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EB-5 VISA CAP BUSTING LAWSUIT OPENS UP TANTALIZING POSSIBILITIES TO ELIMINATE BACKLOGS IN EMPLOYMENT AND FAMILY PREFERENCE IMMIGRANT VISAS

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Ever since I co-wrote The Tyranny of Priority Dates in 2010, followed by How President Obama Can Erase Immigrant Visa Backlogs With A Stroke Of A Pen in 2012, I have steadfastly maintained that the current Trump and the prior administrations of Obama, Bush, Clinton and Bush (Senior), have got it wrong when counting visa numbers under the family and employment preferences.

There is no explicit authorization for derivative family members to be counted separately under either the employment-based or family based preference visas in the Immigration and Nationality Act. The treatment of family members is covered by INA 203(d), enacted in 1990, which states:

"A spouse or child defined in subparagraphs (A), (B), (C), (D), or (E) of section 1101(b) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, 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."

Nothing in INA 203(d) provides authority for family members to be counted under the preference quotas. While a derivative is "entitled to the same status, and the same order of consideration" as the principal, nothing requires that family members also be allocated visa numbers. If Congress allocates a certain number of visas to immigrants with advanced degrees or to investors, it makes no sense if half or more are used up by family members. I have also written blogs over the years, here, here and here, to further advance this argument.

The primary objective of my advocacy was to try to persuade a more immigrant friendly Obama administration, in line with other executive actions, to either not count derivatives or count the entire family unit as one consistent with INA 203(d). If the administration was afraid of being sued by reinterpreting INA 203(d), I advocated that there was sufficient ambiguity in the statute to do so without the need for Congress to sanction it. A government agency's interpretation of an ambiguous statute is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—often abbreviated as "*Chevron* deference".

Despite announcing DACA and DAPA, the Obama administration was too timid to undertake such an audacious reinterpretation of INA 203(d). Much water has flown under the bridge since 2016. The Trump administration will never entertain this idea. While risky, a lawsuit would be an option of last resort. The Trump administration will likely argue that INA 203(d) is ambiguous and thus invoke *Chevron* deference to the way it and all prior administrations have counted immigrant visas.

I am pleased to learn that a group of investors under the employment-based fifth preference (EB-5) have filed a lawsuit, *Feng Wang v. Pompeo*, and even won class certification. They are being represented by the venerable Ira Kurzban and John Pratt of Kurzban, Kurzban, Weinger, Tetzeli & Pratt, P.A. Their main argument, supported by an expert opinion from David Bier of Cato Institute, is that in every year, except for 2017, the number of derivatives receiving permanent residence was greater than the number of principal applicants, thus resulting in backlogs for China and subsequently Vietnam in the EB-5. If the derivative family members were not counted in the EB-5, the principal applicants would have received conditional permanent residence or green cards by now.

The EB-5 plaintiffs have focused their argument specifically on the language in INA 203(b)(5), which provides that "isas shall be made available, in a number not to exceed 7.1 percent of worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new enterprise.....in which such alien has invested" a qualifying amount of capital, and which will create at least 10 jobs for U.S. workers. Thus, plaintiffs argue that INA 203(b)(5) unambiguously provides that 7.1% of the 140,000 employment-based visas shall be allocated to investors who satisfy the EB-5 requirements. Nothing in the language of INA 203(b)(5) provide for the reduction of the allocation of EB-5

visas to spouses and children. Rather, spouses and children, under INA 203(d) will "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 plaintiffs in *Feng Wang v. Pompeo* also point to the provision in INA 217(f) regarding the removal of conditions for conditional residents to further demonstrate that Congress did not intend to classify the spouses and children of investors as investors under INA 203(b)(5). INA 217(f) separately defines an "alien entrepreneur" who was admitted for permanent residence from the "alien spouse" or "alien child", who were admitted for permanent residence by virtue of being the spouse and child of the "alien entrepreneur."

Finally, the plaintiffs also argue that INA 203(b)(5)(B) sets aside 3,000 visas for those who invest in targeted employment areas (TEA), and in exchange, the investor invests a reduced amount. However, since historically approximately two derivative spouses/children accompany each EB-5 investor, investors would be able to use up only the 3,000 visas allocated to TEA investors, even though Congress intended that investors be given a choice to invest in a TEA or in an area outside a TEA.

If the plaintiffs prevail in *Feng Wang v. Pompeo*, the beneficial impact of the ruling will be limited to EB-5 investors. They have moved for a preliminary injunction based on imminent harm such as children aging and other economic harms. Still, a victory, assuming that the plaintiffs also prevail on appeal, will provide a springboard for EB plaintiffs in other backlogged preferences to file a broader class action. Although the plaintiffs in *Feng Wang v. Pompeo* relied on the unique language in INA 203(b)(5) and INA 217(f), plaintiffs in other EB preferences can rely on similar language in other statutory provisions. For instance, a plaintiff in a backlogged country such as India under the employment-based first preference can point to INA 203(b)(1)(A)(i) to show that Congress intended that all the visas in the EB-1 be allocated to an alien with extraordinary ability while the spouses and children immigrated with the principal alien of extraordinary ability under INA 203(d). Similarly, a plaintiff from a backlogged country in the EB-2 can point to INA 203(b)(2)(A) to show that Congress intended that all the visas in the EB-2 would be allocated to qualified immigrants who are members of the professions holding advanced degrees or those with exceptional ability while their spouses and children immigrated under INA 203(d). A plaintiff in the EB-3 can point to INA

203(b)(3)(A) to show that Congress clearly intended all the visas in this category to be allocated to skilled workers, professionals and other workers while their spouses and children immigrated through INA 203(d). These future plaintiffs can also move for a preliminary injunction showing similar imminent harm as the EB-5 plaintiffs have shown.

Of course, winning on these arguments will not be easy. The government will seek to show, among other arguments, that there is ambiguity in INA 203(d) and invoke Chevron deference to the way it currently and has historically counted principals and derivatives separately. However, if the EB-5 plaintiffs win in *Feng Wang v. Pompeo*, then it opens up tantalizing opportunities for plaintiffs in other backlogged EB preferences, and potentially family-based preferences, to make similar arguments in lawsuits and win. If plaintiffs in these lawsuits are victorious, the number of available green cards will double or triple without Congress needing to lift a finger and despite the Trump administration's resistance to expanding legal immigration. The waiting lines will vanish or be drastically reduced. As Rabbi Hillel asked in Ethics of the Fathers, if not now, when?