

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-cv-24753-JAL

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Elena ASTAKHOVA , individually, Ling TANG ,)
individually, Lan Hoang NGUYEN , individually,)
Paulo Guntovitch KRIEGER , individually,)
Rafael Ramon Aragones PARDO , individually,)
Linh Thi Thuy PHAM , individually, Alvaro Victor)
Alejandro Lorenzo Sousa GARCIA , individually,)
Parviz ABDEVEIS , individually, HRH Linus Nto)
MBAH , individually, Mauricio Esteban Garci)
GIRALDO , individually, Qing HE , individually,)
Meihang LU , individually, Seyed Majid)
BANIHASHEMI , individually,)
)
<i>Plaintiffs</i>)
)
v.)
)
Kevin McALEENANN , Secretary of the United States)
Department of Homeland Security; Kenneth T. (Ken))
CUCCINELLI , Director, United States Citizenship and)
Immigration Services; Sarah KENDALL , Chief,)
Immigrant Investor Program Office, United States)
citizenship and Immigration Services; UNITED)
STATES CITIZENSHIP AND IMMIGRATION)
SERVICES)
)
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)
<i>Defendants.</i>)
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**PLAINTIFFS’ AMENDED COMPLAINT
FOR WRIT IN THE NATURE OF MANDAMUS**

Plaintiffs, by and through their undersigned attorneys, commence this action against the above-named Defendants, and state as follows:

1. This action arises from Defendants' failure to adjudicate the I-526 petitions of twelve (12) of foreign investors who each invested \$500,000 into a Limited Partnership associated with the Q Burke resort in Vermont in the hopes of obtaining lawful permanent resident status in the U.S. for themselves, their spouses, and their children through the employment based fifth preference category of the Immigration and Nationality Act, INA § 203(b)(5)-otherwise known as the EB-5 visa program.

2. Q Burke Mountain Resort Hotel & Conference Center LP ("Burke" or the "NCE") was a part of the larger Jay Peak series of EB-5 investment projects owned and operated by Ariel Quiros (among others), who is the subject of an SEC action in this Court (SEC v. Quiros, 16-21301 (the "SEC Action")) alleging that he misused and/or misappropriated investor funds and defrauded several hundred EB-5 investors who invested in numerous Limited Partnerships, including those in this action, over many years.¹

3. The NCE was formed to raise money from foreign investors and use the money to build and operate various components of the Q Burke resort, thereby creating jobs for U.S. workers and allowing the investors to meet the requirements of the EB-5 program.

4. As part of the SEC Action, the Court appointed a Receiver to take possession of the Jay Peak and Q Burke resorts, preserve and recover the assets of the limited partnerships, and operate them for the benefit of the investors- which includes supporting their immigration goals as well as their investment goals.

5. Despite the actions of Mr. Quiros, through the efforts of the Receiver (including the recovery of substantial sums of money), the Jay Peak and Q Burke projects were able to be funded with the recovered proceeds of the investor plaintiffs' investments and each project remains

¹ The SEC Action was resolved by, among other things, the entry of a Permanent Injunction against Mr. Quiros. *See* SEC Action [ECF No. 398].

capable of creating all of the jobs necessary to support the investor plaintiffs' green card petitions, and, as of May 2019, have already created enough jobs to support the green card petitions of almost all of the investors.

6. The investor Plaintiffs have met the requirements for having their I-526 petitions approved, however, Defendants have failed to adjudicate their petitions after- in some cases- many years.

7. Plaintiffs have suffered (and continue to suffer) harm as a result of the delay, and now seek an order from the Court compelling USCIS to adjudicate their petitions.

PARTIES

A. Plaintiffs

8. The Burke I-526 Plaintiffs are twelve (12) foreign investors who have all invested \$500,000 into Burke and filed I-526 petitions with Defendants in the hopes of qualifying for an EB-5 visa and immigrating to the U.S. with their families. The adjudication of these petitions has been unreasonably delayed.

9. Plaintiff, Elena Astakhova, filed a Form I-526 petition on April 6, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1590255589.

10. Plaintiff, Ling Tang, filed a Form I-526 petition on March 2, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1590191026.

11. Plaintiff, Lan Hoang Nguyen, filed a Form I-526 petition on June 9, 2016 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1690503116.

12. Plaintiff, Paulo Guntovitch Krieger, filed a Form I-526 petition on June 3, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1590381876.

13. Plaintiff, Rafael Ramon Aragones Pardo, filed a Form I-526 petition on September 3, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590568432.

14. Plaintiff, Linh Thi Thuy Pham, filed a Form I-526 petition on December 11, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1690200409.

15. Plaintiff, Alvaro Victor Alejandro Lorenzo Sousa Garcia, filed a Form I-526 petition on June 23, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590427550.

16. Plaintiff, Parviz Abdeveis, filed a Form I-526 petition on February 20, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590179852.

