No. 23-583

IN THE

Supreme Court of the United States

AMINA BOUARFA,

Petitioner,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMERICAN IMMIGRANT INVESTOR ALLIANCE, AMERICAN LENDING CENTER HOLDINGS, AND CENTURY AMERICAN REGIONAL CENTER, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are stakeholders in the EB-5 Immigrant Investor Program—the fifth employment-based immigrant-visa preference category for noncitizen investors in job-creating U.S. businesses. *See* 8 U.S.C. § 1153(b)(5).

American Immigrant Investor Alliance (AIIA) is a non-profit organization advocating for the interests of EB-5 investors from around the world. AIIA represents EB-5-investor interests by informing, educating, and advocating on their behalf in a variety of forums, including litigation in the federal courts.

American Lending Center Holdings (ALC) is a California-based corporation that owns a total of 14 "regional centers" designed by United States Citizenship and Immigration Services (USCIS) to pool immigrant-investor capital and promote economic growth through investments in job-creating U.S. businesses. ALC's regional centers are designated to develop projects across the continental United States. Since 2010, ALC's regional centers have served approximately 900 EB-5 investors in more than 90 projects, and another 500 investors in more than 20 partners' projects. These projects have collectively created more than 27,000 full-time jobs for U.S. workers nationwide. In addition, as a Paycheck Protection Program lender approved by the U.S. Department of Treasury and the Small Business Administration, ALC preserved over

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission.

120,000 jobs nationwide during the recent pandemic through approximately 28,000 funded PPP loans going to small businesses in all 50 states.

Century American Regional Center is a USCIS-designated regional center that pools immigrant-investor capital primarily to finance major real-estate development projects in areas of high unemployment. Century American has raised more than $150 million of investor capital and has helped create more than 6,000 full-time jobs for U.S. workers through its sponsorship of EB-5 projects.

Amici submit this brief to highlight the impact of this controversy beyond the context of spousal visa petitions. The Court's interpretation of 8 U.S.C. § 1155 may impact judicial review of nearly *all* immigrant-visa-petition revocations, including visa petitions filed for immigrant investors and other employment-based immigrants. Judicial review has historically played a crucial role in ensuring lawful implementation of employment-based visa programs; insulating visa-petition revocations from judicial review would lead to irrational results and undermine the faith of U.S. businesses as well as high-skilled foreign workers and investors in the rule of law. Amici, moreover, have an interest in explaining the harms to immigrant investors and other employment-based immigrants of upholding the Eleventh Circuit's judgment.

SUMMARY OF ARGUMENT

Filing a visa petition with USCIS is a prerequisite for most forms of immigration to the United States. This includes immigration under all family-based and employment-based visa categories. Because the statute

at issue in this case, 8 U.S.C. § 1155, applies to all such visa petitions, this case may impact a broad range of visa petitioners—including U.S. businesses sponsoring noncitizen workers, self-petitioning employment-based immigrants, and EB-5 investors.

Judicial review has historically played a crucial role in correcting mistakes by USCIS in its adjudication of employment-based visa petitions. A visa petition is the procedural mechanism to establish that the prospective noncitizen employee or investor meets the nondiscretionary criteria for a particular immigrant-visa classification. But USCIS can make serious mistakes in visa-petition adjudications, and businesses and intending immigrants alike have historically turned to the courts to correct such errors. For all the reasons explained by Petitioner, there is no reason for judicial review of USCIS's errors to depend on whether USCIS denies a visa petition in the first instance, or issues an approval and a later revocation on the premise that the noncitizen was ineligible from the start.

In its Brief in Opposition to Certiorari, Respondent suggested that review of visa-petition revocations was unimportant because following a revocation, a visa petitioner could simply refile the petition and obtain judicial review of the inevitable denial. BIO, at 18. Amici agree with Petitioner that this suggestion highlights the irrationality of Respondent's position. But Amici also write to highlight several serious practical problems that preference immigrants would face from being forced down Respondent's proffered path. Many employment-based visa preference categories are backlogged, and if a petitioner is forced to refile the petition, the priority date—and thus the noncitizen's place in the visa line—is lost in

many cases. This results in the noncitizen reentering the visa line at the very back, as the priority date of a revoked petition is not preserved. Moreover, forcing a petitioner to refile the petition and to litigate the subsequent denial creates a substantial risk of minor children "ageing out" and losing their chance to immigrate to the United States with their parent, even if a court ultimately reverses USCIS's finding of ineligibility.

