NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-5210, 22-5313, 22-5320
(Consolidated January 27, 2023)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE THOMSON,

Plaintiff-Appellant

v.

ALEJANDRO N. MAYORKAS, SECRETARY
DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendant-Appellee

On Appeal from the United States District Court for the
District of Columbia Civ. 1:21-cv-01602-RBW

ADRIAN DA COSTA AND JAYDE DA COSTA,

Plaintiffs-Appellants

v.

IMMIGRATION INVESTOR PROGRAM OFFICE AND UR
M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND
IMMIGRATION SERVICES,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia Civ. 1:22-cv-01576-JEB

SERGE PHILIPPE BEGA, ET AL.,

Plaintiffs-Appellants

v.

UR M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia Civ. 1:22-cv-02171-BAH

BRIEF *AMICUS CURIAE* OF INVEST IN THE USA IN SUPPORT OF APPELLANTS DA COSTA AND DA COSTA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Invest in the USA certifies as follows:

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Adrian Da Costa
Jayde Da Costa
Serge Philippe Bega
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Serge Brian Bega
Pierrot Serge Bega

Appellees
Alejandro Mayorkas, Secretary of United States Department of Homeland Security
Ur M. Jaddou, Director of United States Citizenship and Immigration Services
Alissa Emmel, Chief of the USCIS Immigrant Investor Program Office
Immigrant Investor Program Office

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B. Rulings under Reviews

Order Granting Appellee's Motion to Dismiss for Case No. 21-cv-01602 (ECF No. 10)
Order Granting Appellee's Motion to Dismiss for Case No. 22-cv-01576 (ECF No. 17)
Order Granting Appellee's Motion to Dismiss for Case No. 22-cv-02171 (ECF No. 9)

C. Related Cases

No Related Cases

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I. Introduction

On its surface, this case raises a seemingly straightforward question- whether the court below properly applied the standard for resolving a motion to dismiss pursuant to Rule 12(b)(6) in accordance with *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and related precedent in dismissing the Da Costas' complaint that USCIS had unreasonably delayed the adjudication of their EB-5 petitions. However, what is at stake in this case is significantly more complicated and impactful.

The processing time for an I-526 petition has grown from six months or less in 2011 to an astounding 47.5 to 81.5 months currently (according to currently posted USCIS processing times). Regardless of the order in which USCIS has said that it processes I-526 petitions, IIUSA members report high variations in processing times- occasionally differing by *years* for investors filing petitions around the same time- and frequent and consistent examples of later-filed petitions being approved before earlier-filed petitions. Indeed, they report an inherent randomness to the case processing.

The unpredictability and inconsistency of processing times, as well as the lack of transparency into processing times, has- and continues to- hurt the EB-5 program and EB-5 regional centers. Existing investors are frustrated and angry, and feel betrayed because the processing times have inexplicably increased two or

three fold from when they invested. Investors see other investors who filed petitions after they did have them approved before their petitions are approved. Some investors have sought to withdraw their investments because of the delay. Some have died while awaiting adjudication. Prospective investors have declined to invest as a result of the unpredictable processing times, which are several times longer than the processing times of other nations' investment immigration programs. The delays make the EB-5 program and the United States unappealing and uncompetitive with other nations, frustrating the job creation and economic development purposes of the program.

The EB-5 industry, and the EB-5 investors filing the petitions, have no recourse with the agency. Their only recourse lies with unreasonable delay actions in the district courts. Without access to the courts through the mandamus statute and the A.P.A., USCIS- an agency of the Executive Branch- operates almost entirely unchecked. Moreover, Appellees possess and control nearly all of the information and documents that could explain their processing of I-526 petitions., but publish only a limited number of statistics that do not explain how they actually process cases, or why their case processing rates have dropped more than 90% since FY 2018. Without the litigation process, including discovery, it is all but impossible to determine if Appellees' processing of any given I-526 petition- or I-526 petitions in general- is reasonable. Yet a growing number of district

courts have granted motions to dismiss these cases as a result of an improper application of Rule 12(b)(6), insulating Appellees' inaction from needed review or oversight.

II. Identity and Interest of *Amicus Curiae*

Amicus Curiae, Invest in the USA ("IIUSA"), is the national, membership-based, not-for-profit industry trade association for the employment-based, fifth-preference Regional Center Program (the "EB-5 Program"). Federally-designated, active EB-5 Regional Centers are IIUSA's core members. IIUSA represents over 130 Regional Centers serving more than 30 states across the country including the District of Columbia. IIUSA members have facilitated the investments of tens-of thousands of EB-5 investors into job-creating investment projects in the United States, totaling billions of dollars and resulting in the creation of countless jobs for U.S. workers.

