UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FENG WANG, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	)	Case No.: 18-cv-1732-TSC

AMICUS BRIEF IN SUPPORT OF PLAINTIFFS

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, Invest in the USA (IIUSA) is the national, membership-based, not-for-profit industry trade association for the EB-5 Regional Center Program (the Program) and the Federally-designated active EB-5 Regional Centers are IIUSA's core members. IIUSA represents over 210 Regional Centers accounting for approximately 95% of all EB-5 capital investments. IIUSA and its members depend on the accurate and lawful numbers of available visas to facilitate their economic development investments. If this number is calculated inaccurately, IIUSA members will struggle to execute the Program's mission to create jobs, improve the economy, and expand the United States' tax base.

[1] *Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel affirms that no party's counsel authored this brief in whole or in part, nor has any party's counsel contributed money intended to fund the preparation or submission of this brief. No person, other than amicus curiae, has contributed money intended to fund the preparation or submission of this brief.*

Amicus has, among other interests, an interest in providing, if not an obligation to provide, this Court with all the information it might wish to consider before ruling on an important matter of public interest such as the instant matter.

SUMMARY OF ARGUMENT

Defendants incorrectly state immigration law with respect to the limitations on immigrant visas for individual countries. These limitations do not apply all derivatives, as they claim, but rather only some derivatives who are also subject to the worldwide limitations. If not all derivatives are subject to the individual country caps, then not all derivatives are subject to the worldwide caps. Unlike the defendants' view, this interpretation of the statute avoids conflicting with other portions of the text and gives meaning to all provisions of the law.

ARGUMENT

I. The "County Cap" Does Not Explicitly or Implicitly Apply to Derivatives Under Section 203(d).

Defendants claim, "The country cap also explicitly applies to derivatives, as stated in INA section 202(b), the statutory directive on 'chargeability,' i.e., to which country an immigrant will be 'charged' for purpose of the country cap." *See* Def. Opp'n at 25. Furthermore, the government asserts that "since the country cap is a subset of the overall family and employment-based caps, then equally clearly, if the country cap applies to derivatives, then so too do the overall caps." *See* Def. Opp'n at 26. The plaintiffs dispute the conclusion (*See* Pls.' Reply at 15-16), but the defendants' premise is also incorrect.

Subsection (b) of INA Section 202 states:

(b) Rules for Chargeability. - Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship system of the United Nations, other

than the United States and its outlying possessions, shall be treated as a separate foreign state for the purposes of a numerical level established under subsection (a)(2) when approved by the Secretary of State. All other inhabited lands shall be attributed to a foreign state specified by the Secretary of State. F or the purposes of this Act the foreign state to which an immigrant is chargeable shall be determined by birth within such foreign state except that-

(1) an alien child, when accompanied by or following to join his alien parent or parents, may be charged to the foreign state of either parent if such parent has received or would be qualified for an immigrant visa, if necessary to prevent the separation of the child from the parent or parents, and if immigration charged to the foreign state to which such parent has been or would be chargeable has not reached a numerical level established under subsection (a)(2) for that fiscal year;

(2) if an alien is chargeable to a different foreign state from that of his spouse, the foreign state to which such alien is chargeable may, if necessary to prevent the separation of husband and wife, be determined by the foreign state of the spouse he is accompanying or following to join, if such spouse has received or would be qualified for an immigrant visa and if immigration charged to the foreign state to which such spouse has been or would be chargeable has not reached a numerical level established under subsection (a)(2) for that fiscal year; (3) an alien born in the United States shall be considered as having been born in the country of which he is a citizen or subject, or, if he is not a citizen or subject of any country, in the last foreign country in which he had his residence as determined by the consular officer; and (4) an alien born within any foreign state in which neither of his parents was born and in which neither of his parents had a residence at the time of such alien's birth may be charged to the foreign state of either parent.

Subsection (d) of INA Section 203 states:

(d) Treatment of Family Members. - A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

The provision describes two types of derivatives: first, those who receive status under section 203(d)—which has no quota—and second, those derivatives "otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c)"—which do have quotas. At issue in this case is whether derivatives who receive status *under section 203(d)* are counted against the numerical limitations under subsections (a), (b), or (c). But the language that the government quotes in INA section 202(b) never mentions derivatives who receive status *under section 203(d)*.

After the passage of the revised section 203 in 1990, Congress again distinguished derivatives who receive status under subsection (a), (b), or (c) of section 203 from those who receive status under subsection (d) in section 422(c)(3) of the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. Nothing in section 202(b) applies the per country limits to this latter—and much more numerous—group of derivatives who are also not subject to the worldwide limitations in section 203.

II. The "Country Cap" Applies Only to Derivatives Who Do Not Receive Status Under Section 203(d).

Section 202(a)(2) explicitly applies the individual country limits only to those aliens who receive visas "*made available . . . under subsections (a) and (b)*" of section 203. Thus, those

derivatives who receive status under subsection (d) of section 203 cannot be subject to the individual country limitations, and if they are not subject to those limitations, they cannot be subject also to the worldwide limits. Congress has repeatedly and specifically described the rules for derivatives who receive status *under subsection (d)*. *See* INA section 101(a)(15)(V), INA section 204(l)(2)(C), INA section 204(i)(1)(B), and section 422(c)(3) of the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. If derivatives *always* received status under section 203(d), this specification would be unnecessary and inaccurate.

Instead, some derivatives receive status under section 203(d), while others do not. For example, minor children of spouses of legal permanent residents under section 203(a)(2)(A) are both the derivatives of the spouse and principal applicants in their own right, meaning that they are entitled to receive status under section 203(a) with a quota, and so per section 203(d), receive status under that subsection, not subsection (d) without a quota. Other examples are the spouses and children of special immigrants under section 203(b)(4) who are part of the definition of a special immigrant as defined in section 101(a)(27).

Again, the fact that these derivatives are included in the definition of a special immigrant means that they are derivatives who count against the individual country limits and who do not receive status under section 203(d). If Congress wanted section 203(d) derivatives to count against the individual country limits, it knew how to do so, but chose not to. That is why section 202 nowhere mentions section 203(d).

Moreover, the government's view fails to account for all parts of the statute. In 2000, for example, Congress added a provision for special immigrant broadcasters that explicitly includes "the immigrant's accompanying spouse and children" (INA 101(a)(27)(M)). Because spouses and children of broadcasters would have already been entitled to visas under subsection (d) of

section 203, these provisions served only to require that the dependents count under the quota under section 203(b)(4). According to the administration's interpretation, they would serve no purpose whatsoever. A basic cannon of statutory construction is that wherever possible the statute should be interpreted in a way that avoids "surplusage"—language that is purely redundant—to give meaning to all portions of the text. That Congress did not use this method for other employer, family, or diversity immigrants indicates that it did not want them counted.

Because section 203(b)(5) defines EB-5 principals as those who are the investors and not their spouses and children, neither the worldwide nor per-country limits should apply to derivatives who receive status under section 203(d), which has no limit.

CONCLUSION

For the foregoing reasons, the court should find that the limitations on immigrant visas for individual countries do not apply to all derivatives, but rather only to some derivatives who are also subject to the worldwide limitations. If not all derivatives are subject to the individual country caps, then not all derivatives are subject to the worldwide caps. This interpretation of the statute avoids conflicting with other portions of the text and gives meaning to all provisions of the law.

Respectfully submitted,

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