If adopted, Respondent's position would threaten to undermine confidence in our employment-based immigration system and dampen its job-creating and economy-boosting impacts. The rule of law depends on access to judicial review for nondiscretionary decisions, and preserving such review for visa petitioners who face the revocation of an approved petition will help preserve the vitality of our employment-based immigration system.

ARGUMENT

I. THIS CASE MAY IMPACT THE AVAILABILITY OF JUDICIAL REVIEW OF VISA-PETITION REVOCATIONS IN NEARLY ALL IMMIGRANT-VISA PREFERENCE CATEGORIES, INCLUDING PETITIONS FILED BY U.S. BUSINESSES AND JOB-CREATING INVESTORS.

Petitioner ably explains the textual, contextual, and common-sense reasons why revocations of immigrant-visa petitions under 8 U.S.C. § 1155 should be subject to judicial review when the revocation is based on non-discretionary eligibility criteria. *See* Pet. Br. at 22–51. Petitioner also aptly describes the significant harms that U.S. citizens and their noncitizen spouses face when an approved spousal petition is revoked. *Id.* at 10.

Spousal petitions, though, are just the tip of the iceberg. All family- and employment-based immigrants must secure visa-petition approvals establishing their eligibility for the particular preference classification sought, and all such petitions are subject to possible revocation under 8 U.S.C. § 1155. An overbroad reading of 8 U.S.C. § 1252(a)(2)(B)(ii) to preclude review of all visa petition revocations—including those based on non-discretionary eligibility criteria—could have far-reaching effects on U.S. businesses seeking to sponsor foreign workers, as well as employment-based self-petitioners, including EB-5 investors.

A. All Immigrants Must Secure Approval Of A Visa Petition Before They Can Immigrate To The United States.

The Immigration and Nationality Act (INA) defines various categories of noncitizens who are eligible for an immigrant visa. First, there are "immediate relatives," who include the spouses and minor children of U.S. citizens. *See* 8 U.S.C. § 1151(b)(2). These immigrants are exempt from the annual quotas that govern other immigrant-visa categories. *Id.* All other such categories are set forth at 8 U.S.C. § 1153. These include "family-sponsored immigrants," *id.* § 1153(a), "employment-based immigrants," *id.* § 1153(b), and "diversity immigrants," *id.* § 1153(c).

The "family-sponsored immigrant" umbrella includes various subcategories, including: (1) the unmarried sons and daughters of U.S. citizens (F1 category); (2) the spouses and minor children of lawful permanent residents (F2A category), and unmarried sons and daughters of lawful permanent residents (F2B category); the married

sons and daughters of U.S. citizens (F3 category); and (4) the brothers and sisters of U.S. citizens (F4 category). *Id.* § 1153(a); *see Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 46–47 (2014) (plurality opinion).

The employment-based immigrant-visa categories are broken down into five broad subsections that are themselves broken down in further subcategories. *See* 8 U.S.C. § 1153(b). Some categories describe noncitizens who are coming to the United States to work for a U.S. business sponsoring their immigration. These include noncitizens with advanced degrees or with exceptional ability who "will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." 8 U.S.C. § 1153(b)(2)(A). Other categories include certain skilled workers, professionals, and other workers, *id.* § 1153(b)(3), executives and managers working for a multinational business, *id.* § 1153(b)(1)(C), and ministers and other religious workers coming to the United States to work for a bona fide religious organization, *id.* § 1153 (b)(4); *id.* § 1101(a)(27)(C). Also included are noncitizens with "extraordinary ability" in their field whose entry will "substantially benefit" the United States, *id.* § 1153 (b)(1). For historical reasons, the "employment-based" umbrella also includes other "special immigrants" who are not actually seeking employment here, including special immigrant juveniles who have been abused, abandoned, or neglected by a parent, 8 U.S.C. § 1153(b)(4); *id.* § 1101(a)(27)(J). Finally, there is a category for EB-5 investors—noncitizens who invest substantial capital in a U.S. business that creates at least ten jobs for qualifying U.S. workers, *id.* § 1153(b)(5).