IIUSA and its members depend on the timely, efficient, and lawful processing of immigration petitions by USCIS to facilitate their economic development investments and eligibility under the EB-5 Program. As the only national EB-5 trade association, *amicus curiae* is particularly well-suited to provide the Court with important context and all the information it might wish to consider before ruling on an important matter of public interest, such as the instant matter.

III. Rule 29 Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned 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.

Counsel for all appellants have consented to the filing of this brief. *See* D.C. Circuit Rule. 29(b).

IV. An EB-5 Investor's Extraordinary Commitment to the American Dream

The minimum investment required to qualify for an EB-5 visa has fluctuated between $500,000 and $1,050,000. In 2020, the U.S. median household income was $67,521. To get a green card and join the American community, an EB-5 investor has had to invest, at a minimum, 7.4 times this amount. Exceedingly few EB-5 investors are ultra-wealthy to the point where they can casually risk $500,000 or more just to get a green card. More often, EB-5 investors are investing multi-generational wealth and savings to make a better life in America for themselves and their children. They must put this money at risk in an investment that creates at least 10 new jobs for U.S. workers. Contrast this with other employment-based green cards, where the foreign national is coming to the U.S. to accept a job for a U.S. employer. He or she is getting paid by the U.S. employer and presumably

coming for a better life. An EB-5 investor, on the other hand, must risk what may be his or her entire life savings- or even his or her extended family's life savings- for a chance to join our society. This is an extraordinary commitment to the American Dream.

V. I-526 Processing Times- the Great Mystery

USCIS publishes quarterly data on its case processing. According to this data, USCIS adjudicated 9,817 I-526 petitions in FY2015; 9,367 in FY2016; 12,243 in FY2017; and FY15,122 in 2018. Inexplicably, that number dropped to 4,673 in FY 2019- an approximately 69% reduction in case processing. In FY 2020, the number dropped to 3,421. Of note, the highest productivity in FY 2020 was achieved in the third and fourth quarters- from April 1 to September 30, at the height of the Covid 19 pandemic. In FY 2021, USCIS processed only 3,048 petitions. By the end of FY 2022, the number had deteriorated to a mere 1,415, or less than 10% of the number processed in FY 2018. Current estimates derived from whistleblower data (and not published by USCIS) are that the IPO is processing approximately 100 I-526 petitions a month.[1] The backlog, as of the end of FY 2022, was 13,062. At the current processing rate, IPO would need more

[1] See https://blog.lucidtext.com/processing-data/#jp-carousel-14943 (chart) and https://blog.lucidtext.com/processing-data/#:~:text=The%20median%20processing%20times%20for,wide%20range%20of%20filing%20dates.

than 10 years to process the existing backlog, and any new investor would have to wait longer than that.

While adjudications have steadily declined, so have the number of I-526 petitions filed with USCIS. They have dropped from a high of 14,373 in 2015, to 6,424 in 2018, 4194 in 2019, 4,328 in 2020, 814 in FY 2021, and 829 in FY 2022- a mere 5.8% of 2015 levels. Yet overall queue time has increased dramatically.

When we look at staffing, what we see does not match our expectations. IPO currently has approximately 225 staff members. IN FY 2018, it had only around 200.

The result to this equation? More employees plus substantially fewer filings equals- *dramatically increased processing times?* On its face, this simply does not make sense.

IPO, in various declarations and public statements, has proffered a number of reasons for the increase in processing times, none of which appears to be particularly credible.

IPO has cited the Covid 19 pandemic as a reason for the reduction in I-526 processing. The numbers do not bear this out. The massive decline in I-526 processing began in the first quarter of FY 2019, with IPO processing about 1,500 fewer petitions than it had in Q4 of FY 2018. By Q2 of FY 2019, IPO processing had dropped to less than 1,000 petitions per quarter (which is 10 times the current

rate). Whatever really caused the drop in I-526 petitions happened long before the Covid lockdowns. IPO productivity was better in April through September of 2020, during the height of the lockdowns. The EB-5 industry has also learned that IPO staff has been partially or mostly remote since before the pandemic, making IPO better positioned than most agencies or businesses to adapt to pandemic working conditions.

