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CENTRAL DIST. OF CALIF.
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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

BUHLER, Albrecht CHANG, Chiao Ying CHANG, Tsung Wei CHANG, Wei Ting CHANG, Wen Wan CHUANG, Hui Yu CHUANG, Yu Te HSU, Chi Fang HSU, Yu Fang HUANG, Bi Chen HUANG, Ta Lun	**Case No.: CV 99-10518-GHK(AJWx)**[1] **FOURTH AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF: CLASS ACTION**

1 The instant case has been consolidated with *Ahn v. United States*, Case No.: CV 01-07382-GHK(AJWx).

HUANG, Ta You
HUR, Kyu
HUR, Kyung Hwa
HUR, Myung Ok
HUR, Yool
KIM, Choong Nam
KONG, Sung Duck
KUO, Chin Hsin
LIN, Chin Ching
LIN, Ko Ting
LIN, Szu Yin
SU, Chun Chen
SU, Po-Lin
SU, Po-Wei
WANG WONG, Yuk Lan,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Plaintiffs, by and through their undersigned counsel, sue the Defendant and allege as follows:

I. INTRODUCTION

1. Plaintiffs and the class members ("Investor Plaintiffs" or "Plaintiffs") seek declaratory and injunctive relief requiring the Defendant, the United States of

America, and its agents to approve their applications for status as lawful permanent residents as investors under 8 U.S.C. § 1153(b)(5) ("Immigrant Investor Law" or "Immigrant Investment Program") and to prohibit the Defendant and its agents, from retroactively applying new rules and requirements in connection with those applications.

2. The Immigration and Naturalization Act ("INA") of 1990, Section 203(b)(5), 8 U.S.C. §1153(b)(5), created a new preference allocation of visas ("EB-5 visas") for immigrants who have invested, or are in the process of investing, a designated amount of lawfully obtained capital in commercial enterprises, and can demonstrate the investment will benefit the United States economy and create, or save, ten or more jobs for qualified United States workers. Under the Immigrant Investor Law, qualified immigrant investors may obtain lawful permanent residence in the United States for themselves and their dependents.

3. One part of the Immigrant Investor Program, the Immigrant Investor Pilot Program ("Pilot Program"), was established in order to encourage immigrants to pool their capital and invest in "regional centers," which are designated public and private economic units involved in the promotion of economic growth, including "increased export sales, improved regional productivity, job creation,

and increased domestic capital investment." 8 C.F.R. § 204.6(e). The Pilot Program allows an investor in a regional center to demonstrate indirect job creation, relaxing the requirement that the investor create 10 jobs.

4. For consideration as an immigrant investor, or alien entrepreneur, an individual must file an I-526 petition with supporting documentation showing the investor has placed the required amount of capital at risk in a commercial enterprise. Once the I-526 (Immigrant Petition by Alien Entrepreneur) is approved, an immigrant investor may obtain status as a lawful conditional resident by filing an I-485 (Application to Register Permanent Residence or Adjust Status) if residing in the United States or by applying for an immigrant visa if residing abroad.

5. In order to lift the conditional resident status and become a full lawful permanent resident, an immigrant investor must file an I-829 (Petition by Entrepreneur to Remove Condition) within 90 days before the second anniversary of the immigrant investor's admission to the United States as a conditional resident. The I-526 petition sets forth the immigrant investor's investment plan. If the immigrant investor in good faith maintains the investment that was previously approved in the I-526 investment plan for two years, absent any fraud or any impermissible or significant change rendering the commercial enterprise or

petitioner unqualified, the Service must approve the I-829 petition. This case addresses the failure of the Defendant to approve Plaintiffs' and class members' I-829 applications.

6. Plaintiffs to this action include individual immigrant investors, their spouses, and dependents. The Investor Plaintiffs invested substantial amounts of assets in various partnerships through American Immigration Services ("AIS" or "Partnerships"). Each Plaintiff invested the requisite amount and became a conditional resident.

7. On the basis of their investments, Investor Plaintiffs filed I-526 petitions for classification as alien entrepreneurs. Defendant and its agents reviewed each of the Investor Plaintiffs' I-526 petitions. Defendant approved all of the Investor Plaintiffs' I-526 petitions. Plaintiffs were granted the status, authority, and permission to enter the United States as conditional residents. Many Plaintiffs sold their homes and businesses to immigrate to the United States and pursue their new lives and investments. The Investor Plaintiffs relied on (1) the conditional grant of lawful status; (2) the Defendant's rules, interpretations, and procedures; and (3) the Defendant's representations, promises, and assurances that the investments fully complied with the law and qualified them for lawful permanent residence in the United States.

8. In reliance on the previous official approval of their I-526 investment plans, Investor Plaintiffs timely filed I-829 petitions to remove the conditions of their lawful permanent residence. Some Investor Plaintiffs have already received formal notice from the Defendant that those I-829 petitions to remove the conditions of their residency were denied. Some other Investor Plaintiffs have been denied but never received formal notice of the denials. Other Investor Plaintiffs have filed their I-829 applications and will receive a formal notice of denial from the Defendant during the course of this litigation. Not one adjudicated I-829 petition of a Plaintiff, who is a partner in AIS, has been approved. All fully adjudicated applications have been denied.

9. Plaintiffs were granted conditional lawful permanent residence based on the law, regulations, requirements, and rules relating to the Immigrant Investor Program then in existence. Subsequently, the Defendant, more specifically the legacy Immigration and Naturalization Service, now known as the United States Citizenship and Immigration Service, (hereafter "USCIS", "CIS", "INS" or "Service") abruptly, radically, and unlawfully changed the rules governing the Immigrant Investor Law. Under these new unlawful rules and policies, the Service has deemed Plaintiffs' investments unapprovable.

10. The Defendant has already applied in some cases, and intends to apply in all cases, its new rules and requirements retroactively to immigrant investors, like the Plaintiffs, who made their investments and achieved lawful conditional permanent resident status. As a result, Plaintiffs have lost their immigration status or live in constant fear that their United States immigration status will be lost. Plaintiffs fear they will be deported, barred from reentry, and lose all the time, energy, assets, and resources expended in immigrating to this country.

11. Due to the initial denial of some of the Plaintiffs' applications, and the certain denial of the remainder, a cloud of uncertainty hangs over their immigration status. This fear has made it is impossible for the Plaintiffs and their families to make future plans regarding their personal lives, finances, or education. Those Plaintiffs with children constantly worry that if deported, their children will not be able to re-adapt to schools in their native country after many years in United States schools and the children's education will suffer irreparably. Plaintiffs immigrated to the United States and established themselves in their communities, enrolled their children in school, invested their assets, time and hard work in new careers or in private business in order to create a successful future for their families in the United States. Many Plaintiffs sold their homes and businesses, left successful and profitable jobs, to immigrate to the United States. Now, Plaintiffs will be forced to

discard what they worked hard to establish here in the United States and many are left with nothing to return to in their native land.

12. Defendant's retroactive application of these new rules and policies is arbitrary, capricious, and an abuse of discretion. Further, these new requirements were adopted without lawful notice or the opportunity to comment in violation of the Administrative Procedure Act ("APA"). Defendant's complete and sudden revision of the regulatory scheme governing the Immigrant Investor Law is contrary to the law's authorizing legislation and exceeds its jurisdiction and authority; therefore, the revision should be nullified pursuant to 5 U.S.C. § 706(2)(C). The retroactive application of the new requirements is illegal and violates Plaintiffs' constitutionally protected rights to due process and equal protection. Defendant, and its agents, also engaged in affirmative misconduct. From 1992 until later 1997, Defendant's agents affirmatively misled AIS and Plaintiffs into believing their investments would entitle them to residency. While misleading Plaintiffs, the Defendant believed that the Plaintiffs' applications were not approvable as early as 1996. Nevertheless, they accepted the I-526 applications and the application fees, approved Plaintiffs' I-526 applications, induced Plaintiffs to invest hundreds of thousands of dollars, and granted Plaintiffs conditional residency. Despite Defendant's prior belief of Plaintiffs' ineligibility and their

subsequent actions inducing Plaintiffs to apply, the Defendant now seeks to deny Plaintiffs' permanent residency. These wrongful actions have caused a serious injustice to Plaintiffs who relied, to their detriment, on Defendant's representations and actions. As a result of Defendant's affirmative misconduct, Plaintiffs can no longer continue with their investments. Defendant must, therefore, be estopped from denying the removal of conditional residency and must grant Plaintiffs their lawful permanent residency.

13. The Ninth Circuit, in *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003), has already ruled that the Defendant and its agents may not retroactively apply the rules, which are the subject of this litigation, to similarly situated immigrant investor plaintiffs whose I-526 petitions had been approved before the new rules were promulgated.

14. In addition to the refusal to grant lawful permanent resident status to Plaintiffs, the Defendant had unreasonably delayed adjudication of *certain* Plaintiffs' applications for naturalization because of its mistaken legal theory that conditional residents are ineligible for citizenship. The plain language of 8 U.S.C. §1186b(e) provides that conditional residents on the basis of investor status shall be considered for naturalization "to have been admitted as an alien lawfully admitted for permanent residence..." Defendant's own regulations provide that

the rights of conditional residents include "the right to apply for naturalization (if otherwise eligible)." 8 C.F.R. §1216.1. Notwithstanding the clear statutory and regulatory language, Defendant has refused to adjudicate *certain* Plaintiffs' applications for naturalization solely because those individuals are conditional residents.

15. Plaintiffs, all of whom have now been conditional residents for more than five (5) years, previously sought to compel United States Citizenship and Immigration Services (herein, "USCIS" or "CIS"), to adjudicate their applications for naturalization (Form N-400s) under 8 U.S.C. §§1186b(e), 8 C.F.R. §1216.1; the Administrative Procedure Act (APA), 28 U.S.C. § 1331 and § 1361 (mandamus), as well as under 8 U.S.C. §1447(b), in appropriate cases. Defendant, pursuant to this Court's order, adjudicated Plaintiffs' pending applications for naturalization and issued boiler-plate denials to Plaintiffs, upholding its mistaken legal theory that conditional residents are ineligible to naturalize. Plaintiffs subsequently filed N-336 Requests for Hearing on a Decision in Naturalization Proceedings pursuant to 8 U.S.C. §1447(a) to administratively appeal the denial of their applications for naturalization. To the extent that many of the plaintiffs or class members have now received denials by USCIS following their N-336 hearings, Plaintiffs now seek judicial review by this Honorable Court over their denied naturalization

applications pursuant to 8 U.S.C. § 1421(c). Plaintiffs had previously alleged separate subclasses of persons who (i) have applied for naturalization, but received no interview, and no decision to date ("category 2"), (ii) have applied for naturalization, have received an interview, but no decision has been rendered within the 120-day period following the interview ("category 3"). *See* Third Amended Complaint ("TAC") filed Nov. 13, 2008. Plaintiffs now allege a further claim under § 1421(c) and a new subclass of persons who have been _*denied*_ their naturalization applications following N-336 hearings and who seek judicial review over their naturalization applications pursuant to 8 U.S.C. § 1421(c) ("the § 1421(c) subclass").[2]

16. The across-the-board denials in the subclass members' naturalization cases were based on the individual's status as a conditional permanent resident, the utilization of boilerplate denial decisions, and have resulted in an improper *de facto* adjudication of these individuals' form I-829s (petitions to remove conditions on permanent residence). The number of N-400 denials as of this date are approximately forty-six (46), *see* Exhibit W, of which twenty-one (21) reside in the Central District of California, *see id.* Of those forty-six (46) proposed subclass

[2] Subject-matter jurisdiction exists over _*all*_ proposed subclass members because the class representatives and named plaintiffs all reside in this District as required for a class action which has as its statutory basis 8 U.S.C. § 1421(c).

members, forty-four (44) have attended their final administrative hearings and twenty-three (23) have received final determinations from the Service upholding the denials of their N-400 applications. More final determinations upholding the N-400 denials will be forthcoming considering the pattern and practice of USCIS's denying the subclass members' claims based upon the agency's misreading of the Immigration and Nationality Act (INA), specifically INA § 216A(e); 8 U.S.C. § 1186b(e).

II. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 2201 (Declaratory Judgment Act), 5 U.S.C. § 701 *et seq.* (Administrative Procedure Act), as well as under 28 U.S.C.§ 1346 (United States as a defendant), 28 U.S.C. § 1361 (Mandamus). With respect to those individuals whose naturalization applications have been denied, Plaintiffs now assert subject-matter jurisdiction under 8 U.S.C. § 1421(c), judicial review over naturalization claims which have been denied by U.S. Citizenship and Immigration Services following an N-336 administrative hearing. Jurisdiction is proper over such claims as all § 1421(c) subclass representatives reside in this District.

17. Venue is pr oper in this District pursuant to 28 U.S.C. § 1391(e) because the United States is a defendant and a substantial number of the named Plaintiffs and class members reside in this District.

III. PARTIES

Investor Plaintiffs – General Class

18. Mr. Albrecht Buhler is a citizen of Switzerland who invested in and became a limited partner in Louisiana La Sevilla Limited Partnership. In December 1995, Plaintiff Buhler filed an I-526 visa petition to be classified as an alien entrepreneur. On January 5, 1996, the Service approved Mr. Buhler's I-526 visa petition and he was subsequently granted conditional residency. As a result, Plaintiff Buhler's dependents, his wife Gillian Webb Buhler and his child Katriona Gillian Kirkpatrick obtained United States conditional lawful permanent residence. Consistent with Service regulations, Mr. Buhler filed an I-829 petition in May 1999 to remove his conditional resident status. The Defendant's unlawful actions described herein with absolute certainty will result in the denial of Mr. Buhler's I-829 application. Defendant's actions will subject Mr. Buhler and his dependents to being stripped of their residency and to being deported from the United States,

which will cause further financial, emotional, psychological, and irreparable harm to them. Mr. Albrecht Buhler is a proposed class representative.

19. Mr. Choong Nam Kim is a citizen of Korea, who invested in and became a limited partner in Georgia Almark LP/Almark Mills, Inc. On June 19, 1996, Mr. Kim filed an I-526 visa petition to be classified as an alien entrepreneur. On June 28, 1996, the Service approved Mr. Kim's I-526 visa petition and he was subsequently granted conditional residency. As a result, Mr. Kim's wife Jae Myung Kim obtained United States conditional lawful permanent residence. Consistent with Service regulations, on January 26, 1999 Mr. Kim filed an I-829 petition to remove his conditional resident status. The Defendant's unlawful actions described herein with absolute certainty will result in the denial of Mr. Kim's I-829 application. Defendant's actions will subject Mr. Kim and his dependents to having their residency stripped from them and being deported from the United States, which will cause further financial, emotional, psychological, and irreparable harm to them. Mr. Choong Nam Kim is a proposed class representative.