No noncitizen, in any of these categories, can obtain an immigrant visa or adjustment of status to that of a permanent resident without first securing the approval of a visa petition establishing their entitlement to a particular immigrant-visa classification. *See* 8 U.S.C. § 1154 (setting forth the petition procedure for immediate relatives and preference immigrants). For most immigrant-visa categories, responsibility to adjudicate the visa petition is vested in the Secretary of the Department of Homeland Security. *Id.*[2] The Secretary, in turn, delegates that responsibility to United States Citizenship and Immigration Services (USCIS).

The identity of the petitioner, and the form and evidence required, depend on the particular classification sought. All family-based preference petitions, for example, are filed on Form I-130 by the U.S. citizen or lawful permanent resident sponsoring the noncitizen relative. *See* 8 C.F.R. § 204.2; https://www.uscis.gov/i-130. Most employment-based petitions are filed on Form I-140. *See* 8 C.F.R. § 204.5; https://www.uscis.gov/i-140. In some cases, the noncitizen can self-petition, and in other cases, a U.S. employer files the petition on the noncitizen's behalf. Still other petitions are filed on Form I-360, including special immigrant juveniles, certain victims of domestic abuse, and other "special immigrants." *See* https://www.uscis.

2. There are a few exceptions, where the visa petition is filed with the Department of State. This applies most notably to "diversity immigrant" petitions for the Green Card Lottery program. *See* 8 U.S.C. § 1154(a)(1)(I); 22 C.F.R. § 42.33(b). The visa petitions for certain limited categories of "special immigrants" under 8 U.S.C. § 1153(b)(4) are also filed with the Department of State. *See id.* § 1154(a)(1)(G)(ii).

gov/i-360. Finally, petitions for classification as an EB-5 investor are filed on Form I-526 or I-526E directly by the noncitizen investor. *See* https://www.uscis.gov/i-526; https://www.uscis.gov/i-526e.

The visa petition is meant to establish that the noncitizen on whose behalf the petition is filed (either the petition's beneficiary or the self-petitioner) meets the requirements of the category in which classification is sought. For family-based petitions, the adjudication centers on whether a qualifying familial relationship exists for the type of preference sought, and whether there are any mandatory bars to approval. In the employment-based context, the adjudication depends on objective factors related to both the employer (where applicable) and the prospective noncitizen employee. And in the case of EB-5 investors, the petition must establish that the noncitizen made a qualifying investment in a U.S. business that will create at least ten jobs for qualified U.S. workers. 8 C.F.R. § 204.6(j).

While the statutory definitions of visa categories are sparse, they are elaborated upon significantly by regulations as well as guidance set forth in precedential agency adjudications and published agency policy. In the EB-5 context, for example, petitions are adjudicated not only pursuant to the definition of an "immigrant investor" set forth at 8 U.S.C. § 1153(b)(5), but also under regulations at 8 C.F.R. § 204.6, four precedential agency decisions, *see Matter of Izummi*, 22 I. & N. Dec. 169 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I. & N. Dec. 158 (Assoc. Comm'r 1998); *Matter of Hsiung*, 22 I. & N. Dec. 201 (Assoc. Comm'r 1998); and *Matter of Ho*, 22 I. & N. Dec. 206 (Assoc. Comm'r 1998), and guidance set forth

in USCIS's Policy Manual, 6 USCIS Policy Manual, Part G, all of which interpret the statutory requirements for EB-5 classification.

In all cases, if USCIS determines that the facts set forth in the visa petition are true and that the noncitizen meets the requirements of the classification sought, USCIS "shall" approve the petition. 8 U.S.C. § 1154(b).

B. The Visa Petition Revocation Statute Applies To Nearly All Approved Immigrant Visa Petitions.

At the heart of this case is 8 U.S.C. § 1155, providing that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title."

The government can invoke this provision to revoke nearly all petitions for immigrant-visa classification: all family-based petitions and all employment-based petitions, including petitions filed by EB-5 investors. That is because, as noted above, almost visa petitions for nearly all preference categories are filed with USCIS, which is delegated authority to adjudicate them by the Secretary of Homeland Security. The Court's decision in this case, therefore, may impact the reviewability of revocations of nearly *all* visa petitions for nearly all immigrant-visa preference categories.

II. EXCLUDING VISA-PETITION REVOCATIONS FROM ALL JUDICIAL REVIEW WOULD UNDERMINE EMPLOYMENT-BASED IMMIGRATION.

A. Judicial Review Of Agency Decisions On Employment-Based Visa Petitions Serves An Important Error-Correction Function For An Agency Lacking In Business Expertise.