Appellees have cited to a massive re-training of IPO staff at some point in 2019. IIUSA has requested and received the 2019 training materials through FOIA. They do not appear significantly different than earlier training materials obtained through FOIA.

Appellees have cited to staffing constraints, but, as discussed above, IPO has more staff now than it did in FY 2018. IPO has attempted to explain this away by saying that there are fewer I-526 adjudicators now then there were in 2018. Although other immigration programs currently appear to have a higher fraud or national security risk, it appears that IPO is prioritizing hiring Fraud Detection and National Security (FDNS) personnel instead of adjudicators. Thus, staffing shortages seem to have resulted from agency choices.

Amicus has learned that there may be a Controlled Application Review and Resolution Program (CARRP) unit embedded in IPO. The CARRP program is allegedly to identify applicants or petitioners who may pose a national security

risk based on loose and amorphous "indicators," some of which include transfers of large amounts of money and knowledge of a foreign language. These factors apply to nearly all EB-5 investors. It functions more as a secret star chamber deciding- based on factors unrelated to statutory or regulatory eligibility- which investors should be denied, and then encouraging adjudicators to find ways to deny their petitions. *See generally* https://www.aclusocal.org/en/carrp (last visited March 1, 2023). The legality and constitutionality of the CARRP program is questionable.

IPO has cited to a budget shortfall as a reason for processing delays. In 2020, USCIS publicly stated that it would need to furlough two-thirds of its workforce. It appears that this fiscal emergency was misrepresented to the public and congress. A letter from Senator Leahy to USCIS states:

> To put it more plainly, USCIS could pay all of its staff through the end of the fiscal year, avoid furloughs entirely, and still end the fiscal year with a sizeable carryover balance.

See https://www.uscis.gov/sites/default/files/document/foia/USCIS_Furlough_delay_Vice_Chairman_Leahy.pdf (last visited March 1, 2023).

Regardless, there is not a single agency or business (and exceedingly few households) that does not operate under budget constraints. They are an unavoidable fact of life. USCIS has a duty and a responsibility to manage its

budget and complete its work. This is especially so when the agency is supported by fee paying customers.

The four highest filing fees charged by USCIS are all related to EB-5 petitions and applications. At $3,675, the I-526 filing fee is the third highest filing fee charged by USCIS. The first is the I-956 fee at $17,795. The second is the I-829 fee at $3,750. The fourth is the I-956G fee of $3,035. Using USCIS case filing data, we estimate that USCIS took in more than $50 million of EB-5 fee revenue in FY2017, $40 million in FY2018, and $33,356,035 in FY2019. Yet, if you believe the published processing times, a large number of those cases have yet to be processed. In the words of a recent blog on the subject, "[w]hen one collects fees for a service, spends the fees, and then does not deliver the service or even allocate resources to provide the service, that's generally called fraud." *See* https://blog.lucidtext.com/category/eb-5-statistics/ (last visited December 29, 2022). Between October 1, 2021 and December 29, 2021, when Appellees claim the regional center program was lapsed and they could not adjudicate regional center I-526 petitions, they accepted 344 I-924A annual compliance forms from Regional Centers, with the accompanying $3,035 filing fee, for a total of over $1m in fee revenue.

It is also no secret that USCIS uses EB-5 fees to pay for non-EB-5 adjudications, and has done so since at least 2016. *See* 81 Fed. Reg. No. 86. At

26904, et seq. It appears the agency treats EB-5 as a cash cow for other programs, then neglects EB-5 adjudications and claims budget shortfalls.

To add insult to injury, USCIS continues to raise filing fees, claiming more money is necessary to reduce processing times. So far, processing times have gone up after fee increases, not down. The last fee increase was in 2016, when the filing fee for an I-526 nearly doubled. Processing times have more than doubled since. USCIS now proposes to raise EB-5 fees again to an astronomical $11,160, a 204% increase over the current level. The I-829 fee would increase to $9,525, a 148% increase. All told, USCIS seeks to collect $20,000 per investor. Yet, even at those levels, no one outside of USCIS has any confidence that it will improve processing times.