17. Plaintiff, HRH Linus Nto Mbah, filed a Form I-526 petition on August 24, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590547146.

18. Plaintiff, Mauricio Esteban Garci Giraldo, filed a Form I-526 petition on May 20, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590348310.

19. Plaintiff, Qing He, filed a Form I-526 petition on July 6, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590451987.

20. Plaintiff, Meihang Lu, filed a Form I-526 petition on April 10, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590267420.

21. Plaintiff, Seyed Majid Banihashemi, filed a Form I-526 petition on September 21, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590605575.

B. Defendants

22. Defendant, Kevin McAleenan, is the Acting Secretary of the United States Department of Homeland Security, with responsibility for the administration of applicable laws and statutes governing immigration and naturalization. He is generally charged with enforcement of the Immigration and Nationality Act and is further authorized to delegate such powers and authority to subordinate employees of the Department of Homeland Security. More specifically, the Secretary, is responsible for the adjudication of applications to amend regional center designations and petitions for alien entrepreneurs.

23. Defendant, Kenneth Cuccinelli, is the Acting Director of USCIS, and is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. These functions include: adjudication of immigrant visa petitions and applications for adjustment of status; adjudication of naturalization petitions; adjudication of asylum and refugee applications; adjudications of I-924 Applications for Regional Center Designation; adjudications performed at the service centers, and all other adjudications performed by the USCIS.

24. Defendant, Sarah Kendall, is the Chief of the USCIS Immigrant Investor Program Office, which is directly charged with responsibility for processing applications and petitions under the EB-5 program, and specifically applications to amend regional center designations and petitions for alien entrepreneurs.

25. Defendant, U.S. Citizenship and Immigration Services (“USCIS”) (formerly, the Immigration and Naturalization Service) is an agency of the federal government within the Department of Homeland Security (formerly, within the U.S. Department of Justice) and is responsible for the administration of laws and statutes governing immigration and naturalization.

JURISDICTION

26. Jurisdiction in this case is proper under 28 U.S.C. §§1331 and 1361, 5 U.S.C. §701 et. seq., and 28 U.S.C. §2201 et. seq. Relief is requested pursuant to said statutes. Specifically, this Court has jurisdiction over this action pursuant to 28 U.S.C. §1331, which provides that “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,” and under 28 U.S.C. §1361, which provides the district court with “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.” Review is also warranted and relief sought under the Administrative Procedure Act 5 U.S.C. §701 et seq., § 702, §706(1) and §555(b).

VENUE

27. Venue properly lies within the Southern District of Florida pursuant to 28 U.S.C. §1391(e), in that this is an action against officers and agencies of the United States in their official capacities, brought in the District where a Defendant in the action resides. Additionally, this action is substantially related to SEC v. Quiros, 16-21301, as the Limited Partnerships and their assets are the subject of the action and the Receivership presently being administrated by the Receiver, and the adjudication of the immigration benefits sought by the investor Plaintiffs substantially impacts the Receiver’s disposition of Receivership assets and the course of action taken with each

of the Limited Partnerships. Further, some of the alleged fraudulent activities took place in or are related to the Southern District of Florida.

EXHAUSTION OF REMEDIES

28. Plaintiffs have exhausted their administrative remedies. Plaintiffs have made inquiries with defendants concerning the status of their petitions, all to no avail. No other administrative remedy is available to Plaintiffs.

BACKGROUND ON THE EB-5 PROGRAM

29. In 1990, Congress amended the Immigration and Nationality Act of 1965, allocating, inter alia, 10,000 immigrant visas per year to foreign nationals seeking Lawful Permanent Resident (“LPR”) status on the basis of their capital investments in the United States. See generally the Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(5), 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1153(b)(5)). Pursuant to the so-called “Immigrant Investor Program,” foreign nationals may be eligible for an employment-based, fifth preference (“EB-5”) immigrant visa if they have invested, or are actively in the process of investing, \$1 million (or \$500,000 in a high unemployment or rural area) in a qualifying New Commercial Enterprise (“NCE”), and that investment results in the creation of at least ten jobs for U.S. Workers. See 8 U.S.C. § 1153(b)(5)(A)-(D); see also 8 C.F.R. § 204.6(a)-(j). The EB-5 regulations further provide that, in order to qualify as an “investment” in the EB-5 Program, foreign nationals must actually place their capital “at risk” for the purpose of generating a return, and that the mere intent to invest is not sufficient. See 8 C.F.R. § 204.6(j)(2). The purpose of this program was to promote foreign direct investment into, and job creation within, the U.S.