Judicial review has historically played a crucial role in correcting arbitrary and capricious decisions by USCIS in its adjudication of employment-based visa petitions.

Although the statutory definitions of employment-based visa categories seem simple enough, the agency has engrafted onto the statutory text myriad additional requirements and interpretations in the form of regulations, precedential decisions, and sub-regulatory policy guidance. *See generally* Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 2493–2556 (18th ed. 2022) (describing eligibility criteria and petition procedures for employment-based visa petitions). Many of the eligibility criteria on which adjudication of these requirements depends are matters of common sense in the worlds of business or law, but USCIS adjudicators—who are usually not attorneys or businesspeople—often lack experience in those realms.

Serious errors result in employment-based visa-petition adjudications—errors that require judicial intervention to correct. Consider *Zizi v. Cuccinelli*, 2021 WL 2826713 (N.D. Cal. July 7, 2021). That case involved a Ph.D., M.D. biophysicist who filed a visa petition seeking classification under the EB-1A "extraordinary ability"

employment-based preference category. As interpreted by USCIS, a noncitizen who is not a recipient of a major international award (like the Nobel Prize) must demonstrate at least three of ten enumerated criteria to qualify for such classification. *See* 8 C.F.R. § 204.5 (h)(3). The district court found that USCIS made multiple errors in its analysis of four such categories by ignoring evidence of the noncitizen's scientific contributions and scholarly articles and by misapplying the agency's own regulations. For example, USCIS dismissed the relevance of venture-capital funding because it was given to the noncitizen's *company* rather than to the noncitizen *individually*—a distinction without legal grounding. *See Zizi*, 2021 WL 2826713 at *3–8. Other examples of arbitrary and capricious adjudications of employment-based visa petitions abound. *See, e.g.*, *Scripps College v. Jaddou*, 2023 WL 8601208, *5–*7 (D. Neb. Dec. 12, 2023) (USCIS's denial of visa petition filed by a university under the "outstanding researcher or professor" preference category was arbitrary and capricious because USCIS made "inconsistent findings" and imposed "novel evidentiary requirements"); *Golani v. Allen*, 2023 WL 4874767, *6–*9 (E.D. Mich. July 31, 2023) (denial of EB-1A petition for cancer researcher was arbitrary and capricious); *Rubin v. Miller*, 478 F. Supp. 3d 499, 504–07 (S.D.N.Y. 2020) (reversed EB-1 visa petition denial for computational neuroscientist); *Berardo v. USCIS*, 2020 WL 6161459, *7–*10 (D. Or. Oct. 10, 2020) (reversing EB-1 denial for animator); *Chursov v. Miller*, 2019 WL 2085199 (S.D.N.Y. May 15, 2019) (EB-1 denial reversed for research scholar).

Decisions on EB-5 visa petitions further illustrate this point. Consider *Zhang v. USCIS*, 344 F. Supp. 3d 32 (D.D.C. 2018), *aff'd,* 978 F.3d 1314 (D.C. Cir. 2020)—

a case which involved erroneously denied visa petitions filed by EB-5 investors. To qualify for EB-5 preference classification, an investor must demonstrate that he or she invested the requisite "capital" in a qualifying U.S. business. 8 U.S.C. § 1153(b)(5)(A)(i). Under longstanding regulations, "capital" (quite sensibly) includes "cash." 8 C.F.R. § 204.6(e). But during a "Telephonic Stakeholder Engagement" in 2015, USCIS officials abruptly announced that, in the agency's view, cash that investors obtain from a third-party loan (such as a mortgage on property or an unsecured loan from a business they own) was not "cash," and therefore could not be used to make a qualifying EB-5 investment. *Zhang*, 344 F. Supp. 3d at 41. Both the D.C. District Court and the D.C. Circuit resoundingly rejected that position, ordering USCIS to reopen and readjudicate visa petitions the agency had denied on the erroneous premise that the cash proceeds of a loan are not "cash." *See* 344 F. Supp. 3d at 46–56; 978 F.3d at 1319–22.