VI. The "Visa Availability Approach"

In January 2020, USCIS announced a process change for I-526 Petitions, from a first-in, first-out ("FIFO") basis to a "visa availability approach". Under this new process, which took effect March 31, 2020, IPO would prioritize I-526 Petitions connected to immigrant investors from countries where visas are currently available. USCIS Deputy Director Mark Koumans was quoted as saying, "This new approach increases fairness, allowing qualified EB-5 petitioners from traditionally underrepresented countries to have their petitions approved in a more timely fashion to receive consideration for a visa." *See* USCIS Adjusts Process

for Managing EB-5 Visa Petition Inventory, available at https://www.uscis.gov/archive/uscis-adjusts-process-for-managing-eb-5-visa-petition-inventory (last accessed March 1, 2023).

The alleged rationale was to process cases for petitioners who could use the approval to promptly obtain a visa rather than using resources to adjudicate the petitions of investors who, because of visa backlogs, would not be able to use the approval to obtain a visa for a long time, thereby speeding up the adjudications of petitions of investors who are not from backlogged countries. Yet, USCIS's visa availability approach has done nothing to increase the adjudication numbers; instead, it has produced historically low adjudication numbers and completion rates.

USCIS has had a deference policy for EB-5 petitions for many years, now codified in the EB-5 Reform and Integrity Act. Once USCIS reviews and approves an EB-5 project, it is obliged to give deference to that approval in subsequent adjudications, including those of other investor petitions in the same project. By adjudicating the project only once, instead of reviewing it in conjunction with each investor petition, time and effort are saved and inconsistent adjudications are avoided. Once the project portion of an I-526 petition is reviewed, all that is left to adjudicate is the investor's biographical and source of funds information. In other words, more than half the work is already done. This is the reason the visa

availability approach ostensibly takes into account whether or not the project has previously been reviewed.

Amicus's members report that IPO appears to process approved projects in batches irregularly at best. In practice, even though the project approval is supposed to be given deference, different IPO adjudicators will still issue inconsistent requests for evidence on the project. Often they are at least partially duplicative of issues already resolved. Sometimes they raise entirely new issues that could have been raised in the previous adjudication, but were not. This, of course, undermines any efficiency benefit allegedly gained by reviewing previously reviewed projects.

Moreover, data from Amicus' members suggests that IPO is not following its own ordering approach. Significant, unexplainable differences in processing times are common. Exceptions to FIFO processing of visa-available, project-reviewed petitions are common. Even the posted USCIS processing times suggest that the approach is not being followed. The only countries currently subject to a visa backlog are India and China. Yet USCIS lists processing times for Indian natives as 47.5 months, while the processing times for non-backlogged countries is 58.5 months. China is currently listed at 81.5 months.

VII. The harms caused by processing delays.

1) Agency delays cause investment risk not contemplated by Congress.

When USCIS took 6 months to process an I-526 petition, industry standard practice was to hold an investor's money in escrow until his or her I-526 petition was approved. If it was denied, the investor got the money back, and did not have to face the investment risk if he or she was not also getting the immigration benefit. In addition to being beneficial to investors, it also allowed USCIS to vet an investment project before any money was released to it. While no guaranty, this provided at least an opportunity to detect potentially fraudulent investment schemes before anyone could run off with the money.

With processing times delayed multiple years, escrow until approval of the I-526 petition is commercially unfeasible. A real estate development project simply cannot wait 58.5 months for the capital it needs.

USCIS policy requires an investor to place his or her funds at risk for the two-year conditional residence period. This period does not begin to run until the I-526 is approved and the investor obtains a conditional residence visa. Adding years to the processing time of an I-526 petition delays the start of this two year period by a corresponding number of years.

As a result of the delays, projects are often completed and return funds to the investment enterprise prior to the end of an investor's two-year period. In such a case, USCIS policy requires the funds to be redeployed into another investment to keep them at risk, adding a subsequent investment risk. While Congress intended

for an EB-5 investor to make an at-risk investment, surely Congress did not intend for an EB-5 investor to face financial risk for an indeterminate number of years because of immigration delays.

Congress created a truncated program. It expected that an investor would invest for not less than two years to create the necessary jobs, and that after two years of residence, the investor would file an I-829 petition to remove the conditions on his or her residence showing that he or she had met the capital investment and job creation requirements, and USCIS would process that petition in 90 days. *See* 8 U.S.C. § 1186b. Congress has expressed that it generally expects USCIS to complete immigration applications and petitions in 180 days. 8 USC§1571(b). Taken together, congress intended the EB-5 process to be a compact three-or-four year process.[2] Not 7, or 10, or 15 years.