20. Mr. Sung Duck Kong is a citizen of Korea, who invested in and became a limited partner in Mississippi Bass Limited Partnership. On July 25, 1996, Mr. Kong filed an I-526 visa petition to be classified as an alien entrepreneur. On October 8, 1996, the Service approved Mr. Kong's I-526 visa

petition and he was subsequently granted conditional residency. As a result, Mr. Kong's dependents, his wife Hye Ra Kong. His daughter Hyun Jung Kong and his son Min Suk Kong obtained United States conditional lawful permanent residence. Consistent with Service regulations, on February 9, 1999 Mr. Kong filed an I-829 petition to remove his conditional resident status. The Defendant's unlawful actions described herein with absolute certainty will result in the denial of Mr. Kong's I-829 application. Defendant's actions will subject Mr. Kong and his dependents to having their residency stripped from them and being deported from the United States, which will cause further financial, emotional, psychological, and irreparable harm to them. Mr. Sung Duck Kong is a proposed class representative.

21. Mr. Chin Hsin Kuo is a citizen of Taiwan who invested in and became a limited partner in Louisiana La Sevilla LP. On April 15, 1996, Mr. Kuo filed an I-526 visa petition to be classified as an alien entrepreneur. On April 22, 1996, the Service approved Mr. Kuo's I-526 visa petition and he was subsequently granted conditional residency. As a result, Mr. Kuo's dependents, his wife Mei-Miao and his son Chien-Ting Kuo, obtained United States conditional lawful permanent residence. Consistent with Service regulations, on October 23, 1998, Mr. Kuo filed an I-829 petition to remove his conditional resident status. The Defendant's unlawful actions described herein with absolute certainty will result in the denial of

Mr. Kuo's I-829 application. Defendant's actions will subject Plaintiff Kuo and his dependents to having their residency stripped from them and being deported from the United States, which will cause further financial, emotional, psychological, and irreparable to them. Mr. Chin Hsin Kuo is a proposed class representative.

22. Mr. Chun Chen Su is a citizen of Taiwan, who invested in and became a Limited Partner in Alabama Denim LP. On April 30, 1996, Mr. Su filed an I-526 visa petition to be classified as an alien entrepreneur. On May 20, 1996, the Service approved Mr. Su's I-526 visa petition and he was subsequently granted conditional residency. As a result, Mr. Su's dependents, his wife Hsueh-Lan Tang and his sons Po-lin Su and Po-Wei Su obtained United States conditional lawful permanent residence. Consistent with Service regulations, on January 20, 1999, Mr. Su filed an I-829 petition to remove his conditional resident status. The Defendant's unlawful actions described herein with absolute certainty will result in the denial of Mr. Su's I-829 application. Defendant's actions will subject Mr. Su and his dependents to having their residency stripped from them and being deported from the United States, which will cause further financial, emotional, psychological, and irreparable harm to them. Mr. Chun Chen Su is a proposed class representative.

23. Suit on behalf of any Plaintiff who is a minor is brought by the parent Plaintiff, as guardian.

24. The individuals listed in the footnote below are the current putative class members within the general class. The above-referenced proposed class representatives are so designated, as well, in the following list.[3]

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[3] AHN, Kyung Sook, AHN, Jae Bum, AHN, Soo Yeon, AHN, Tae Eun, BAK, No Woong, BAK, Syun Hee, BAK, Eun Kyu, BAK, Hyun Jung, BUHLER, Albrecht (**Class Rep.**), BUHLER, Gillian Webb, BUHLER, Katriona Gillian Kirkpatrick, CHA, Myung Jo, CHA, Nak Soon, CHA, Sun Yi, CHA, Yoon Yi, CHANG, Ching-Farn, CHANG, Hsueh-Mei, CHANG, Chan-Chia, CHANG, Chan-Haw, CHANG, Chan-Zue, CHANG, Chan-Wei, CHANG, Myung Hoon, CHANG, Hye Yeon,CHANG, Jae Young,CHANG, Jae Woo, CHANG, Jae Bum, CHANG, Ruey Rong, HSU, Yu-Fang, CHANG, Wei-Ting, CHANG, Tsung-Wei, CHANG, Ta-Peng, CHANG, Hsu-Yi, CHANG, Chia-How, CHANG, Wen-Wan, CHANG, Tsung-Ming, CHANG, Chiao-Ying, CHANG, Yong Sik, CHANG, Mi Ok, CHANG, Min Ah, CHANG, Min Il, CHEN, Chi-Jen, CHEN, Chao Fang, CHEN, Chien Chuan, CHEN, Mu Hua, CHEN, Guo-Chueng, CHEN, Yueh-Ying, CHEN, Chia-Ling, CHEN, Hsiang-Fu, CHEN, Chih Hui, CHEN, Yu-Tai, CHEN, Yu-Hung, CHEN, Hui-Hsiung, CHEN, Chiung-Chu, CHEN, Po-Lin, CHEN, Yi-Hsuan, CHEN, Hsin-I CHEN, Hung-Liang, CHEN, Ling-Ching, CHEN, Chih-Yu, CHEN, Kuen-Yan, CHEN, Hsiu-Hua, CHEN, Jun-Chiu, CHEN, Wu-Cheng, CHEN, Liang-Chung, CHAO, Siao-Shee, CHEN, I-Fan, CHEN, Pao-Chu, CHENG, Shu-Hua, CHENG, Chiu-Liang, CHENG, Yi-Fan, CHENG, I-Chieh, CHIU, Ching-Chi, CHIU, Hsueh-Hui, CHIU, Yen-Chih, CHIU, Yen-Ling, CHOE, Yoon Seok, CHOE, Young Ja, CHOE, Woo Seok CHOI, Jeong Hwan, CHOI, Min Koo, CHOI, Soo Bong, CHOI, Yoon Hee, CHOI, Hyung Jin, CHOI, Woo Hyun, CHOI, Hee Jin, CHOU, Hsu Yuan-Heng, CHOU, Chih-Wei, CHOU, Chih-Ling, CHOU, Jin-Chen, CHOU, Shu-Fang, CHOU, Wei-Chun, CHOU, Yu-Shan, CHOU, Wei-Jen, CHOU, Yu-Lin, YEN, Wei, CHOU, Mao-Chuan, CHOU, Yi-Hsuan, CHUANG, Yu-Te, CHUANG, Mei-Lin, CHUANG, Hui-Tsung, CHUANG, Hui-Yu, CHUANG, Kai-Hung, ESPINUEVA, Eugene C., ESPINUEVA, Fe Helengrace R., ESPINUEVA, Edward Rae R., ESPINUEVA,

Evelyn, NELL, Elissa R., GONG, Hong-Mei, WANG, Fuyu, WANG, Bin, WANG, Yuan, GU, Mi Jin, GU, Ja Kyung, GU, Bon Young, GU, Bon Min, JUN, Woo Young, JUN, Chae Ok, JUN, Jae Young, HONG, Jung Sook, HONG, Myong Soo, HONG, Jee Min, HONG, Sung Koo, HONG, Kyung He, HONG, Yoon Ki HSIAO, Cheng-Ming, HSIAO, Li-Mei, HSIAO, Chiao-Yun, HSIAO, Mu-Jou, HSIEH, Hsien-Ming, HSIEH, Shu-Chuan, HSIEH, Pei-Chen, HSIEH, Pei-Shan, HSIEH, Hsiu Chin, HSIEH, Jui-Hsin, HSIEH, Hui Jou, HSIEH, Tsung-Yen, HSIEH, Tsung-Yi, HSIEH, Pang-Chi, HSIEH, Hui Ling, HSIEH, Chia, HSIEH, Chen HSU, Shih Chieh, HSU WU, Shu Chen, HSU, Chi-Fang, HUANG, Bi Chen, HUANG, Jen-Chieh, HUANG, Ta-Lun, HUANG, Ta-You, HUANG, Ta-Wei, HUR, Myung Ok, HUR, Yool, HUR, Kyung Hwa, HUR, KyuJANG, Ya Jin, JANG, Jae Hyeok, JO, Jae Sung, JO, So Nim, JO, Yoo Jin, JO, Yoon Suk, KAI, Chuan-Ching, KAI, Ching-Jen, KAI, Yu-Ling, KAI, Yu-Chia, KANG, Chang Sik, KANG, Young Hee, KANG, Yo Han, KANG, Ik Hee, KANG, Eun Tae, KANG, Shin Ho, KANG, Ha Na, KANG, Jeoung Soo, KANG, Yang Sook, KANG, Ki Soon, KANG, Moon Hwan, KANG, Ji Eun, KANG, Woo Jin, KANG, Woo Sung, KAO, Chien Kuei, LIANG, Yu Lien, KAO, An Kuo, KIM, Chae Young, KIM, Hwa Shin, KIM, Soo Jeong, KIM, Geon Tae, KIM, Min Seong, KIM, Chang Hack, KIM, Ok Hyeun, KIM, Joung Nam, KIM, Joung Kwan, KIM, Choong Nam (**Class Rep.**), KIM, Jae Myung, KIM, Dong Ho, KIM, Sung Sook, KIM, Hee Jung, KIM, Hyung Seok KIM, Han Soo, KIM, Sung Ja, KIM, So Jeong, KIM, Young Chan, KIM, Hwan Kyum, JANG, Kwee Sik, KIM, June Gil, KIM, June Young, KIM, Jong Won, KIM, Young Mo, KIM, Tae Ho, KIM, Yeon Jin, KIM, Joong Heon, KIM, Keun Young, KIM, Jeong Sun, KIM, Jeong Kyung, KIM, Seong Ik, KIM, Kwang, Won, KIM, Duk Soo, KIM, Jung Hoon, KIM, Jung Woo, KIM, Kwon Gi, KIM, Young Hee, KIM, Seung Hwan, KIM, Hee Jin, KIM, Kyung Ho, KIM, Yeon Joo, KIM, Hae Jin, KIM, Won Woo, KIM, Kyung Joong, KIM, Myong Soon, KIM, Hyung Sun, KIM, Wan Sun, KIM, Kyung Sook,KIM, Hyun Woo, KIM, Soon Ae, KIM, Tae Kyu, KIM, Tae Hyun, KIM, Ssang Gi, KIM, Jin Hee, KIM, Da Young, KIM, A Young, KIM, Dae Woong, KIM, Tae Ho, KO, Horng Yuan, HSU, Jui-Hsiu, KO, Jung Yung, KO, Jung Yen, KO, Jung-Da KO, Mee Sun, KO, Sung Hyun, KO, Sung Hoon, KONG, Sung Duck (**Class Rep.**), KONG, Hye Ra, KONG, Hyun Jung, KONG, Min Suk, KUO, Chin-Hsin, KUO (**Class Rep.**), Chien-Ting, KWON, Hee Jae, KWON, You Young, KWON, Hyo Jeong, KWON, Hyeong Jin, LEE, Kyu Baik, LEE, Ai Ran, LEE, Jin Yong, LEE, Hee Yong, LEE, Woo Yong, LEE, Mei-Jung, LI, Zin-Pha, LEE, Yong Ki, LEE, Sun Hee, LEE, Suh Jin, LEE, Sook Hyun, LEE, Han Na, LEE, Sung Joon, LEE, Sung Hyun, LEE, Yoon Sik, LEE, Jong Hee, LEE, Eung Jun, LEE, Sang Eun, LEE, Eung Sang, LEE, Young Cheon, LEE, Duk Soon, LEE, Joon Woo, LEE, Sang Eun, LEE, Kun Woo, LEE, Young Kyu, LEE, Jeen Ran, LEE, Se Jong, LEE, Se Hyup, LEUNG, Koon Cheung Tom, LEUNG LEE, Kwai Loi, LEUNG, Ho Yin, LEUNG, Wing Yin, LEUNG, Koon Tai, LEUNG WONG, Siu Fong LEUNG, Yi Ting, LEUNG, Hiu Wai, LIAO, Chun-Hsiung, LIAO, Shu-Chen, LIAO, Shun-Jen, LIAO, Wei-Lin, LIAO, Pen-Yu, LIAO, Hsiu Fang, LIAO, Yi Chan, LIAO, Yi Chin, LIAO, Wen-Hsien, LIAO, Mei-Li, LIAO, Hsuan-Ping, LIAO, I-Ping, LIAO, Hung-Hsiang, LIAO, Pin-Pin, LIN, Chen-Chin, LIN, Ching Ming, LIN, Hou Chou, LIN, Wen Yuan, LIN, Ho-Whei, LIN, Lee Li,LIN, Chuang-Ju, LIN, Chuang-Yeh, LIN, Hwa-Hsiung, LIN, Chin-Ching, LIN, Szu-Yin, LIN, Ko-Ting, LIN, Ming Ling, CHEN, Kai-Nan, CHEN, Yu-Ching, LIU, Yu-Hao, TSAI, Te-Hung, TSAI, Chiang Ling, MA, Shiu-Lan, TANG, Chi-Hua, TANG, Hao-Hua, MIN, Hyung Moon, MIN, Young Sook, MIN, Ji Young, MIN, Seon Young, MIN, Se-Young, MOON, Joon Sik, MOON, Mi Ja, MOON, Hyun Sun, NOH, Chi Seung, NOH, Jung Hee, NOH, Dong Hyun, NOH, Hye Rim, NOH, Min Hyun, PAN, Ching-Kuen, PAN, Pei Chun, PAN, Yi Yang, PARK, Don Suk, PARK, Yoon Sok, PARK, Jung Woo, PARK, Jae Kwan, PARK, Ae Ryun, PARK, Jang Sun, PARK, Jee Sun, PARK, In Sun, PARK, Tae Heup, PARK, Hwa Ja, PARK, Joung June, PARK, Joung Hye, PARK, Young Woo, PARK, Hye Sun, PARK, Hyun Sung, PARK, Hyun Wook, SEO, Moung Sook, SEO, Dong Shin, SEO, Dong Hwan, SEO, Jeong Hwa, SHE, Cheng-Hsiung, SHE, Hui Wen, SHE, Tzu Ming, SHIM, Myung Seong, SHIM, Chung Hwa, SHIM, Young Hoon, SHIM, Jie Hye, SHIM, Sug Soo, SHIM, Bo Soo, SHIM, Soon Yong, SHIM, Sun Hee, SHIN, Jin Young, SHIN, Chang Yeol, SHIN, Ji Ye, SHIN, Ji Min, SHIN, Moon Soo, SHIN, Kyung Sook, SHIN, Jae Hoon,SHIN, Won Ju, SIM, Hyun Yong, SIM, Youn Woo, SIM, Hyun Jung, SIM, Jae Hyung, SIU, Stanley S. T.,SIU, Ivy H. K., SIU, Vivian, SU, Chun-Chen (**Class Rep.**), TANG, Hsueh-Lan, SU, Po-Lin, SU, Po-Wei, SUH, You Ho, SUH, Mi Ran, SUH, Dong Kwan, SUH, Min Sue TELLEZ CHAVES, Jorge Alberto, TELLEZ, Martha Consuelo Gomez, TELLEZ GOMEZ, Marcela, TELLEZ GOMEZ, Laura, TONG, Chien-Hwa, TORO-BETANCUR, Andres D., ISAZA, Liliana, TORO-ISAZA, Susana, TORO-ISAZA, Paulina, TSANG, Fan Zee Eric, TSENG, Hsiu-LIANG, TSENG, Wen-His, TSENG, Huan-Min, TSUI, Tu Hsiu, TSUI, Chien Mei, TSUI, Chia Hsiang, TSUI, Fang Chi, TSUI, Fang Ching, WANG, Po-En, WANG, Hsiao-Fang, WANG, Wei, WANG WONG, Yuk Lan, WANG, Ming, WANG, Dawei, WU, Yu-Fen, WU, Yang, WU, Ching-Chun, WU, Chun-Chieh, YANG, Man-Chiou, YANG, Pen-Po, YANG, Jen-Hsing,

Investor Plaintiffs Seeking Naturalization-
Relating to Subclass Pursuant to 8 U.S.C. § 1421(c)

25. Plaintiffs hereby list the following subclass representatives who will serve to fully and fairly represent the interests of all putative subclass members seeking judicial review of the denial of their applications for naturalization under 8 U.S.C. § 1421(c): 1) Chiao Ying CHANG; 2) Tsung Wei CHANG; 3) Wei Ting CHANG; 4) Wen Wan CHANG; 5) Hui Yu CHUANG; 6) Yu Te CHUANG; 7) Chi Fang HSU; 8) Yu Fang HSU; 9) Bi Chen HUANG; 10) Ta Lun HUANG; 11) Ta You HUANG; 12) Kyu HUR; 13) Myung Ok HUR; 14) Yool HUR; 15) Kyung Hwa HUR; 16) Chin Ching LIN; 17) Ko Ting LIN; 18) Szu Yin LIN; 19) Po-Lin SU; 20) Po-Wei SU; and 21) Yuk Lan WANG WONG. *See* Exhibit W. All subclass representatives reside in the Central District of California as required under § 1421(c) and 8 C.F.R. § 336.9(b).