30. In 1993, Congress created the Immigrant Investor Pilot Program (“Pilot Program”) through the enactment of various provisions of section 610 of the Departments of Commerce,

Justice, and State, the Judiciary, and Related Agencies Appropriation Act. See Pub. L. No. 102-395, § 601, 106 Stat. 1828, 1874 (1992). The Pilot Program allows foreign investors who invest in NCEs affiliated with USCIS (formerly INS) designated regional centers to meet the 10-jobs-per investor by counting indirect jobs- i.e. jobs that created outside of the NCE. Further, in addition to not being restricted to only counting employees of the NCE, investors under the Pilot Program are allowed to use any valid statistical forecasting model to demonstrate job creation. See § 601(a)-(c) of Pub. L. No. 102-395; see also 8 C.F.R. § 204.6(e), (j)(4)(iii), (m)(7)(ii). The intent of these reforms was, again, to incentivize and promote foreign investment into, and job creation within, the U.S.

31. Regional center investment projects typically use an economic model, such as the RIMS II Input/Output model, a U.S. government created model, for predicting the job creation resulting from EB-5 investment into a given project. Input/Output models are based on multipliers derived from vast amounts of government data. For every unit of input, the multiplier is applied to derive a number of units of output. For instance, most common in the EB-5 program is the use of construction expenditures as an input. For every \$1 million of construction expenditures, X number of jobs are created (the multiplier varies by region, but typically there are 10-12 jobs per \$1 million of construction expenditures). The ability to count indirect jobs and use an economic model allows EB-5 funds to be used for types of development projects that would not ordinarily qualify under the non-regional center program due to its requirement of counting only employees of the NCE. Another result of the Pilot Program is that regional centers can aggregate investments from a large number of EB-5 investors in order to finance larger scale projects.

32. In order to become an LPR through both the standard and regional center-model program, a foreign national must initially file with USCIS a Form I-526, Immigrant Petition by

Alien Entrepreneur, which, if approved, makes the foreign national eligible to receive an employment-based, fifth preference immigrant visa, see generally 8 U.S.C. § 1153(b)(5). Upon approval of the I-526 Petition, the foreign national must file a Form I-485, Application to Adjust Status (if he or she is located in the United States), or a Form DS-260, Application for Immigrant Visa and Alien Registration (if he or she is located outside the United States). See generally 8 U.S.C. § 1201 (provisions relating to the issuance of entry documents); 8 U.S.C. § 1255 (provisions relating to adjustment of status). Upon adjustment of status or admission on an EB-5 immigrant visa, the foreign national is granted two-years of conditional permanent resident status, provided that the foreign national is not otherwise ineligible for admission into the United States. See generally 8 U.S.C. § 1182 (provisions relating to excludable aliens). Finally, at the conclusion of the two-year conditional period, the foreign national must file a Form I-829, Petition to Remove the Conditions on his or her LPR status. If the foreign national has fulfilled the EB-5 requirements- i.e. has invested, maintained the investment at risk, and the investment has resulted in the creation of at least ten jobs for U.S workers- then the conditions will be removed and the foreign national will be an unconditional LPR. See generally 8 U.S.C. § 1186b (provisions relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children).

33. An EB-5 investor must maintain his or her investment at risk until the end of the two-year conditional residence period. This period does not begin to run until the investor enters the U.S. with an EB-5 visa or is granted an Adjustment of Status by USCIS while in the U.S.

FACTUAL ALLEGATIONS

A. Burke

34. Burke raised \$60.5 million from 121 EB-5 investors to fund the construction of a hotel and conference center at Burke Mountain, another Vermont ski resort owned by Quiros. The

hotel and conference center have been completed, as well as the construction of a new ski lift and improved snowmaking capacity.

35. The investment in Burke has created enough jobs for all or almost all of the 121 investors. Further improvements to the Burke Resort are capable of creating sufficient jobs for any remaining investors within 2.5 years of the approval of their I-526 petitions, as required by USCIS policy, however, this would require the Receiver to invest additional funds in Burke that may not be recovered upon the sale of the resort, and could reduce any amount available to be returned to the investors.

36. The Receiver is fully committed to making such an investment, and creating enough jobs for all the investors to successfully complete their EB-5 immigration process, provided that USCIS will, in fact, approve their petitions.

37. On July 3, 2018 USCIS terminated the Vermont Regional Center, which sponsored the Jay Peak and Burke EB-5 projects, for failing to supervise the investment, ostensibly allowing Quiros to misuse investor funds. On September 25, 2019, the Vermont Regional Center received a denial of its appeal of the termination from the Administrative Appeals Office of USCIS.

38. The Vermont Regional Center intends to file a Motion to Reopen the Appeal with the AAO or litigation in federal court to challenge the termination.

39. USCIS policy states that if there is a “material change” in the EB-5 investment after an investor has filed an I-526 petition but before that investor has become a conditional resident, it is ground for the denial or revocation of the I-526 petition.

40. Once an investor has become a conditional resident, a material change will not prohibit the approval of that investor’s I-829 petition to remove the conditions on his or her residence.

41. USCIS policy currently states that the termination of the regional center sponsoring an investor's EB-5 project is a material change.

42. It is critical therefore that the I-526 petitions are adjudicated before the AAO makes a final decision on the termination of the Regional Center.