USCIS appears not to care about the congressional time frame. It previously issued I-829 receipt notices extending investor green cards for one year, so investors could have proof of their permanent resident status while the I-829 was processed. USCIS increased the validity of the I-829 receipt to 18 months. And then to two years. And recently, to four years- or roughly 12 times the statutory and regulatory 90-day time frame.

[2] We note that the commercial reality is that an investor is likely to have their funds invested for at least five years, as this reflects the deal cycle of most higher-quality and lower-risk investment projects. The time from pre-development, to construction, to refinancing or sale of the project and return of investment is longer than two or three years. But that is the inherent investment risk contemplated by congress.

2) Delays undermine confidence in the program and harm the reputation of the United States

The delays and inconsistent processing times undermine investor confidence in the fairness and safety of the program. When published processing times double, triple or more after an investor files an I-526 petition, and that investor sees that other, later-filing investors are getting approved before him or her, it causes frustration, anger and a loss of confidence in the fairness of the system. Investors have sought to withdraw their investments, sometimes threatening, and even filing lawsuits against regional centers, NCEs, JCEs or attorneys. Many investors have simply quit the program, and abandoned their pursuit of a green card through EB-5. When an investor starts demanding a return of capital while a project is in development, it can cause uncertainty in the capitalization of the project. If, for instance, a developer starts construction of a $100 million hotel in reliance on the availability of EB-5 funding, and EB-5 investors start demanding their money back halfway through, this could jeopardize the project, and the job creation produced by the project.

Moreover, many investors that have made the extraordinary commitment to the U.S. discussed above, did so to get away from unpredictable, corrupt, or unfair governments (e.g. China, Russia, Venezuela). IPO's unpredictable processing, lack of transparency, and lack of any means to get information about a case has

tarnished the reputation of the United States with these and other international investors.

For investors considering an EB-5 investment, one of the most common questions is “when will I get my green card?” At the moment, it is difficult or impossible to answer that question. IPO could take several months or five-plus years to adjudicate an I-526 petition. This makes the EB-5 program unattractive and uncompetitive, and makes it significantly harder to recruit new investors. This, in turn, frustrates the entire congressional purpose of the program. Members report that prospective investors have often decided not to invest because of IPO processing times.

3) Investors have literally died waiting

Members have reported that investors have died while awaiting IPO adjudication of their petitions. In some cases, it has been exceedingly difficult to return capital to the investor’s family because of problems with foreign probate procedures. In most cases, when the investor dies, his or her spouse and children are unable to continue the immigration process. The investment is not simply assignable to the derivative beneficiaries. USCIS takes the position that the petition dies with the petitioner.

4) Unsuitability as a retirement visa

One of the major benefits for EB-5 investors is that EB-5 provides a pathway to U.S. citizenship. As conceived by Congress, three or four years after filing an EB-5 petition, the investor would have obtained conditional permanent resident status and would have removed conditions on permanent resident status (Form I-829), and would have been eligible to apply for naturalization. By delaying every part of the process, including the I-526 and the I-829, USCIS has made the goal of U.S. citizenship illusory for many investors. Instead of three to four years, the combination of I-526 processing times and I-829 processing times results in EB-5 investors being unable to file for naturalization for twelve to fifteen years, and in many cases longer.

Many investors who have accumulated the wealth necessary to make an EB-5 investment are not of tender years. The most striking example of this is retirees. EB-5 has long been known as the only option available in the U.S. immigration system for retirees who want to relocate and settle in the U.S., but who have no intention to work in the U.S. and who have no family members in the U.S. The current USCIS processing times results in waits of five to seven years or more before retirees can relocate to the U.S. This is impractical at any age; it is particularly impractical as a retirement solution for people of retirement age.

VIII. Argument

1) The Availability of Judicial Intervention Under the A.P.A. or Mandamus Statute Remains of Paramount Importance.

While we believe that the Da Costas have sufficiently pled facts that could support a claim for mandamus or relief under the A.P.A., the overriding concern of *Amicus Curiae* is that judicial relief remain available in unreasonable delay cases deriving from I-526 and other EB-5 petitions. The picture of IPO painted by the data and information and public record is bleak. While USCIS in general has struggled with processing times, we are aware of no other area of immigration that has seen the dramatic decline in case processing that IPO has.