26. Each principal investor made the proper investment and complied with all requirements of their I-526 petitions and their I-526 petitions were all approved by Defendant. Defendant has refused to take any action to adjudicate

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YANG, Hsin-Ti, YIM, Ki Sun, YIM, Young Sook, YIM, Chong Hwa, YIM, Yon Jung, YOO, Dong Khun, YOO, Ha Young, YOO, Seung Han, YOO, Sang Won, YOO, Su Jung, YOO, Ho Yang, YOO, Young Ae, YOO, Sung Hwan, YOO, Jin Hwan, YOON, In Soo, YOON, Kyung Deog, YOON, Byung Hee, YOON, Ji En, YOON, Kwang Hee, KIM, Hak Woo, KIM, Hak Sun, YOUN, Yeo Bok, YOUN, Cin Ok, YOUN, Chul Hwoan, YOUN, Young Hwoan, and YUN, Ki Soon.

their I-829 applications because, to date, and for more than nine years, it has refused to promulgate the necessary regulations pursuant to AC21. The investors did invest the requisite amount and have complied with and maintained their residency since the approval of their I-526 petitions and the statute does not require any job creation during the two year period. *See* INA § 216A(d). Thus, Defendant improperly denied Plaintiffs' applications for naturalization on the erroneous ground that they were not "lawfully admitted for permanent residence" because the conditions have not yet been lifted from their residency. All subclass representatives and putative class members were denied on the same mistaken legal basis and should be permitted to proceed on a class basis.

27. The individuals listed in the footnote below are the current putative class members within the § 1421(c) subclass whose interests will be represented by the subclass representatives contained in Paragraph 25.[4]

Defendant

28. Defendant is the United States of America, its respective agencies, and respective delegates, *to wit*: the Department of Justice, the Department of

[4] Eun BAK; Hyun BAK; Syun BAK; Hsui Yi Lai CHANG; Yi Fan CHENG; Min Koo CHOI; Jin Chen CHOU; Wei Chun CHOU; Wei Jen CHOU; Yu Shan CHOU; Shua Hua Cheng HSIEH; Jui Hsiu HSU; Chang Sik KANG; Yohan KANG; Young Hee KANG; Hee Jin KIM; Horng Yuan KO; Jung Yung KO; Jung Da KO; Hee Yong LEE; Woo Yong LEE; Ching Min LIN; Hou Chou LIN; Wen Yuan LIN; and Dawei WANG.

Homeland Security, Department of State, United States Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), Customs and Border Protection ("CBP"), the Attorney General of the United States, the Secretary of Homeland Security, the Commissioner of USCIS, and the Secretary of State, which are responsible for the administration and enforcement of the INA, the Immigration Investor Program, and the rules and regulations promulgated thereunder.

Class Allegations relating to General Class—All Counts

29. Mr. Buhler, *et al.*, Plaintiffs, bring this action as a class action pursuant to Rule 23(a) and 23(b)(1)(A) and/or 23(b)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all others similarly situated. The class consists of the following ascertainable members:

> **All aliens, including derivative beneficiaries, who invested in one of the AIS Partnerships described in paragraphs 215 to 242 of the original Ahn Complaint, who had an I-526 petition approved by the Attorney General after January 1, 1995 and before August 31, 1998, and were granted conditional residence status pursuant to the Immigration and Nationality Act (INA), section 203(b)(5), 8 U.S.C. § 1153(b)(5), and who timely filed, in accordance with INA § 216A(c)(1)(A), 8 U.S.C. § 1186b(c)(1)(A), and before November 2, 2002, an I-829 petition requesting the removal of such conditional basis, and who have received or will receive a denial of their permanent residency because they are unable to comply with the investment and employment requirements under INA §§ 203(b)(5) and 216A and existing regulations as a result of: (1) the retroactive application of the standards announced in Matter of**

<u>Izumii</u> and its progeny; (2) the affirmative misconduct of the Defendants in approving class members I-526 petitions on which the class members detrimentally relied; and/or (3) APA, abuse of discretion, ultra vires, and due process and equal protection violations.

30. The class of investors consists of at least 200 investors and their number makes joinder of all members impracticable.

31. A community of interest exists between Mr. Buhler et al., and members of the class in that there are questions of law and fact which are common to all Plaintiffs and class members. All Plaintiffs and class members are subject to a change in rules, policies, and procedures of the Defendant as detailed in paragraph 105, *infra*, which will result in the denial of their permanent residency in the United States. All of these changes with respect to all Plaintiffs and all members of the class: (1) were made in violation of the notice and comment provisions of the Administrative Procedures Act; (2) constitute an abuse of discretion under the APA and the INA; (3) exceed the Defendant's statutory authority under 5 U.S.C.§ 706(2)(C) and INA §§216(c)(1)(A) and (d)(1), 8 U.S.C. §§1186b(c)(1)(A) and (d)(1); violate due process and equal protection; (5) violate principles of estoppel; and (6) involve the improper retroactive application of the law. In addition, all Plaintiffs are subject to the same facts and policy in regard to the affirmative misconduct of the Defendant as detailed in paragraphs 79, 118-37,

whereby Defendant decided, as early as August 1996, that Plaintiffs' investor petitions could not be approved yet they approved them, allowed the Investor Plaintiffs to enter the United States and remain here for many years, accepted their filing fees for their I-829 petitions, and took no action to revoke their I-526 applications.

32. The claims or defenses of the representative Plaintiffs and of Defendant are typical of the claims of the class or defenses of the Defendant.

33. The representative Plaintiffs Mr. Buhler, *et al.*, will fairly and adequately protect the interests of the class because they, like all class members, are subject to the unlawful policies and actions of the Defendant which will result in the denial of their I-829 applications to lift the conditions on their residency. The legal outcome is identical to that which the members of the class have been subjected to, threatened with, or will be subjected to.

34. Individual suits by each member of the class would be impracticable because:

a. They would create a risk of inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct of the party opposing the class; and

b. Defendants have acted or have threatened to act, on grounds generally applicable to each member of the class, making appropriate final declaratory and injunctive relief with respect to the class as a whole.

35. The number of individual suits would impose an undue burden on the courts as it would require the adjudication of at least 200 separate cases.

36. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

37. Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of class members as well as the named Plaintiffs.

38. The class members have suffered a denial of a previously available right exercised by other similarly situated investors in AIS investment programs as a result of the Defendant's illegal conduct.

39. As a result of the Defendant's unlawful actions and affirmative misconduct, the Investor Plaintiffs have also suffered substantial and irreparable harm. Many, if not all, of the Investor Plaintiffs are suffering from fear, anxiety, worry, insomnia, and nightmares due to the current uncertainty as to their immigration status and that of their dependents. Other injury, harm or hardship suffered by the Investor Plaintiffs includes the current and future financial and

emotional losses incurred by being unable to plan for the future. Due to the uncertainty, investments cannot be made, houses cannot be purchased, stable and permanent jobs cannot be secured, overseas travel cannot be planned, and educational opportunities cannot be pursued. Many Investor Plaintiffs have suffered and continue to suffer substantial economic loss and psychological trauma due to the uncertainty of their U.S. immigration status, as they are denied the ability to further invest or otherwise plan financially for their future. In addition, Investor Plaintiffs may be subject to the 3 and 10 year bar if they are now forced to leave the United States.

40. Many Investor Plaintiffs have relatives residing in the United States who are either permanent lawful U.S. residents or U.S. citizens. If unlawfully denied their lawful permanent residency and deported, these Investor Plaintiffs will be separated once again from their mothers or fathers, brothers or sisters, in-laws and other relatives residing in the United States. There are even Investor Plaintiffs with minor children who are U.S. citizens by birth, who would be forced to choose between taking their child back to a country they have never known, or leaving the child behind with relatives in this country.

41. Those Investor Plaintiffs who have school-age dependents express great fear, anxiety, and stress relating to their children's education. Most of the

Investor Plaintiffs' children left schools in their native countries upon immigrating to the United States, and have been attending U.S. schools for the past several years as conditional lawful permanent residents. Both the children and their parents suffer greater fear, anxiety, and stress considering the possibility that they may be deported and their education terminated. 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 parents and children came, it would therefore be almost impossible for these children to re-adapt or reintegrate into the educational system of their native land. 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. 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.

42. Similarly, most, if not all, of the Investor Plaintiffs sold homes and businesses, and liquidated assets to emigrate to the United States. Many are unable to return to their home countries because they will be unable to earn a living there in light of their previous actions in liquidating assets and leaving their countries. The constant threat of deportation, brought on by the Defendant's unlawful action

and affirmative misconduct, causes severe emotional and physical harm to the Investor Plaintiffs and their dependents. The Investor Plaintiffs, in reliance upon the Defendant's rules, regulations, assurances, representations, statements, and promises that the investment programs offered by the AIS partnerships complied fully with the law and that their I-526 and I-829 petitions would be approved, emigrated to the United States. 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 the dream of lawfully residing in the United States.

43. In addition, the Investor Plaintiffs in good faith maintained or sought to maintain their investments as required by the Immigrant Investor Law and as set forth in their I-526 petitions. All Investor Plaintiffs, so required, timely filed their I-829 petitions to remove conditions. Now, the retroactive application of the new rules by Defendant exposes them to deportation and the resulting economic, emotional, and familial devastation.

Subclass Allegations of Class Members Denied Naturalization Regarding Cause of Action Seven And § 1421 Subclass

44. The following are the subclass representatives for the proposed subclass of individuals who have been denied naturalization by USCIS: Yuk-Lan Wang Wong; Wen-Wan Chang; Po-Wei Su; and Po-Lin Su. These named subclass representatives bring this action on behalf of the putative subclass members listed within Exhibit W, pursuant to Rule 23(a) and 23(b)(1)(A) and/or 23(b)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all others similarly situated.

45. Regarding the § 1421(c) subclass, the proposed subclass definition is as follows:

> **All persons, including derivative beneficiaries, who invested in one of the AIS Partnerships, who were granted conditional residence status under the employment based fifth preference of the Immigration and Nationality Act, section 203(b)(5), 8 U.S.C. §1153(b)(5) as alien investors, who have been conditional residents for 5 years or more, whose conditional resident status has not been revoked, who have final denials of their N-400 applications, and who are seeking judicial review pursuant to 8 U.S.C. § 1421(c), having had their N-400 applications systematically denied by USCIS based upon their status as EB-5 Conditional Residents in contravention of 8 U.S.C. § 1186(e).**

46. A community of interest exists between the Subclass Representatives and members of this subclass in that there are questions of law and fact which are common to all named representatives and subclass members.

47. All representatives and subclass members within the § 1421(c) subclass are subject to the same improper application of the law and policies and procedures of the Defendant as detailed in paragraph 14, *supra*, which will result or has resulted in the denial of each subclass members' application for naturalization thus conferring jurisdiction in this Court pursuant to 8 U.S.C. § 1421(c).

48. The claims or defenses of the representative Plaintiffs and of Defendant are typical of the claims of the class or defenses of the Defendant. For example, the class representatives are either the principal investors, or derivative family members of the principal investors, who were all granted I-526 conditional residency status. They share the same claims for naturalization as all subclass members in that they all were granted EB-5 conditional residency status more than five (5) years ago, all are eligible for naturalization barring any issues of good moral character, physical presence, and all other issues impacting on their eligibility for naturalization.

49. The subclass representatives will fairly and adequately protect the interests of the subclass because they, like all subclass members, are subject to the unlawful policies and actions of the Defendant. Such policies and actions, as applied to the subclass members' naturalization applications, have resulted in these individuals being prevented from becoming United States citizens. The legal outcome is identical to that which the members of the subclass have been subjected to, threatened with, or will be subjected to.

50. Plaintiffs seek judicial review of the denial of their applications for naturalizations pursuant to 8 U.S.C. § 1421(c). Section 1421(c) permits a court to conduct a *de novo* hearing on an application for naturalization at the request of the petitioner. Plaintiffs seek to proceed on a representative basis to evaluate an identified legal question as a threshold matter. Plaintiffs seek to proceed on a representational basis because individualized hearings, in regard to the identified, threshold legal question presented, may be deemed impracticable because, for example,

a. They would create a risk of inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct of the party opposing the subclass; or

b. Defendants have acted or have threatened to act, on grounds generally applicable to each member of the class, making appropriate final declaratory and injunctive relief with respect to the subclass as a whole.