43. However, the fact that Plaintiffs have not yet become conditional residents is, to some extent, the result of USCIS delays in processing their I-526 petitions.

44. USCIS has acknowledged receiving the interim reports from the Receiver, and has been aware of the Receiver's efforts- including the spending of tens of millions of dollars to complete the various Jay Peak projects and create enough jobs for all of the investors in Jay Peak and Burke to qualify for their green cards since 2016, yet USCIS has failed to adjudicate Plaintiffs' I-526 petitions, and has acted to terminate the regional center supporting those petitions, potentially undermining the reason those funds were spent in the first place.

45. USCIS recently promulgated regulations that have an effective date of November 21, 2019, which would increase the minimum investment amount for an EB-5 investment to \$900,000 if the investment is in a targeted employment area or \$1.8 million if the investment is outside of a targeted employment area. This regulation also amends the process for qualifying as a targeted employment area in a manner that industry insiders will reduce the number of available investment projects that qualify as a targeted employment area by 80-90%.

46. Thus, if the investor Plaintiffs have their petitions denied and desire to make a new investment and file a new petition, they will have to invest- at a minimum- nearly double the amount of money they previously invested if they do so after November 21, 2019. Delays in adjudicating their petitions could result in Plaintiffs having to invest between \$400,000 and \$1.3 million more than they already invested in order to qualify for an EB-5 visa if they wish to do so.

47. Significantly, approximately fifty-four (54) investors in Burke have filed I-526 petitions and had them approved by Defendants.

48. Approximately fifty-four (54) investors in Burke have filed I-526 petitions with Defendants that remain pending.

49. Each I-526 petition filed by an investor in the NCE contains a section devoted to the investor's biographical information and source of funds (the investor portion), and a set of template documents relating to the eligibility of the project, including a template cover letter to be used by the investor's attorney in the preparation of that investor's I-526 submission (the project portion).

50. The project portion of the I-526 is provided by the Regional Center to all investors who file I-526 petitions in relation to the NCE, so that all investors can file with the same project documents. The purpose is to ensure consistency in filings.

51. All investors, including Plaintiffs and the other investors with approved I-526 petitions, would have filed an identical or substantially similar package of documents.

52. Plaintiff, Elena Astakhova, a native of Russia, currently residing at 152 Harwich road, Chestnut Hill, MA 02467, filed a Form I-526 petition on April 6, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1590255589. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

53. Plaintiff, Ling Tang, a native of China, currently residing at No 18 Huangliyang Industrial Estate, Qiantan Town, Jiande, Zhejiang Province, China 311600, filed a Form I-526 petition on March 2, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1590191026. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to move to the U.S., make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

54. Plaintiff, Lan Hoang Nguyen, a native of Vietnam, currently residing at 5054 N. Winthrop Ave, Apt. 302, Chicago, IL 60640, filed a Form I-526 petition on June 9, 2016 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1690503116. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

55. Plaintiff, Paulo Guntovitch Krieger, a native of Brazil, currently residing at Alameda Republica Dominicana, 503 Alphaville 2, Barueri, SP, Brazil 06470-040, filed a Form I-526 petition on June 3, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P., WAC1590381876. The Form I-526 remains pending. Plaintiffs have been

greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to move to the U.S., make business, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

56. Plaintiff, Rafael Ramon Aragonés Pardo, a native of Mexico, currently residing at Alcazar de Toledo 507, Lomas Reforma, Mexico D.F. 11930 Mexico, filed a Form I-526 petition on September 3, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590568432. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to move to the U.S., make business, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

57. Plaintiff, Linh Thi Thuy Pham, a native of Vietnam, currently residing at 338, Ba Trieu Street, Dong Tho Ward, Thanh Hoa City, Thanh Hoa Province, Vietnam, filed a Form I-526 petition on December 11, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1690200409. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- c. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- d. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to move to the U.S., make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

58. Plaintiff, Alvaro Victor Alejandro Lorenzo Sousa Garcia, a native of Peru, currently residing at Av. General Pezet 375, Lima, Lima 27, Peru, filed a Form I-526 petition on June 23, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590427550. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- e. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- f. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

59. Plaintiff, Parviz Abdeveis, a native of Iran, currently residing at NO 109 W. 8th St., Third Phase, Kian Pars Avenue, Ahvaz , Iran, filed a Form I-526 petition on February 20, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590179852. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.

- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

60. Plaintiff, HRH Linus Nto Mbah, a native of Nigeria, currently residing at Linto House, 116 Azikiwe Road, Aba, Aba State, Nigeria, filed a Form I-526 petition on August 24, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590547146. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to move to the U.S., make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

61. Plaintiff, Mauricio Esteban Garica Giraldo, a native of Colombia, currently residing at Medellin, Colombia, 3776 Harold Avenue, Fort Myers, Florida 33901-7744, filed a Form I-526 petition on May 20, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590348310. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to move to the U.S., make career, family, and life

choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

62. Plaintiff, Qing He, a native of China, currently residing at 20 Richardson Road, Burlington, MA 01803, filed a Form I-526 petition on July 6, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590451987. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

63. Plaintiff, Meihang Lu, a native of China, currently residing at No.10, 126 Nong Chengnan Road, XiXinBieShu Yongkang, Zhejiang, China 321300, filed a Form I-526 petition on April 10, 2015 based on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590267420. The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- a. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- b. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

64. Plaintiff, Seyed Majid Banihashemi, a native of Iran, currently residing at 82nd Alley, Ghasraldasht Street, Shiraz, Iran, filed a Form I-526 petition on September 21, 2015 based

on an investment Q Burke Mountain Resort Hotel & Conference Center L.P. WAC1590605575.

The Form I-526 remains pending. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate the I-526 petitions.

- c. Plaintiff has been damaged in that Plaintiff's investment funds remain at risk, with no indication of whether Plaintiff will be able to obtain the immigration benefit that motivated the investment.
- d. Plaintiff has been damaged in that Plaintiff faces ongoing uncertainty about the future, which hinders Plaintiff's ability to make career, family, and life choices, and deprives Plaintiff of the peace of mind of knowing where Plaintiff's future will be.

B. Disposition of Receivership Assets

65. The Court appointed the Receiver over the LPs and other Jay Peak assets on April 13, 2016 and then expanded the receivership on April 22, 2016. *See* SEC Action [ECF Nos. 13 & 60].

66. The Receiver is charged with the management of the Jay Peak and Burke resorts, the recovery and preservation of assets for the benefit of the investors and other creditors. Importantly, because the investors all invested through the EB-5 program, the Receiver has spent substantial time, effort, and money to provide the investors with the best chance possible to obtain their green cards. As a result of the protracted and unanticipated adjudication period, the Receiver has had to balance his obligation to serve the economic interest of the Receivership and the resorts with the need to help, or at least not frustrate, investors' goals of a obtaining a green card. However, this goal is not always consistent with the goal of recovering as much money as possible to repay the investors, and the Receiver has had to balance these interests. Had Plaintiffs been able to complete their immigration processes in a timely fashion, the Receivership would not have had this additional consideration and obligation.

67. When the Receiver took over operation of the JayPeak and Burke resorts, the JayPeak resort required additional capital to complete all of the construction that had been contemplated and the Burke resort was not yet fully operational. Absent the need to consider the Plaintiffs' immigration goals, the Receiver would have elected to sell the Burke resort rather than engage in operation and improvements.

68. Undertaking the operation and improvement of the Burke resort and the JayPeak resort has taxed the time and financial resources of the Receivership. The Receiver has had to use resources to pay immigration counsel, economists and other professionals in order to prepare templates for Plaintiffs to file petitions and respond to RFEs and NOIDs, and has expended millions of dollars making improvements to both resorts in order to satisfy the EB-5 job creation requirements on behalf of the investors.

69. The Receiver negotiated a settlement with Raymond James. *See* SEC Action [ECF No. 353]. A substantial portion of the Raymond James recovery was utilized for contractor liens and to pay off certain aspects of the hotel paving the way for Plaintiffs to satisfy the requirements of the EB-5 program. Had the Plaintiffs' immigration status not been uncertain as a result of the delay in adjudication coupled with the Defendants' silence even as the Receiver publicly disclosed his intent to use the proceeds of the settlement to satisfy the requirements of the EB-5 program, the Receiver would not have funneled the proceeds of the Raymond James settlement back into the resorts, but would have instead repaid the investors. The decision to continue to fund projects at the resorts, rather than selling the resort and attempting to repay the investors, including Plaintiffs, was solely driven by the uncertainty faced by the Plaintiffs as to their immigration goals and the desire to protect their immigration process by complying with the requirements of the EB-5 program.

70. During the initial months of the Receivership, USCIS had continued to adjudicate petitions, issuing RFEs, NOIDs, or approvals, but no denials, leading the Receiver to believe the continued operation of the resort was a rational decision as the investors would be moved through the immigration process successfully.

71. Over the course of 2017, adjudications of petitions for the Plaintiffs and other JayPeak investors slowed to a trickle or stopped completely.

72. In July of 2018, after adjudications had severely slowed or stopped. USCIS terminated the Vermont Regional Center, lending further uncertainty to Plaintiffs' immigration journeys.

73. Defendants monitored the Receiver's website and were aware of the development of the resorts and the expenditure of funds at the JayPeak project and yet continued to stonewall the adjudication process and proceeded to terminate the Vermont Regional Center.

74. Had Defendants adjudicated all of, or a majority of, Plaintiffs' petitions, in any fashion, or simply continued to consistently issue decisions on the pending petitions, the Receiver could have made informed decisions on how best to handle the estate instead of remaining in a holding pattern to see how Defendants would proceed.