Another example of judicial review's importance for avoiding erroneous visa-petition adjudications comes in a series of district-court decisions reversing USCIS's erroneous finding that noncitizens seeking EB-5 classification had not truly "invested" capital. *See Chang v. USCIS*, 289 F. Supp. 3d 177 (D.D.C. 2018); *Doe v. USCIS*, 239 F. Supp. 3d 297 (D.D.C. 2017). By regulation, USCIS interprets the statutory requirement that an EB-5 applicant "invest" capital to mean that the capital must be placed "at risk for the purpose of generating a return." 8 C.F.R. § 204.6(j)(2). In *Chang* and *Doe*, USCIS invoked this regulation, and a precedent decision interpreting it, to suggest that an option by the U.S. business to buy the investor's equity interest at a later date vitiated any investment risk, thereby disqualifying the investment for

EB-5 purposes. Both district courts held that USCIS had wrongly conflated an *option* by the business to buy the investor's interest with a contractual *obligation* to do so, and reversed USCIS's decisions on the I-526 visa petitions accordingly. *See Chang*, 289 F. Supp. 3d at 183–88; *Doe*, 239 F. Supp. 3d at 306–07.

Under the position the Eleventh Circuit adopted in the instant case, none of these serious errors in visa-petition adjudications could have been corrected had USCIS simply approved the petition first, and then revoked it on the same nondiscretionary eligibility ground(s). As Petitioner correctly explains, that result is illogical and is unsupported by the text, context, and purpose of the judicial-review bar at issue which covers only discretionary decisions or actions.

B. Refiling The Visa Petition And Litigating A Subsequent Denial Is Not An Adequate Substitute For Judicial Review Of Visa-Petition Revocations.

In its Brief in Opposition to Certiorari, Respondent suggested that preserving judicial review of visa-petition revocations is unimportant because visa petitioners "may . . . obtain judicial review" of the decision underlying the visa-petition revocation "by filing another petition and seeking review of a subsequent denial." BIO, at 18. Amici agree with Petitioner that this suggestion "underscores the senselessness of the Government's position" that the same substantive decision should be reviewable in the context of a denial, but unreviewable in the context of a revocation. Pet. Br. at 40 n.10. Amici write to highlight the substantial prejudice that would result from adopting Respondent's position.

1. Allowing Judicial Review of Adverse Eligibility Findings Only By Refiling The Visa Petition Would Cause All Visa Petitioners Substantial Delay And Additional Expense.

Petitioner is correct that under Respondent's proposal, visa petitioners would suffer "years of delay, mounting application fees, and duplicative work" with no corresponding gain in the "purported interest in protecting Executive prerogative." Pet. Br. at 40 n.10. These harms would affect *all* visa petitioners, and the impact on EB-5 visa petitioners is illustrative. The current published processing time for an I-526 petition adjudication, the first stage of EB-5 approval, is 54.5 months for non-Chinese investors and 90.5 months for Chinese investors. *See* https://egov.uscis.gov/processing-times/ (last accessed July 7, 2024). And the filing fee for an I-526 petition is currently $11,160. *See* https://www.uscis.gov/g-1055?form=i-526.

Visa-petition revocations often occur many years after the visa petition was originally filed. Forcing petitioners to go through yet more years of delay and thousands of additional dollars in expenses simply to obtain a preordained denial makes little sense.

2. For Most Preference Immigrants, Filing a New Visa Petition Also Means Reentering Backlogged Visa Queues At The Back Of The Line.

The situation would be even worse for most preference immigrants because forcing them to re-file the visa petition would cause them to lose their original priority

date, thereby sending them to the very back of the visa queue. This, in turn, would cause yet more years of delay even if a federal court ultimately reverses USCIS's adverse decision upon review of a later visa-petition denial.

With the exception of "immediate relative" petitions like the one Ms. Bouarfa filed for her noncitizen husband, immigrant visas are subject to annual quotas established by Congress. *See* 8 U.S.C. § 1151; *id.* § 1153. In most preference categories, the demand for such visas outstrips supply, so visa applicants must wait their turn in line before they are eligible to secure an immigrant visa or adjustment of status.[3]

A noncitizen's place in line is determined by the "priority date" assigned to his or her visa petition. Ira J. Kurzban, *supra*, at 2390–91. For most preference immigrants, the priority date is the date the visa petition was filed with USCIS. *Id.* at 2391, 2392; 8 C.F.R. § 204.1(b) (family-based preference categories); *id.* § 204.5(d); *id.* § 204.6(a). The only exception is for employment-based cases that require a "labor certification" from the Department of Labor, where the noncitizen's priority date is the date of the labor-certification filing. *Id.* § 204.5(d).