Therefore, in lieu of individualized hearings before the District Court to evaluate this threshold legal question, Plaintiffs request a ruling from this Court in the form of a legal conclusion that the conditional permanent resident status of any individual subclass member cannot be used as a basis to improperly deny that individual's application for naturalization. In the alternative, if this Court deems that review on a representational basis is not permitted by section 1421(c), Plaintiffs request individualized hearings before the District Court. [5]

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[5] In the event that this Court denies Plaintiffs' instant motion or do not permit Plaintiffs to proceed on a representational basis, Plaintiffs respectfully request that the 120 day time limit for filing a cause of action pursuant to 8 U.S.C. § 1421(c), as set forth in 8 C.F.R. § 336.9(b), be tolled so that proposed subclass members not residing in this District do not lose their right to file a cause of action under Section 1421(c) in their district of residence. *See American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 554 (1974)(the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action); *see also Catholic Social Services v. INS*, 232 F.3d 1139, 1145-49 (9th Cir. 2000)(en banc).

51. The number of individual suits may impose an undue burden on the courts as it would require the adjudication of scores of individual lawsuits.

52. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

53. Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of class members as well as the named Plaintiffs.

54. As a result of the Defendant's unlawful actions, the members of this subclass have suffered substantial and irreparable harm. They have been deprived of the most precious right our country has to offer—the right to be a member of our political community through the grant of citizenship. By denying them the right to have their claim for citizenship adjudicated in a timely manner, Defendant has deprived the subclass members of all the benefits that accrue to citizens including social, political and economic benefits that we extend only to United States citizens. They have been denied the right to apply for employment that is limited to United States citizens such as federal employment in many areas; they have been denied the right to vote in local, county, state and federal elections; and they have been denied the right to obtain certain benefits from the government that are extended to citizens and not conditional residents. They have also been denied the right to petition for other close family members who they wished to be reunited

with in the United States. Many, if not all, of the subclass members are suffering from fear, anxiety, worry, insomnia, and nightmares due to the current uncertainty as to their immigration status. Other injury, harm or hardship suffered by subclass members include the current and future financial and emotional losses incurred by being unable to plan for the future. Due to this uncertainty, investments cannot be made, houses cannot be purchased, stable and permanent jobs cannot be secured, overseas travel cannot be planned, and educational opportunities cannot be pursued. Many Investor Plaintiffs have suffered and continue to suffer substantial economic loss and psychological trauma due to the uncertainty of their U.S. immigration status, as they are denied the ability to further invest or otherwise plan financially for their future.

IV. FACTUAL BACKGROUND COMMON TO ALL PLAINTIFFS

The Immigrant Investor Law

55. In 1990, Congress enacted the Immigrant Investor Law, INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). This provision made available lawful permanent resident visas for qualified immigrants seeking to enter the United States for the purpose of engaging or investing in a "new commercial enterprise." To qualify, the immigrant must invest or be actively in the process of investing $1,000,000.00 in a new commercial enterprise, or at least $500,000.00 where the investment is

being made in a "targeted employment area." The immigrant must demonstrate the investment created full-time employment for no fewer than 10 United States citizens or aliens authorized to be employed in the United States. Where the capital investment is being made in a "troubled business," which is a business that has been in existence for at least two years and that has lost 20 percent of its net worth over the past 12 to 24 months, the immigrant investor can demonstrate the investment maintained the number of existing employees at no less than the pre-investment level for a period of at least two years. If the investment is in a regional center, the employment creation aspect may be met through indirect as well as direct employment.

56. The Service's final rules for implementing the immigrant investor provisions of INA § 203(b)(5) were promulgated on November 29, 1991, 56 Fed. Reg. 60897, and went into effect that day. The final rules set forth the Service's interpretation of the language in INA § 203(b)(5).

57. The Service's regulations set forth, specifically in 8 C.F.R. § 204.6(e), the definitions to be used when reviewing a petition to classify an alien under INA § 203(b)(5).

58. "Capital" means cash and other tangible assets. The Service also broadly construed the term "capital" to include debt instruments, such as

promissory notes, if the immigrant investor is personally liable for the debt and the debt is not secured by the new enterprise's assets. 8 C.F.R. § 204.6(e).

59. "Commercial enterprise" is any for-profit activity formed for the ongoing conduct of lawful business including a partnership, either general or limited. 8 C.F.R. § 204.6(e). In passing the Immigrant Investor Law, Congress intended the term "new commercial enterprise" to be broadly applied and to include pooled investment programs. The purpose of the Immigrant Investor Program was to attract foreign investors to invest new capital, create new commercial enterprises, revitalize existing troubled businesses, promote job creation or job retention, and to benefit the United States economy and labor market. Congress intended immigrant investor petitions to be reviewed in a flexible and reasonable manner in order to achieve the Immigrant Investor Law's purpose.

60. "Invest" means to contribute capital, but the definition excludes any contribution of capital "in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the immigrant investor and the new commercial enterprise." 8 C.F.R. § 204.6(e).

61. "Targeted employment area" means an area that at the time of investment is a rural area or has experienced high unemployment of at least 150 percent of the national average rate. 8 C.F.R. § 204.6(e).

62. "Troubled business" is a business that has been in existence for at least two years, has incurred a net loss for accounting purposes during the prior 12 to 24 month period prior to the immigrant investor's filing date for the I-526, and the loss for such period is equal to twenty percent of the troubled business's net worth prior to such loss. 8 C.F.R. § 204.6(e).

63. The Service's regulations, specifically 8 C.F.R. § 204.6(g), provides that "a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor," (*i.e.*, a "pooled investment"), provided each immigrant investor's investment results in the creation of a least 10 full-time jobs for qualifying employees. This section also provides there can be co-owners of the new commercial enterprise who are not seeking classification as "immigrant investors," as well as foreign or domestic corporations or partnerships.

64. The Service's regulations at 8 C.F.R. § 204.6(j)(5) address the statutory requirement that the immigrant investor be engaged in the management of the new commercial enterprise, either through day-to-day managerial control or

through policy formulation. The regulation provides that a limited partner will be considered sufficiently engaged in the management of the enterprise, if the limited partnership agreement gives the immigrant investor "certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act."

Creation of the Immigrant Investor Pilot Program

65. On October 6, 1992, Congress established the Pilot Program, a sub-program of the Immigrant Investor Program. The Pilot Program amended the Immigrant Investor Law in order to encourage immigrants to pool their capital and invest in "regional centers." "Regional centers" are entities organized "for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." Section 610, Department of Justice and Related Agencies Appropriations Act, 1993, Pub. L. 102-395, 106 Stat. 1828, 1874 ("1993 Appropriations Act").

66. A "regional center" is "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." 8 C.F.R. § 204.6(e). For purposes of the Pilot Program, the Service designates regional centers.

67. Under the Pilot Program, the requirement in the Immigration Investment Program that each individual investment create ten jobs for qualifying individuals was expressly relaxed. The Immigrant Pilot Program allows immigrant investors, who invest in a regional center, to demonstrate "indirect" job creation as a result of the investment.

68. On August 24, 1993, the Service promulgated its Interim Rule governing the Immigrant Investor Pilot Program. 59 Fed. Reg. 44606. Although the legislation authorizing the Pilot Program specified that the program's multiple purposes were the "promotion of economic growth, including export sales, improved regional productivity, job creation, and increased domestic capital investment," the Service's rulemaking improperly focused only on the "increased exports" component of the program. To that end, the preamble to the rule noted that, while Section 610(c) requires that the revenues generated by the enterprise must result in exports, the enterprise itself need not be engaged directly in generating exports of goods or services. Therefore, immigrant investors participating in the Pilot Program were allowed to credit jobs created directly through their investment activities. 58 Fed. Reg. at 44607.

69. The Service's Interim Rule also provides that, in lieu of strict adherence to the "10 jobs created" requirement of the original immigrant investor

program, "reasonable methodologies" could be used to estimate the number of jobs created by investment in a regional center. These methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods and 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 C.F.R. § 204.6(m)(3)(v).

70. The Service's final rule implementing the Pilot Program was published on April 15, 1994. 59 Fed. Reg. 17920. No substantive changes were made to the Interim Rule, but in responding to comments on it the Service noted that the legislative history of Section 610 of the 1993 Appropriations Act "indicates that Congress intended to determine the viability of pooling investments in specific regions of the United States." Id. (*citing* S. Rep. No. 918, 102 Cong., 2d Sess. (1992)). In addition, the Service understood its own regulations and provided guidance to the public that pooled investments in the form of venture capital funds were permitted in the context of regional Pilot Programs. Thus, venture capital funds which included pooling arrangements were permitted.

71. In addition to the regulations cited above, additional guidance on the Immigrant Investor Program has been provided by legal opinions published by the Service's Office of General Counsel ("OGC"). An OGC Memorandum Opinion

dated September 10, 1993 encourages the formation of venture capital funds by concluding that the pooled investment programs fully satisfy the letter and spirit of the Immigrant Investor Law (Exhibit A).

72. A September 10, 1993 OGC Memorandum Opinion confirms that an investor's capital is placed "at risk," for purposes if 8 C.F.R. § 204.6(j)(2), even if the investor, and the enterprise in which he or she invested, has an agreement for the sale of the investor's interest in the enterprise (such as by redemption, third-party purchase, or otherwise) after the two-year conditional period had been satisfied. This was to further encourage immigrant investment by permitting the creation of "exit strategies" for the investor.

73. An OGC Memorandum Opinion dated June 27, 1995 encouraged the extension of credit to immigrant investors by concluding the Service's regulations did not prohibit an investor's indebtedness (such as a promissory note backed by the investor's own assets) to meet the requirements if it was a secured transaction under Article 9 of the Uniform Commercial Code (Exhibit B).

Attaining Lawful Permanent Residence Under the Immigrant Investor Law

74. To obtain lawful permanent residence under the Immigrant Investor Law, an immigrant entrepreneur must first file an I-526 petition setting forth information about the investor and the qualifying investment. 8 C.F.R. § 204.6(a).

The I-526 petition must be filed with the USCIS 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).

75. The I-526 petition 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 that will create full-time positions for not fewer than 10 qualifying employees. In the case of an investment in a "troubled business," 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.

76. In the case of a petition submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the immigrant investor has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center designated by the Service, and that the petitioner has placed the required amount of capital at risk for the purpose of generating a return. Petitions under the Pilot Program need only demonstrate "indirect" job creation, rather than the "direct" job creation required under the Immigrant Investor Law. In other words, a petition under the Pilot Program must be accompanied by evidence that the investment will create 10 full-time positions

either directly or indirectly through revenues generated from increased exports or other forms of business resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies.

77. The USCIS Service Center thereafter adjudicates the I-526 petition. If the Service determines the immigrant investor has met the requirements of INA § 203(b)(5), the petition is approved and a Notice of Approval is sent to the immigrant investor. The immigrant investor and his dependents then obtain conditional lawful permanent resident status either by visa processing at a State Department consular post or through adjustment of status in the United States by the Service. Upon entering the United States or completion of the adjustment of status process, the immigrant investor and his or her dependents are admitted for permanent residence on a conditional basis. Thereafter, and within the 90-day period before the second anniversary of the alien's lawful admission for permanent residence, the immigrant investor must file an I-829 to have the conditional status removed.

78. The adjudication of the I-829 by the Service is *not* a readjudication of the underlying investment. According to both the current version of INA §216A(c)(3)(A) and (d)(1), 8 U.S.C. §1186b(c)(3)(A) and (d)(1) and the statutory version that existed at the time of the adjudication of Plaintiffs' petitions, the

Service is not allowed to re-adjudicate the facts underlying the I-526 petition when adjudicating the I-829, but merely verify that the investor has invested or is actively investing the requisite capital and that the investment has been sustained in conformance with the requirements of the statute. An I-829 must be accompanied by evidence that (1) the investor invested or is actively in the process of investing the requisite capital in the qualifying enterprise, and (2) the investor has in good faith sustained those actions throughout the two-year period of the alien's residency in the United States. The Service has stated that the requirement that the immigrant investor has sustained his investment during the two years will be considered "flexibly." The documentary requirements for the I-829 are minimal according to the Service's own guidelines because similar, substantial documentation is presented at the first (I-526) stage of the process. The immigrant investor must also submit evidence that he created or can be expected to create 10 full-time jobs for qualifying employees. If the investment is in a regional center, the employment creation aspect may be met through indirect as well as direct employment. In the case of a "troubled business," the immigrant investor can demonstrate the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following the investor's admission as a conditional permanent resident. If the immigrant investor properly demonstrates the I-829 requirements, his conditional status is to be removed and he will become a lawful permanent resident of the United States. The decision on the I-829 petition must be made by the Service within 90 days of the date of filing the petition or within 90 days of an interview, unless the interview is waived by the Service, whichever is later.

<u>The Investment Program Through AIS and Plaintiffs' Investments</u>

79. The Plaintiff Investors all invested in partnerships established through American Immigration Services ("AIS"). These partnerships had virtually identical program elements and structure. All of the AIS partnerships that Plaintiffs invested in had programs and elements that complied fully with existing and longstanding Service rules, requirements, interpretations and pronouncements regarding the Immigrant Investor Law.

80. Plaintiff Investors through these partnerships invested the $500,000 or $1,000,000 as required by law by placing cash and promissory notes for the full amount with the partnerships. 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 in a $500,000 investment, or $300,000, $400,000 or $500,000 plus a promissory note for the remainder in a $1,000,000 capital investment. 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 was to be paid after the two-year conditional period had expired and the immigrant investor had achieved lawful permanent resident status. The initial cash payment was held in an escrow account until the necessary approvals on the I-526 petitions were received from the Service and the investor and his or her family became conditional lawful permanent residents through adjustment of status or an immigrant visa. Upon receipt of such approvals, the Plaintiff was admitted as a partner in one of the AIS limited partnerships and the escrowed funds were released to the business entities connected with the investment program to commence satisfaction of the job-creation requirements.

81. The AIS limited partnership represented the investment vehicle for the Plaintiff Investor. The partnership aggregated (or pooled) many immigrant investors and located a qualified business in which to invest.

82. The Plaintiff Investors' funds were then used to make an equity investment in the selected business in accordance with the investment program's requirements. Funds which were not needed for immediate business operations, in some partnerships, were placed in a trust for the benefit of the business and partnership. The trust funds could only be used for legitimate business purposes, but notwithstanding the use of the trust, those funds could still be accessible to

creditors. The trust provision, therefore, ensured that while the investment in the business was an equity investment, the Plaintiff Investor had a voice in the management of the business, and the funds were at risk.

83. Under most, but not all, investor agreements, the partnership agreed to pay the immigrant investor a minimum annual return on the invested cash based upon the partnership having available funds. The immigrant investor was also granted an option to see his limited partnership interest back to the partnership after the balance of the promissory note was fully paid. The partnership had a corresponding option to buy back the Plaintiff Investor's limited partnership interest at that time. Both of these transactions were widely accepted standard business practices for concluding an equity investment.

84. Another program element typically included in most investment agreements between the Plaintiff Investors and the AIS partnerships was a provision allowing for the deduction of reasonable management fees and costs as part of the investment.