75. With every decision, the Receiver must balance the immigration and financial interests of the investors. This includes whether to spend money, sell all or part of the resorts, and close or operate part or all of the resorts. The continued investment in the resorts is likely to decrease the amount of money available to repay investors at a later date. If USCIS is ultimately going to deny the petitions, spending millions of dollars to protect the Plaintiffs' immigration interests is futile and wasteful, and not in the Plaintiffs' interest.

C. General Allegations

76. The investor Plaintiffs have suffered economic damages from various parties for which they are pursuing remedies against third parties not included in this action.

77. Plaintiffs have made multiple inquiries with Defendant USCIS about the status of their petitions, but have received only form responses from USCIS, with no meaningful or case specific information.

78. Defendants' delay in adjudicating plaintiffs' petitions severely prejudices the interests of plaintiffs both financially and with respect to their immigration goals.

79. The longer it takes for the investor Plaintiffs' I-526 petitions to be processed, the longer their money is at risk, and the greater the risk that the project will not have available funds to repay them if their I-526 petitions are denied.

80. The unanticipated and unreasonable delay also prejudices the immigration interests of the plaintiffs. At best, it delays their ability to obtain conditional permanent resident status, which includes their ability to relocate to the U.S., to work in the U.S., to become a citizen of the U.S., to start businesses in the U.S., to have their children educated in the U.S., etc., for an unreasonable period of time. At worst, it prevents them from ever achieving these goals if changes in the project or regional center occur which USCIS considers to be a material change, in which case the USCIS position is that the petitions will have to be denied.

81. USCIS has terminated the Vermont Regional Center, and denied an appeal of that termination. USCIS terminated the regional center knowing that, because of its delays in adjudications of investors' I-526 petitions, it was unilaterally taking action that, under its present policy, would result in the denial of plaintiffs' petitions because of its position that the termination of the regional center constitutes a material change.²

² On information and belief, the termination of the regional center would also negatively impact more than 100 investors in EB-5 projects sponsored by the regional center that are completely unrelated to Jay Peak, Q Burke, or

82. If the Plaintiffs' petitions were adjudicated timely, they would have been able to obtain conditional permanent residence before the termination of the regional center. If they are now adjudicated immediately, it is possible that they would be able to apply for and obtain conditional permanent resident status before the decision on the appeal on the termination of the regional center. This is very significant because, even if USCIS takes the position that this is a material change, a material change that occurs after an investor becomes a conditional permanent resident does not prejudice the investor.

83. Despite its public statements to the contrary, USCIS is not adjudicating petitions in the order filed. Plaintiffs are aware of many investors with petitions filed subsequent to their petitions that have been adjudicated by Defendants.

84. According to 8 U.S.C. §1571(b), "[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application.

85. Since at least 2012, USCIS has stated publicly and regularly at stakeholder meetings and calls that its goal for adjudications is 6 months or less for I-526 petitions.

86. However, in reality, USCIS has arbitrarily and intentionally increased EB-5 processing times. They have done this by significantly reducing the number of petitions adjudicated to a level that is below 20% of adjudications in prior years. USCIS processing times for EB-5 petitions have increased over 200% since 2015 and over 100% since the beginning of 2019. This has occurred despite a decrease in petition receipts as verified by USCIS in the preamble to its recent EB-5 regulations.

Ariel Quiros. These investors have invested in projects that meet the EB-5 eligibility criteria, have and are creating jobs, and have not been subject to fraud or misappropriation. The only thing that would cause these investors to have their I-526 petitions denied is the fact that- like in the present case- USCIS failed to process their I-526 petitions before unilaterally creating the circumstances that may lead to the denial of those petitions.

87. According to its own statistics, in FY 2018, USCIS processed 15,122 I-526 petitions.

88. In the first three Quarters of FY2019, it has processed only 4,127.

89. Of those, 2,573 were processed in the first quarter.

90. In the third quarter of FY 2019, USCIS processed only 579 I-526 petitions, or roughly 15% of what it was processing in FY 2018.

91. Defendant USCIS has erected barriers to prevent investors from communicating with the agency regarding the status of their petitions unless their petitions have been pending more than 42 months (for I-526s) and more than 85 months (for I-829s petitions).

92. Defendant USCIS' actions and inactions are consistent with changes made to its mission statement deleting reference to foreign nationals filing petitions as "customers" (even though they are fee paying customers), eliminating "granting immigration and citizenship benefits" from the mission statement and eliminating reference to the U.S. as a "nation of immigrants."

93. By regulation (effective November 21, 2019), an investor must have the I-526 petition approved before he can reinvest and file a new I-526 petition and keep his original priority (quota) date, which is critical to many of the plaintiffs. If USCIS takes the position that the termination of the regional center is a material change, many of the plaintiffs may be required to reinvest and file new petitions.

