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WANG V. BLINKEN NIXES ANY HOPE FOR EXCLUDING THE COUNTING OF FAMILY MEMBERS IN THE GREEN CARD CAPS

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On July 9, 2021, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in *Wang v. Blinken*, No. 20-5076 (D.C. Cir. 2021), interpreting INA § 203(d) to include the counting of derivatives toward the EB-5 investor cap. The Plaintiffs in the case are a group of EB-5 investors who would have been able to adjust status long ago if not for the lengthy backlogs in the EB-5 China, and subsequently Vietnam, categories caused by counting derivative family members against the EB-5 cap.

In a previous blog, we discussed the case at the District Court Level, where Plaintiffs' primary argument was that nothing in the language of INA § 203(d), which states 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, requires derivative family members to be counted against the cap. Instead, spouses and children, under INA 203(d) are "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."

Plaintiffs also argued that Congress intended to exempt derivative family members from the numerical caps when it changed the relevant regulatory language in the Immigration Act of 1990. Prior to 1990, the "same status, and the same order of consideration" language as it pertains to derivative family members appeared in a section describing which immigrants "are subject to

the numerical limitations", but in 1990 this provision was shifted to a new section entitled "Treatment of Family Members". Plaintiffs argued that this change indicated an intent on the part of Congress to subject only EB-5 investors, and not their spouses and children, to the numerical cap.

The Court, however, disagreed with this reasoning. Judge Walker, who authored the opinion, interpreted the key phrase "same status" to mean that because an EB-5 investor's family members get the same type of visa as the principal, they must also be counted against the cap, and reasoned that "same order of consideration provided in the respective subsection," which refers to the worldwide cap on employment-based visas, further indicates that spouses and children of EB-5 investors are subject to the cap.

The Court's decision in *Wang v. Blinken* comes as a deep disappointment to the many immigration attorneys who had hoped that the Biden administration could reinterpret INA § 203(d) to support either not count derivatives at all or counting family units as one. We have long taken the position that not counting derivatives under the preference quotas would be consistent with INA § 203(d). See, for example, our blogs on The Tyranny of Priority Dates in 2010, How President Obama Can Erase Immigrant Visa Backlogs With A Stroke Of A Pen in 2012, and The Way We Count in 2013. The Biden administration solicited recommendations on how to remove barriers and obstacles to legal immigration, and unitary counting of derivatives, an idea which our firm proposed, would have done much to serve this goal by relieving the decade-long backlogs. If the Biden administration wanted to reform the immigration system through executive actions, reinterpreting the law to not count derivatives in the green card categories would have been a good first step, along with not opposing the plaintiffs in *Wang v. Blinken*. Sadly, though, the administration did not choose to go in this direction, and the Court's decision in *Wang v. Blinken* is likely a death knell for other, future lawsuits that would make similar arguments under other employment or family-based visa categories.

While the Court's decision in *Wang v. Blinken* can still be appealed to the Supreme Court, a positive outcome is not likely given the conservative majority on the Supreme Court, which has adopted a pseudo textualist approach to interpreting immigration statutes. For instance, the Supreme Court in *Sanchez v. Mayorkas* also recently strictly interpreted INA § 244(f)(4) to hold that the grant of Temporary Protected Status did not constitute an admission thus allowing recipients to adjust status in the US. Even if different plaintiffs could get a

favorable decision in another circuit, the Supreme Court would likely rule on the circuit split anyway. Particularly as it has *Chevron* deference on its side, the government is likely to prevail in any litigation scenario. And even if the Biden administration later changes its mind and decides to adopt a nationwide policy to not count derivatives, it would be precluded from implementing this policy for people living within the jurisdiction of the D.C Circuit. Perhaps a better way forward would be convincing Congress to explicitly state that derivative family members will not be counted against the cap under INA § 203(d). Passing such an amendment would be extremely difficult in a divided Senate, but one idea is to pass a measure through the reconciliation procedure that requires only a simple majority, rather than a filibuster-proof majority in the Senate.

(This blog is for information purposes, and should not be relied upon as a substitute for legal advice).

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