<u>The Plaintiff Investors' Applications and the Defendant's Response</u>

85. Pursuant to the Defendant's directives, each Investor Plaintiff separately filed an I-526 petition, accompanied by exhaustive evidence describing, *inter alia*, the investment and investment program elements, including but not

limited to, the use of a limited partnership, promissory note, business trust, redemption provision, and the provision for an annual return on the invested cash. The Service, upon a thorough review of each and every Investor Plaintiff's I-526 petition, and the application of the existing rules, requirements, and regulations, approved *each and every* I-526 petition filed by the Investor Plaintiffs. Thereafter, the Service granted adjustment of status or the Department of State granted immigrant visas to the Plaintiffs. These numerous approvals were made by the Service and the Department of State with full knowledge and disclosure of all elements and structure of the investment programs at issue. The Plaintiffs filed their I-526 petitions separately and on different dates. Each I-526 was individually reviewed, evaluated, and ultimately approved by a different Service official on a different date. It was not coincidence, therefore, that each Service official evaluated and approved each individual I-526 petition by applying the identical, existing Service rules, policies, procedures, and guidelines to determine whether the individual investment at issue met the qualifying criteria for approval under the law. Further, and not coincidentally, thousands of other petitions separately filed by other immigrant investors containing the same or similar investment features as those of the Plaintiffs, were independently evaluated and approved by various Service officials at various times in compliance with the Service's existing rules, policies and guidance *prior to* unlawful precedent decisions, again resulting in approvals.

86. In addition to these and other consistent approvals by the Service of investor petitions containing identical investor program elements, the Service and the Department of State promised, represented, and assured the Partnerships, their partners, representatives, and agents that their investment programs fully complied with the Immigrant Investor Law, the Pilot Program, and the relevant existing rules and regulations. Through their approval of each and every I-526 petition for each investor and through numerous published opinions and policies, the Service and the Department of State repeatedly and publicly assured and represented that petitions containing investment programs identical to those offered by the Partnerships would not be a cause to deny a petition which was otherwise approvable.

87. Prior to the Service's unlawful adoption of its new rules and requirements, the Service's statements, memoranda, and field instructions expressly approved of the structure and elements of the investment programs at issue. Moreover, the Service and Department of State, since the passage of the Immigrant Investor Law, consistently approved immigrant investor petitions, issued immigrant visas, granted adjustment of status, granted conditional lawful

permanent resident status, and removed the two-year condition to such status, to thousands of alien entrepreneurs who participated in investor programs containing some or all of the investment structure and elements at issue here. Indeed, no such petition or application was ever denied based upon these same or similar investment features prior to the Defendant's unlawful and wholesale revision of the Immigrant Investor Law's rules and requirements.

88. Plaintiffs reasonably relied on the Defendant's rules, regulations, assurances, representations, statements, and promises that the investment programs offered by the Partnerships fully complied with the law and that their I-526 and I-829 petitions would be approved. The Investor Plaintiffs would not have made these substantial investments, uprooted their families, and immigrated to the United States had they known that the Defendant would unlawfully change the rules and requirements in mid-stream.

89. The Service proclaimed and promised as early as 1996 that any new rules or requirements relating to the Immigrant Investor Law would be promulgated in accordance with the rulemaking procedures of the Administrative Procedures Act and would only be applied prospectively. In December 1997, however, the Service abruptly and radically changed its rules and requirements, without notice and comment, for adjudicating petitions under the Immigrant

Investor Law. In addition, the Service instructed that its new rules and requirements would be applied retroactively to immigrant investors, like the Plaintiffs, who had achieved lawful conditional permanent resident status, but who had yet to have their two-year conditions removed.

90. Subsequent to the Investor Plaintiffs' obtaining their conditional residency, and as detailed in this Complaint, the Service unlawfully and unconstitutionally changed the criteria for an acceptable investment and determined that the structure used by the partnership was no longer permissible under Service regulations.

91. Following the expiration of five (5) years after the grant of certain Investor Plaintiffs' (and their family members') conditional residency status, many individuals applied for naturalization. By virtue of prior orders of this Court, the delays that many plaintiffs had experienced were alleviated and many plaintiffs in the prior "Category 2" and "Category 3" subclasses were adjudicated. *See* Exhibit W. To date, forty-six (46) individuals have received decisions denying their N-400s applications for naturalization and have appealed the denial of those decisions by requesting an N-336 hearing. *See* sample N-400 denials at Exhibit X. Forty-four (44) of the forty-six (46) proposed subclass members have attended their N-336 hearings. *See* Exhibit W. Of those individuals, twenty-three (23) have

received decisions upholding the denials of their naturalization applications. *See* sample N-336 final denials at Exhibit Y. The denials at both levels were based on an across-the-board finding of ineligibility for naturalization due to the applicants' present status as conditional permanent residents. Moreover, the decisions all contained similar boilerplate language alleging that the applicant or the principal-investor-family member in question had filed to make the appropriate investment and/or otherwise failed to comply with the EB-5 program and that the applicant had failed to overcome the basis of the initial N-400 denial.

Rules and Authority Relied Upon by Plaintiffs

92. The Plaintiffs invested in Partnerships with investment structures that had been approved by and were in fact based upon the authoritative written precedent, regulations, directives, and practice of the Service and Department of State. Each of the now challenged program elements had been previously approved by the Service or the Department of State in hundreds, if not thousands, of cases and in one or more of the following authoritative written and published directives, adjudications, public statements, and opinions, constituting the available administrative jurisprudence as to the interpretation and implementation of the Immigrant Investor Law, as well as other oral and written statements,

pronouncements, and opinions, which include, but are not limited to, the following which are discussed in this Complaint:

a. The August 31, 1993 decision of the Service's Administrative Appeals Unit ("AAU") (now know as the "AAO"), which affirmed a district director's decision approving a petition containing a promissory note (Exhibit C);

b. The September 10, 1993 Memorandum Opinion of the OGC (Exhibit A);

c. A September 24, 1993 letter from Lawrence Weinig, the Service official in charge of administering the Immigrant Investor Law (Acting Associate Commissioner for Examinations), which discusses the use of an investment fund as a new commercial enterprise (Exhibit D);

d. An October 20, 1993 letter from R. Michael Miller, Acting Assistant Commissioner, to Michael Aytes, Director of Service Center Operations, directing the September 24, 1993 letter from Weinig be distributed to the Eastern, Northern, and Western Service Centers (Exhibit E);

e. An OGC Memorandum Opinion dated June 27, 1995, which concludes that the Service's regulations do not require that the indebtedness of an investor meet the requirements of a secured transaction under Article 9 of the Commercial Code (Exhibit B);

f. An August 10, 1995 letter from the Service's Chief of Immigrant Branch Adjudications, which addresses the issues of job-creation, pooled investments in venture capital funds, capital in export-generating businesses, non-immigrant investors, and capital being placed "at risk" (Exhibit F);

g. A December 21, 1995 letter from Michael Straus, Acting Chief Immigrant Branch, Adjudications, and Service official in charge of administering the Immigrant Investor Law, which addresses a petitioner's role in management of a new commercial enterprise and promissory notes as qualifying capital (Exhibit G);

h. Service Field instructions to Service Centers, dated October 20, 1997, expressly approving each of the program elements (Exhibit H);

i. A December 19, 1997 OGC Memorandum Opinion discussing some of the program's elements (Exhibit I); and

j. A history of consistent, uniform and repeated Service and Department of State approvals of thousands of immigrant investor petitions, applications for immigrant visas, petitions to adjust status, applications to enter the United States as conditional lawful permanent residents, and petitions to remove the two-year conditions.

93. The above directives and opinions flowed from the Immigrant Investor Program's statutory or regulatory framework, official directives to Service's adjudicating officers in the field, and longstanding and consistent adjudications. Each was a part of the rules that governed the Defendant's adjudication of I-526 and I-829 petitions at the time that the Defendant granted the Plaintiffs' conditional residence by placing its imprimatur of approval on their investments.

The Unlawful Adoption and Retroactive Application of New Rules by the Service

94. In 1996, the Service became concerned about some of the features of some of the programs that were being submitted for its approval and questioned whether those features complied with the Immigrant Investment Program's statutory authority. These features included passive versus active participation in an investment, pooled investments, and promissory notes.

95. At an August 23, 1996 meeting, which included everyone in the Service making relevant decisions as to the Immigrant Investor Program at the time, Service officials agreed that the applications being considered did not comply with the law, and that the then current regulations were inadequate to deal with the Service's issues as to some features under the Immigrant Investor Program that were being approved. However, the Service continued to approve the I-526 applications. Rather than end approvals or seek revocation of approved petitions that the Defendant believed were unapprovable, the Defendant continued to approve petitions and did not revoke petitions. Instead, the Service decided to wait for the I-829 applications and deny those under the new standards. *See* (Exhibit J) (August 26, 1996 email discussing the August 23, 1996 meeting).

96. The Service initially thought these concerns could be dealt with by drafting written guidance to the Service's field offices. The OGC advised that such changes to the program standards had to be accomplished by means of a rule making proceeding. The Service brought in officers from three (3) Service Centers and began drafting new Immigrant Investor Program regulations. To date, the Service has never promulgated those regulations.

97. Katherine Lorr, who headed the regulation drafting team, "was told very firmly by HQCOU that for, APA reasons, we needed new regs to deal with all

of the substantive issues that had to be addressed at that time." (Email Katherine Lorr (12/2/97)) (emphasis added) (Exhibit K).

98. On October 20, 1997, the Service's Office of Adjudications ("OA") issued field instruction to all Service Regional Directors (Exhibit H) to provide "guidance on adjudicating Form I-526, Petition for Alien Entrepreneur, under section 203(b)(5) of the INA, and existing regulations." The Office of Adjudications reiterated the Service's prior practice of approving immigrant investor petitions with features, as exist in the AIS investment program, such as: pooling funds where limited partners' capital was invested in a portfolio of investments within the regional center, limited partners joining partnerships subsequent to their formation, redemption agreements; the payment of reasonable management and other fees; and guaranteed interest returns on the cash investment. These program elements had long been recognized by the Service as complying with the Immigrant Investor Law and its regulations, which it confirmed by the approvals of thousands of immigrant investor petitions that contained investments in programs with some or all of these program elements. At that time, the Service's position was that "everything else was to be dealt with in new [regulations]." (Email Katherine Lorr) (12/2/97)) (Exhibit K).

99. Notwithstanding the guidance issued by the Service on October 20, 1997 to ensure the continued operation of the Immigrant Investor Program, the Service, on or before December 1, 1997, secretly directed all Service Centers to freeze adjudicating petitions involving pooled investment programs, such as AIS's program. Subsequently, and at the Service's request, the Department of State issued a similar freeze on visa applications containing these programs. The institution of this unlawful "freeze" was concealed from United States businesses such as the Partnerships, which were using their investment programs to raise substantial sums of capital and create or maintain employment, and from immigrant investors such as the Plaintiffs, who had invested substantial capital into such programs and who were filing visa petitions on the basis of those same investments. The Service's unlawful freeze on adjudications was subsequently publicly confirmed in the Service's Field Instruction of March 11, 1998 (Exhibit L). The freeze was issued for the purpose of stopping action on cases until it could issue new regulations.

100. On December 10, 1997, the Department of State issued a State Department Cable to all diplomatic and consular posts instructing them to immediately suspend visa processing in certain immigrant-investor cases because the Department of State had been informed by the Office of Programs at Service

Headquarters that the Service was "undertaking a review of some of the provisions of various types of investment and partnership agreements which many applicants have used to obtain petition approval in the EB-5 [immigrant entrepreneur] category." The Department of State suspension was likewise issued to freeze adjudication while new regulations could be issued.

101. Instead of commencing a rulemaking proceeding, the Service adopted an unlawful approach to changing the rules governing the Immigrant Investor Program.

102. In early December of 1997, the Service decided not to publish the rules it had prepared in final form to alter the Immigrant Investor Program. Defendant decided to circumvent the notice and comment requirements of the APA by issuing an OGC Memorandum Opinion and then enforce its contents through field instructions directing Service employees on how to adjudicate cases.

103. On December 19, 1997, the OGC issued a thirty-six page legal memorandum, which provided specific guidelines changing the Immigrant Investor Program (Exhibit I). These guidelines rejected previously approved investment programs stating their program elements or structure would no longer comply with the Immigrant Investor Law. The OGC Memorandum Opinion also determined

these new rules and requirements were to be applied retroactively to conditional residents, like the Plaintiffs.

104. The OGC's December 19, 1997 Memorandum Opinion (Exhibit I), was made into a directive having the force of law in a March 11, 1998 Field Memorandum (Exhibit L). The December 19, 1997 OGC Memorandum and the March 11, 1998 Field Memorandum altered and amended the regulations and made the following features impermissible: (1) the use of a cash down payment with the remainder of the investor's contribution in promissory notes; (2) a multi-year investment plan on a promissory note with a substantial balloon payment after the conditions on the investor's permanent residence is removed; (3) an option given to the investor to sell the investment for a fixed price that may be less than, equal to, or greater than the alien's cash contribution; (4) an option given to the enterprise or limited partnership to buy the investment at a fixed price; (5) a provision that allows or requires the commercial enterprise to place sufficient cash into a bank account to guarantee that funds will be available to repay the investor if the sell option is exercised; (6) withholding a portion of the capital contribution for attorneys' fees, finders' fees, and other management costs; and (7) a guaranteed return on the cash portion of the investment. Prior to this date, each of these investor program elements had been approved by each and every relevant Service

adjudication, statement, and operating instruction. Moreover, since 1992, the Service had consistently approved thousands of immigrant investor petitions involving petitioners, including Investor Plaintiffs, who had participated in investor programs containing some or all of these program elements.

105. The Service's March 11, 1998 Field Memorandum instructed all Service Centers to place all immigrant investor petitions involving "pooled" investments on "hold," and to immediately cease the adjudication of all such cases because the OGC had determined that "although some business agreements used in current investment programs originally appeared to constitute acceptable investment arrangements, they in fact did not comport with the law because they contained some combination of the provisions held to be invalid in the December 19, 1997 OGC opinion." In other words, the Service's Field Memorandum directed all Service and Department of State offices to follow the purported rules and requirements adopted and reflected in the OGC's December 19, 1997 Memorandum, and to apply them retroactively.

106. The Service was fully aware that the December 19, 1997 Memorandum and the later field instructions departed both abruptly and radically from existing Service policy and practice thereby constituting an amendment of existing regulations. Moreover, the Service was fully aware that a retroactive

application of the new interpretations would impermissibly burden and harm individual investors who had relied on the Service's prior consistent application of the Immigrant Investor Law. Indeed, as the Service was in the process of radically revising its prior consistent policy, those Service officials charged with this task repeatedly acknowledged that the type of changes envisioned should not be retroactively applied and should indeed be the subject of new regulations.