USCIS has structured the system so that an EB-5 investor *cannot even make an inquiry* into the status of his or her petition until more than the posted processing time has elapsed. Inquiries by Congress into case status and processing times result in form responses and generate little interest at IPO. The USCIS Ombudsman's office is so backlogged that it is not accepting inquiries into case status. EB-5 petitioners simply have nowhere to turn for answers.

The A.P.A. and mandamus statute were both enacted to provide the regulated public with the means of seeking redress from the courts when an executive agency acts unreasonably or fails to act. This is a critical check on unfettered agency discretion. An un-checked IPO would be dangerous to the industry and to the success of the EB-5 program. The data strongly suggests that IPO, through affirmative actions and choices, has intentionally reduced the rate of I-526 processing. Why? We don't know. That knowledge exists exclusively

within the agency, and has not been made public. Without the availability of judicial oversight, IPO could decide, for any reason or no reason at all, to further limit I-526 processing, which would further damage the reputation and marketability of the program, and essentially render an immigrant visa category and job-creating program created by Congress a nullity. At the current pace of adjudications, it would take 10 years and 10 months to get through the current backlog of petitions, requiring an EB-5 investor to maintain his or her investment at risk for more than 12 years. IPO is endangering the life savings of many investors through its delays and policies requiring the investment to remain at risk long after it has created the necessary jobs. This displays a reckless disregard for the interests of the regulated public.

Moreover, since the agency is not opening its books and sharing the reasons for its inability to manage its case load, there is no way, absent the discovery process, to ascertain whether the delays are reasonable, a result of mismanagement, a result of malfeasance, or a result of something else entirely. Given that the agency operates as a black box and does not communicate meaningfully with stakeholders, judicial oversight is that much more important.

2) Misperception and Malignment of Petitioners who File Delay Actions

Appellees frequently attempt to characterize the petitioners who file delay actions as a result of long processing times as simply wealthy petitioners who can

hire a lawyer to file a lawsuit in an attempt to game the system and jump to the head of the line. *See e.g. Lyons v. United States Citizenship & Immigration Servs*. 21-cv-3661 (S.D. N.Y. Jan. 10, 2023). The government is essentially implying that these are bad people abusing the system. While we appreciate the frustration on the bench with the number of immigration mandamus cases clogging the courts, we posit that the problem is not people trying to game the system, but an agency with systemic problems that it is unwilling or unable to fix- perhaps due to a lack of oversight and accountability. It is notable that the uptick in EB-5 based mandamus actions corresponds with the 2019 and later drop in case processing.

A brief survey of PACER Shows that Alissa Emmel is a Defendant in approximately 94 lawsuits since 2020. Her predecessor, Sarah Kendall, appears as a defendant in 97 cases. Of nearly 200 lawsuits, only 5 were filed before 2019, and the majority were filed in 2020 and later, after processing times dropped precipitously. We cannot tell from the docket if these are all mandamus cases. We also cannot tell if this represents the entire universe of delay cases against the IPO due to different practices in naming parties.

Where there is smoke, there is often fire. There is a whole lot of smoke coming from IPO. The numbers and public record suggest that something larger is afoot than wealthy people trying to game the system. The data and other factors discussed above suggest that there is a legitimate problem at USCIS. The flow of

lawsuits is a result of that problem and of the extreme frustration and lack of other options for petitioners.

Some courts have reacted by being overly deferential to the government, and quick to dismiss mandamus claims. Respectfully, the case below appears to be such a case. The lower court, relying on the *ipse dixit* of the government, and nothing else, concluded that IPO processing times are governed by a rule of reason, ignoring plausible factual allegations and substantial data to the contrary in the process.

The problem with this approach is it simply does not address the root cause of the ever-increasing immigration docket. We suspect if courts took the opposite approach, and made IPO show its actions are reasonable, the agency would be more inclined to right the ship, and the number of lawsuits would decrease.[3]

3) Evaluation of the TRAC Factors is Inherently Fact Specific

The Da Costas' complaint, as well as the case processing data, raised a host of factual questions that simply cannot be resolved by mere reference to the "visa availability approach" and Appellees' website (or, in some cases, the one-sided, un-cross examined declaration of USCIS).

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[3] There is precedent for this. In the early 2000's, courts were flooded with mandamus actions relating to applications for adjustment of status that had been delayed due to FBI security checks. After enough lawsuits, USCIS re-negotiated its contract with the FBI and instituted procedures that reduced the security check process to an average of 30 days. *See* Office of the Inspector General, "A Review of U.S. Citizenship and Immigration Service's Alien Security Checks," November, 2005; USCIS Fact Sheet "Immigration Security Checks- How and Why the Process Works," April 25, 2006.