The priority date assigned to a denied or revoked visa petition does not carry over to any new visa petition filed on behalf of the preference immigrant. *See Matter of Carbajal*, 20 I. & N. Dec. 461 (BIA 1992). Thus, in Respondent's proffered scenario, a preference immigrant

3. Visa availability in the various preference categories is released monthly by the Department of State on its Visa Bulletin. *See, e.g.*, U.S. Dep't of State, *July 2024 Visa Bulletin*, https://bit.ly/4bB4Nzy.

whose priority date is tethered to the visa-petition filing date would lose his or her place in the visa queue even if the denial of a subsequently filed visa petition is reversed by a federal court and the petition is ultimately approved. The loss of a priority date associated with a revoked petition will thus in many cases lead to additional years of delay as a result of the noncitizen reentering a backlogged visa line at the back—additional delay separate and apart from the time it takes for USCIS to adjudicate the newly-filed visa petition.

3. In Many Cases, Lost Priority Dates Would Also Cause Child Derivatives To Age Out Of Eligibility.

Respondent's proffered alternative to judicial review of visa-petition revocations would lead to another serious consequence: the age-out of children who lose their ability to immigrate to the United States with their parents.

The children of preference immigrants, including EB-5 investors, are entitled to the same preference classification as their parent. 8 U.S.C. § 1153(d). No separate visa petition for such children is filed. Rather, they are entitled to apply for an immigrant visa or for adjustment of status based on the "same order of consideration" as their immigrant parent, *id.*—an order tethered to the priority date of the parent's visa petition. To qualify, however, the preference-immigrant's child must remain under the age of 21 at the time the immigrant visa is issued or adjustment of status is granted. *Cuellar de Osorio*, 573 U.S. at 45.

Requiring the refiling of a visa petition, just so it can be denied, to enable judicial review of an adverse visa-petition determination would cause children to age out of eligibility for two reasons. First, during the extra time expended by refiling and waiting for an inevitable denial, a noncitizen's child continues to age. *Id.* at 50 ("[A]s the years tick by, young people grow up, and thereby endanger their immigration status."). Second, enabling judicial review only of the later-filed petition substantially weakens the protections afforded by the Child Status Protection Act (CSPA). Under the CSPA, the time from the petition filing through the date of final adjudication is subtracted from the child's biological age. *Id.* at 53. Requiring the refiling of a revoked visa petition just to obtain judicial review of the adverse determination would cause children to lose the main CSPA benefit—a reduction in age from the original filing date to the date USCIS ultimately approves the petition after judicial review.[4]

4. To illustrate—suppose an EB-5 investor files an I-526 petition when her daughter is 18 years of age. USCIS approves the petition, but later revokes it three years after the petition was filed. If the investor can obtain judicial review of the revocation, and ultimately succeeds in overturning it, the child may remain eligible to immigrate as a derivative because the time from the original filing to the ultimate approval is deducted from the child's age. If, however, the investor is forced to refile the petition, the child has no hope of immigrating as a derivative—even if the denial is overturned—because she is already 21 at the time the new I-526 petition is filed.

C. USCIS's Penchant For Adopting New Agency Policies And Retroactively Applying Them To Pending Cases Underscores The Need To Preserve Judicial Review For Visa-Petition Revocations.

Preserving review of revocations is especially important because immigration authorities frequently adopt new agency policies and interpretations and apply those policies to pending cases. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J.).

Because of visa backlogs, EB-5 investors and other preference immigrants must often wait many years between the time their visa petitions are approved and the availability of a visa to allow them to secure lawful permanent resident status. At any time up until final issuance of the immigrant visa or the grant of adjustment of status, USCIS can invoke the authority of 8 U.S.C. § 1155 to revoke the petition. This makes preference immigrants subject to visa backlogs especially vulnerable to changes in USCIS's interpretation of eligibility criteria; a visa petition that qualified under preexisting standards and was correctly approved under those standards may be revoked if USCIS changes its position—even if that change is legally flawed or fails to consider the petitioner or beneficiary's reliance interests on the preexisting standards. Judicial review of revocation decisions is therefore important to ensure that unlawful agency interpretations applied to visa petitions already in the pipeline can be corrected.