107. On November 14, 1997, Katherine Lorr requested that Alex Gisser "revisit" his September 10, 1993 HQCOU opinion concerning arrangements with Promissory Notes that contained a buy-back/balloon payment "as the basis for a major policy change." (Lorr Email 11/14/97)(emphasis added) (Exhibit M). In addition to discussing requirements for promissory notes, Katherine Lorr expressly acknowledged the issue of fairness in retroactively applying the rules. As she stated:

> Policy changes of the kind I am suggesting could not be retroactive. And we do need to advise the public of prospective changes and explain why these are necessary. But AILA is apparently jumping into this arena and we need to be more forthcoming about what is acceptable within the statute and what is not.

(Lorr Email 11/14/97)(emphasis added) (Exhibit M).

108. On December 30, 1997, Katherine Lorr further highlighted the need that "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." (Lorr Email (12/30/97) (Exhibit N).

109. An Options Paper, dated January 6, 1998 (Exhibit O), recommended that the Service "[p]ublish a notice in the Federal Register that the INS will be immediately enforcing current regulations as set forth in the General Counsel's opinion, and deny such petitions based on the General Counsel's conclusion that they fail to comport with current regulations on a number of grounds." From this point, it is clear that the Service concluded it would be detrimental to its legal position if it published new regulations.

110. A January 14, 1998 email (Exhibit P) from the Service's Deputy General Counsel states that the Service does not want to wait for new regulations: "I have thought further re the notice v. notice of reg issue…I am not convinced that we can wait for a new reg, or notice of a new reg. Indeed, I feel that reliance on a new reg may, or will, put our position in jeopardy."

111. Another email dated the following day, January 15, 1998 (Exhibit Q) from an attorney in the OGC, indicates the agency was receiving advice from the

Department of Justice that its revision of the standards governing the EB5 program effectively constituted rulemaking.

112. Notwithstanding a clear awareness of the substantial burdens and harm the new policies would have on previously approved investors, the Service chose to apply the new requirements, as set forth and reflected in its December 19, 1997 Memorandum Opinion, retroactively to immigrant investors who had achieved lawful permanent residence, such as the Plaintiffs, but who have not as yet had their two-year conditions removed. The new requirements also were to be retroactively applied to those immigrant investors (1) who filed petitions that were already approved and were awaiting interviews for adjustment of status to receive conditional lawful permanent residence, and (2) who had filed petitions that had not yet been adjudicated because of the (unlawful) Service freeze or hold.

113. The opinions, interpretations, and requirements announced in the Field Memorandum attaching the OGC Memorandum amended existing Service regulations and were contradictory to written opinions of the Service Administrative Appeals Office, prior written opinions of the OGC, as well as the rules the Service had consistently applied over many years in adjudicating thousands of immigrant investor petitions. They were also contradictory to the Service's promises, representations, and assurances made to United States

businesses such as AIS Partnerships and to immigrant investors such as the Plaintiffs. The Service's prior pronouncements and practice, as well as existing regulations, had the force of law since they were binding on Service and Department of State employees who adjudicated the Plaintiffs' petitions. In addition, these were binding with respect to each of the Plaintiffs' I-829 applications.

114. In fact, on information and belief, since the enactment of the Immigrant Investor Law in 1990 until 1997, not a single immigrant investor petition, visa application, petition to adjust status, or petition to remove the two-year condition was ever denied or rejected solely because of the use of one of the above-stated investment program structures or elements.

115. The Service made a clear change in policy that was to effect numerous immigrant investors who were to rely on the Service's decisions without informing the immigrant investor's of their intent.

116. In January 1998, the Service initiated a process that circumvented the APA by selecting specific cases to be used as "precedent decisions" in order to apply the new rules stated in the OGC's December 19, 1997 Memorandum Opinion. The Service's Office of Programs, consistent with the Defendant's plan to avoid publication in the Federal Register and the notice and comment

requirements, ordered each of the Service's four Service Centers to select cases that raised the issues in the OGC's December 19, 1997 Memorandum Opinion and forward those cases to the AAO to become "precedent" decisions. Four Service officers were selected to manage certification of cases to the Administrative Appeals Office. The officers were sent the OGC Memorandum Opinion so that they could ensure that "all issues raised in the opinion are covered in the cases certified." (Exhibit R) (Lorr 1/28/98 (4:32PM)).

117. While the Service was secretly organizing to apply retroactively its unlawfully promulgated new rules to the detriment of Plaintiff Investors who had received conditional residency, each of the Plaintiffs were in the process of relocating to the United States at great expense, establishing themselves in their communities, enrolling their children in school, and investing their assets, time, and hard work, either in new careers or in private businesses, to create a successful future for their families and the betterment of this country. While the Service concealed its plans to retroactively apply these new rules, Plaintiffs sold homes and businesses, often leaving successful and profitable jobs. The Defendant and its agents were fully aware of the substantial commitments that the Plaintiffs were undertaking in reliance on the prior rules under which their conditional residence had been granted. However, because the Defendant concealed its intentions,

Plaintiffs are now faced with having to discard all that they worked to establish in the United States in order to return to their native lands, where many have sold and given up everything.

118. On June 26, 1998, Joseph R. Greene, the Acting Associate Commissioner of Programs issued a memorandum explaining that the AAO had received 19 immigrant investor petitions on certification from the four Service Centers (pursuant to the March 11, 1998, Operating Instruction (Exhibit L), and was preparing decisions on these cases. The Service would then designate certain "precedent decisions" from these 19 certified cases (Exhibit S) (June 26, 1998 Joseph R. Greene memorandum superseding prior June 12, 1998 memorandum).

119. The AAO, however, is part of the Service Office of Adjudications, and is under the direct supervision of the Service management team. Further belying the independence and impartiality of the AAO is the fact that it periodically consults and in fact did consult with the Service's Office of General Counsel (author of the December 19, 1997 Memorandum setting out the new rules and requirements for immigrant investor petitions), as well as other Service offices before issuing the "precedent decisions" certified to it from the regional service centers. The AAO submitted its proposed decisions in each of the precedent decisions to the OGC for its review and approval prior to the publication by the

AAO of these decisions. In sum, the AAO simply lacks the independence to fairly and impartially decide administrative appeals. The OGC, through its legal memorandum of December 19, 1997, ensured the outcome of these cases that no pending or previously approved immigrant investor petitions would be found approvable under the Service's new rules and requirements.

120. Notwithstanding the AAO's lack of independence and the Service's use of the AAO merely to circumvent APA notice and comment requirements, the AAO in June and July, 1998 issued four so-called "precedent" decisions all denying the petitions of investors. *Matter of Soffici*, 22 I & N Dec. 158 (Assoc. Comm. Exams. 1998); *Matter of Izumii*, 22 I & N Dec. 169 (Assoc. Comm. Exams. 1998); *Matter of Hsuing,*, 22 I & N Dec. 201 (Assoc. Comm. Exams. 1998); *Matter of Ho*, 22 I&N Dec. 206 (Assoc Comm. Exams. 1998). These decisions are collectively referred to as the *Izumii* decisions.

121. The *Izumii* decisions merely put in "precedent" form the OGC Memorandum and the rules and regulations the Service had previously refused to publish in December 1997 in accordance with the notice and comment provisions of the APA. These new rules and requirements amended existing regulations and were radically contrary to the existing rules, requirements, policies, and procedures applied by the Service in all prior adjudications over a six-year period. These

drastic changes, which will result in the denial of all Investor Plaintiffs' I-829 applications to lift their conditional residency, are as follows:

Rule 1. **Time of Establishment.**

__Prior Rule:__ The Immigrant Investor Program's regulations permit 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. This is confirmed by the regulations, field instructions, and consistent adjudication, which contemplate investments under the Uniform Limited Partnership Act, which has no limitation on the timing of a person's investment 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).

__New Rule:__ In order for a petitioner to be considered to have established an original business, he must have had a hand in the original creation of the new commercial enterprise and must have been present at its inception. Any investor who was not a member of the partnership at the time it was established is automatically disqualified. The new requirement is unworkable and illogical as it would have the investor agree to make an investment before he knew about the investment or business plan, since no business has yet been formed. Now the investor is required to be a partner at the time of the paper formation of the partnership even if the new partnership has not conducted business. Plaintiffs joined AIS as limited partners subsequent to the paper formation and, therefore, this amendment alone results in the denial of all of the Plaintiffs' I-829s. Although Congress has abolished the requirement specified in *Izumii*, USCIS has not yet published regulations receding from its position in the *Izumii* decisions. *See* "21st Century Department of Justice Appropriations Authorization Act," enacted November 2, 2002, Pub.L.No. 102-273, 116 Stat. 1758 (Title I, Subtitle B).

Rule 2. **Nature of Participation in Enterprise.**

<u>Prior Rule:</u> The Immigrant Investor Program's regulations provide that Investors are "sufficiently engaged in the management of the new commercial enterprise" even if they were not active limited partners, so long as the Investor had certain rights, powers, and duties normally granted to limited partners under the (Revised) Uniform Limited Partnership Act. 8 C.F.R. 204.6(j)(5)(iii); September 10, 1993 Office of General Counsel Memorandum (Exhibit A at page 6).

<u>New Rule:</u> A limited partner is required to show that he has greater involvement than that which is required under the Uniform Limited Partnership Act, which thus amends 8 C.F.R. § 204.6(j)(5)(iii).

Rule 3. **Timing of Redemption Agreements.**

<u>Prior Rule:</u> The Immigrant Investor Program's regulations permitted promissory notes without limitations. 8 C.F.R. § 204.6(e)("capital means cash, equipment, inventory, other tangible property, *cash equivalents, and indebtedness* secured by assets owned by the alien entrepreneur . . .")(emphasis added). In addition, the Service issued and consistently applied a field instruction and opinion of the Service OGC that allowed for redemption agreements to be *entered into* prior to the end of the two-year period of conditional residence, so long as the redemption *itself* did not occur until after the two-year period of conditional residence or, in the case of a promissory note, after the promissory note has been paid in full.

New Rule: The Service has, in effect, amended the regulations to add new conditions to promissory notes. An alien may not *enter* into a redemption agreement with the new commercial enterprise at any time prior to completing all of his cash payments under a promissory note, and in no event may the alien *enter* into a redemption agreement prior to the end of the two-year period of conditional residence.

Rule 4. **Redemption Agreement as "At Risk" Investment.**

Prior Rule: The Immigrant Investor Program's regulations do not preclude redemption agreements. Indeed, a September 10, 1993 Office of General Counsel Memorandum (Exhibit A at page 8) expressly approved of investments containing redemption agreements (which provided for the redemption to take place after the two-year period of conditional residency) to qualify as an "at risk" investment where the redemption was payable if the partnership or investment entity was successful, thus earning a profit.

New Rule: The Service has, in effect, amended the regulations to prohibit redemption agreements. A redemption agreement between an alien investor and the new commercial enterprise constitutes a debt arrangement.

Rule 5. **Guaranteed Payments to Investors.**

Prior Rule: The Immigrant Investor Program's regulations do not preclude guaranteed payments to investors and the regulations do not define the guaranteed payment as a debt relationship. Indeed, the Service issued, publicized, and consistently applied an express field instruction allowing enterprises to make guaranteed payments to investors, even while the investor still owes money to the commercial enterprise. *See* September 10, 1993 Office of General Counsel Memorandum (Exhibit A at page 10) ("we conclude that requiring alien investors to place large amounts of capital at absolute risk, without some private third-party guarantee that they will receive a minimum rate of return on their investment would not only be contrary to current reasonable business practices, but would be violative of Congress's intent to encourage foreign capital investment.").

New Rule: The Service has, in effect, amended its rules, so that an alien may not receive guaranteed returns from a new commercial enterprise while he or she owes money to the new commercial enterprise.

Rule 6. **Inclusion of Legitimate Business Expenses.**

Prior Rule: The Immigrant Investor Program's regulations do not preclude the deduction of legitimate business expenses from the capital contribution. In all prior AAO opinions and Service approvals, funds that were used to cover legitimate business, escrow and managerial expenses associated with the investment, were considered as investment capital at risk. The Service permitted all amounts attributable to the start-up of the new commercial enterprise, and other legitimate managerial, escrow and business expenses to be included in the total requisite amount of the capital contribution.

New Rule: The Service has, in effect, amended it rules so that the funds that are used for ordinary and necessary business expenses cannot be considered as part of the invested capital. Thus, all amounts attributable to start the new commercial enterprise, to pay for managerial or escrow fees associated therewith, or for any other legitimate business expense associated with the investment, are not part of total required investment amount, as they are not "employment-creating," "job-related," or "profit-generating."

Rule 7. **Investments Benefiting Businesses Outside of Targeted Employment Area.**

Prior Rule: The Immigrant Investor Program's regulations do not require that the employment be created only in a targeted employment area to qualify for the reduced capital contribution. The Service consistently held that petitioners qualified for the reduced minimum capital requirement of $500,000.00 if their investment was made in a new commercial enterprise located within a targeted employment area. There was at no time any exclusion where businesses located outside the targeted area, in addition to those inside the targeted area, benefited from the investment. Indeed, the controlling statutory provision only states that the new commercial enterprise "create employment in a targeted employment area" 8 § 1153(5)(B), and not create employment <u>exclusively</u> in a targeted employment area. The sole purpose of the targeted employment area was to create jobs in rural areas or areas of high unemployment. So long as this criteria was met, the benefit to additional businesses outside the targeted area in no way disqualified the investment from receiving the reduced minimum investment requirement.

New Rule: The Service has, in effect, amended its rules so that regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job-creating businesses may only lend money to businesses located within targeted areas in order for a petitioner to be eligible for the reduced minimum capital requirement. In other words, only businesses located in the targeted employment area may benefit from the investment.

Rule 8. **Location of New Commercial Business Relative to Job Creation.**

Prior Rule: The Immigrant Investor Program's regulations permit petitioners to qualify for the application of indirect job creation criteria if the investment was made in a new commercial business located within a regional center. There was never a separate requirement imposed by the Service that all of the petitioner's investment activities must benefit businesses solely within the regional center in order for the petitioner to qualify for indirect job-creation criteria. *See* 8 C.F.R. § 204.6(m)(7).

New Rule: The Service has, in effect, amended its regulations so that if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must *all* be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

Rule 9. **Proof of Lawful Source of Funds.**

Prior Rule: The Service consistently and repeatedly permitted petitioners to set forth in a sworn affidavit and through minimal documentation, if any, that they had obtained the investment funds through lawful means. If the funds were supplied by a donor an affidavit by the petitioner to that effect was sufficient. Lawful funds were broadly defined and only specifically excluded illegal drug profits.