The complaint, supported by USCIS average case processing time data, alleges that processing times have more than doubled since 2017. Comp. at ¶ 43. The complaint further alleges that IPO is artificially slowing down I-526 adjudications. Id., at ¶ 51. The complaint also details the decline in petitions processed per year, ¶¶ 59-62, and alleges that IPO does not actually have a rule of reason. ¶ 137. The complaint alleges that a lack of resources is not the cause of the delay in adjudication of the Da Costas' petition. It is supported by IPO staffing details. ¶ 177. It further alleges that the use by IPO of EB-5 filing fees to fund an FDNS unit at IPO is unlawful. ¶ 178. It alleges that despite the "visa availability approach," IPO has no assignment policy within that regime, and, as such, there is no distinct "line" for the Da Costas' petition to jump. ¶ 186. The complaint alleges that IPO does not adjudicate I-526 petitions "in any predictable manner." ¶ 187. Finally, the complaint alleges that the delays and increases in processing times are intentional on the part of IPO. ¶ 192.

The lower court's opinion does not meaningfully engage with these allegations. Notably, all involve questions of fact. In light of the fact that IPO is currently processing I-526 petitions at a rate that is less than 10% of its historical rates, these allegations are not merely speculative.

The absolutely extraordinary drop in case processing, *by itself*, is enough to support a plausible inference that the agency has intentionally decreased the flow

of adjudications. In fact, to even a causal observer, it seems *by far* the most likely explanation. Was that decision reasonable? IPO has not admitted to intentionally decreasing its rate of adjudication, or posited a reason for such a decision. As such, it is currently impossible to conclude that it was reasonable. This fact alone is sufficient to meet the *Twombly* standard.

A myriad of other questions exist, the answers to which are almost certainly obtainable through discovery. For instance, whether or not cases are actually processed FIFO or according to the visa availability approach could be easily confirmed by IPO data that includes the filing date, adjudication date, backlogged vs. non-backlogged visa status, and reviewed or not reviewed project status of all petitions filed since 2015 (or another date). Unfortunately, only IPO has that data. Member data suggests that cases are not processed FIFO and there are regular and frequent deviations under the visa availability approach, but it is not a complete data set, and not available to most petitioners. How are I-526 petitions assigned and tracked under the visa availability approach to make sure they are processed in a FIFO order according to the visa availability criteria? *Are* they tracked? To what extent are the rules actually followed? Why did case processing rates plummet and why do they continue to decline? Why does USCIS prioritize non-adjudicator hiring over adjudicator hiring? Why does IPO assign non-adjudicatory work and non-I-526 adjudications to its limited number of I-526 adjudicators? Is that a

reasonable use of resources? How many hours does and should it take to adjudicate an I-526 petition, excluding queue time? Does IPO even track that or have metrics for evaluating completion rates? Importantly, what happened to the filing fees paid by EB-5 investors that were supposed to be used to process their petitions?

An equally long list of questions exists relating to the other TRAC factors. Although the 180-day time frame specified in 8 USC§1571(b) is non-binding, a growing number of courts have found that it is nevertheless instructive of what constitutes a reasonable time. *See e.g. Liu v. Mayorkas*, 2021 WL 2115209, at *5 (D. D.C. May 25, 2021); *Keller Wurtz v. USCIS*, 2022 WL 4673949, at *5 (N.D. Cal. Aug. 12, 2020). Moreover, when examined in light of the two-year conditional residence period and the 90 day time frame for adjudicating I-829 petitions discussed above, it becomes clear that I-526 processing times of four or five years are more are clearly not what congress intended. USCIS public statements going as far back as 2014 citing the agency's goal of processing these petitions in 6 months also provide context for how the agency interpreted the expectations of congress. *Kraus Lyons* at 12.