An example from the EB-5 context is illustrative: As discussed above, in 2015 USCIS adopted a new policy of refusing to treat cash from a loan as "cash" for EB-5 purposes. The agency, however, refused to acknowledge that this was a new adjudicatory policy, and it applied the policy to visa petitions filed under preexisting standards. The D.C. District Court vacated the agency ruling, and the D.C. Circuit affirmed, holding that USCIS's policy conflicted with the implementing regulations' plain language and, indeed, was contrary to prior agency precedent. *See supra*, at 11-12.

In a separate case, *Wang v. USCIS*, 306 F. Supp. 3d 1 (D.D.C. 2018), an EB-5 investor had her visa petition approved under prior agency practice. After USCIS announced its new interpretation, in a mistake acknowledged by Government counsel, the agency proceeded to "deny" the investor's visa petition rather than "revoke" the prior approval. Because the district court held the agency to its characterization of the decision, it reviewed the merits of Ms. Wang's eligibility, ultimately agreeing with *Zhang*. Ms. Wang's loan proceeds were not "cash" and the agency's conclusion was arbitrary and capricious. *See Wang v. USCIS*, 366 F. Supp. 3d 118 (D.D.C. 2019). This case illustrates both the risks that preference immigrants with approved petitions face when dealing with agency policy changes, and the illogic of making judicial review depend on the procedural label affixed to a non-discretionary determination that a noncitizen does not qualify for a particular immigrant-visa classification.

III. ELIMINATING JUDICIAL REVIEW OF VISA-PETITION REVOCATIONS WOULD UNDERMINE FAITH IN THE U.S. IMMIGRATION AND JUDICIAL SYSTEMS, DAMPENING THE ECONOMY-BOOSTING POWER OF EMPLOYMENT-BASED IMMIGRATION.

Employment-based immigration pathways have long contributed to economic growth and prosperity in the United States. Within the past few decades, the U.S. economy has exhibited signs of weakened dynamism, which threatens innovation levels and overall economic productivity. *See* William A. Kandel, et al., Cong. Rsch. Serv. R47164, *U.S. Employment-Based Immigration Policy* 20–21 (2022). To combat these downward trends, the United States has depended on foreign workers to fill crucial STEM positions, establish new businesses, and spark the development of novel business methodologies. *Id.* at 21. At the most acclaimed American universities, foreign-born creators have helped generate most patents. *See* Don Beyer, Chairman, Joint Economic Committee, *Immigrants Are Vital to the U.S. Economy* 1, 5. Employment-based immigration is thus fundamental to the preservation of American advancements and vital to the national economic prosperity.

The EB-5 Program in particular has served as a significant driver of economic growth and job creation. In 2012 and 2013, EB-5 investments were estimated to have created 174,039 full-time positions for U.S. workers. *See* David K. Henry, et al., Office of the Chief Economist, U.S. Department of Commerce, *Estimating the Investment and Job Creation Impact of the EB-5 Program*, 1, 2. During the following two years, EB-5 investment in regional centers preserved 355,200 full-time jobs and

produced over six percent of employment growth in the nation's private sector. Jeffrey B. Carr & Robert A. Chase, Economic & Policy Resources, Inc., *Assessment of the Economic Value and Job Creation Impacts of Project Capital Investment Activity Under the EB-5 Program*, Invest in the USA 1, 13 (2019). Amidst fluctuations in the U.S. economy, the livelihood of American citizens has been strengthened by the job creation and economic growth that the EB-5 Program has generated.

Although this case presents a jurisdictional question, the Court's decision may well impact the viability and vitality of our employment-based immigration programs. The United States economy has thrived in large part due to its commitment to the rule of law, and U.S. businesses are appropriately accustomed to accessing federal courts to correct agency errors. Multinational companies seeking to transfer their executives to the United States, as much as U.S. universities seeking to sponsor an accomplished professor or researcher, depend on Courthouse doors being open to review of USCIS's determinations that the agency "mistakenly" approved a petition first and then revoked it, rather than denying it outright.

The integrity of the EB-5 Program, too, would be undermined. EB-5 investors often come from countries where suing the Government is futile or worse. They choose to immigrate to the United States in large part because here even powerful public institutions can be held to account when the law is violated. Nothing in the Immigration and Nationality Act requires Article III protections to be stripped when an approved visa petition is revoked for nondiscretionary reasons, and the Court should so hold.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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July 2024