New Rule: The Service has, in effect, amended its rules to add new conditions to the existing regulation. A petitioner must not only demonstrate that he is the legal owner of the invested capital and that he acquired the legal ownership of the invested capital through lawful means, but he must trace the source of the funds over many years including through donors. The definition of unlawful funds has been expanded to include funds earned in the United States without work authorization. The new "rule" now also requires that the person seeking investor status must prove that United States citizen investors who are involved in the investment (but obviously not seeking any immigration benefit) have provided funds for the investment project from a lawful source before USCIS will approve the immigrant's petition. The new "rule" is arbitrary and designed to unlawfully defeat any valid petition as: (1) the petitioner cannot compel a U.S. citizen non-petitioning investor to provide his or her financial records and financial history if he or she refuses to do so; (2) there is no limit or boundary on the amount of financial information that USCIS can request; and (3) the USCIS can routinely utilize the resources of the CIA and FBI to trace the financial and work history of non-citizens on conditional resident status to uncover any prior unlawful activity.

Rule 10. **Escrow Accounts.**

Prior Rule: The Immigrant Investor Program's regulations permit investments that are placed in escrow accounts to meet the qualifying capital contribution amount, and to be deemed a legal mechanism which places the funds sufficiently "at risk," regardless of whether the funds are in escrow pending the approval of the I-526 petition. There was never a requirement by the Service that the funds be "immediately," "unequivocally," and/or "irrevocably" released into the commercial enterprise for job creation purposes or a requirement that the petitioner establish that such an agreement was entered.

<u>New Rule:</u> The Service has, in effect, amended its regulations to preclude placement of funds in an escrow account pending approval of conditional residence. If a petitioner places the investment funds in an escrow account pending the outcome of his I-526 petition, the funds are not deemed to have been placed at risk and no investment is deemed to have been made, unless the petitioner shows that the funds in escrow are actually committed to the new commercial enterprise, *i.e.* the funds will be available and put to use for job creation purposes immediately and irrevocably upon approval of the petition and visa issuance or adjustment of status.

Rule 11. **Supplementation or Modification of Petition to Ensure Compliance.**

<u>Prior Rule:</u> The Service regulations always permitted petitioners to rectify errors or add or delete information from their petitions. *See, e.g.*, 8 C.F.R. § 103.28.

New Rule: A petitioner may not make material changes to a petition that has already been filed (or even approved) in an effort to achieve compliance or make an apparently now "deficient" petition conform to the Service's new retroactive requirements. Immigrant investors, therefore, cannot "retroactively" amend their petitions so as to cure any deficiencies caused by the retroactive application of the Service's new rules and requirements.

Rule 12. **Valuation of Promissory Notes.**

Prior Rule: The Immigrant Investor Program's regulations do not preclude the valuation of promissory notes at face value. This is confirmed by years of administrative jurisprudence. *See, e.g.,* Exhibit C (August 31, 1993 AAU Decision). The regulations permit promissory notes to be used as capital in immigrant investments at face value. 8 C.F.R. § 206.6(e)(capital means "cash equivalent").

New Rule: The Service has, in effect, amended its regulations to require that all capital must be valued at fair market value in United States dollars, including promissory notes used as capital. In determining the fair market value of a promissory note, it is necessary to consider, among other things, present value, as well as the fair market value of the assets securing the note. The fair market value of the promissory note can be reduced by "considerable expense and effort" to execute on foreign assets.

Rule 13. **Term of Promissory Note.**

Prior Rule: The Immigrant Investor Program's regulations do not impose a particular term for the repayment of the promissory note. Repayment terms were bargained for between the parties and could extend beyond the two-year conditional residency period. This is in accordance with years of administrative jurisprudence, normal business practices, and the Service's application of the Immigrant Investor Law.

New Rule: The Service has, in effect, amended its regulations so that the money due under a promissory note must be payable within two years of obtaining conditional residency and is without provision for extensions. The new "rule" was imposed retroactively upon people who had already agreed to promissory notes with different terms. An investor who budgeted for a five-year payment schedule was suddenly told the payment schedule must be reduced to two years. On one hand the Service changed the terms of the investment after it approved the initial investment by reducing the time for repayment on a promissory note; on the other hand, because of other retroactive rule changes, it will not allow amendments to the promissory note. *See* Rule 11 *supra*.

Rule 14. **Perfection of Security Interest on Promissory Note.**

Prior Rule: The Immigrant Investor Program's regulations do not require the security for the promissory notes to be perfected or amenable to seizure under the

UCC's perfected security interest standards. *See, e.g.*, 8 C.F.R. § 204.6(j)(2)(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."). Indeed, no such requirement of a "perfected" security interest is contained in the statute, regulations, or field instructions prior to the Service's radical revision of the law. In fact, the memorandum of June 27, 1995 sent by Paul Virtue, Acting General Counsel to Edward Skerrett, Chief, Immigrant Visa Section, defined what the Service meant by the term "secured" as being "at the time he or she files the visa petition, that he or she actually possesses, and has secured personal assets having a fair market value of at least that of the indebtedness." Following this memorandum, which was widely circulated through professional journals, the Service routinely approved petitions where the applicants' verifiable net worth exceeded the value of the promissory note. There was no requirement to perfect the security interest by recording it as a matter of public record.

New Rule: The Service has, in effect, amended its regulations to provide that a promissory note secured by assets owned by a petitioner can constitute capital only if: it is secured by specifically identified assets which belong to the petitioner, the security interests in the note are perfected in the jurisdiction in which the assets are located, *and* the assets are fully amenable to seizure by a United States note holder.

Rule 15. **Trust Agreements.**

Prior Rule: The Immigrant Investor Program's regulations permit investments containing trust agreements. This is confirmed by consistent adjudication and field instructions. The Service recognized that the purpose of the trust is most beneficial where an investment was made in a "troubled business." In that instance, the trust will prevent the business from utilizing all of the investment funds up-front and prevents the funds from being immediately seized by creditors. Furthermore, the Service permitted petitioners to place their investments in escrow accounts pending the approval of their I-526 petition. Third-party guarantees were permitted by the Service so long as they were not backed by a government obligation, and bank accounts qualified as security. *See* September 10, 1993 Office of General Counsel Memorandum (Exhibit A).

New Rule: The Service has, in effect, amended its regulations to provide that capital invested using a trust reserve is not deemed "at risk."

Rule 16. **Capital Availability to Employment Creating Enterprise by Holding Companies.**

Prior Rule: The Service's regulations do not require that holding companies make the full amount of capital available to the businesses responsible for creating the employment.

> **<u>New Rule:</u>** The Service has, in effect, amended its regulations so that if the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.

122. None of the requirements reflected in the so-called precedent decisions were ever previously imposed by the Service or lawfully promulgated as amendments to either the Immigrant Investor Law or its regulations. These new rules directly conflict with the imprimatur of approval that the Service placed on each of the Plaintiffs' investments by approving their I-526 petitions. The Defendant may not rely on these self-proclaimed "precedent" decisions as the AAO is incapable of properly issuing rules through adjudication, as it is not an impartial and independent adjudicative body. Moreover, the AAO's "precedent" decisions merely reflect the Service's new rules and requirements set forth in the OGC's December 19, 1997 Memorandum, both of which were promulgated in violation of the APA. Also, the retroactive application of these new rules and requirements is arbitrary, capricious, and an abuse of discretion.

123. The Defendant has instituted a policy and practice of denying the Plaintiffs' I-829 petitions in a manner that is contrary to the law. Each denial of one of the Plaintiffs' I-829 petitions invokes the new "rules" that were announced in the OGC legal memorandum and are embodied in *Izumii* and its progeny. These same new rules, which serve as the basis for denying the Plaintiffs' petitions, were not applied in the adjudication of the Plaintiffs' I-526 petitions. The Defendant's asserted policy and practice of retroactively applying these new rules has resulted and will result in the denial of all of the Plaintiff Investors I-829 petitions. All of the Plaintiffs' investments have one or more features that were previously lawful and had received the Defendant's imprimatur of approval when their I-526 petitions were favorably adjudicated, but are now considered impermissible in light of *Izumii* and its progeny. Not a single immigrant investor, who invested in one of AIS' limited partnerships, has received an approved I-829 petition since the Defendant began engaging in its unlawful practice of retroactively applying new rules promulgated without the requisite notice and comment.

V. <u>CAUSES OF ACTION</u>

<u>First Cause of Action: Improper Retroactive Application</u>

124. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

125. The Defendant, through its agents, has applied its new rules as expressed in *Matter of Izumii* and its progeny and the General Counsel's memorandum of December 19, 1997 retroactively.

126. The Defendant's retroactive application of its new rules, even if regarded as interpretations, may not be applied retroactively to the detriment of the Plaintiff Investors and Partnerships. *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

127. The retroactive application in fact irreparably harms and impermissibly burdens Investor Plaintiffs because they have detrimentally relied on the Defendant's former criteria when investing in the United States. By applying new criteria to all Plaintiffs, which were not part of Investor Plaintiffs' original applications and the AIS Partnerships' original programs, the Defendant has rendered it impossible for Plaintiff Investors to achieve the removal of their conditional residency even if they complied with all requirements that were expected of them under the regulations regarding the removal of conditional residency.

128. The new rules, even if regarded as interpretations, represent an abrupt departure from well-established policy and practice.

129. The Plaintiffs relied greatly on the former rules, policies, and practices of the Defendant with respect to the Immigrant Investor Program in making their investments. Indeed, the Partnerships and Plaintiffs relied specifically on these rules and other representations of the Service in designing the investment programs in which the Plaintiffs participated.

130. The retroactive application of the new rules, even if regarded as interpretations, place an extremely high burden on the Plaintiffs, who have sold their homes and businesses, quit their jobs, and liquidated their assets in order to make their investments and relocate to the United States. The Plaintiff Investors all now face revocation of their residence status, removal, and being barred from returning to the United States for three or ten years.

131. The statutory interest in applying these new rules to the Plaintiffs' I-829 petitions does not outweigh Plaintiffs' reliance on Defendant's previous rules, policies, practices, and more specifically the rules applied to the adjudication of their I-526 petitions.

132. Even if characterized as interpretations, Plaintiffs have been and will continue to be irreparably injured to their detriment as a result of the Service's retroactive application of its new rules.

133. The Ninth Circuit, in *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003), has already ruled that the Defendant and its agents may not retroactively apply the rules, which are the subject of this litigation, to similarly situated immigrant investor plaintiffs whose I-526 petitions have been approved before the new rules were promulgated.

Second Cause of Action: Estoppel

134. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

135. From 1992 until the end of 1997, Service officials engaged in a pattern of conduct that affirmatively misrepresented the Immigrant Investor program to Investor Plaintiffs and caused Investor Plaintiffs to rely, to their detriment, on such misrepresentations. As a result of this affirmative misconduct, Investor Plaintiffs are unable to continue to comply with the statutory and regulatory requirements of the Immigrant Investor Program.

136. Prior to the publication of regulations regarding the Immigrant Investor Program attorneys, including a former General Counsel of the Immigration and Naturalization Service, Maurice Inman, met with officials of the Defendant in regard to the program. As a result of these meetings Mr. Inman and others were assured that the structure that Investor Plaintiffs ultimately invested in

with AIS was consistent with the Immigrant Investor Law. In 1992, Mr. Inman, as counsel for the AIS partnerships conveyed this information to AIS which established its partnerships consistent with the representations made by the Service to Mr. Inman and others. (Exh. T, Deposition of Maurice Inman, March 29, 2000 at pp.59-63).

137. The pattern of affirmative misrepresentations continued by the Service from 1993 until the end of 1997. The Service issued and publicized memoranda, decisions, and other documentation that continued to affirmatively mislead AIS and Investor Plaintiffs into believing that the program elements that were part of the AIS partnerships were approvable as presented. *See* Exhibits A-H. Meetings were held with representatives of the Investor Plaintiffs during this period where, despite the Service's concerns over certain matters, they were reassured that the AIS programs were in compliance with the Immigrant Investor Law and any changes would be applied prospectively. In addition, during this period, the Service continued to approve each and every I-526 of each and every Investor Plaintiff further misleading the Investors into believing that their investment program was approvable and would continue to be approved according to plan.

138. The I-526s, submitted by Investor Plaintiffs, provided for investments in AIS partnerships where funds would subsequently be put into troubled

businesses to preserve jobs. The Investor Plaintiffs made the requisite $500,000 investment in the partnerships and the partnerships, in turn, negotiated with troubled businesses to invest the funds and preserve jobs. Trust arrangements were established with the troubled businesses to insure that the investor's funds were protected and that the requirements of the Immigrant Investor Law were met. Neither the AIS partnerships, nor Investor Plaintiffs individually were informed during this period that these investment programs were not approvable or that the arrangements established for the partnerships and investments were not in compliance with law. In fact, by approving each I-526 and thousands like it, as well as by meeting with AIS representatives and issuing positive memoranda, the Service affirmatively misled the Investor Plaintiffs into believing that their investments were in compliance with the Immigrant Investor Law.

139. Notwithstanding their repeated assurances to Investor Plaintiffs, through the Plaintiffs' representatives, the Service, as early as August 1996, secretly determined that Investor Plaintiffs' applications did not comply with the Immigrant Investor Law. (Exhibit J). Service officials knew that applications were being approved that contained features that the Service believed were inconsistent with the Immigrant Investor Law. (Exhibit J, Exhibit U, Deposition of Alexander Gisser at pp. 9-12, 33-36, Exhibit V, Deposition of Katherine Lorr at pp.17-20).

They nevertheless took no action to stop the approvals or to immediately revoke the approved I-526 petitions.

140. Instead, the Defendant continued to accept Plaintiffs' I-526 applications, collect fees from Plaintiffs, and continued to approve their I-526 applications and their conditional residency. (Exhibit J). Furthermore, Defendant allowed Plaintiffs and their families to enter the United States, abandon their homes abroad, and establish new lives in the United States. Based on the knowledge of the forthcoming policy changes, the Service's subsequent actions constituted bad faith and willful misconduct.

141. Defendant knew, and its agents acknowledged, Plaintiffs would rely upon the Service's consistent and long-standing practice, as expressly stated in policy memoranda, pronouncements, rulings, and written replies to inquiries, concerning immigrant investor programs.

142. Defendant knew, and its agents acknowledged, Plaintiffs would conform the structure of their own investment programs to this long-standing practice.

143. Defendant knew, and its agents acknowledged, that Plaintiffs relied on Defendant's specific assurances that (1) the investment programs at issue complied with the Immigrant Investor Law and the Pilot Program, and (2) any

potential changes to the Service's rules or requirements issued pursuant to those laws would be applied prospectively.

144. Defendant knew, and its agents acknowledged, Plaintiffs relied on the prior approval of their I-526 petitions and their conditional residency.

