2002). Such denial is mandated simply because the job-creation purpose of section 203(b)(5) was not met. Compare Montgomery Ward, 691 F.2d at 1332-33 (noting that FTC had "wide latitude" in determining appropriate scope of adjudicatory order).

Hence, an alien who leaves his home country and takes up conditional residence in the United States under the immigrant investor program is making a bet that his commercial enterprise will succeed at least long enough to obtain I-829 approval and removal of the condition on his permanent resident status. That bet is risky because the success of the enterprise could be dependent upon factors beyond the alien's control, such as a sudden downturn in the national economy, local labor strife, raw materials shortages, natural disasters, and so on. While the alien may be prepared to take the risk in order to jump ahead in the visa line thanks to the preference offered by section 203(b)(5), the point is that, given the risk of business failure, it is unwise for any alien to sever ties with his home country simply because his I-526 petition was approved. The only prudent course is to limit physical, financial, and family commitments to the United States until I-829 approval and unconditional permanent resident status are obtained.

That is doubly true for the individual alien plaintiffs here because they obtained their I-526 approvals as limited partners. These aliens rested their hopes of obtaining I-829 approval on enterprises over which they have scant influence and no control. The success or failure of the enterprises lies in the hands of the aliens' general partners. The immigrant investor regulations permit I-526 petitions by aliens who propose to act as limited partners in the job-creating commercial enterprise, *see* 8 C.F.R. § 204.6(j)(5)(iii) (2000), but the fact remains that such aliens have little to do with whether the enterprise actually creates any jobs. Under such circumstances, there is no reasonable basis for the contention that approval of the I-526 petitions filed by the Plaintiffs created a legally cognizable expectation on their part that I-829 approval was just a matter of time.

Thus, the EB-5 statute and regulations provide for a two-year conditional permanent resident status, but does not guarantee investors that they will obtain lawful permanent resident status at the end of that two year period. At the end of that period, the aliens' investments must be reassessed to ensure that they comport with the requirements of the statute. The precedent decisions clarified the statutory requirements, and these requirements are in effect whether assessing an I-526 petition, or in reviewing an I-829 petition. There is absolutely no basis in the statute for plaintiffs' assertion that the INS's inquiry into I-829 petitions is of "narrow

scope." (App. Brf. at 59). In fact, the statute specifically provides for a catchall termination of conditional status if there is a finding that the qualifying enterprise is improper. *See* INA § 216A(b)(1)(C), 8 U.S.C. § 1186b(b)(1)(C) (providing for termination of status if the alien was otherwise not conforming to the requirements of section 203(b)(5)"). Further, plaintiffs mischaracterize the so-called "pro forma nature" of the review of the I-829 petition, stating that "suggested evidence for the formation of the commercial enterprise is simply federal income tax returns." (App. Brf. at 59). Instead, in its entirety, the applicable regulation provides that the alien must provide "[e]vidence that a commercial enterprise was established by the alien. Such evidence *may include, but is not limited to*, Federal income tax returns." 8 C.F.R. § 216.6(a)(4)(i) (2002) (emphasis added).

In short, there is no support, either in the statue or the regulations, for plaintiffs' contention that the scope of inquiry at the I-829 stage is "pro forma" and "narrow." (App. Brf. at 58-59). Instead, the INS was always, and continues to be, under the obligation to ensure that the statutory requirements of the EB-5 program are met. These requirements include the definitions and statutory requirements outlined in the precedent decisions, and are applicable to potential immigrant investors, whether they are at the initial stage of filing a I-526 petition, or at the secondary stage of attempting to remove their conditional residency status via the

filing of an I-829. Simply because the INS may have wrongly approved certain I-526 petitions that it later determined did not comply with the requirements of the statute does not preclude the Service from rectifying its mistake and denying aliens' I-829 petitions where those aliens' investments were not in compliance with the EB-5 program. As this Court said in RLILP:

> Administrative agencies make mistakes; they should be allowed to correct those errors. * * * It would be ridiculous to require the INS to grant a petition because it had previously granted a similar petition by mistake. That is precisely why unpublished decisions do not create precedent.

86 F. Supp.2d at 1024.

CONCLUSION

For the foregoing reasons, the Court should hold that: (1) the District Court erred in concluding it had jurisdiction over the denial of Plaintiff Chiang's I-829 petition; and (2) further erred in finding this Court's Montgomery Ward balancing test applicable to Plaintiff Chiang's I-829 denial. The Court should, however, dismiss Plaintiffs' appeal of the district court's decision granting Defendant's Motion for Judgment on the Pleadings with respect to: (1) the dismissal of those Plaintiffs' who had not yet received I-829 denials, and whose claims were therefore not ripe;

(2) the dismissal of Plaintiffs' estoppel claim against the government; (3) the dismissal of Plaintiffs' Motion for Class Certification as moot; (4) the dismissal of Plaintiffs' claims for violation of the APA.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), counsel for Respondent states that she is not aware of any cases currently pending before the Court that raises issues that are the same as, or closely related to, those presented in this case.

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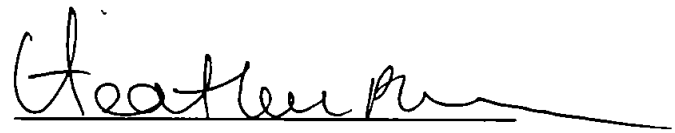
CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(B), I certify that the Respondent's Brief is: (1) double-spaced, (2) proportionately spaced in Times New Roman, 14 point, non-script typeface, and (3) excluding the certificate of related cases, certificate of service, and certificate of compliance, contains 13,291 words.



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2002, I caused two copies of the foregoing "Brief for Defendant-Appellee" to be served upon Plaintiffs-Appellants' counsel by having them placed in the Department of Justice mailroom in sufficient time for same day mailing, first class postage prepaid, and addressed to:

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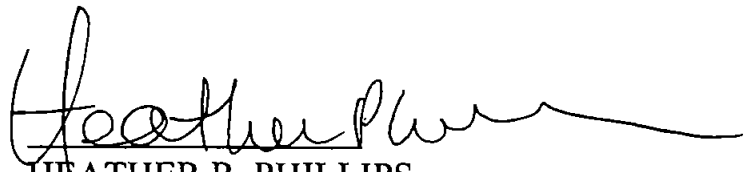

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