94. The delay in the adjudication of the I-526 petitions is delaying the ability of the investors to file new petitions, if necessary. This is critical because, for any investor who has to invest and file a new petition, the amount that the investor will have to invest will increase from

\$500,000 to either \$900,000 or \$1,800,000 (depending on the geographical area of the investment) on November 21, 2019.

95. Upon information and belief, Defendant USCIS' delays in processing Plaintiffs' petitions are part of an overall effort on the part of Defendants to delay processing times for immigrants seeking benefits. This is consistent with the fact that Defendants' overall average case processing times increased by 46% over the past two fiscal years. Case processing times increased substantially during the last fiscal year even as case receipt volume markedly decreased.

96. Defendant USCIS' "net backlog" of all case types now exceeds 2.3 million delayed cases, which amounts to more than a 100% increase over the span of one year despite a 4% increase in case receipts during that period.

97. USCIS' posted processing time for I-526 petitions through the second quarter of fiscal year 2019 was 21.2 months (up from 13.9 months in fiscal year 2015).

98. The increase in posted processing time for I-526 petitions from 2015 to the present is a 227% increase.

99. None of the increase in processing times is justified by an increase in case receipts. In fact, case receipts have been decreasing while processing times have been increasing.

100. USCIS has purposefully reduced the number of I-526 petitions adjudicated in 2019 by approximately 85%.

101. According to USCIS published information, USCIS adjudicated 9,817 I-526 petitions in 2015; 9,367 in 2016; 12,243 in 2017; 15,122 in 2018; and 4,127 in 2019.

102. In contrast to the substantial volume of I-526 adjudications, I-526 filings have decreased substantially, from a high of 14,373 in 2015, to 6,424 in 2018, and a mere 3,003 in the first three quarters of FY 2019. In fact, from the beginning of 2016 through the third quarter of

2019, USCIS has received only 35,739 I-526 petitions- or approximately 5,000 less than it has adjudicated (40,859).

103. As a result, the USCIS inventory of I-526 petitions has also decreased substantially from a high of 24,992 in 2017 to 13,070 as of the end of the second quarter of FY 2019. Given USCIS' proven capability to process 15,000 I-526 petitions a year, it appears that USCIS could easily adjudicate its entire current inventory of I-526 petitions in less than one year.

104. Mysteriously, despite the substantial volume of petitions processed and the near halving of the backlog and the modified first-in-first-out approach used by USCIS in processing cases (which means Plaintiffs' 2015 petitions should be processed before later filed petitions), Plaintiffs' cases have not been adjudicated in nearly four years.

105. USCIS has established criteria for expediting the processing of applications and petitions.

106. One of those criteria is “Severe financial loss to a company or person, provided that the need for urgent action is not the result of the petitioner’s or applicant’s failure to: 1. File the benefit request or the expedite request in a reasonable time frame, or 2. Respond to any requests for additional evidence in a reasonably timely manner.” See <https://www.uscis.gov/forms/how-make-expedite-request> (last visited October 22, 2019).

107. This case falls firmly within that criteria, as the Receiver has continued spending substantial sums of money while awaiting the adjudications of the petitions.

108. USCIS is primarily a fee supported, and not an appropriation supported agency.

109. On information and belief, USCIS, through DHS, is permitted to set filing fees for the applications and petitions it adjudicates, including the I-526 petition.

110. The delays in processing plaintiffs' petitions and other petitions have occurred despite the fact that USCIS increased its fees on I-526 petitions by 145% in December 2016.

111. On May 4, 2016 USCIS (through DHS) issued a Notice of Proposed Rulemaking (NPRM), in which it proposed fee increases for almost all types of benefits applications and petitions it adjudicates. That NPRM states that USCIS is using EB-5 filing fees to pay for other, non-EB-5 adjudications instead of using EB-5 filing fees to process EB-5 applications and petitions in a timely fashion. See 81 Fed. Reg. No. 86. At 26904, *et seq.*

112. In the NPRM, USCIS states that the average number of employee hours it takes to process an I-526 petition is only **6.5 hours**.

113. On information and belief, the Immigrant Investor Program Office has the authority to hire personnel at rates outside of the normal GS scale in order to attract candidates with the specialized business and economic knowledge and experience that is relevant to EB-5 adjudications.

114. On information and belief, USCIS, through DHS, has the ability to set fees at a level necessary to ensure sufficient resources to hire enough staff to process EB-5 applications and petitions in a timely manner.

115. The filing fee for an I-526 petition is currently \$3,675. On information and belief, it is the third most expensive filing fee for a single petition (the first is the I-924 application for regional center designation at \$17,795, the second most expensive is the I-829, at \$3,750, and the fourth most expensive is the I-924A at \$3,035- all of which are EB-5 petitions or applications).

116. On information and belief, USCIS generated more than \$50 million of EB-5 fee revenue in 2017 and \$40 million in 2018.