145. In determining whether or if the immigrant investor programs at issue were valid means by which to immigrate to the United States, Plaintiffs reasonably and justifiably relied on the written and oral representations made by the Service, the consistent and long-standing practices of the Service, and specifically the approval of I-829 petitions and issuance of visas to immigrant investors participating in similar or identical investment programs.

146. Plaintiffs reasonably and justifiably relied on the representations and assurances of the Defendant when the Defendant granted them conditional lawful permanent residence by individually approving each of the Plaintiffs' I-526 petitions, which contained their fully disclosed investments.

147. Plaintiffs reasonably and justifiably relied on the Defendant's specific promises, representations, and assurances to AIS and the investors that AIS investment programs complied with the Immigrant Investor Law and accordingly the Plaintiffs' I-526 petitions and their conditional residency would be approved.

In fact, each and every I-526 petition and adjustment of status or immigrant visa in this case was approved by Defendant.

148. Plaintiffs also reasonably and justifiably relied on the Defendant's specific promises, representations, and assurances to AIS and the investors that any changes in the Immigrant Investor Law would be prospective only through participatory rule making.

149. As a result of their reasonable and justifiable reliance on the consistent and long-standing position of the Defendant, Plaintiffs sold their homes, uprooted their families, dramatically changed their lives, spent substantial sums of money, and moved their families thousands of miles away from their home countries.

150. Once Investor Plaintiffs had moved to the United States, resettled their families and dramatically changed their lives, the Defendant put into motion process that prevented the Investor Plaintiffs from successfully removing their conditional residency status and becoming lawful permanent resident.

151. The Defendant's conduct post-October, 1997 made it impossible for Plaintiffs to continue investing partnership assets in businesses. Despite issuing an October, 1997 memorandum (Exhibit H) that confirmed the propriety of the Plaintiffs' investments, the Defendant placed Investor Plaintiffs' I-829 applications

on hold until they could issue the *Izumii* decisions that would permanently bar Plaintiffs from receiving their lawful permanent resident status. The uncertainty created by Defendant's illegal actions in first placing a hold on all applications and thereafter issuing opinions in June/July 1998 in *Matter of Izumii* and its progeny (that asserted that Plaintiffs' investments could never be valid) forced Plaintiffs' partnerships, as a matter of their fiduciary responsibility, to withhold assets and stop making payments to underlying businesses in order to protect the assets of the partnership. Although the full amount of qualifying funds were placed in the AIS partnerships, and jobs were initially preserved when the investments were first made upon the approval of the I-526 applications, the partnerships could not, consistent with their fiduciary responsibilities, continue to invest funds in the underlying businesses given the Defendant's affirmative misconduct. The Defendant's stay and its actions pre- and post-*Izumii* demonstrated that no set of circumstances and *no continued investment* would have qualified Plaintiffs for the approval of their I-829 applications. <u>Thus, the Defendant's illegal actions in issuing stays and applying the *Matter of Izumii* decisions actually forced the Plaintiffs (and putative class members) into a position of non-compliance</u>.

152. The effects of the Defendant's illegal actions continue until this day. Almost 7 years have passed since the issuance of *Matter of Izumii*. Plaintiffs were

only required under law to maintain their investments for a period of two years. Although Plaintiffs have maintained their full investment in their partnerships, virtually all of the businesses that the partnerships invested in are no longer in business due to the passage of time. In addition, Investor Plaintiffs were required to expend funds to preserve existing assets through litigation or otherwise. The investment funds, therefore, have been eroded through litigation and administrative costs.

153. The Defendant should therefore be estopped from denying Plaintiffs' I-829 applications under INA §§216(c)(1)(A) and (d)(1), 8 U.S.C. §§1186b(c)(1)(A) and (d)(1) as the failure to comply with the investment and job preservation requirements is solely due to the Defendant's affirmative misrepresentations to Plaintiffs that first induced Plaintiffs to invest and thereafter determined the investment was illegal.

Third Cause of Action: Violation of Administrative Procedure Act (Rule Making)

154. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

155. The Service promulgated its new requirements, which are substantive rules of general applicability, without complying with the APA's rule making procedures. When applied retroactively, these new rules amend the prior Service's

rules, procedures, policies, practices, and individual adjudications of Plaintiffs' I-526 petitions, which all had the force of law.

156. The APA requires notice of the proposed rulemaking be published in the Federal Register and the agency provide notice and opportunity for comment by interested persons. Further, such rules may only be applied prospectively under the APA. Defendant, in violation of the APA, is applying its new rules retroactively. The retroactive application of these new rules, without notice and comment, has a substantial and direct deleterious effect on Plaintiffs.

Fourth Cause of Action: Abuse of Discretion

157. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

158. The Service's stated decision to adjudicate the Investor Plaintiffs' I-829 petitions using investment and investor qualification standards different than those used by the Service to adjudicate the Investor Plaintiffs' I-526 petitions, even though both petitions are based on identical facts, is arbitrary, capricious, and an abuse of discretion.

159. The Service's stated decision to apply its new rules and requirements retroactively, and with full knowledge of the deleterious impact this application would have on the Plaintiffs, is arbitrary, capricious, and an abuse of discretion.

160. The Service's decision to abruptly and radically depart from its own prior publicly announced and published rules, requirements, and standards governing the Immigrant Investor Law without the opportunity of prior notice and comment is arbitrary, capricious, and an abuse of discretion.

161. Defendant's failure to provide proper evidence of status to immigrant investors and their dependants with pending I-829s such as an I-551 card or a stamp in their passport demonstrating conditional residence and failure to provide proof that they are employment authorized are also in violation of law and are likewise arbitrary, capricious and an abuse of discretion.

162. Plaintiffs have reasonably relied on the Service's prior rules, requirements, pronouncements, statements, and adjudications relating to the Immigrant Investor Law, and upon the Service's approval of the I-526 petitions and the Department of State's issuance of visas in specific cases involving the Investor Plaintiffs where the investment programs contained one or more of the elements at issue.

163. Even if the rules are characterized as interpretation, the Defendant has still abused its discretion by failing to consider the factors enunciated in *Montgomery Ward v. FTC,* 691 F.2d 1322, 1333 (9th Cir. 1982), when it applies its

radically different rules and policies to the adjudication of the Plaintiffs' I-829 petitions.

164. Plaintiffs have been and will continue to be irreparably harmed by the retroactive application of the new rules and requirements.

Fifth Cause of Action: Action Exceeding Statutory Authority

165. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

166. Defendant's abrupt and radical revision of the regulatory scheme governing the Immigrant Investor Law and the Pilot Program exceeded its statutory jurisdiction and authority, under the former INA 216A, 8 U.S.C. §1186b in violation of the APA, 5 U.S.C. § 706(2)(C).

167. Under INA §§216(c)(1)(A) and (d)(1), 8 U.S.C. §§1186b(c)(1)(A) and (d)(1) as they existed at all relevant times to Plaintiffs' complaint, the Service was strictly limited to what it could review in the context of removing the condition on a resident's conditional residency. The INA specifically limited the review, and the applicant was only required to present, evidence that: (a) a commercial enterprise was established; (b) that the investor had invested or was actively in the process of investing the requisite capital; and (c) that the investor sustained these actions during the period of conditional residency. Even under the current statutory

regime the I-526 constitutes the Service's approval of the investor's business plan. The I-829 process does not permit a re-adjudication of the business plan but rather a determination that the approved plan has been complied with by the investor.

168. In this case, the Service approved each investor's business plan, allowed each investor to invest the requisite amount of funds in a program acknowledged and approved by the Defendant and allowed the investor to maintain the investment since 1998 by taking no action to revoke the I-526 approval. Notwithstanding the approval, the Defendant re-adjudicated the petitions *ab initio* and used new standards that were retroactively applied. The re-adjudication of the petitions violated INA §216A.

169. Defendant has also sought to unlawfully adjudicate Plaintiffs' I-829 petitions to remove conditions from their residency in the context of determining their eligibility for naturalization, thus violating the scope of statutory authority permitted by 8 U.S.C. §§ 1422-1430.

Sixth Cause of Action: Violation of Due Process and Equal Protection

170. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

171. Defendant's abrupt and radical revision of the regulatory scheme governing the Immigrant Investor Law and the Pilot Program, and its retroactive

application of the new rules and requirements, violate Plaintiffs' rights to due process under the Constitution of the United States.

172. Defendant violated Plaintiffs' due process rights by failing to follow its own regulations and by allowing the AAO, which is not an independent and impartial adjudicative body, to adjudicate the "precedent" cases.

173. Defendant violated Plaintiffs' due process rights by engaging in unfair practices and policies by systematically denying the §1421(c) subclass members' applications for naturalization as a result of a misreading of the Immigration and Nationality Act (INA) in violation of due process and equal protection. *See McNary v. Hatian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (holding *inter alia* that a district court has jurisdiction to review due process challenges to systematic denials by the former INS, now USCIS).

Seventh Cause of Action:
Judicial Review Over Naturalization Pursuant to 8 U.S.C. § 1421(c)

174. Plaintiffs hereby incorporate by reference as if set forth in full and at length herein paragraphs 1 through 126 of this Complaint.

175. Pursuant to 8 U.S.C. § 1421(c), "[a] person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this title, may seek review of such denial before the United States district court for the district in which such person

resides . . . .Such review shall be *de novo*, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application." *Id.*

176. Plaintiffs, subclass representatives, or subclass members, and their family members, listed within Exhibit W, are the proposed §1421(c) subclass who have applied for naturalization and have been denied, across-the-board, based on their status as EB-5 conditional permanent residents. All forty-six (46) subclass members have filed N-336 Requests for Hearing on a Decision in Naturalization Proceedings and all, save two, have attended their respective N-336 hearings. To date, twenty-three (23) subclass members have received final determination letters from the Service affirming the denial of their naturalization applications. All proposed subclass representatives reside in Central District of California and are filing this action for judicial review pursuant to 8 U.S.C. § 1421(c) within 120 days of receiving the final determination denying their applications for naturalization as required by 8 C.F.R. § 336.9(b).

177. *All* proposed subclass members have met the statutory requirements for United States citizenship, including demonstrating good moral character, allegiance to the United States, passing the civic and English language tests, as well as having satisfied the physical presence and all other requirements for

naturalization, including eligibility based on their conditional residency status pursuant to 8 U.S.C. § 1186b(e). Despite their statutory eligibility for naturalization, all subclass members have been issued boilerplate denial decisions by USCIS reciting that each person, or his or her family-member-principal investor, failed to meet the requirements of the EB-5 investment program, and thus are not eligible to naturalize because they have not successfully removed the conditions from their residency. Therefore, the Service has improperly adjudicated Plaintiffs' petitions to remove conditions on their permanent residency (form I-829) in the context of their respective naturalization proceedings.

178. Plaintiffs respectfully request that this Court exercise its jurisdiction under 8 U.S.C. § 1421(c) to review *de novo* the denial of Plaintiffs' applications for naturalization on a representative basis, with respect to their eligibility for naturalization, and to make a legal conclusion that the Plaintiffs, named subclass representatives, and subclass members are not ineligible for naturalization solely based on their status as EB-5 conditional residents nor based upon an improper adjudication of their I-829 petitions to remove conditions on their residency.

179. In the alternative, if this Court determines that proceeding on a representative basis is not the best method for adjudicating Plaintiffs' cause of

action under § 1421(c), Plaintiffs hereby request separate, individualized hearings to review the denial of their applications for naturalization.

VI. IRREPARABLE HARM TO ALL PLAINTIFFS

180. Defendant's unlawful actions and affirmative misconduct has caused Plaintiffs substantial and irreparable harm as set forth *supra* in paragraphs 42-46, and paragraph 57.

VII. ATTORNEYS' FEES

181. As a result of the Defendant's unlawful actions, Plaintiffs were required to hire counsel and pay counsel reasonable attorney's fees, which may be recovered along with costs and expenses under the Equal Access to Justice Act.

VIII. RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request this Court enter judgment in their behalf and enter the following:

a. an order directing Defendant not to consider the Plaintiffs' presence in the United States as unlawful during the period of time between the denial of their I-829 petition and the disposition of this litigation;

b. an order declaring the AIS investment program elements and structure, in existence prior to December 19, 1997, as used by and offered to the

Plaintiffs, satisfies the requirements of the Immigrant Investor Law and its regulations;

c. an order directing Defendant and its agents immediately to reinstate approvals concerning any I-526 petitions filed by Plaintiffs that have been revoked;

d. an order directing Defendant and its agents to immediately issue all necessary and appropriate documentation to the Investor Plaintiffs and their dependents to evidence continuing lawful resident status in the United States and the right to work and to freely enter the United States as lawful residents;

f. an order directing Defendant and its agents, in a prompt and timely manner, to approve each and every I-829 petition to remove conditional status already filed by Investor Plaintiffs;

g. an order declaring invalid and ordering the Defendant to withdraw and set aside the purported "precedent" decisions of the AAO;

h. an order declaring the practices of Defendant challenged herein as violating the Plaintiffs' right to due process and equal protection under the Constitution of the United States, the Administrative Procedure Act, the INA and federal regulations, and general principles of estoppel;

i. an order declaring that the practices of the Defendant constitute an improper retroactive application of the law, which has harmed all Plaintiffs;

j. an order declaring any and all new rules and requirements regarding the EB-5 investor visa program be promulgated only in accordance with the Administrative Procedure Act and that such new rules and requirements may only be applied prospectively to I-526 petitions filed after the effective date of the new rules and requirements;

k. an order pursuant to 8 U.S.C. § 1421(c) granting judicial review before this Court for all Plaintiffs, class and subclass members within the § 1421(c) subclass and a legal conclusion that a person's status as a conditional permanent resident is not a bar to approval of their naturalization (N-400) application;

l. an injunction enjoining the Defendant from applying any of the criteria announced in the General Counsel Memorandum of December 19, 1997 or in *Matter of Izumii* and the other "precedent" decisions following *Izumii* to Plaintiffs' cases, including their I-829, I-526, and I-485 applications;

m. an injunction enjoining the Defendant from taking any action to deport, remove or deem inadmissible any Investor Plaintiffs from the United States pending a final determination in this case;

n. an injunction enjoining the Defendant from taking any action to deprive the Investor Plaintiffs of their right to be employed in the United States during the pendency of this case;

o. a mandatory injunction requiring the approval of Plaintiffs' I-829 applications absent fraud;

p. an injunction enjoining the Defendant from using the EB-5 conditional residency status of any plaintiff, class or subclass member to deny naturalization;

q. an order granting a mandatory injunction prohibiting Defendant from using Plaintiffs' conditional resident status or any matters related to their conditional resident status as a basis for denial of their naturalization applications;

r. an order awarding Plaintiffs their attorney's fees and costs; and

s. an order granting such other relief as the Court may deem just, equitable and proper.

Dated: May 11, 2010

Respectfully submitted,

/s/ Ira J. Kurzban

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