TRAC factors 3 and 5 are almost 100% issues of fact. Very little should be needed in a pleading to avoid dismissal under *Twombly*. As for TRAC Factor 4, the only competing interest IPO typically proffers is that expediting a petition as a

result of a lawsuit only serves to put the investor ahead of others. To the extent that courts have elevated this to an insurmountable obstacle, it eviscerates the A.P.A.'s protections and renders the statute moot. If you speed one application up, it necessarily will go ahead of another application. But what is the actual effect? Is the next application delayed by minute or hours as a result? A day? Moreover, mandamus or relief under the A.P.A. serves to rectify a problem. The delay may have resulted from IPO processing cases out of order. Putting Appellants back at the front of the line could simply be restoring their proper position. But we simply cannot know without a factual inquiry because we do not know 1) if there really is a line as IPO says; and 2) assuming there is, in fact, a line, whether IPO actually goes in order. *See Keller Wurtz*, 2020 WL 4673949, at *5. Moreover, courts have the power to fashion appropriate relief, and such relief may not be as simple as just putting the plaintiff at the head of the line. *Liu*, 2021 WL 2115209, at *5.

Although a plaintiff does not need to prove bad faith on the part of the agency under TRAC Factor 6, the Da Costas have raised the issue of whether IPO is handling I-526 petitions in bad faith. Looking at the facts- going from 15,000 cases processed per year to under 1,000; questionable hiring and resource allocation decisions; creating obstacles to prevent petitioners from making inquiries into their case status for many years; using EB-5 filing fees for other things and claiming a lack of resources as a basis for delays- there is a plausible

inference that IPO has acted in bad faith in its processing of I-526 petitions subsequent to FY 2018.

By simply accepting the government's visa availability approach as a rule of reason without addressing the allegations that IPO simply does not follow that rule even though it exists, together with all the other facts alleged, it appears that the lower court ignored important aspects of the problem by blindly deferring to the government.

4) Was the Regional Center Program Expired or Wasn't it?

In assessing the reasonableness of USCIS delays in processing EB-5 petitions, USCIS' actions during the temporary lapse of the regional center program are instructive. When the program temporarily lapsed on July 1, 2021, USCIS took the position that it was legally unable to process EB-5 petitions during the lapse, which lasted for over nine months.

However, inexplicably, the government agreed in oral argument in the case of *Behring Reg'l Ctr. LLC v. Mayorkas*, 2022 WL 2290594, at *5 (N.D. Cal. June 24, 2022) that USCIS, in fact, had the authority to adjudicate EB-5 petitions during the lapse and chose not to do so. [transcript of oral argument available].

The litigation in the Northern District of California was necessitated by USCIS' action, without any legal foundation, terminating all regional centers following the passage of the RIA. Judge Chhabria in the Northern District of

California issued a nationwide preliminary injunction enjoining USCIS' action, which resulted in the restarting of the EB-5 program. *See Behring Reg'l Ctr. LLC v. Mayorkas,* 2022 WL 2290594, at *5 (N.D. Cal. June 24, 2022). Unfortunately, USCIS' posting of vastly increased processing times soon followed.

During the regional center program lapse, USCIS chose not to deploy its EB-5 adjudicators to adjudicate direct EB-5 petitions. (The direct EB-5 program did not lapse). It also chose not to deploy its EB-5 adjudicators to lessen the I-829 petition backlog.

At the same as it was not adjudicating EB-5 petitions, the agency continued to collect fees from EB-5 regional centers for filing of annual statements. It also chose not to refund over $1 million of filing fees for I-924 project applications that will never be adjudicated.

These facts, individually and collectively, do not provide a picture of a government agency acting reasonably to promote the goals of the congressionally-authorized EB-5 program.

IX. Conclusion

The facts alleged in the complaint below, as well as the public record, paint a picture of an executive agency that is not accountable to its stakeholders, cannot or will not manage its case load, and routinely unreasonably delays the adjudication of I-526 petitions. The allegations are specific, plausible and

supported by data and the public record. Any precedential decision limiting the availability of judicial review under the A.P.A. or mandamus statute would have devastating consequences on the EB-5 industry, eviscerate an essential check on an executive agency and almost certainly result in even lengthier processing times, striking a serious blow to the viability of the EB-5 program.

Respectfully submitted,

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On the Brief

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1) I, the undersigned, certify that this brief contains 6,448 words of text in compliance with FRAP 29(a)(5).

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Invest in the USA ("IIUSA") is the national, membership-based, not-for-profit 501(c) organization, industry trade association for the employment-based, fifth-preference Regional Center Program (the "EB-5 Program"). Federally-designated, active EB-5 Regional Centers are IIUSA's core members. IIUSA represents over 130 Regional Centers serving more than 30 states across the country including the District of Columbia. No companies or publicly traded corporations own 10% or more of the stock of IIUSA.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I served a copy of this brief on all parties by filing with the Court's electronic filing system.

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