117. Plaintiffs have followed all filing procedures and have submitted complete petitions.

118. On information and belief, Plaintiffs are, and have been since the time of filing, eligible to have their petitions approved.

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119. Plaintiffs reiterate the allegations set forth in Paragraphs 1-117 as if fully set forth herein.

120. Defendants' refusal to act in this case is, as a matter of law, arbitrary and not in accordance with the law. Defendants willfully, and unreasonably, have delayed and have refused to, adjudicate Plaintiffs' petitions, thereby depriving them of the right to a decision on their status and the peace of mind to which they are entitled.

121. Plaintiffs have fully complied with all applicable laws, regulations and procedures, and have provided Defendants with all information and documents required or requested in conjunction with their and petitions.

122. Defendants' delay in adjudicating the investor Plaintiffs' I-526 petitions is unreasonable and unjustified.

123. USCIS has the ability to generate fee income and allocate sufficient resources to meet its own case processing goals in the time frame specified by Congress for the adjudication of immigrant benefits, but Defendants continue to unreasonably fail to do so.

124. Regardless of resources, Defendants' failure to adjudicate Plaintiffs' and petitions within normal processing times is unreasonable.

125. The EB-5 program was intended by Congress to stimulate job creation in the U.S., and USCIS' failure to adjudicate EB-5 petitions within the time frame specified by Congress and

the goals stated by the agency itself frustrates the goals of the program, and makes the delay in the adjudications of Plaintiffs' and petitions even more unreasonable.

126. USCIS has offered no reason for the delay, and has not indicated a time frame in which a response can be expected, and has only provided automated form responses to inquiries, all of which undermine confidence in its intent to adjudicate the and petitions within a reasonable time absent court intervention.

127. Plaintiffs have been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate their applications as follows:

- a. Investor Plaintiffs have been damaged in that their funds remain at risk, with no indication of whether they will be able to obtain the immigration benefit that motivated them to make the investment.
- b. Investor Plaintiffs have been damaged in that they face ongoing uncertainty about their future, which hinders their ability to make career, family, and life choices, and deprives them of the peace of mind of knowing where their futures will be.

128. The harm suffered by Plaintiffs is ongoing, and can be resolved only through the adjudication of their applications.

129. Plaintiffs have a statutory right to the adjudication of their petitions pursuant to the INA and governing regulations at 8 C.F.R. § 204.6.

130. Defendants are required by their own regulations to adjudicate and issue a written decision on Plaintiffs' petitions. See 8 C.F.R. § 204.6(k), (m)(5).

131. Plaintiffs' payment of fees and Defendants' acceptance of those fees for processing Plaintiffs' application and petitions represents a quid pro quo whereby Defendants are accepting a fee in exchange for providing a service- namely the processing and adjudication of Plaintiffs' application and petitions.

132. In the process of adjudicating an I-526 petition, on information and belief, Defendants are required to complete certain security checks. However, on information and belief, none of these should cause a significant delay in adjudication.

133. According to a report published by one of Defendants' agencies, the FBI name check is concluded within one month for 94% of applicants, and within six months for 99% of applicants. However, according to a recent USCIS press release, the backlog of FBI name checks has been eliminated, and there remain NO cases in which an FBI name check has been pending for more than six months. All other security checks performed in conjunction with Defendants' adjudication of an application or petition generally take less than a month to complete, and some take as little as a day or two. 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.

134. Defendant USCIS is an administrative agency subject to 5 U.S.C. § 555(b), which provides "[w]it due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." (emphasis added).

135. Completing security checks and adjudicating I-526 petitions are purely routine and ministerial duties performed on a daily basis by Defendants.

136. Except under very specific provisions of law that are not applicable here, Defendants lack the legal authority or discretion to abstain from processing applications or petitions for immigration benefits or completing security checks.

137. Thus the completion of security checks and adjudication of I-526 petitions are clearly subject to the requirements of 5 U.S.C. § 555(b), and Defendants have a legal duty to complete them within a reasonable time.

138. Because Defendants have a purely ministerial duty under the law to adjudicate Plaintiffs' application and petitions within a reasonable time, and have utterly failed, or refused, to do so, a Writ of Mandamus is proper to compel Defendants to perform their duty to adjudicate Plaintiffs' application and petitions to avoid further harm to Plaintiffs.

139. For the same reasons, relief under the A.P.A. is warranted.

PRAYER FOR RELIEF

WHEREFORE, in view of the arguments and authority noted herein, Plaintiffs respectfully pray that the Defendants be cited to appear herein and that, upon due consideration, the Court enter an order:

- a. Granting Plaintiffs a Writ of Mandamus and/or an order under the A.P.A. requiring Defendants to adjudicate the investor Plaintiffs' I-526 petitions within 30 days; and
- b. Granting such other relief at law and in equity as justice may require.
- c. It is further requested that the Court retain jurisdiction over this matter to ensure Defendants' compliance with this Court's order.

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